THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly

Supreme Court Case No. 2021-001339

Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes,
Petitioner

v.

Bank of America National Association,
Respondent

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No.: 2017-CP-42-02834
(Appeal Tracking No: 2018-000568

Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes .....Appellant,

v.

Bank of America National Association .....Respondent.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF SPARTANBURG	)	**IN THE COURT OF COMMON PLEAS**
	)	
	)	
PHILLIP FRANCIS LUKE HUGHES, on behalf of the Estate of Jane K. Hughes, Plaintiff,	)	**Civil Action No.: 2017- CP-42-02834**
	)	
vs.	)	
	)	**ORDER ON MOTION TO DISMISS**
BANK OF AMERICA NATIONAL ASSOCIATION	)	
	)	
Defendant.	)	

This matter came before this Court for a hearing on the Motion to Dismiss filed by the Defendant, Bank of America, N.A. ("BANA"), on February 22, 2018. Present at the hearing were the following: Brad D. Hewett, Esquire, on behalf of the Plaintiff; and Robert Muckenfuss, Esquire and Elizabeth Timmermans, Esquire on behalf of BANA. Having heard arguments from counsel, and after careful consideration of the pleadings, motion, memoranda, and exhibits filed by the parties, this Court hereby grants BANA's Motion to Dismiss, with prejudice.

FACTS ALLEGED

Plaintiff's late parents opened a $120,000 line of credit from BANA on June 13, 2006, secured by a mortgage on their Spartanburg, South Carolina home. (Compl. ¶ 7.) Plaintiff alleges that on that same day, BANA presented his parents with policy documentation concerning optional line protection coverage ("LPP"). (*Id.* ¶ 11.) The optional LPP would enable a borrower to cancel some or all of the monthly payments on the variable portion of a credit line due to events like disability, accidental death, or involuntary unemployment. (*Id.*) Plaintiff asserts that his parents declined to purchase LPP coverage when they received the

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$120,000 line of credit. (*Id.*) Plaintiff alleges that, despite his parents declining LPP coverage, "for several years," BANA drafted a monthly charge of $28.40 from his parents' account for LPP coverage for his father. (*Id.* ¶ 23.)[1] Plaintiff's father passed away in October 2008. (Compl. ¶ 27.) In or about March 2015, BANA notified Mrs. Hughes that it would stop charging for the LPP fee, and upon learning of Mr. Hughes' death, refunded all LPP payments drawn on the Hughes' account after October 2008. (Compl. ¶15, TAC ¶30). In June 2015, Mrs. Hughes also passed away. (Compl. ¶ 29.)

PROCEDURAL HISTORY

This is not Plaintiff's first time suing BANA relating to the LPP product. In 2015, Plaintiff (on behalf of his mother's estate) filed suit against BANA in this court and asserted almost identical factual allegations as those made in this matter, bringing claims of fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent acts, breach of duty of good faith and fair dealing, and a violation of the Truth in Lending Act ("TILA"). BANA removed the action to the United States District Court for the State of South Carolina, Spartanburg Division, Civil Action No. 7:15-cv-05083-MGL (the "2015 Federal Action".) After Plaintiff amended his complaint three times, BANA moved to dismiss Plaintiff's

[1] As discussed herein, Plaintiff previously filed suit against BANA for the LPP product charges and contended in his prior lawsuit that the monthly charges began "on or about June 2006," and that a $28.40 fee was listed on his parents' monthly account statements. (2015 Federal Action Third Am. Compl., Dkt. No. 23, Civil Action No. 7:15-cv-05083-MGL ("TAC") ¶ 25.) In Plaintiff's Response to BANA's Motion to Dismiss the operative Complaint, Plaintiff incorporated the allegations made in his prior 2015 Federal Action TAC into this Complaint. (Pl. Opp. to Motion to Dismiss, pg. 1) This Court may take judicial notice of the allegations made in the TAC, and may consider those allegations without converting Defendant's motion into a motion for summary judgment. *See Lucht v. Youngblood*, 266 S.C. 127, 134, 221 S.E.2d 854, 858 (S.C. 1976) ("Generally, the prior pleadings in an action may be received in evidence against the pleader."); *see also Teilabs, Inc. v. Makor Issues & Right, Ltd.*, 531 U.S. 308, 322-323, 127 S. Ct. 2499, 2509 (S.C. 2007) (noting a court may take judicial notice of publicly-available court documents without converting a motion to dismiss into one for summary judgment.).

Third Amended Complaint. Prior to the District Court's ruling on the motion to dismiss, Plaintiff voluntarily dismissed his fraud-based claims (fraud, fraudulent concealment, and breach of contract accompanied by fraudulent acts). (2015 Federal Action, Dkt. No. 31.) On February 13, 2017, District Court Judge Mary Geiger Lewis granted BANA's motion to dismiss the remaining claims, holding that Plaintiff's breach of contract and TILA claims were time-barred and that equitable tolling did not apply to save the untimely claims. (2015 Federal Action, Dkt. No. 33 at 4.)

Plaintiff appealed the District Court Order to the Fourth Circuit Court of Appeals. On September 22, 2017, after a *de novo* review, the Fourth Circuit affirmed the trial court's order and held that Plaintiff's claims relating to the LPP product were time barred and not subject to equitable tolling. *Hughes, on behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n*, 697 F. App'x 191, 193 (4th Cir. 2017). Plaintiff petitioned the Supreme Court of the United States for a *writ of certiorari.* On January 22, 2018, the Supreme Court denied Plaintiff's writ. *Hughes, on Behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n*, No. 17-884, 2018 WL 491558, at *1 (U.S. Jan. 22, 2018).

While Plaintiff's appeal of the District Court's Order in the 2015 Federal Action was still pending before the Court of Appeals, Plaintiff filed this lawsuit (again in a representative capacity on behalf of his mother's estate). While Plaintiff again alleged that BANA improperly charged his parents for an unwanted LPP product, Plaintiff brought claims for fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), breach of fiduciary duty, and conversion. Plaintiff also asserts a statutory survival cause of action in an effort to enforce his six substantive causes of actions.

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LEGAL CONCLUSIONS

The Court hereby grants BANA's Motion to Dismiss on the several grounds articulated by BANA in its motion to dismiss and during the hearing on its motion, namely that the claims are barred by the doctrine of *res judicata*. In addition to *res judicata*, Plaintiff's fraud-related claims are all barred as those claims did not survive the death of the Plaintiff's parents; the SCUTPA statute itself does not allow Plaintiff to bring a claim in a representative capacity; and all of Plaintiff's claims are barred by the applicable statutes of limitations.

A. THE DOCTRINE OF RES JUDICATA BARS PLAINTIFF'S CLAIMS.

Plaintiff's Complaint involves the same parties and is based on the same transaction, same occurrence, and same issues (BANA's allegedly wrongful charging of Plaintiff's parents for the LPP product) that were previously litigated and adjudicated by the District Court. Plaintiff's claims are therefore barred under the doctrine of *res judicata*.

"*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (S.C. 1999); *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 190–92, 417 S.E.2d 569, 571 (S.C. 1992). "Under the doctrine of *res judicata*, [a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Plum Creek*, 334 S.C. at 34, 512 S.E.2d at 109 (quoting *Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (S.C. 1987)); *see also id.* ("To establish *res judicata*, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit.").

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Pursuant to the doctrine of *res judicata*, Plaintiff is barred from re-litigating his claims before this Court. First, in both this action and the 2015 Federal Action, Plaintiff sued Defendant BANA. Second, the subject matter of the two lawsuits is identical. Both lawsuits seek damages for the alleged injury resulting from BANA charging Plaintiff's parents for the LPP product in connection with a 2006 loan.

Finally, Plaintiff's claims relating to the LPP product were already adjudicated in the 2015 Federal Action. In the 2015 Federal Action, the District Court held that Plaintiff's claims were time-barred under a three year statute of limitations. Here, all of Plaintiff's claims have a statute of limitations period of three years. Thus, if Plaintiff's claims were time-barred in 2015, his 2017 claims before this Court are likewise barred.

The District Court and the Court of Appeals also considered the record and rejected Plaintiff's request to apply the scarcely used equitable tolling doctrine to save his claims. The District Court squarely held that "the charge for the mortgage insurance appeared on the Hughes' monthly checking account statements from 2006 to 2015. Thus any argument they failed to discover the purported wrongdoing by Defendant during this period of time, although they exercised due diligence, is bereft of any merit." (2015 Federal Action, Dkt. No. 23 at 4.) The Fourth Circuit reviewed the dismissal of the action, *de novo*, and affirmed the District Court's holding on equitable tolling:

> Generally, parties "are entitled to equitable tolling only if they show that they have pursued their rights diligently and extraordinary circumstances prevented them from filing on time." *Raplee v. United States*, 842 F.3d 328, 333 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 2274 (2017). "[E]quitable tolling is reserved for those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result." *Id.* "[T]he use of equitable tolling must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes." *Lawrence v. Lynch*, 826 F.3d 198, 204 (4th Cir. 2016) (internal quotation marks omitted). Where a plaintiff has alleged fraudulent

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> concealment of his cause of action, equitable tolling requires a plaintiff to demonstrate that "(1) the party pleading the statute of limitations fraudulently concealed facts that are the basis of the plaintiff's claim, and (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995). With these standards in mind, we have reviewed the briefs and the record before us and conclude that the district court did not err in granting the motion to dismiss Appellants' claims.

Hughes, on behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n, 697 F. App'x 191, 192-193 (4th Cir. 2017).

That Plaintiff's causes of action in this suit are not identical to the causes of action in the 2015 Federal Action does not save his barred claims. All of Plaintiff's claims were equally available, and within the scope and purview of suit at the time of the 2015 Federal Action. *See e.g. Sub-Zero Freezer Co.*, 308 S.C. at 192, 417 S.E.2d at 571 ("The claims were either litigated in the prior actions or could have been so litigated. Thus, the trial court properly held that Clarkson's claims were barred by *res judicata* ...".). In fact, Plaintiff previously brought identical fraud-based claims against BANA in the 2015 Federal Action but subsequently dismissed them. Plaintiff is therefore barred from re-litigating previously dismissed claims and new claims based on the allegations already adjudicated in federal court.

B. PLAINTIFF'S FRAUD-RELATED CLAIMS AND SCUTPA CLAIM CANNOT BE BROUGHT BY AN ESTATE.

Plaintiff is barred from bringing fraud-related claims on behalf of his deceased mother under both the South Carolina's survivability and SCUTPA statutes. *See* S.C. Code Ann. §§ 15-5-90, and 39-5-140. Although the survivability statute generally allows causes of action for personal injuries to survive the death of a person, the South Carolina Supreme Court has expressly ruled that fraud-related claims do not survive a person's death. *Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 15 S.E.2d 117, 119 (S.C. 1941) (holding that a cause of action

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for fraud did not survive the death of a person). The South Carolina Supreme Court affirmed that fraud claims do not survive death in 2002. In *Ferguson v. Charleston Lincoln Mercury, Inc.*, the South Carolina Supreme Court analyzed the survivability of fraud and fraudulent concealment-based allegations brought by a plaintiff's estate against a car dealership. The Court held:

> South Carolina case law has continued to recognize a common law exception [to the survivability statute] regarding causes of action for fraud or deceit. . . . At the core of Mr. Ferguson's complaint was the allegation that CLM misled him into paying more for the car than he should have paid, and concealed the overcharge either through intentionally deceptive actions or through grossly negligent disclosure practices. Allegations of such fraud and deceit are exempted from the general survival statute and do not survive the plaintiff's death. Accordingly, we hold that Mr. Ferguson's cause of action did not survive his death.

Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563-64, 564 S.E.2d 94, 97-98 (S.C. 2002). More recently, in 2008, the South Carolina Court of Appeals reaffirmed this long-standing exception to the survivability of a fraud claim in *Brailsford v. Brailsford.* The court noted:

> South Carolina . . . has long recognized several exceptions to the survivability of a claim, including an exception for fraud. . . . The fraud exception to survivability is not limited only to a cause of action titled "fraud." In *Ferguson,* our supreme court recognized that although Ferguson's cause of action arose under the "Dealer Act,"5 the essence of the Defendant's alleged conduct amounted to misleading Mr. Ferguson, and concealing overcharges by either intentional deception or gross negligence. The court held that because such actions fit within the ambit of fraudulent or deceptive conduct, it was insignificant what "label" the Plaintiff gave to such conduct.

Brailsford v. Brailsford, 380 S.C. 443, 449-450, 669 S.E.2d 342, 345 (S.C. Ct. App. 2008) (internal citations omitted). Accordingly, Plaintiff's claims for fraud, fraudulent concealment, and breach of contract with fraudulent intent are all barred.[2]

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[2] In addition, because Plaintiff's SCUTPA claim is also based on fraud and fraudulent concealment, the SCUTPA claim is also barred by the common law application of the survivability statute. *See e.g. Davis v. Life Care Centers of Am., Inc. et al,* Case No. 02-CP-10-

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Similarly, the plain language of the SCUTPA statute does not allow for a representative of an estate, like Plaintiff, to maintain an action under the Act. SCUPTA clearly states:

> Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, *but not in a representative capacity*, to recover actual damages.

S.C. Code Ann. § 39-5-140 (emphasis added). It is clear that "an unfair trade practices claim may not be brought in a representative capacity." *Wogan v. Kunze,* 366 S.C. 583, 609, 623 S.E.2d 107, 121 (S.C. Ct. App. 2005), *aff'd as modified*, 379 S.C. 581, 666 S.E.2d 901 (S.C. 2008). Accordingly, all of Plaintiff's claims based on fraud and deceit – fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, and violation of the SCUTPA did not survive the death of Plaintiff's parents and may not be brought on behalf of Mrs. Hughes' estate.

C. PLAINTIFF'S CLAIMS ARE ALL TIME BARRED.

Statutory law and common law set a three-year statute of limitations period for each of Plaintiff's claims: 1) fraud (*see* S.C. Code § 15-3-530(7)); (2) fraudulent concealment (*id.*); (3) breach of contract accompanied by a fraudulent act (*see* S.C. Code § 15-3-530(1)); (4) violation of the SCUTPA) (*see* S.C. Code Ann. § 39-5-150); (5) breach of a fiduciary duty (*see Mazloom v. Mazloom*, 382 S.C. 307, 323, 675 S.E.2d 746, 755 (S.C. Ct. App. 2009) ("Generally, the statute of limitations is three years for actions for a breach of a fiduciary duty.")); and (6) conversion (*see* S.C. Code Ann. §§ 15-3-530(4) and 15-3-530(5)).

The relevant statutes of limitation began to run on Plaintiff's claims when Mrs. Hughes could or should have known, using reasonable diligence, that a cause of action might exist. "The

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3566, 2003 WL 25460625 (S.C. Ct. Comm. Pleas Mar. 28, 2003) ("SCUTPA does not survive the death of an alleged injured party.").

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exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed." *Snell v. Columbia Gun Exch., Inc.,* 276 S.C. 301, 303, 278 S.E.2d 333, 334 (S.C. 1981). Because Plaintiff alleged that his parents started receiving payment deductions from their account, and notice of said deductions on each monthly statement, beginning in June 2006, the statute of limitations on their potential claims ran in June 2009.

This Court agrees with the findings by the District Court and the Court of Appeals in the 2015 Federal Action that equitable tolling does not apply in this case. Mrs. Hughes was given actual notice of the alleged improper charges by both monthly charges being deducted from her account and the monthly bank and/or home equity loan statements identifying those charges. Plaintiff specifically alleges that "BANA withdrew a monthly charge of $28.40 from the Hughes' BANA joint checking account beginning on or about June 2006" for his father's LPP coverage. (TAC ¶ 25.) Plaintiff also states that the LPP fee appeared on his parents' checking account statements. (Compl. ¶ 23.) The South Carolina Supreme Court has maintained that "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.,* 386 S.C. 108, 117, 687 S.E.2d 29, 32 (S.C. 2009). "It has been observed that equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Id.* at 116. Here, because Plaintiff's parents received actual monthly notice of the charges being deducted from their account from 2006 to 2015, Plaintiff's allegations on the face

of the complaint make clear that nothing was hidden from him. Plaintiff also does not plead that BANA engaged in conduct that prevented his parents from filing suit during the appropriate time-period. Accordingly, the scarcely used doctrine of equitable tolling is not appropriate for this case.

CONCLUSION

For all of the above-stated reasons, this Court hereby GRANTS Bank of America, N.A.'s Motion to Dismiss the Plaintiff's Complaint with prejudice.

AND IT IS SO ORDERED.

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Spartanburg Common Pleas

Case Caption: Phillip Francis Luke Hughes , plaintiff, et al VS Bank Of America National Association

Case Number: 2017CP4202834

Type: Order/Dismissal

It is so Ordered.

s/ R. Keith Kelly - 2165

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

PHILLIP FRANCIS LUKE HUGHES, on behalf of the ESTATE OF JANE K. HUGHES, JOANNE HAFTER, and all others similarly situated, Plaintiffs,	§	
vs.	§	CIVIL ACTION NO. 7:15-5083-MGL
BANK OF AMERICA, N.A., Defendant.	§	

MEMORANDUM OPINION AND ORDER
GRANTING DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

In Plaintiffs Francis Luke Hughes and Joanne Hafter (collectively, Plaintiffs)'s Third Amended Complaint, they allege the following causes of action against Defendant: violations of the Truth in Lending Act, 15 U.S.C. § 1601 (TILA), fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent act, and breach of duty of good faith and fair dealing. The Court has federal question jurisdiction over Plaintiffs' TILA claims, 28 U.S.C. § 1331, and supplemental jurisdiction over Plaintiffs' state claims, 28 U.S.C. § 1367.

Pending before the Court is Defendant's motion to dismiss for Plaintiffs' failure to state a claim, Fed. R. Civ. P. 12(b)(6). Having considered the motion, the response, the reply, the record, and the applicable law, the Court will grant the motion.

II. FACTUAL AND PROCEDURAL HISTORY

Plaintiff Hughes is the personal representative of Jane Hughes. Jane Hughes and her husband, John Hughes (collectively, the Hughes), opened a line of credit with Defendant on June 13, 2006. The Hughes agreed at the time to allow Defendant to draft their payments automatically from their bank account. This account was with Defendant. Viewing the facts in the light most favorable to Plaintiff Hughes, the Hughes declined to purchase the mortgage insurance Defendant offered them when they opened their line of credit. Nevertheless, from 2006 to 2015, Defendant charged them for the product. On or about March 17, 2015, Defendant sent a notice to the Hughes stating their mortgage insurance would be cancelled on September 30, 2015.

Plaintiff Hafter obtained a home equity line from Defendant in October 2008. Viewing the facts in the light most favorable to Plaintiff Hafter, she never authorized Defendant to withdraw any funds from her banking account to pay for mortgage insurance. Even so, Defendant charged her for the product from 2008 until 2015 when Defendant informed Plaintiff Hafter it would no longer do so.

Plaintiffs filed their Third Amended Complaint with this Court after which Defendant filed the instant motion to dismiss. Having been fully briefed on the relevant issues, the Court is prepared to discuss the merits of the motion.

III. STANDARD OF REVIEW

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,

570 (2007)). The Court is "not required to accept as true the legal conclusions set forth in a plaintiff's complaint." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir.1999). Indeed, "[t]he presence of a few conclusory legal terms does not insulate a complaint from dismissal under Rule 12(b)(6) when the facts alleged in the complaint cannot support" the legal conclusion. *Young v. City of Mount Ranier*, 238 F.3d 567, 577 (4th Cir. 2001). In addition, when analyzing a Rule 12(b)(6) motion to dismiss, the Court may consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs. Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

IV. CONTENTIONS OF THE PARTIES

Defendant argues all of Plaintiffs' claims are time barred and equitable tolling is inapplicable. It also contends Plaintiffs fail to state a claim upon which relief can be granted.

Plaintiffs maintain their claims have been equitably tolled. Although Plaintiffs agree certain of their claims should be dismissed, they assert the remaining causes of action ought to go forward. The Court details below which claims Plaintiffs aver should survive this motion.

V. DISCUSSION AND ANALYSIS

As noted above, Plaintiffs brought claims against Defendant for violations of the TILA, fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent act, and breach of duty of good faith and fair dealing. Plaintiffs, however, subsequently agreed their claims for breach of duty of good faith and fair dealing should be dismissed, ECF No. 28 at 29. They also consent to the dismissal without prejudice of Plaintiff Hughes' causes of action for

fraud, fraudulent concealment, and breach of contract accompanied by fraudulent act. ECF No. 31.

Defendant contends all of Plaintiffs' remaining claims are time barred. The Court agrees.

Plaintiffs fail to dispute they neglected to file their lawsuit before the pertinent statutes of limitations expired. Instead, they rely on the doctrine of equitable tolling to argue their claims are timely.

Plaintiffs must establish the following elements before equitable tolling applies: "(1) the party pleading the statute of limitations fraudulently concealed facts that are the basis of the plaintiff's claim, and (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." *Supermarket of Marlinton v. Meadow Gold Dairies*, 71 F.3d 119, 122 (4th Cir. 1995); *Am. Legion Post 15 v. Horry Cty.*, 674 S.E.2d 181, 184 (S.C. Ct. App. 2009) (emphasizing the need for due diligence before allowing for equitable tolling). Assuming without deciding Plaintiffs are able to satisfy the first requirement, their arguments they can meet the other two elements are unavailing.

The charge for the mortgage insurance appeared on the Hughes' monthly checking account statements from 2006 to 2015. Thus, any argument they failed to discover the purported wrongdoing by Defendant during this period of time, although they exercised due diligence, is bereft of any merit. Assertions Joanne Hughes "underwent major heart surgery, suffered from dementia, experienced vision impairments, including cataracts and eye surgery, and suffered a broken hip that required hospitalization and extensive rehabilitation at White Oak Manor Nursing Home in Spartanburg, South Carolina," ECF No. 28 at 3, although unfortunate, are simply insufficient to satisfy the due diligence requirement.

As to Plaintiff Hafter's claims, she admits in her complaint the charge for the insurance appeared on her home equity statement each month, from 2008 until 2015. Accordingly, any argument she failed to discover Defendant's alleged nefarious acts during this time, although she exercised due diligence, strains the bounds of credulity.

The fact equitable tolling is to be employed sparingly is so established as so make citation to authority unnecessary. For the Court to adopt Plaintiffs' position their claims are entitled to equitable tolling would mean statutes of limitations are inconsequential. And, of course, that is not so.

VI. CONCLUSION

Therefore, based on the foregoing discussion and analysis, Defendant's Motion to Dismiss is **GRANTED**.

IT IS SO ORDERED.

Signed this 13th day of February, 2017, in Columbia, South Carolina.

s/ Mary Geiger Lewis
MARY GEIGER LEWIS
UNITED STATES DISTRICT JUDGE

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	Civil Action No.: 2017-CP-42-_____
PHILLIP FRANCIS LUKE HUGHES, on behalf of the Estate of Jane K. Hughes,	)	
	)	
Plaintiff,	)	**COMPLAINT**
	)	(Jury Trial Demanded)
vs.	)	
	)	
BANK OF AMERICA NATIONAL ASSOCIATION,	)	
	)	
Defendant.	)	

Plaintiff, on behalf of the Estate of Jane K. Hughes, would respectfully show unto the court as follows:

1. Plaintiff Phillip Hughes is the son of John P. Hughes, Sr. (Mr. Hughes) and Jane K. Hughes (Mrs. Hughes) and has standing to bring this claim after being appointed as Personal Representative of the Estate of Jane K. Hughes by the Spartanburg County Probate Court. Prior to her death, Mrs. Hughes was a citizen and resident of Spartanburg County, South Carolina.

2. Bank of America National Association ("BANA") is one of the world's largest financial institutions. Upon information and belief, BANA was at all times relevant to this Complaint a nationally-chartered bank, regulated by the Office of the Comptroller of the Currency, with its principal place of business in North Carolina.

3. That BANA, at all times relevant to this Complaint, was licensed to conduct business in the State of South Carolina and engaged in the business of providing financial services to consumers.

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4. The parties to this action and the acts and omissions complained of herein are subject to the jurisdiction of this Court, and venue is proper. Moreover, this is a survival action brought pursuant to South Carolina Code Ann. § 15-5-90, et seq., for financial injuries and damages to Decedent Jane K. Hughes.

FACTUAL ALLEGATIONS

5. At all relevant times, BANA and its agents marketed a purportedly optional financial product promising "mortgage protection" to its clients, including its "Line Protection Plan" ("LPP"). LPP is essentially a specialized insurance limited to paying portions of a mortgage payment under specific conditions, such as unemployment, disability, or accidental death. Such plans are marketed, usually at the time of closing, as an *optional* protection. A "mortgage protection" plan is *not* "Private Mortgage Insurance" (widely referred to as "PMI"), which is *required* by lenders to protect a mortgagee in case of default by a mortgagor.

6. BANA, and other companies, market mortgage protection plans because they are profitable. This profitability resulted in such abuses of unsophisticated customers that Congress established explicit disclosure and authorization requirements to protect citizens from being duped into unknowingly paying for unwanted mortgage protection plans. *See, e.g.*, 15 U.S.C. §§ 1604, 1637(c)(5), 1639(l); 12 C.F.R. § 226.4.

7. On June 13, 2006, Mr. and Mrs. Hughes opened a line of credit from BANA in the amount of $120,000.00, secured by a mortgage ("Mortgage") on their Spartanburg County homestead. The line of credit is governed by a document entitled "Bank of America Maximizer Agreement and Disclosure Statement" ("Agreement") signed by both borrowers on June 13, 2006.

8. At the same time, Mr. and Mrs. Hughes signed an acknowledgement and authorization ("Authorization") which allowed BANA to automatically draft loan payments from

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the Hughes's BANA bank account.

9. During the meeting to complete the Mortgage transaction, BANA presented Mr. and Mrs. Hughes with a document entitled "Optional Line Protection Plan Addendum ("Addendum")." As stated on the form, the "Line Protection Plan only provides protection on the variable portion of your credit line" and "This Product is Optional." If elected, the Line Protection Plan allowed the cancellation of all or some monthly loan payments in the event of disability, accidental death, or involuntary unemployment. At the time that BANA presented the plan to the Hughes, LPP offered six protection options, with the monthly fee ranging in cost from 4.5% to 13.5% of the minimum monthly payment on the borrowers' credit line.

10. The Agreement explicitly stated that the borrowers "must specifically request" the Line Protection Plan.

11. Mr. and Mrs. Hughes both signed a two-page document captioned "OPTIONAL LINE PROTECTION PLAN ADDENDUM ("ADDENDUM")" which stated that BANA provided them with information on the Line Protection Plan. The Hughes designated their election to decline the purportedly optional Line Protection Plain by clearly and conspicuously checking a box next to the "DECLINE to purchase any Protection on this Credit Line" option. *See* attached Exhibit A (OPTIONAL LINE PROTECTION PLAN ADDENDUM dated June 13, 2006).

12. In June 2006, Mr. Hughes was age 86. Mrs. Hughes was age 85 in June 2006 and underwent major heart surgery, suffered from dementia, and experienced vision impairments, including cataracts and eye surgery, from June 2006 until her death. Mrs. Hughes also suffered a broken hip after June 2006 that required hospitalization and extensive rehabilitation at White Oak Manor Nursing Home in Spartanburg, South Carolina. Mrs. Hughes was diagnosed with impaired cognition and mobility, atypical psychosis, confusion, blindness, renal insufficiency, heart failure,

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and was noted to lack decisional capacity in the years subsequent to June 2006.

13. John P. Hughes died on October 22, 2008. Mr. Hughes left his estate to his wife Jane-K. Hughes.

14. Over six years after Mr. Hughes's death, on or around March 17, 2015, BANA sent a boilerplate form cancellation notice addressed to the Mr. and Mrs. Hughes, informing them that "The Line Protection Plan would be cancelled on September 30, 2015," and that "You're no longer being charged for the Protection Plan as of April 1, 2015." The notice also indicated that John P. Hughes was a "protected" borrower.

15. Curiously, the BANA notice to the Hughes also stated that "Going forward, any payments that would have previously been applied to Protection Plan fees will be applied to other amounts owed as described in your loan documents, unless refunded to you. If we apply the payment to other amounts owed and you later determined that you mistakenly paid Protection Plan fees and prefer to have a refund of these amounts, please contact us at 1.866.731.4210."

16. Although Mr. and Mrs. Hughes never elected to purchase any "Protection Plan," BANA sent a second letter dated March 25, 2015, stating that Mr. Hughes had selected "6 month, Involuntary Unemployment, Disability, Accidental Death and Hospitalization" protection at a monthly rate of 9.5% of the Hughes' Minimum Monthly Payment. *See* attached Exhibit B.

17. In response to inquiry from Mrs. Hughes, BANA stated in a May 6, 2015 letter that "The Line Protection Plan (Plan) addendum for your Bank of America loan ending in 4699 is enclosed, per your request, and enclosed an eight-page document entitled "OPTIONAL LINE PROTECTION PLAN ADDENDUM ("ADDENDUM")." *See* attached Exhibit C.

18. The eight-page "ADDENDUM" provided by BANA in May 2015 is not the two-page "ADDENDUM" signed by Mr. and Mrs. Hughes in 2006, and does not contain or provide

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for signatures or a place for election or rejection of the "protection."

19. In any event, BANA did not provide the eight-page addendum to Mr. or Mrs. Hughes before May 2015.

20. The Line Protection Plan premium did not appear on the mortgage finance charge disclosed to Mr. and Mrs. Hughes in 2006.

21. Before March 2015, BANA did not provide any statement, notice, or communication of any sort to Mrs. Hughes revealing that BANA believed that the Hughes's had elected any "Protection Plan" or that an amount was to or was being charged to them for such a plan.

22. To date, Plaintiff has been unable to locate, and BANA has been unable to provide, any documentation that Mr. or Mrs. Hughes ever elected or agreed to pay for any "Protective Plan" coverage of any sort.

23. Despite having declined to purchase the Line Protection Plan, BANA withdrew a monthly charge of $28.40 from the Hughes's BANA joint checking account for several years. This charge was ambiguously listed as "Ad Insurance Des:XXXXXX4374 ID: 6 R# XXXXXXX1070 Indn:Hughes Sr, John P Co ID:XXXXXX4660 Ppd" and appeared amid numerous other monthly charges.

24. All other charges from BANA or its subsidiaries appearing on the Hughes's bank statements during the relevant period were clearly designated as transactions with "Bank of America" or "BkofAmerica" and other insurance transactions were clearly identified with the name of the charging company (i.e., "Patrons Mutual," "Travelers Insur").

25. In addition, none of the numbers in the Line Protection Plan transaction description were related to the Hughes's BANA mortgage or line of credit.

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26. As neither Mr. or Mrs. Hughes had elected Line Protection Plan coverage or had received any notice that BANA had issued such a plan to them, they were not expecting to be charged for any such service and they did not have any reason to expect that "Ad Insurance Des:XXXXXX4374 ID: R# XXXXXXX1070 Indn:Hughes Sr, John P Co ID:XXXXXX4660 Ppd" was a BANA charge generally or a "Line Protection Plan" charge specifically until receiving the March 2015 BANA notices.

27. Upon receiving notice of Mr. Hughes's death, on May 6, 2015, BANA declined coverage under the Line Protection Plan on the grounds that "[t]he death was the result of disease or treatment of disease or any medical treatment (and/or was not for the treatment of an accidental injury)."

28. BANA refused and continues to refuse to refund the payments drawn during Mr. Hughes's lifetime.

29. On June 3, 2015, Jane K. Hughes passed away, and Plaintiff was subsequently named as personal representative of her estate.

AS A FIRST CAUSE OF ACTION
(Fraud)

30. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

31. Defendant BANA made the following false and material representations and engaged in the following fraudulent conduct, among others alleged herein:

a. BANA, with knowledge of the falsity or reckless disregard for the truth of its representation, represented to Mr. and Mrs. Hughes that BANA would draft funds from their account solely for monthly loan payments; and

b. Through its agreements with Mr. and Mrs. Hughes, BANA represented, with knowledge of the falsity or reckless disregard for the truth of its representation that

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the Line Protection Plan was optional coverage that would only be added to the Hughes's credit line and home equity loan with their consent.

32. BANA made these representations to the Hughes's with the intent that they be induced to enter into the Agreement with BANA and sign the Authorization to grant BANA access to their account for purposes of drafting funds.

33. The Hughes's had no knowledge of the falsity of BANA's representations and had the right to rely on those representations. Mrs. Hughes used reasonable prudence and diligence by documenting in writing their decision to decline LPP coverage.

34. Decedent Jane Hughes relied on BANA's representations to her detriment, resulting in consequent and proximate injury in that BANA thereafter wrongly used its automatic drafting capability to improperly deduct payments from Hughes's financial account to pay for the Line Protection Plan without their knowledge and despite their rejection of that plan.

35. Due to the fraudulent nature of BANA's actions, BANA is liable for punitive damages. Decedent Jane Hughes and Plaintiff suffered pecuniary loss, actual damages, and consequential damages as a result of Defendant's fraudulent conduct.

FOR A SECOND CAUSE OF ACTION
(Fraudulent Concealment)

36. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

37. Pleading in the alternative, Defendant BANA intentionally concealed the material facts that it enrolled the Hughes's in the Line Protection Plan by not providing any notice to them of the enrollment.

38. Defendant BANA wrongly withdrew monthly payments for the Line Protection Plan from the Hughes's account under the confusing and non-descript transaction of "Ad Insurance

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Des:XXXXXX4374 ID: R# XXXXXXX1070 Indn:Hughes Sr, John P Co 14 ID:XXXXXX4660 Ppd" with the intention that the Hughes's not identify the true nature of the transaction.

39. Because the Hughes's entrusted BANA with authorization to draft monies from their account, and expressly reposed a trust in confidence in BANA with respect to automatic drafting transactions, BANA had a duty to disclose to Mr. and Mrs. Hughes that it unilaterally enrolled them in the Line Protection Program and that BANA was withdrawing payments which were not authorized by the borrowers.

40. Alternatively, BANA had a duty to disclose the withdrawals arising from the fiduciary relationship between the parties.

41. As a result of BANA's concealment, the Hughes's suffered monetary damages in the amount of the unauthorized payments which BANA surreptitiously withdrew from their account.

42. Due to the fraudulent nature of BANA's actions, BANA is liable for punitive damages. Decedent Jane Hughes and Plaintiff suffered pecuniary loss, actual damages, and consequential damages as a result of Defendant's fraudulent conduct.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract Accompanied by a Fraudulent Act)

43. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

44. BANA entered into a binding agreement with Mr. and Mrs. Hughes supported by good and valuable consideration which is represented by the Hughes Mortgage, the Agreement, the Authorization, and the Addendum collectively.

45. The Hughes's performed all obligations required of them under the Agreement or otherwise had the performance of any obligation excused.

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46. Defendant BANA breached the agreement between it and the Hughes's by enrolling them in the Line Protection Plan without their express agreement, and without having them sign a separate addendum explicitly

47. BANA further breached the agreement by drafting Line Protection Plan payments from the Hughes's financial accounts, thereby exceeding its authority under the agreement between the parties, which is limited only to drafting loan payments.

48. In addition to breaching its contract with Mr. and Mrs. Hughes, BANA acted fraudulently by concealing that it enrolled the Hughes's in its Line Protection Plan without express permission and by drafting unauthorized payments for the product from the Hughes's bank account, which BANA concealed by listing the charge under an ambiguous description not readily identifiable as Life Protection Plan or BANA.

49. BANA had a fiduciary and contractual duty to disclose these facts to Mr. and Mrs. Hughes.

50. As a result of BANA's breach of contract accompanied by fraudulent concealment, Decedent Jane Hughes was damaged in that they unknowingly paid for a benefit that was expressly declined.

51. Due to the fraudulent nature of BANA's actions, BANA is liable for punitive damages, as well as actual and consequential damages Decedent Jane Hughes and Plaintiff suffered pecuniary loss, actual damages, and consequential damages as a result of Defendant's fraudulent conduct.

FOR A FOURTH CAUSE OF ACTION
(Violation of South Carolina Unfair Trade Practices Act)

52. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

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53. Defendant's actions and/or omissions as described herein violate S.C. Code Ann. § 39-5-10, *et seq.*, which pertains to unfair methods of competition and unfair or deceptive acts or practices, in that Defendant enrolled the Hughes's in the Line Protection Plan without consent and withdrew unauthorized payments from the Hughes's account. Defendant concealed its actions, which were calculated to result in monetary gain for the Defendant at the expense of the Hughes's. Decedent Jane Hughes and Plaintiff thereby suffered an ascertainable loss as a result of the Defendants' actions in violation of the Act, as set forth herein.

54. Unfair methods of competition and unfair or deceptive acts or practices are declared unlawful in S.C. Code Ann. § 39-5-10, *et seq.*:

> § 39-5-20(a). **Unfair Trade Practices.** Unfair methods of competition and unfair or deceptive acts or practices in the conduct or any trade or commerce are hereby declared unlawful.

55. Defendant violated and continues to violate the SCUTPA by engaging in and proposing to engage in unfair trade practices by means of the following unlawful, unfair and fraudulent acts and practices:

a. Knowingly and intentionally representing, with knowledge of its falsity, that BANA would draft funds from their account solely for monthly loan payments;

b. Knowingly and intentionally representing that the Line Protection Plan was optional coverage that would only be added to the Hughes's credit line and home equity loan with their consent;

c. Fraudulently drafting funds from the account for the Line Protection Plan without consent or authorization;

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d. Intentionally disguising the Line Protection Plan withdrawals with an innocuous and non-descript designation in an effort to further conceal the fraudulent withdrawals;

e. Acting, using, or employing deception, fraud, false pretenses, false promises or misrepresentations and/ or concealed, suppressed or omitted material facts with the intent that customers rely upon such concealment, suppression, or omission, in connection with their authorization to BANA to draft automatic loan payments from BANA bank accounts.

56. The misrepresentations and omissions of the Defendant described herein were likely to deceive, induce, and mislead the Hughes's. BANA did in fact deceive, induce, and mislead the Hughes's.

57. The Defendant knew or should have known that the Hughes's would be deceived, induced, and misled.

58. BANA's actions and omissions as set forth herein evidence a lack of good faith, honesty in fact and observance of fair dealing and observance of fair dealing so as to constitute unconscionable commercial practices, in violation of the South Carolina unfair trade practices laws.

59. The Defendant acted willfully, knowingly, intentionally, unconscionably, illegally, unlawfully, and with reckless indifference when it committed the aforesaid acts of unfair and deceptive trade practices and/or consumer fraud.

60. As a result of the acts of the unfair and deceptive trade practices and/or consumer fraud described above, Decedent Jane Hughes and Plaintiff suffered actual, ascertainable loss for which the Defendant is liable.

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61. The unlawful trade practices engaged in by BANA have an adverse impact on the public interest by reason of established procedures being utilized and thereby creating potential for repetition. Plaintiff requests actual damages, treble damages, punitive damages, costs and attorneys' fees under this cause of action.

FOR A FIFTH CAUSE OF ACTION
(Breach of Fiduciary Duty)

62. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

63. Defendant owed a fiduciary duty to the Hughes's to disclose that BANA was withdrawing funds for Line Protection Plan and to honor the Authorization.

64. BANA failed to notify the Hughes's, and instead withdrew monies from the Hughes's account which were neither authorized by nor disclosed to the Hughes's.

65. BANA knowingly withdrew these funds without authorization and intentionally withheld disclosure of same.

66. As a result of this breach by Defendant, Decedent Jane Hughes was damaged in that she unknowingly paid for a benefit that was expressly declined. Plaintiff has suffered pecuniary loss, actual damages, and consequential damages as a result of Defendant's breach of its fiduciary duty.

AS A SIXTH CAUSE OF ACTION
(Conversion)

67. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

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68. By withdrawing funds from the Hughes's account for the Line Protection Plan, assumed the Hughes's money without authorization and exercised rights of ownership over the monies to the exclusion of the rights of the Hughes's.

69. BANA converted the Hughes's money in determinate sums.

70. As a result, Decedent Jane Hughes suffered actual damages in the amount of the money withdrawn from her account, without authorization, by BANA. Such improper and illegal withdrawals caused pecuniary loss and financial damage to Plaintiff, by reducing assets that otherwise would have been distributed to the heirs of Decedent Jane Hughes.

AS A SEVENTH CAUSE OF ACTION
(Survival Action)

71. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

72. Plaintiff, as Personal Representative of the Estate of Jane Hughes, brings this action pursuant to S.C. Code Ann. § 15-5-90 for the benefit of Decedent Jane Hughes's statutory beneficiaries and heirs.

73. As a result of the above described acts of Defendant, Decedent Jane Hughes suffered pecuniary loss, actual damages, and financial injuries. Defendant's conduct and illegal withdrawals reduced the value of Decedent's estate.

74. Plaintiff, as Personal Representative of Decedent Jane Hughes's Estate, is entitled to recovery for the financial injuries and damages caused by Defendant to Decedent Jane Hughes prior to her death. Plaintiff seeks actual and punitive damages under this cause of action.

JURY TRIAL DEMAND

75. Plaintiff hereby demands that all issues in this case triable before a jury be so tried.

WHEREFORE, Plaintiff prays for judgment against Defendant for actual damages, punitive damages, pre-judgment and post-judgment interest, treble damages, attorneys' fees, the costs of this action, and such other relief as this Court deems just and proper.

Respectfully Submitted,

MIKE KELLY LAW GROUP, LLC

BY: s/ Brad D. Hewett

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Attorneys for Plaintiff

Columbia, South Carolina
July 27, 2017

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Bank of America

OPTIONAL LINE PROTECTION PLAN ADDENDUM ("ADDENDUM")

Borrower(s):

JOHN P HUGHES SR

JANE K HUGHES

Credit Line Agreement Date: JUNE 13, 2006

Protection Date: JUNE 13, 2006

Credit Line Number: 4699

IMPORTANT INFORMATION ABOUT BANK OF AMERICA'S LINE PROTECTION PLAN

LINE PROTECTION PLAN ONLY PROVIDES PROTECTION ON THE VARIABLE PORTION OF YOUR CREDIT LINE. THIS PLAN DOES NOT PROVIDE PROTECTION FOR ANY FIXED RATE LOAN OPTIONS INCLUDED IN YOUR CREDIT LINE.

This Product is Optional. I understand that the purchase of Line Protection Plan is optional. Whether or not I purchase Line Protection Plan will not affect My application for credit or the terms of any existing credit agreement I have with Bank of America.

Termination of Line Protection Plan: I have the right to cancel Line Protection Plan at any time by making a written request. Bank of America has the right to cancel Line Protection Plan upon sixty (60) days notice to Me.

Line Protection Plan will automatically terminate in any of the following circumstances:

1. Any Monthly Fee remains unpaid ninety (90) days after its due date;
2. The Credit Line is charged off to profit and loss;
3. The Credit Line is closed or refinanced;
4. The Credit Line and its servicing is transferred to an unaffiliated lender;
5. Ten (10) years from the Agreement Date listed above.

Amount of Fee: The Monthly Fee for the selected Line Protection Plan option is percent of My Minimum Monthly Payment.

Eligibility Requirements, Conditions and Exclusions: I understand there are eligibility requirements, conditions and exclusions that could prevent Me from receiving benefits under Line Protection Plan. The following sections of the Line Protection Plan Addendum contain a complete explanation of eligibility requirements, conditions and exclusions:

For **Definitions**, refer to Section I

For **Disability Protection** refer to Section III A

For **Involuntary Unemployment Protection** refer to Section III B

For **Accidental Death Protection**, refer to Section III C

FOR BANK USE ONLY:

Associate Name: _____ **Telephone Number:** _____

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Credit Line Number: .4699

Initial Below Next to the Option Selected	Protection Options	Type of Protection	Benefit Period	Monthly Fee as a Percentage of My Minimum Monthly Payment
BPG ( )	Disability (DIS)/Accidental Death (AD)	Single	6 months	4.5%
BPH ( )	Disability (DIS)/Accidental Death (AD)	Joint	6 months	8.5%
BPI ( )	Involuntary Unemployment (IU)/Accidental Death (AD)	Single	6 months	5.5%
BPJ ( )	Involuntary Unemployment (IU)/Accidental Death (AD)	Joint	6 months	9.5%
BPK ( )	Disability (DIS)/Involuntary Unemployment (IU)/Accidental Death (AD)	Single	6 months	8.0%
BPL ( )	Disability (DIS)/Involuntary Unemployment (IU)/Accidental Death (AD)	Joint	6 months	13.5%

PLEASE NOTE ALL PROTECTED BORROWERS MUST INITIAL THIS DOCUMENT NEXT TO THE OPTION SELECTED ABOVE.

Refer to section III for specific details pertaining to these options.

If selected, the above protection will be provided subject to the terms of this Addendum. Protection will expire ten (10) years from Agreement Date listed on Page 1 of this document regardless of the Protection Date. By signing below, each Borrower acknowledges that they have read and agreed to the terms of this Addendum.

☐ **I/We ELECT single protection** for the Borrower listed below.

Print Protected Borrower's Name: _____

☐ **I/We ELECT joint protection** for the two Borrowers listed below.

Print 1st Protected Borrower's Name: _____

Print 2nd Protected Borrower's Name: _____

☑ **I/We DECLINE to purchase any Protection on this Credit Line.**

By signing below, I/we acknowledge receipt of the Important Information shown on page 1 and the above product disclosures. After reviewing the above information about Line Protection Plan and having full opportunity to read the Addendum and ask questions, I/we make the choice selected above.

Please Print Borrower's Name: JOHN P HUGHES SR

Borrower's Signature

Please Print Borrower's Name: JANE K HUGHES

Borrower's Signature

Please Print Borrower's Name:

Borrower's Signature

Please Print Borrower's Name:

Borrower's Signature

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March 25, 2015

0000037-0000243 SNADF 001 459709

000037-000243
John P Hughes
632 Crystal Dr
Spartanburg, SC 29302

Dear John P Hughes:

The Protection Plan® (Plan) addendum for your Bank of America loan ending in 4699 is enclosed, per your request.

Listed below is the protection plan you selected and the details of that protection.

6 month, Involuntary Unemployment, Disability, Accidental Death and Hospitalization protecting the following protected borrower(s):
John P Hughes

Cost of protection. The monthly Plan fee for the selected Line Protection Plan option is 9.50 percent of your Minimum Monthly Payment. The monthly Plan fee will be reflected on your statement for each month there is a balance on your account.

There's nothing you need to do. This document is for your records only.

We're pleased to serve your credit needs. If you have questions or need future benefit requests, please call us at 1.866.317.5116, Monday through Friday from 8 a.m. to 8 p.m. Eastern or write to us at:

Protection Plan Services
PO Box 961290
Fort Worth, TX
76161-0290

Sincerely,

Protection Plan Services

AREESUT5 R050214

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COMPLAINT EXHIBIT C

May 6, 2015

0001492-0003089 SWADF 001 468002

001492-003089
John P Hughes
632 Crystal Dr
Spartanburg, SC 29302

John P Hughes:

The Line Protection Plan® (Plan) addendum for your Bank of America loan ending in 4699 is enclosed, per your request.

Listed below is the protection plan you selected and the details of that protection.

6 month, Involuntary Unemployment, Disability, Accidental Death and Hospitalization protecting the following protected borrower(s):

John P Hughes

As of April 1, 2015, you will not be charged a monthly Plan fee for the Plan. You should have received a communication that your Plan will be cancelled effective September 30, 2015 unless terminated earlier pursuant to the terms and conditions of your Plan. You may cancel your enrollment in your Plan at any time prior to September 30, 2015.

You can still request benefits for qualifying events that occur prior to the cancellation effective date; however, you must request benefits within 365 days of the start of the event. Please note that the loan will not be eligible for any Plan benefits for events that occur after the Plan cancellation effective date.

There's nothing you need to do. This document is for your records only.

If you have questions regarding past Plan fees, or would like to request a benefit, please call us at 1.866.317.5116, Monday through Friday from 8 a.m. to 8 p.m. Eastern or write to us at:

Protection Plan Services
PO Box 961290
Fort Worth, TX
76161-0290

Protection Plan Services

ARR3KCSK R032715

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OPTIONAL LINE PROTECTION PLAN™
ADDENDUM ("ADDENDUM")

This Addendum amends the Agreement ("Agreement" refers to the Credit Line Agreement). In this Addendum, the term "I", "Me", and "My" refers to each Protected Borrower named above, jointly and severally, and "You" and "Yours" refers to Bank of America, N.A. Unless otherwise defined in this Addendum, all capitalized terms shall have the same meaning as set forth in the Agreement.

THIS ADDENDUM PROVIDES FOR THE CANCELLATION OF ALL OR PART OF THE OUTSTANDING BALANCE, INCLUDING INTEREST, UNDER THE AGREEMENT UPON THE OCCURRENCE OF CERTAIN EVENTS. EXCEPT FOR REFUNDING THE MONTHLY FEE AS SPECIFIED BELOW, IN NO CASE DOES THIS ADDENDUM OBLIGATE THE BANK TO PAY ANY AMOUNT TO THE PROTECTED BORROWER(S).

TYPES OF PROTECTION YOU SELECTED. The protection I selected is shown on page 2 of this Addendum. I understand that other Protection packages are available.

I. DEFINITIONS

"Accidental Death" means that the Protected Borrower's death meets all of the following criteria:

1. Is directly due to accidental injury;
2. Is independent of all other causes, except accidental injury;
3. Is unintended, unexpected, and unforeseen;
4. Occurs after the Protection Date; and
5. Occurs within ninety (90) days after the date of accidental injury.

"Credit Line" means the line of credit issued by Bank of America, N.A. For purposes of the Line Protection Plan, Credit Line does NOT include any portions of the line of credit that are part of a Fixed Rate Loan Option. For Agreements originated in Texas, Credit Line is referred to as "Account."

"Disability" or **"Disabled"** means that after the Protection Date:

1. I become and remain unable to perform the major duties of My occupation at the time I became disabled, and I am not working for wages or profit during the disability;
2. I am under the continuous care of a licensed physician (other than Myself);
3. I have been disabled longer than thirty (30) consecutive days;
4. I have sent You satisfactory proof of My disability from the treating physician; and
5. I am disabled as a result of an injury or sickness not otherwise excluded.

"Draw Date" means the date upon which I take a credit advance on My Credit Line.

"Expiration Date" means the date ten (10) years from the Agreement Date upon which Protection automatically expires.

"Full Time Work" means working for wages or profit at least thirty (30) hours per week for the same employer.

"Initial Draw Date" means the date upon which I first take a credit advance on My Credit Line.

"Involuntary Unemployment" or **"Involuntarily Unemployed"** means that after the Protection Date I become and remain unemployed due to one of the following:

1. Layoff - a suspension of employment by My employer, which continues more than thirty (30) days;
2. Termination - a complete and permanent severance of employment by My employer;
3. Strike - an authorized, unionized labor dispute, that continues more than thirty (30) days, by a chartered or previously organized trade or labor union, through the coalition of its members (including Me), to obtain higher wages, shorter hours of employment, better working conditions or some other concession from My employer, by the employees stopping work at a pre-concerted time, which involves a combination of persons and not a single individual. Non-union collective bargaining is not included in this definition;

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4. Lockout - My employer's discharge of employees (including Me) or temporary closing of a place of employment, in response to organized employee activity, that continues more than thirty (30) days.

"Minimum Monthly Payment" means the minimum amount required by You for the payment of principal and interest under the Agreement. Minimum Monthly Payment does NOT include any past due principal or interest, or other fees or services.

"Monthly Fee" means the amount charged by You for My Line Protection Plan as stated under the Cost of Protection below.

"Monthly Payment" means the minimum amount required by You for the payment of principal and interest under the Agreement, plus the Monthly Fee. Monthly Payment does NOT include any past due principal or interest, or other fees or services.

"Monthly Payment Period" means the period in which the monthly principal and interest payment plus the Monthly Fee is due.

"Monthly Periodic Statement" means the monthly statement that You will send to Me if I have an Outstanding Balance on My Credit Line that will show, among other things, credit advances, finance charges, other charges, payments made, other credits, My previous Outstanding Balance, and My new Outstanding Balance.

"Outstanding Balance" means the balance of the Credit Line which, if applicable, includes credit advances, accrued interest on the outstanding credit advances, and fees and charges. For purposes of Line Protection Plan, Outstanding Balance does NOT include any amounts that are part of a Fixed Rate Loan Option.

"Payment Option" means the repayment schedule that I have chosen for any credit advances taken on this Credit Line.

"Protection Date" means the date upon which My Line Protection Plan becomes effective as shown on Page 1 of this document. No benefits are available under Line Protection Plan for any Disability, Involuntary Unemployment or Accidental Death that occurs prior to the Protection Date.

II. YOUR COST OF PROTECTION

A. MONTHLY COST OF PROTECTION.

The Monthly Fee is shown on page 2 and shall be payable at the same time and place as payments of principal and interest under the Agreement and any related documents. As the amount of the Minimum Monthly Payment changes, You will recalculate the Monthly Fee as shown above. No Monthly Fee will be charged for any month in which there is no Minimum Monthly Payment due to You. I understand that You retain the right to adjust the Monthly Fee as a percentage of My Minimum Monthly Payment if you provide me with sixty (60) days advance notice of such adjustment and an opportunity to cancel the Protection without penalty before the adjustment becomes effective.

B. APPLICATION OF PAYMENTS.

Payments made on the Agreement will be applied first to the Monthly Fee and then to the other amounts due under the Agreement and Security Instrument. All additional amounts shall be applied as stated in the Agreement and Security Instrument.

III. PROTECTION OPTIONS

A. DISABILITY PROTECTION

BENEFITS: You will cancel up to a maximum of six (6) Monthly Payments regardless of the number of occurrences of Disability. If Joint Protection is purchased, You will cancel up to a maximum six (6) Monthly Payments for the Disability of each Protected Borrower, regardless of the number of occurrences of Disability. In order for You to cancel any Monthly Payments:

1. I must be Disabled longer than thirty (30) consecutive days to activate this feature. Once I have been Disabled longer than thirty (30) days, You will cancel Monthly Payments from the first day of My Disability, assuming all other eligibilityrequirements have been met and no exclusions apply. Cancellation of Monthly Payments will stop when I am no longer continuously Disabled or when a total of six (6) Monthly Payments have been cancelled, whichever occurs first.

2. In any Monthly Payment Period in which I am Disabled for less than the entire period, You will cancel a portion of the Monthly Payment based on the number of days I am Disabled times a daily amount equal to one-thirtieth (1/30) of the Monthly Payment.

3. I do not have to use all of My Monthly Payments for Disability at one time. If I am Disabled for less than six (6) months, You will cancel the remaining Monthly Payments during future periods of Disability, up to a cumulative total of six (6) Monthly Payments.

4. Cancellation of all or a portion of a Monthly Payment will be applied within seven (7) business days of You receiving satisfactory proof of My Disability for the applicable Monthly Payment Period.

5. If I return to work and then become Disabled again within ninety (90) days, I do not have to wait another thirty (30) days to receive Protection unless the causes of each Disability are different and unrelated. You will not cancel any part of My Monthly Payment for the period I return to work and I am responsible for making My Monthly Payments.

6. Disability ends when I no longer meet the definition of Disability.

ELIGIBILITY

1. I must have worked Full Time for wages or profit at least thirty (30) hours per week, for the same employer, on a continuous basis during the three-month period immediately preceding the date of My Disability.

2. I am **NOT** eligible for Disability Protection if I retire or become unemployed after the Protection Date.

EXCLUSIONS:

1. You will **NOT** cancel Monthly Payments if My **Disability** is a result of:

   a. Normal pregnancy or childbirth;
   b. Attempted suicide or intentionally self-inflicted injury, while sane or insane;
   c. Participation in a riot or commission of an assault or felony; or
   d. An injury or sickness that occurs prior to the Protection Date.

CALCULATION OF BENEFITS:

1. For purposes of cancellation, the Monthly Payment that will be cancelled will be equal to the Monthly Payment as shown on My Monthly Periodic Statement immediately preceding the date of My Disability.
2. If I was under the treatment of, or consulted with, a licensed physician for the medical condition related to My Disability within the ninety (90) days prior to My Disability and I took a credit advance or changed My Payment Option in that same ninety (90) day period, You will cancel the Monthly Payment as shown on My Monthly Periodic Statement date just prior to that credit advance or Payment Option change. If I changed My Payment Option more than once or took more than one credit advance within the 90-day period before My Disability, You will use the Monthly Periodic Statement prior to the earliest of any credit advances or Payment Option changes taken in the 90-day period.
3. The maximum amount that can be cancelled in any one month is $750.00 plus the Monthly Fee.
4. Monthly Payments will not be cancelled during any benefit period if the Outstanding Balance protected for that benefit reaches zero ($0), even if the qualifying Disability continues.

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5. Is due to termination as a result of willful misconduct (a transgression of some established and definite rule of action, a forbidden act or omission, or an act or omission involving dishonesty, or a dereliction of duty, active or passive, which is willful in character and beyond simple negligence) or criminal misconduct (unlawful behavior as determined by local, State or Federal law);
6. Is due to seasonal employment, business failure if self-employed, or a severing of employment relationship if an independent contractor;
7. Is due to any act of war, declared or undeclared.

In addition, Monthly Payments will not be cancelled if I am receiving severance pay, salary continuation or any other compensation from My employer until I have been Involuntarily Unemployed longer than thirty (30) consecutive days after the end of the period covered by the severance pay, salary continuation, or other compensation, including the period of time for which lump sum amounts were paid.

CALCULATION OF BENEFITS:

1. For purposes of cancellation, the Monthly Payment that will be cancelled will be equal to the Monthly Payment as shown on My Monthly Periodic Statement immediately preceding the date of My Involuntary Unemployment.
2. If I took a credit advance or changed My Payment Option within the ninety (90) days prior to My Involuntary Unemployment, You will cancel the Monthly Payment as shown on My Monthly Periodic Statement date just prior to that credit advance or Payment Option change. If I changed My Payment Option more than once or took more than one credit advance within the 90-day period before My Involuntary Unemployment, You will use the Monthly Periodic Statement prior to the earliest of any credit advances or Payment Option changes taken in the 90-day period.
3. The maximum amount that can be cancelled in any one month is $750.00 plus the Monthly Fee.
4. Monthly Payments will not be cancelled during any benefit period if the Outstanding Balance protected for that benefit reaches zero ($0), even if the qualifying Involuntary Unemployment continues.

C. ACCIDENTAL DEATH PROTECTION

BENEFITS: Upon the Accidental Death of either Protected Borrower, You will pay the Benefit Amount not to exceed the lesser of the Outstanding Balance on the Credit Line or $50,000 for each Protected Borrower. Under no circumstances shall the Benefit Amount for one or both Protected Borrowers exceed the Outstanding Balance on the Credit Line as of the date of Accidental Death.

The "Benefit Amount" is equal to the Outstanding Balance of the Credit Line, including late fees and accrued interest, if any, as of the date of Accidental Death of a Protected Borrower, not to exceed a total of $50,000 per protected Borrower.

ELIGIBILITY

All Protected Borrowers are eligible for Accidental Death Protection.

EXCLUSIONS: You will **NOT** cancel the Outstanding Balance of the Credit Line if **Death** results from:

1. Suicide or intentionally self-inflicted injury, while sane or insane;
2. Disease or treatment of disease, or any medical treatment unless for the treatment of an accidental injury;
3. Infection, unless the infection is a direct result of the accidental injury;
4. The use of alcohol or other intoxicants;
5. The use of any drug, sedative or narcotic, unless prescribed by a physician;
6. Participation in a riot or commission of an assault or felony;
7. Operation or riding in an aircraft, unless as a fare-paying passenger or acting as a crew member on a regularly scheduled airline; or
8. War or act of war, declared or undeclared.

Additionally, You will **NOT** cancel the Outstanding Balance of the Credit Line if **Death** occurs prior to the Protection Date.

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3. If the request and proof of death are received within sixty (60) days of the date of Accidental Death, You will cancel the Benefit Amount as of the date of death, and any remaining Borrower will not be obligated to pay any interest or fees that accrue on the Benefit Amount after the date of death.
4. If the request and proof of Accidental Death are received more than sixty (60) days after the date of death, You will cancel the Benefit Amount as of the date of receipt, and any remaining Borrower or the estate of the Protected Borrower shall be liable for any interest or fees that accrue on the Benefit Amount after the date of Accidental Death.
5. To avoid additional interest and late fees on the Agreement, any remaining Borrowers should continue to make scheduled Monthly Payments until the benefit feature is activated.

D. ADDITIONAL PROCEDURES FOR DISABILITY OR INVOLUNTARY UNEMPLOYMENT

If the protected Disability or Involuntary Unemployment covers all of My missed Monthly Payments, You CANNOT TRY TO COLLECT WHAT I OWE OR FORECLOSE UPON OR REPOSSESS ANY COLLATERAL UNTIL THREE (3) CALENDAR MONTHS AFTER My first missed Monthly Payment is due or until My claim is accepted or rejected by You, whichever comes first. You can, however, try to collect, foreclose, or repossess if I have money due and owing or I am otherwise in default when My Disability or Involuntary Unemployment claim is made or if a senior mortgage or lien holder is foreclosing.

If My request for benefits is accepted within the three (3) calendar months, You must cancel My Monthly Payments as though I had paid on time. If My request for benefits is rejected within the three (3) calendar months, I will have thirty-five (35) days from the date that the rejection is sent to pay any past due payments, plus late charges. I can contact You and You will tell Me how much I owe. After that time, You can take action to collect or foreclose or repossess any collateral I may have given.

If My request for benefits is accepted but requires that I send in additional forms to remain eligible for continued benefits, I will send in these completed additional forms no later than required. If I do not send in these forms on time, My benefits may be stopped and You may then be able to take action to collect or foreclose or repossess any collateral I may have given.

V. TERMINATION

A. All Protections terminate when the first of the following occurs:

1. The Monthly Fee for any Monthly Payment Period remains unpaid ninety (90) days after its due date;
2. The Credit Line evidenced by the Agreement is subject to charge off by You.
3. The Credit Line is closed or refinanced;
4. The Credit Line is transferred to another (non-affiliated) creditor and is no longer serviced by You;
5. You receive a written request from Me to terminate the Protection. The written request should be sent to: Line Protection Plan, NC4-105-02-09, PO Box 21848, Greensboro, NC 27420 or by calling 1.888.356.4892. If I terminate Protection within sixty (60) days of the Agreement Date, You will return any Monthly Fee paid by Me, without interest;
6. The Expiration Date is reached;
7. I change the payment requirement from monthly to any other period; or
8. Sixty (60) days after You notify Me that the Protection is being terminated. If You send Me such notice or otherwise attempt to modify this Addendum, I may immediately cancel the Protection without penalty.
9. My obligation on the Agreement is assumed by other borrower(s) and any Protected Borrower is released from liability under the Agreement.

B. Effects of Termination

1. If the termination event occurs in the first five (5) days of my Monthly Payment Period, then the effective date of termination is the last day of the prior Monthly Payment Period and the Fee for the current Monthly Payment Period will be unearned and I will not owe this Fee. Otherwise, the effective date of termination is the last day of the current Monthly Payment Period and the Fee will be earned. I will pay the full Monthly Payment, including the Fee, for the Monthly Payment Period in which my Protection is terminated.

2. Unless the Agreement has been closed or refinanced, if a protected event occurs prior to the effective date of termination, You will continue to provide the related Protection after the effective date of termination in accordance with the provisions in this Addendum.

3. I will be billed for any Monthly Fees accrued up to the date of termination. These Monthly Fees may post on subsequent billing statements.

VI. OTHER PROVISIONS

A. TAX IMPACT OF THE LINE PROTECTION PLAN. I understand that cancellation of all or a part of the Credit Line may be taxable income to Me, My estate or that of My survivors. If I have any questions, I should contact a financial advisor concerning the tax impact of the Protection.

B. JOINT PROTECTION:

1. The Bank may rely upon the instructions or notice of either Protected Borrower with respect to the Protection, and such instructions or notice shall be binding on all Borrowers.

2. If both Protected Borrowers are entitled to Protection at the same time, for example both are Disabled, You will cancel only one Monthly Payment at a time, but I may instruct You which of us to treat as the Protected Borrower with respect to the cancelled Monthly Payments.

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STATE OF SOUTH CAROLINA)	IN THE COURT OF
)	COMMON PLEAS
)	OF THE SEVENTH
COUNTY OF SPARTANBURG)	JUDICIAL CIRCUIT
)	
)	
)	
PHILLIP FRANCIS LUKE HUGHES,)	
ON BEHALF OF THE ESTATE OF)	
JANE K. HUGHES,)	
)	
Plaintiff,)	TRANSCRIPT OF RECORD
)	2017-CP-42-02834
vs.)	
)	
BANK OF AMERICA NATIONAL)	
ASSOCIATION,)	
Defendant.)	
)	

February 22, 2018
Spartanburg, South Carolina

B E F O R E:

HONORABLE R. KEITH KELLY, Judge.

A P P E A R A N C E S:

BRADLEY DAVIS HEWITT, ESQUIRE
For Plaintiff

ROBERT A. MUCKENFUSS, ESQUIRE
For Defendant

ELIZABETH MARION ZWICKERT-TIMMERMANS, ESQUIRE
For Defendant

Julie A. Ashbrook,
Circuit Court Reporter
Seventh Judicial Circuit

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those claims should be dismissed. And the fraud claim, obviously, should be dismissed. They admit that in terms of the prior precedent. And unless the Court has any other questions, Your Honor.

THE COURT: No, sir, I think that's it.

Yes, sir.

MR. HEWITT: Your Honor, good morning.

THE COURT: Good morning.

MR. HEWITT: Brad Hewitt here for the estate of Jane Hughes.

THE COURT: Yes, sir.

MR. HEWITT: And I'm certainly not one to recite the full facts and procedural history, as the Court has read the memorandums submitted to the court. And I recognize there is controlling binding precedent on the primary issues in this case, which are the fraud based claims. That the lower court is handcuffed as to what it can do based in part on a 1941 decision and does state that those fraud claims when you die, die with you.

There's a 2002 opinion as well. I think that's the Ferguson case, which cited to Madison further for the support that your fraud based claim simply cannot continue on. We're one of seven states that hold that fraud based claims die when the claimant dies.

And so I recognize this may be at this stage in the proceeding an exercise of futility in terms of what the Court can do on fraud based claims, but those claims were not adjudicated at the federal level. Res judicata nor collateral estoppel apply to forbid those claims from going forward. We could not go forward with them, but upon realizing that there was a disallowance based in part on the Madison case, we withdrew the claims.

And they could not be certified back to the Supreme Court by the Federal Court, so there was nothing that the Federal Court could do, nor could we move forward, so we withdrew them and chose in part the proper course of action, which is to challenge the state of the law through the Circuit Court and ultimately through the appellate courts. That is the intention.

So I know where this case is going at this level in terms of the fraudulent claims and we set forth the policy reasons as to why we are endeavoring to do that. I've committed to this family to see this case through. You've seen through the procedural history where we have unsuccessfully applied to the Fourth Circuit and the United States Supreme Court to visit at least the TILA claims and the breach of contract claims. But there was no adjudication. There was no full and fair opportunity to litigate the issues of fraud.

I'm inclined to concede the point on the remaining stated four claims of the conversion and breach of fiduciary duty, that they may be barred by collateral estoppel and res judicata analysis. I would tend to perhaps agree, but the crux of this case is to challenge the state of the law on the fraud claims.

And so even if the Court -- and I don't mean to try to make the Court's job any easier, as I understand a dismissal is likely forthcoming. What my request would be, Judge Kelly, is that an order of dismissal be limited on the grounds that there is controlling precedent in place that forbids the fraud based claims, rather than founded on any statute of limitations argument or collateral estoppel or res judicata defenses. So I think that the order can be confined to that ruling.

If the Court is so inclined to explore those issues, I have made clear why we think they don't apply in the memo, that they were not adjudicated. That there were discovery inhibitions, procedural disadvantages. That they were not fully and fairly explored. I think that -- and I haven't seen much in the way of argument that they were because they were withdrawn. There was no discovery at those levels.

And so even beyond that, Judge, if you were

What became known to the family was by way of a letter from Bank of America in March of 2017, about seven years after her husband had died, that we are gonna stop charging you for this product, a product that they had never signed up for. A family member got that letter, did some due diligence, if you will, put two and two together and quickly realized they had rejected it and been absconded of several thousand dollars and then came to see us and we filed suit shortly thereafter.

And so the Court knows the discovery rule in this state for fraud is when they were aware of the misconduct. And so for the purposes of the statute of limitations argument, this case was timely filed. If the Court were so inclined to find that it were not, then that's where we go into a equitable estoppel argument, that based on her condition she certainly had no knowledge of the misconduct.

And what the Federal Court did, Judge Lewis, and ultimately the Fourth Circuit, was they, they looked into equitable estoppel. That was the, the thrust of our argument. But they applied a federally created rule that was more restrictive than what our court uses, which is based in part on the Hooper case in 2009 which looks at all the circumstances. There's no due diligence requirement. And so it's to avoid technical

be founded on any statute of limitations, collateral estoppel, res judicata type issues. For that matter, the statute of limitations, according to this state under *Johnston versus Bowing*, is an issue for the jury to decide as to when the party knew or should have known of the wrongdoing.

And so considering we're one of the few remaining states that hold the way we do with fraud, any illusion to this being sanctionable type conduct to me is far fetched. You know, the way the law gets changed in terms of common law is you challenge it.

So I think I would tend to agree that the conversion claim, breach of fiduciary claims are probably foreclosed and that we would forego those claims. As to unfair trade, if there is -- and I may have just missed this in the research. And it may be clear in the legislation. If there's a case on point where once you die, your unfair trade claim dies with you, I would again concede the point that there's controlling precedent. And this is being brought in a represented capacity obviously.

And so the challenge in this case is to try to change the stat of the law in South Carolina for fraud based claims and this is the only way I know how to do it. There was adjudication of these claims on the

federal level, which is why we're here today.

So unless the Court has any questions, I do appreciate your time.

THE COURT: No, I don't have any.

Anything?

MR. MUCKENFUSS: Very briefly, Your Honor. I think it is appropriate for this Court to apply issue preclusion in addition to the fact that there is no claim in South Carolina for fraud post death. But it is appropriate issue preclusion as to equitable estoppel decision by the federal court would apply to all of these claims.

That's different than claim preclusion, but the federal court very specifically held that the plaintiffs in this case, the plaintiffs in this case did not exercise the due diligence that would be required. It's cited in the South Carolina case that's on point for that standard.

So there is not a different federal standard to the standard that South Carolina courts will apply. So we would ask that when the case is dismissed, that it's dismissed on the fact that there's clear precedent, obviously, you know, bringing these claims, in addition to issue preclusion on the equitable estoppel, equitable tolling argument that in addition -- that would be

COURT REPORTER CERTIFICATE

I, the undersigned Julie A. Ashbrook, Court Reporter for the Seventh Judicial Circuit Court of the State of South Carolina, do hereby certify that to the best of my ability the foregoing is a true, accurate, and complete transcript of record of all the proceedings and evidence introduced in the hearing and/or trial of the captioned case, relative to appeal, in the Court of Common Pleas for Spartanburg County, South Carolina, on the 22nd day of February, 2018.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

s/Julie A Ashbrook.
Julie A. Ashbrook
Circuit Court Reporter
Seventh Judicial Circuit

ELECTRONICALLY FILED - 2017 Dec 21 12:15 PM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4202834

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	
	)	Civil Action No.: 2017- CP-42-02834
PHILLIP FRANCIS LUKE HUGHES, on behalf of the Estate of Jane K. Hughes,	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
BANK OF AMERICA NATIONAL ASSOCIATION	)	
	)	
Defendant.	)	

BANK OF AMERICA, N.A.'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, STAY PLAINTIFF'S COMPLAINT

COMES NOW Defendant Bank of America, N.A. (hereinafter "BANA"), by and through undersigned counsel, and pursuant to Rules 8, 9, 12(b)(6) of the South Carolina Rules of Civil Procedure, hereby moves the Court to dismiss Plaintiff's, Phillip Hughes on behalf of the Estate of Jane Hughes (hereinafter "Hughes"), Complaint with prejudice for failure to state a claim upon which relief can be granted, or, in the alternative, to stay the proceedings. To this end, BANA respectfully shows this Honorable Court as follows:

1. Plaintiff previously brought claims relating to this exact same set of facts, and for the same relief now sought, in an action filed in this Court in 2015.

2. After removal to federal court, on February 13, 2017, the U.S. District Court for the State of South Carolina, Spartanburg Division, dismissed Plaintiff's lawsuit for failure to state a claim finding that his claims were barred by the applicable statutes of limitations. The court also found the doctrine of equitable tolling to be inapplicable.

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3. On appeal, on September 11, 2017, the Fourth Circuit Court of Appeals issued an unpublished opinion affirming the District Court's holding, thus conclusively finding that Hughes' claims were time-barred, and that Hughes could not rely on the doctrine of equitable tolling to argue his claims were timely.

4. Subsequently, on December 11, 2017, Plaintiff filed a Petition for *Writ of Certiorari* in the Supreme Court of the United States, appealing the Fourth Circuit decision to affirm the District Court's ruling dismissing his action.

5. The Petition for *Writ of Certiorari* involves the same parties, the exact same set of factual allegations, and concerns issues directly pertinent to the this matter – whether the Fourth Circuit Court of Appeals erred when it affirmed the holding that Plaintiff could not rely on the doctrine of equitable tolling and that Plaintiff's claims were all barred by the applicable statutes of limitations.

6. Notwithstanding the petition to the U.S. Supreme Court, the Fourth Circuit Court's ruling has a preclusive effect on Plaintiff's action.

7. Plaintiff's factual allegations and claims for relief demonstrate that no claim for relief can be maintained as his claims are barred by doctrines of *res judicata* and collateral estoppel.

8. Plaintiff's factual allegations and claims for relief demonstrate that no claim for relief can be maintained as his claims are barred by the applicable statutes of limitations.

9. Plaintiff's factual allegations and claims for relief based on elements of fraud cannot be maintained as the fraud claims did not survive the death of Hughes' parents.

10. The Plaintiff fails to state facts sufficient to constitute cognizable causes of action.

11. The Plaintiff fails to state facts sufficient to entitle him to relief.

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12. This Motion will be supported by the pleadings, a memorandum of law, oral argument, and any other evidence requested or permitted by this Court.

WHEREFORE, Bank of America N.A. prays, pursuant to Rules 8, 9 and 12(b)(6) of the South Carolina Rules of Civil Procedure, that this Court dismiss Plaintiff Hughes' Complaint with prejudice, or, in the alternative, Bank of America N.A. prays that the Court stay these proceedings until there is determination of the Petition recently submitted to the United States Supreme Court.

This the 21st day of December 2017.

Respectfully submitted,

s/ Robert A. Muckenfuss
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Attorney for Defendant Bank of America, N.A.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this **21st day of December 2017**, the foregoing **BANK OF AMERICA, N.A.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT** has been served upon counsel by mailing a copy with sufficient postage prepaid and by electronic mail, to the following:

D. Michael Kelly, Esq.
Brad D. Hewett, Esq.
Jamie N. Smith, Esq.
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Attorneys for Plaintiff

s/Robert A. Muckenfuss
Robert A. Muckenfuss

ELECTRONICALLY FILED - 2018 Feb 20 12:30 PM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4202834

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF SPARTANBURG	)	**IN THE COURT OF COMMON PLEAS**
	)	
	)	
PHILLIP FRANCIS LUKE HUGHES, on behalf of the Estate of Jane K. Hughes,	)	**Civil Action No.: 2017- CP-42-02834**
Plaintiff;	)	
	)	
vs.	)	
	)	
BANK OF AMERICA NATIONAL ASSOCIATION	)	
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT BANK OF AMERICA, N.A.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Plaintiff Phillip Francis Luke Hughes, as the personal representative of the Estate of Jane K. Hughes, ("Plaintiff") brings a suit against Bank of America, N.A. ("BANA") related to an insurance product called a Line Protection Plan (or "LPP"), which protected Plaintiff's parents if they failed to make their periodic loan payments due to unemployment, accidental death, disability or illness. Plaintiff claims that although his parents dutifully paid for the LPP coverage offered by BANA, and for nearly a decade received monthly statements reflecting these payments, his parents were unaware of the LPP charge and had actually declined the loan protection coverage at the time they obtained the line of credit in 2006.

Plaintiff already sued BANA under the same set of allegations in 2015, the United States District Court for the District of South Carolina dismissed his lawsuit, holding that Plaintiff's

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claims were untimely and not tolled by the doctrine of equitable tolling. The Fourth Circuit Court of Appeals affirmed, and the Supreme Court of the United States denied Plaintiff's petition for *writ of certiorari* in January 2018.

Undeterred, Plaintiff has again brought time-barred claims relating to BANA charging his parents for LPP coverage. Plaintiff brings claims for fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), breach of fiduciary duty, and conversion, and he alleges a statutory survival cause of action in an effort to enforce the six substantive causes of actions. Notwithstanding Plaintiff's repeated attempts to re-litigate his futile allegations, this Court should dismiss these claims, with prejudice, for the following reasons:

- The doctrines of *res judicata* and collateral estoppel bar Plaintiff's claims;
- The statute of limitations expired for the Plaintiff's claims years ago; and
- As a representative of an estate, Plaintiff may not maintain his fraud-related or SCUTPA claims.

FACTUAL ALLEGATIONS & PROCEDURAL HISTORY

I. FACTUAL ALLEGATIONS.

Plaintiff, as personal representative of the estate of his mother, Jane Hughes, alleges that his late parents opened a $120,000 line of credit from BANA on June 13, 2006, secured by a mortgage on their Spartanburg, South Carolina home. (Compl. ¶ 7.) Plaintiff alleges that his parents signed the mortgage, a Bank of America Maximizer Agreement and Disclosure Statement (which governs the line of credit), and an acknowledgement and authorization permitting BANA to automatically draft payments from their account. (*Id.* ¶¶ 7-8.)

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Plaintiff claims that on June 13, 2006, BANA also presented his parents with policy documentation concerning optional line protection coverage ("LPP"). (*Id.* ¶ 11.) The optional LPP would enable a borrower to cancel some or all of the monthly payments on the variable portion of a credit line due to events like disability, accidental death, or involuntary unemployment. (*Id.*) Plaintiff asserts that his parents declined to purchase LPP coverage when they received the $120,000 line of credit. (*Id.*)

Plaintiff alleges that "*for several years*," BANA drafted a monthly charge of $28.40 from his parents' account for LPP coverage, and that only his father (John Hughes) received LPP coverage. (*Id.* ¶ 23 (emphasis added).) However, in the previous action Plaintiff brought against BANA, on an identical set of factual allegations, Plaintiff alleged that the monthly charges began "on or about June 2006."[1] (Exh. 2, TAC ¶ 25.) Plaintiff alleges that the $28.40 fee was listed on his parents' monthly account statements, and identified on the monthly statements as:

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[1] On November 16, 2015, Plaintiff filed a class action Complaint in this Court (*Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes, and all others similarly situated; JoAnne Hafter, and all others similarly situated v. Bank of America, National Association*, Case No. 2015-CP-42-4748) (the "2015 Lawsuit"). There, Plaintiff alleged that "BANA drafted a monthly charge of $28.40 from the Hughes' account beginning *in August 2008 or earlier*." (*See* Exh. 1, 2015 Compl., ¶ 22 (emphasis added).) After removal to federal court (Civil Action No. 7:15-cv-05083-MGL in the U.S. District Court for the State of South Carolina, Spartanburg Division), Plaintiff filed his Third Amended Complaint ("TAC") and amended his earlier allegation to state that "*beginning on or about June 2006*" BANA withdrew a monthly charge of $28.40 from the Hughes' joint checking account. (*See* Exh. 2, TAC ¶ 25 (emphasis added).) The originally filed Complaint and the TAC in the 2015 Lawsuit are practically identical to the Complaint filed in this current case, with some notable omissions. Curiously, Plaintiff wittingly omitted from this current complaint the date for which the injury occurred (*i.e.* when BANA began drafting the $28.40 monthly payments from the Hughes' account), deciding instead to use the phrase "for several years" rather than identify the specific date and month.

The law does not allow this type of artful pleading. This court may take judicial notice of the allegations Plaintiff previously made in the 2015 Lawsuit. *Wise v. Wise*, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (S.C: Ct. App. 2011) ("A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records.") *citing Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (S.C. Ct. App. 1984); *Lucht v. Youngblood*, 266

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(Compl. ¶ 23.)[2] Plaintiff contends this charge was "ambiguous" and that "all other charges from BANA . . . were clearly designated." (*Id.* ¶¶ 23-24.)

In or about March 2015, John Hughes' estate notified BANA that Mr. Hughes had passed away seven years earlier. (*Id.* ¶ 27.) BANA then refunded all LPP premium payments drawn on the Hughes' account after the death of John Hughes in October 2008. (*See* Exh. 2, ¶ 30.)[3] On June 3, 2015, Plaintiff's mother, Jane Hughes, passed away, and Plaintiff was named personal representative of her estate. (*Id.* ¶ 29.)

S.C. 127, 134, 221 S.E.2d 854, 858 (S.C. 1976) ("Generally, the prior pleadings in an action may be received in evidence against the pleader."). More importantly, this Court may deem the allegations Plaintiff previously plead in his 2015 Lawsuit to be admissions for the purpose of this lawsuit. *See* Trial Handbook for South Carolina Lawyers § 10:24 (2017) ("admissions made by a party in a prior action regarding facts relevant to a subsequent action . . . are generally regarded as evidence of the admitted fact . . . ."); *see also Young v. Martin,* 254 S.C. 50, 58, 173 S.E.2d 361, 365 (S.C. 1970) ("It is well established that an admission contained in a pleading in one action may be received in evidence against the pleader on the trial of another action . . . It has been held that a party is bound by an admission contained in a pleading . . . ."); *see also Benbow v. Harvin,* 92 S.C. 180, 75 S.E. 414, 416 (S.C. 1912) (pleadings in prior partition action against the alleged common source of title admissible in subsequent action to quiet title); *Fales & Jenks Mach. Co. v. Browning*, 68 S.C. 13, 46 S.E. 545, 546 (S.C. 1903) (bankruptcy schedule admissible in evidence as an admission of insolvency).

Further, when considering a motion to dismiss, a court may take judicial notice of these publicly-available court documents without converting this motion into one for summary judgment. *Teilabs, Inc. v. Makor Issues & Right, Ltd.*, 531 U.S. 308, 322-323, 127 S. Ct. 2499, 2509 (S.C. 2007). Under the South Carolina Rules of Evidence, a court may take judicial notice of matters of public record. S.C.R. Evid. 201.

[2] Plaintiff also attached as an exhibit to his TAC in the 2015 Lawsuit a bank statement from February 2009, listing the monthly charge for the LPP coverage. (*See* Exh. 2, TAC at Exh. D.) Notably, he omits that exhibit from his complaint in this action.

[3] In addition to omitting the date that Plaintiff's parents had notice that BANA began withdrawing funds from their account, and omitting the exhibit showing charges on a 2009 bank statement, Plaintiff also omitted from his new complaint that BANA refunded the amount of payments made after his father's death in 2008, as alleged in the 2015 Lawsuit. (*Compare* Compl. *with* Exh. 2, TAC ¶ 30.)

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II. PROCEDURAL HISTORY.

As noted above, on November 16, 2015, Plaintiff filed the 2015 Lawsuit, a class action Complaint in this Court (Case No. 2015-CP-42-4748), asserting almost identical factual allegations as those made in the Complaint in this matter, and alleging federal and state law causes of action relating to the LPP coverage. (*See* Exh. 1, 2015 Compl.) BANA timely removed the action to the United States District Court for the State of South Carolina under federal question jurisdiction. Plaintiff's original action involved the *same parties,* the *exact same set of factual allegations and subject matter*, and the *same alleged injury.* Plaintiff amended his complaint in the 2015 Lawsuit twice, with the District Court granting Plaintiff leave to file his TAC on March 22, 2016. In the TAC, Plaintiff alleged that BANA's charging for the LPP, when the Hughes (and another Plaintiff, JoAnne Hafter) allegedly declined coverage, amounted to fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent acts, breach of duty of good faith and fair dealing, and a violation of the Truth in Lending Act ("TILA"). Plaintiff also sought to represent a class of "BANA customers who, without the customer's express and informed written consent, were enrolled in and charged for a protection plan insurance products referred variously as 'Borrower's Protection Plan,' 'Line Protection Plan,' or other similar monikers." (*See* Exh. 2, TAC ¶ 43.)

On April 21, 2016, BANA filed a motion to dismiss all of the claims (against the purported class, Plaintiff, and Hafter) for failure to state a claim. On August 23, 2016, after the motion to dismiss was fully briefed, but prior to the District Court's ruling on the motion to dismiss, Plaintiff voluntarily dismissed his fraud-based claims (fraud, fraudulent concealment, and breach of contract accompanied by fraudulent acts), admitting that "there is controlling precedent that may

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bar recovery for these particular claims by virtue of Jane Hughes' death." (*See* Exh. 3, Notice of Dismissal at 1.)[4]

On February 13, 2017, the District Court granted BANA's motion to dismiss the remaining claims, holding that Plaintiff's remaining breach of contract and TILA claims were time-barred and that Plaintiff could not rely on the doctrine of equitable tolling to save the untimely claims. (*See* Exh. 4, District Court Order.)[5] The court further noted that "[t]he charge for the mortgage insurance appeared on the Hughes' monthly checking account statements from 2006 to 2015, thus any argument they failed to discover the purported wrongdoing by Defendant during this period of time, although they exercised due diligence, is bereft of any merit." (*Id.* at 4.)

That same day, Plaintiff filed a Notice of Appeal to the Fourth Circuit Court of Appeals. On September 11, 2017, the Fourth Circuit affirmed the District Court's ruling "for the reasons stated by the district court." (*See* Exh. 5, 4th Cir. Order, at pg. 5.) Despite the decisive ruling by the Fourth Circuit barring Plaintiff's LPP claims, Plaintiff served BANA with a copy of the nearly identical Complaint in this action on November 21, 2017. On December 11, 2017, Plaintiff filed a Petition for *Writ of Certiorari* ("Writ Petition") in the Supreme Court of the United States, appealing the dismissal of his identical action in federal court. The Supreme Court denied Plaintiff's Writ Petition on January 22, 2018. *See Estate of Hughes v. Bank of Am. Nat'l., Ass'n.*, --- S. Ct. --- (2018), No. 12-884, 2018 WL 491558 (Jan. 22, 2018).

STANDARD OF REVIEW

[4] Plaintiff Hughes and Plaintiff Hafter also both voluntarily dismissed their claims for breach of implied covenant of good faith and fair dealing.

[5] The Court also dismissed all of the remaining claims of Plaintiff Hafter in the 2015 Lawsuit: fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent acts, and violation of TILA.

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Under S.C. R. Civ. P. Rule 12(b)(6), a complaint should be dismissed if, after examining the evidence and finding the jurisdictional facts, it fails "to state facts sufficient to constitute a cause of action." "[T]he motion must be granted if facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case." *Jarrell v. Petroseed Co.*, 331 S.C. 207, 209, 500 S.E.2d 793, 794 (S.C. Ct. App. 1998); *Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137, 139 (S.C. 1999); *Brown v. Leverette*, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (S.C. 1987). To survive a 12(b)(6) motion, plaintiff must set forth "ultimate facts" – *i.e.*, facts that state more than a mere legal conclusion – "showing he is entitled to relief." *Watts v. Metro Security Agency*, 346 S.C. 235, 238, 550 S.E.2d 869, 870 (S.C. Ct. App. 2001). In addition, when analyzing a Rule 12(b)(6) motion to dismiss, the Court may consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *see Doe v. Bishop of Charleston*, 407 S.C. 128, 134 n.2, 754 S.E.2d 494, 497 n.2 (S.C. 2014) (recognizing a court may take judicial notice of previously entered, related court orders and consider them when ruling on a S.C. R. Civ. P. Rule 12(b)(6) motion to dismiss).

ARGUMENT

I. THE DOCTRINES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL BAR THIS ACTION.

The United States District Court for the District of South Carolina already held that Plaintiff's claims are time-barred, and the Fourth Circuit affirmed that decision (and the Supreme Court of the United States denied Plaintiff's Writ Petition). Plaintiff is therefore barred from re-litigating previously dismissed claims and allegations based on the same transaction.

A. *Res Judicata* (Claim Preclusion) Bars Plaintiff's Claims As All Of Plaintiff's Claims Were Litigated Or Could Have Been Litigated In The Previous Action.

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Because Plaintiff's 2015 Lawsuit involved the same transaction, and because there has been a full adjudication concerning the applicable statutes of limitations, Plaintiff's claims in this action are barred under the doctrine of *res judicata*, or claim preclusion. "*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (S.C. 1999); *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 190–92, 417 S.E.2d 569, 571 (S.C. 1992). "Under the doctrine of *res judicata*, [a] litigant is barred from raising any issues which were adjudicated in the former suit and *any issues which might have been raised* in the former suit." *Plum Creek*, 334 S.C. at 34, 512 S.E.2d at 109 (quoting *Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (S.C. 1987) (emphasis added)). "*Res judicata* also bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 469, 419 S.E.2d 217, 218 (S.C. 1992); *Johnson v. Greenwood Mills, Inc.*, 317 S.C. 248, 251, 452 S.E.2d 832, 833 (S.C. 1994) (holding that *res judicata* bars subsequent action by same parties on same issues). "To establish *res judicata*, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." *Plum Creek Dev. Co.*, 334 S.C. at 34, 512 S.E.2d at 109.

The matter at hand is exactly the kind of case that the doctrine of *res judicata* was made to prevent. First, the identity of the parties is identical. In both actions Plaintiff sued Bank of America, N.A. Second, the subject matter of the two lawsuits is also identical. Both lawsuits are specifically seeking damages for the injury that allegedly occurred relating to the LPP product

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applied to the account of Plaintiff's parents. In fact, the complaints are so indistinguishable that the majority of the factual allegations are identical. (*Compare* Compl. *with* Ex. 2). Specifically, Plaintiff alleges that his parents declined the LPP product in connection with their loan, that BANA signed up Mr. Hughes for the LPP product despite their declining it, that BANA charged the Hughes' account for the LPP product, and that his parents did not and could not have known about the LPP charges. Because the timeliness of these exact allegations has already been rejected previously, Plaintiff's complaint must be dismissed.

In both lawsuits, Plaintiff asserted fraud, fraudulent concealment, and breach of contract accompanied by fraudulent acts relating to the LPP coverage, providing further support for the identity of the subject matter. In the 2015 Lawsuit, Plaintiff voluntarily dismissed the three fraud claims after acknowledging that they did not survive Ms. Hughes' death. (*See* Exh. 3.) That Plaintiff's remaining *causes of action* in the 2015 lawsuit are not identical to the causes of action in this Lawsuit does not save his barred claims. *See e.g. Sub-Zero Freezer Co.*, 308 S.C. at 192, 417 S.E.2d at 571 ("The issues in this case have been or could have been brought before the South Carolina Circuit Court twice, the District Court for South Carolina once, the Wisconsin Circuit Court, the Wisconsin Supreme Court and this Court. All of Clarkson's claims arise out of the distributorship or the settlement agreement. The claims were either litigated in the prior actions or could have been so litigated. Thus, the trial court properly held that Clarkson's claims were barred by *res judicata* and entered judgment in favor of Sub-Zero."). All of Plaintiff's claims were equally available, and within the scope and purview of suit at the time of the 2015 Lawsuit. Indeed, as Plaintiff is resting on identical factual allegations in this lawsuit when compared to the 2015 Lawsuit, the SCUTPA, breach of fiduciary duty, conversion, and "new" fraud-related causes of action were all available to him.

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Finally, the issue of whether Plaintiff's claims were brought within the applicable statute of limitations has been fully adjudicated. As an initial matter, Plaintiff conceded in the 2015 Lawsuit that all of his claims were barred by the applicable statute of limitations unless the doctrine of equitable tolling applied. (*See* Exh. 6, Pl.'s Opp. To Mot. To Dismiss, pp. 1, 15-16.) The District Court agreed and held that Plaintiff's claims were time-barred. Here, the statute of limitations period is the same for Plaintiff's existing claims as his prior breach of contract claim: three years.[6] Thus, if Plaintiff's claims were time-barred in 2015, his 2017 claims are likewise barred.

The District Court also considered the record and rejected Plaintiff's request to apply the scarcely-used equitable tolling doctrine to save his claims. Specifically, the District Court determined that Plaintiff could not establish two of the three elements necessary to apply equitable tolling to the facts of this case. Plaintiff failed to establish that (1) "plaintiff failed to discover those facts within the statutory period," or (2) that plaintiff exercised "due diligence" in the attempt to discover the relevant facts during the statutory time period. (*See* Exh. 4, at p. 4.) The District Court squarely held that "the charge for the mortgage insurance appeared on the Hughes' monthly checking account statements from 2006 to 2015. Thus any argument they failed to discover the purported wrongdoing by Defendant during this period of time, although they exercised due diligence, is bereft of any merit." (*Id.*)[7] The District Court therefore dismissed Plaintiff's 2015 Lawsuit.

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[6] The statutes of limitations for all of Plaintiff's claims in his 2017 Lawsuit are three years. (*See* below Section II.) Plaintiff's claim in his 2015 Lawsuit under TILA had a one-year statute of limitation.

[7] Under South Carolina jurisprudence, the analysis is the same. The South Carolina Supreme Court has maintained that "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C.

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Because the identity of the parties, subject matter, and issues in this case are identical to those brought in the 2015 Lawsuit, the District Court's ruling (affirmed by the Fourth Circuit Court of Appeal, and with *certiorari* denied by the United States Supreme Court), bars Plaintiff's current claims. *See Pye v. Aycock*, 325 S.C. 426, 433, 480 S.E.2d 455, 458 (S.C. Ct. App. 1997) (citing *Surety Realty Corp. v. Asmer*, 249 S.C. 114, 119, 153 S.E.2d 125, 128 (S.C. 1967) ("In a subsequent suit between the same parties on a different claim, the former judgment is conclusive as to those issues actually determined in the prior action."). Accordingly, this court should dismiss Plaintiff's Complaint on the basis of *res judicata* alone.

B. The Doctrine Of Collateral Estoppel (Issue Preclusion) Bars Plaintiff's Claims.

For the same reasons espoused above, Plaintiff's claims are also barred under the related doctrine of collateral estoppel, or issue preclusion. "Under the doctrine of collateral estoppel . . . when an *issue* has been actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action whether on the same or a different claim." *Zurcher v. Bilton*, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (S.C. 2008) (emphasis added). The doctrine of collateral estoppel prevents the re-litigation of issues necessarily determined in a former proceeding, regardless of whether there is identity of the causes of action or even parties in successive lawsuits. *See Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (S.C. Ct. App. 2009) ("Collateral estoppel applies to specific issues, regardless of whether the claims in the first and subsequent suits are the same."). Under South Carolina state law, the party asserting collateral estoppel must show "that the issue in the present lawsuit was (1) actually litigated in the prior

108, 117, 687 S.E.2d 29, 32 (S.C. 2009). "It has been observed that equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Id.* at 116. Here, because Plaintiff's parents received monthly notices of the charges being deducted from their account from 2006 to 2015, nothing was being hidden from them and they were, in no way, "prevented from filing suit."

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action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (S.C. Ct. App. 2009); *see Beall v. Doe*, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189-90 n.1 (S.C. Ct. App. 1984).

In this case, Plaintiff's allegations and the issues to be litigated are the same as those in his 2015 Lawsuit. In the 2015 Lawsuit, the parties fully briefed the dispositive issues of timeliness and equitable tolling as to Plaintiff's LPP coverage allegations: both were *actually* litigated in the 2015 Lawsuit. (*See* Exh. 6, Pl.'s Opp. to Mot. to Dismiss; *see* Exh. 7, BANA's Mot. to Dismiss; *see* Exh. 8, BANA's Reply to Mot. to Dismiss.) The District Court directly determined that the facts as alleged established that Plaintiff's claims were outside of the statutes of limitations and were insufficient to establish equitable tolling. The District Court thus held that Plaintiff's claims were untimely under the one-year (TILA) or three-year (breach of contract) statute of limitations. Finally, the Court's ruling regarding the issues of timeliness and equitable tolling served as the basis for the District Court's dismissal of the 2015 Lawsuit, and were thus clearly necessary to support the Court's final judgment. *See Judy*, 383 S.C. at 7, 677 S.E.2d at 217. Here, Plaintiff pursues causes of action based on identical issues, and his causes of action are knowingly and obviously beyond their respective statutes of limitations. Indeed, the issues of the timeliness of the claims, and whether or not the facts allege sufficient grounds to equitably toll the statute of limitations are directly at issue in this case just as they were in the 2015 Lawsuit. Plaintiff's claims are thus barred by the doctrine of collateral estoppel. Accordingly, Plaintiff's action must be dismissed, with prejudice, in its entirety.

II. ALL OF PLAINTIFF'S CLAIMS ARE TIME BARRED.

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Even if this Court does not apply *res judicata* or collateral estoppel to bar Plaintiff's claims, his 2017 claims – all relating to conduct beginning in 2006 – are time-barred. Plaintiff claims that despite having declined to purchase the LPP when the Hughes opened their line of credit from BANA on June 13, 2006, BANA withdrew a monthly charge of $28.40 "for several years." (Compl., ¶ 23.) In fact, although Plaintiff deliberately omitted the injury date from this version of his Complaint, Plaintiff seeks to prosecute claims that arise from conduct which occurred "on or about June 2006." (*See* Exh. 2, ¶ 25.) Accordingly, all of Plaintiff's claims are barred by the applicable statutes of limitation and must be dismissed with prejudice.

South Carolina has a three-year statute of limitations period for each of Plaintiff's causes of action: (1) fraud (*see* S.C. Code § 15-3-530(7)); (2) fraudulent concealment (*id.*); (3) breach of contract accompanied by a fraudulent act (*see* S.C. Code § 15-3-530(1)); (4) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA") (*see* S.C. Code Ann. § 39-5-150); (5) breach of a fiduciary duty (*see Mazloom v. Mazloom,* 382 S.C. 307, 323, 675 S.E.2d 746, 755 (S.C. Ct. App. 2009) ("Generally, the statute of limitations is three years for actions for a breach of a fiduciary duty.")); and (6) conversion (*see* S.C. Code Ann. §§ 15-3-530(4) and 15-3-530(5)).

The relevant statutes of limitation began to run on Plaintiff's claims when Mrs. Hughes could or should have known, using reasonable diligence, that a cause of action might exist. "All actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. Code Ann. § 15-3-535; *Mitchell v. Holler*, 311 S.C. 406, 408-9, 429 S.E.2d 793, 795 (S.C. 1993) (articulating the "discovery rule"); *RWE NUKEM Corp. v. ENSR Corp.*, 373 S.C. 190, 196, 644 S.E.2d 730, 733 (S.C. 2007) (applying rule in breach of contract action); *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 76, 777 S.E.2d 176, 198-99 (S.C. 2015), *reh'g*

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granted (July 8, 2015), *cert. denied sub nom.,* 136 S. Ct. 824 (S.C. 2016) (applying rule in SCUTPA action); *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 395-6, 593 S.E.2d 183, 187-88 (S.C. Ct. App. 2004) (applying rule in action for fraud and breach of a fiduciary duty); *Campus Sweater & Sportswear Co.*, 515 F. Supp. 64, 76 (D. S.C. 1979) (applying rule to conversion claim action). In fact, a party must act with "some promptness" when facts and circumstances would put a reasonable person on notice that her rights have been invaded. *Mitchell*, 429 S.E.2d at 795 (quoting *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (S.C. 1981)).

As determined by the District Court in the 2015 Lawsuit, Mrs. Hughes knew or should have known that BANA was charging her and her husband for LPP coverage based on the monthly LPP charges being deducted from her account, and the monthly bank and/or home equity loan statements identifying those charges. Plaintiff specifically alleges that "BANA withdrew a monthly charge of $28.40 from the Hughes' BANA joint checking account beginning on or about June 2006" for his father's LPP coverage. (*See* Exh. 2, ¶ 25.) Plaintiff also states that the LPP fee appeared on his parents' checking account statements. (*Id.*) As a result, Mrs. Hughes was put on reasonable notice of the alleged wrong-doing, and the statutes of limitations started to run when Plaintiff admits that the first charge was deducted from her account and appeared on her monthly statement (in June 2006). *See Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 407-08, 680 S.E.2d 778, 783 (S.C. Ct. App. 2009) (finding statute of limitations barred negligence claim where the bank account statements put deceased account co-holder, and thus the personal representative of her estate, on notice of potential injury more than three years before personal representative brought claim against bank). Accordingly, the statute of limitations for all of Plaintiff's claims expired three years after the time of reasonable notice (in June 2009) — over *eight* years before the filing

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of this operative Complaint. For these reasons, all of Plaintiff's claims are time-barred and should be dismissed with prejudice.[8]

III. PLAINTIFF'S FRAUD-RELATED CLAIMS DO NOT SURVIVE THE DEATH OF MRS. HUGHES.

In bringing fraud-related claims on behalf of his deceased mother, Plaintiff runs afoul of South Carolina's survivability statute, which he admitted in his 2015 Lawsuit. *See* S.C. Code § 15-5-90. Although this statute generally allows causes of action for personal injuries to survive the death of the person, the South Carolina Supreme Court has expressly ruled that fraud-related claims *do not* survive the person's death. *Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 15 S.E.2d 117, 119 (S.C. 1941) (holding that a cause of action for fraud did not survive the death of a person who was allegedly defrauded by an apparent cancellation of an insurance policy). "South Carolina case law has continued to recognize a common law exception [to the survivability statute] regarding causes of action for fraud or deceit." *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563-64, 564 S.E.2d 94, 97 (S.C. 2002); *see also Brailsford v. Brailsford*, 380 S.C. 443, 449, 669 S.E.2d 342, 345 (S.C. Ct. App. 2008) ("South Carolina . . . has long recognized several exceptions to the survivability of a claim, including an exception for fraud.").

The South Carolina Supreme Court in *Ferguson* analyzed the survivability of fraud and fraudulent concealment-based allegations brought by a plaintiff's estate against a car dealership. The Court held:

[8] Because all six of Plaintiff's substantive causes of actions are barred by the statutes of limitations, Plaintiff cannot maintain a cause of action for "survival." If the decedent could not have brought these claims years after the statute of limitations had run, the bar passes to the decedent's estate. Succinctly stated, if the decedent had no claim at her death, the estate has no claim. *Layne v. International Bhd. of Elec. Workers*, 271 S.C. 346, 352, 247 S.E.2d 346, 351 (S.C. 1978) (noting that only a "cause of action which could have been brought by the deceased in his lifetime survives to his representative.")

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> The essence of Mr. Ferguson's allegation was that [the defendant] CLM included an improper fee in the purchase price and concealed the fee through fraudulent and deceptive actions. Whether Mr. Ferguson labeled CLM's actions as unfair, misleading, or deceptive is irrelevant. At the core of Mr. Ferguson's complaint was the allegation that CLM misled him into paying more for the car than he should have paid, and concealed the overcharge either through intentionally deceptive actions or through grossly negligent disclosure practices. Allegations of such fraud and deceit are exempted from the general survival statute and do not survive the plaintiff's death. Accordingly, we hold that Mr. Ferguson's cause of action did not survive his death.

Ferguson, 349 S.C. at 563-64, 564 S.E.2d at 97-98.

Here, much like in *Ferguson*, Plaintiff alleges that BANA "made false and material representations" relating to the LPP coverage or "in the alternative, Defendant BANA intentionally concealed the material facts that it enrolled Plaintiffs in [the LPP]." (Compl., ¶¶ 31, 37.) Plaintiff asserts that "[d]ue to the fraudulent nature of BANA's actions," he is entitled to damages, including punitive damages. (*Id.* ¶¶ 35, 42, 51, 60, 61.) Plaintiff's allegations relating to fraud and deceit are "exempted from the general survival statute and do not survive the plaintiff's death." *Ferguson*, 564 S.E.2d at 97-98. Accordingly, all of Plaintiff's claims based on fraud and deceit – fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, and violation of SCUTPA claims did not survive the death of Mrs. Hughes and must be dismissed.

IV. PLAINTIFF CANNOT BRING A SCUTPA CLAIM AS A REPRESENTATIVE OF AN ESTATE.

Plaintiff's SCUTPA claim also fails because Plaintiff purports to bring the claim as a representative of an estate. Plaintiff affirmatively alleges that he is bringing this action as the "personal representative of the estate of Jane K. Hughes." (Compl., ¶ 1.) However, the plain language of the SCUTPA statute does not allow for a representative of an estate to maintain an action under the Act. SCUPTA clearly states:

> "[a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, *but not in a representative capacity*, to recover actual damages.

S.C. Code Ann. § 39-5-140 (emphasis added). Applying this statutory language, courts analyzing South Carolina law have therefore precluded estate representatives from maintaining claims under SCUTPA. *See Faircloth v. Jackie Fine Arts, Inc.*, 682 F. Supp. 837, 845 (D.S.C. 1988), *aff'd in part; rev'd in part on other grounds; Faircloth v. Finesod*, 938 F.2d 513 (4th Cir. 1991) ("[T]he language of the statute precludes the bringing of a SCUTPA action by a plaintiff who acts in a representative capacity."). It is clear that "an unfair trade practices claim may not be brought in a representative capacity." *Wogan v. Kunze*, 366 S.C. 583, 609, 623 S.E.2d 107, 121 (S.C. Ct. App. 2005), *aff'd as modified*, 379 S.C. 581, 666 S.E.2d 901 (S.C. 2008). Accordingly, Plaintiff's claim under the SCUTPA must be dismissed.

CONCLUSION

For the multitude of reasons discussed above, BANA respectfully requests that this Court grant its motion to dismiss and dismiss Plaintiff's Complaint with prejudice.

Dated: February 20, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 20th day of February 2018, the foregoing **BANK OF AMERICA, N.A.'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT** was electronically filed with the Clerk of the South Carolina Court using the E-Filing system, and has been served upon counsel by mailing a true and accurate copy with sufficient postage prepaid, and by electronic mail, to the following:

D. Michael Kelly, Esq.
Brad D. Hewett, Esq.
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Attorneys for Plaintiff

/s/ Robert A. Muckenfuss
Robert A. Muckenfuss

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EXHIBIT 1

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)

Phillip Francis Luke Hughes, et al.)
Plaintiff(s))

vs.)

Bank of America National Association)
Defendant(s))

CIVIL ACTION COVERSHEET

2015-CP-42-4748

Submitted By: Brad D. Hewett
Address: Mike Kelly Law Group, LLC
500 Taylor Street
PO Box 8113
Columbia, SC 29201

SC Bar #: 77924
Telephone #: (803) 726-0123
Fax #: (803) 252-7145
Other:
E-mail: bhewett@mklawgroup.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

**If Action is Judgment/Settlement do not complete*

☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20___-NI-____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☒ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: _____ **Date:** 11/9/15

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Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

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FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

   a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

   b. Requests for temporary relief;

   c. Appeals

   d. Post Conviction relief matters;

   e. Contempt of Court proceedings;

   f. Forfeiture proceedings brought by governmental entities;

   g. Mortgage foreclosures; and

   h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

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STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	Civil Action No.: 2015-CP-42-4748
Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes and all others similarly situated, Plaintiff, vs. Bank of America National Association, Defendant.	**COMPLAINT** (Jury Trial Demanded) (Class Action)

TO: THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to said complaint on the subscribed, **Mike Kelly Law Group, LLC., 500 Taylor Street, Post Office Box 8113, Columbia, South Carolina 29202, within THIRTY (30)** days after the service hereof, exclusive of the date of such service. If you fail to answer the complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the complaint.

Respectfully Submitted,

MIKE KELLY LAW GROUP, LLC

BY: _____

D. Michael Kelly
Brad D. Hewett
Jamie N. Smith
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Attorneys for Plaintiff

Columbia, South Carolina
November 9, 2015

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF SPARTANBURG)	Civil Action No.:
)	
Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes and all others similarly situated,)	2015-CP-42-4748
)	
Plaintiff,)	**COMPLAINT** (Jury Trial Demanded) (Class Action)
)	
vs.)	
)	
Bank of America National Association,)	
)	
Defendant.)	

Plaintiff, on behalf of the Estate of Jane K. Hughes and all others similarly situated ("Class"), would respectfully show unto the court as follows:

1. Plaintiff Phillip Hughes is the son of the Jane Hughes and has standing to bring this claim after being appointed as Personal Representative of the Estate of Jane K. Hughes by the Spartanburg County Probate Court. Prior to her death, Jane Hughes was a citizen and resident of Spartanburg County, South Carolina.

2. Bank of America National Association ("BANA") is one of the world's largest financial institutions. Upon information and belief, BANA was at all times relevant to this Complaint a nationally-chartered bank, regulated by the Office of the Comptroller of the Currency, with its principal place of business in North Carolina.

3. This court has personal jurisdiction over BANA because it is authorized to do business and has conducted business in South Carolina, it has specifically marketed, offered for sale, and sold Line Protection Plans in South Carolina, BANA has sufficient minimum contacts with this State, and has sufficiently availed itself to the markets of this State through its promotion

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sales and marketing within this State to render the exercise of jurisdiction by this Court permissible.

4. Venue is proper because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in Spartanburg County.

5. The Named Plaintiff seeks damages on behalf of the Jane Hughes's estate and all other similarly situated against the Defendant in an amount to be determined at trial.

ALLEGATIONS AS TO THE CLASS

6. This civil action is brought by the Named Plaintiff as a class action on behalf of themselves and all others similarly situated under the provisions of Rule 23 of the Federal Rules of Civil Procedure .

7. The Class consists of BANA customers who, without the customer's express and informed written consent, were enrolled in and charged for a protection plan insurance product known as "Borrower's Protection Plan" and "Line Protection Plan."

8. Under Federal Rule of Civil Procedure 23, a class action is appropriate in this case because:

a. Based on Defendant's volume of customers the class is so numerous that joinder of all members is impractical;

b. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. These questions include:

i. Whether BANA's unilateral enrollment of the Proposed Class into the LPP program constitutes fraud or breach of contract;

ii. Whether BANA committed fraudulent acts or otherwise was in breach of contract by drafting payments from the accounts of the Proposed Class without express authorization and in violation of the customer's election;

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c. The claims of Plaintiff are typical of the class members' claims. All are based on the same facts and legal theories;

d. Plaintiff will fairly and adequately represent the class members' interests. All claims are based on the same facts and legal theories and Plaintiff's interests are consistent with the interests of the class; and

e. Plaintiff has retained counsel experienced in bringing class actions.

9. Plaintiff's claims are typical of the claims of the members of the Proposed Class because 1) Plaintiff satisfies each of the criteria of the Proposed Class; 2) all other members of the Proposed Class have suffered or may suffer the identical harm as the Proposed Class's plaintiff representative as a result of Defendant's violations of law as alleged herein; 3) the remedy sought by Plaintiff is also sought by each of the other members of the Proposed Class and is directed towards Defendant's conduct perpetrated on the Proposed Class as a whole.

10. A class action is superior for the fair and efficient adjudication of the class members' claims. The injury suffered by each individual class member may be disproportionate to the burden and expense of individual prosecution of complex and extensive litigation to proscribe Defendant's conduct and practices. Additionally, effective redress for each and every class member against Defendant may be limited or even impossible where serial, duplicitous, or concurrent litigation occurs on these disputes. Individualized litigation may lead to incongruous and conflicting judgments against Defendant. A class action procedure involving all class members, Defendant and the court present fewer management difficulties, and provide the benefit of a single adjudication, economy of scale, and judicial efficiency and fairness.

FACTUAL ALLEGATIONS

11. On June 13, 2006, Jane Hughes and her husband, John P. Hughes, opened a line of credit from BANA in the amount of $120,000, secured by a mortgage ("Mortgage") on their Spartanburg County homestead. The line of credit is governed by a document entitled Bank of

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America Maximizer Agreement and Disclosure Statement ("Agreement") signed by both borrowers also on June 13, 2006.

12. Jane and John Hughes signed, along with the Mortgage and Agreement, an acknowledgement and authorization ("Authorization") which authorizes BANA to automatically draft "loan payments" from the borrowers' BANA bank account.

13. On the same date and, upon information and belief, in conjunction with the Mortgage and the Agreement, BANA presented Jane and John Hughes with information about BANA's optional Line Protection Plan ("LPP"). The LPP is intended to provide optional protection on the variable portion of a credit line, for a monthly fee, by allowing the cancellation of all or some monthly loan payments in the event of disability, accidental death, or involuntary unemployment. At the time that BANA presented the plan to the Hughes', LPP offered six protection options, with the monthly fee ranging in cost from 4.5% to 13.5% of the minimum monthly payment on the borrowers' credit line.

14. Along with the Mortgage and the Agreement, Jane and John Hughes signed an addendum statement ("Addendum") acknowledging that BANA had provided them with information regarding LPP. The statement provided an option for the borrowers to 1) elect single protection for one borrower; 2) elect joint protection for both borrowers; or 3) decline to purchase protection on the credit line. The decedent and her husband indicated in this statement that they did not wish to purchase LPP by clearly and conspicuously checking a box next to the "DECLINE to purchase any Protection on this Credit Line" option.

15. The Agreement between Jane and John Hughes also contains a provision pertaining to the LPP. The Agreement between the parties states that in order to obtain LPP, the borrowers "must specifically request" the protection.

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16. John P. Hughes died on October 22, 2008 at the age of 87. Mr. Hughes left his estate to his wife, Jane Hughes.

17. Over six years after John Hughes' death, on or around March 17, 2015, BANA sent a form cancellation notice addressed to the Jane and John Hughes, informing them that the LPP would be cancelled on September 30, 2015. The notice also indicated that John P. Hughes was a protected borrower.

18. On or around March 25, 2015, BANA sent a follow-up letter indicating that Mr. Hughes had selected "6 month, Involuntary Unemployment, Disability, Accidental Death and Hospitalization" protection at a monthly rate of 9.5% of the Hughes' Minimum Monthly Payment. Also enclosed was a Protection Plan addendum ("Addendum") for the policy.

19. Upon information and belief, Mr. Hughes never elected to purchase LPP after declining to do so on June 13, 2006.

20. Upon information and belief, Mr. Hughes never authorized BANA to draft any payments from his account other than the loan payments as set forth in the Authorization.

21. To date, Plaintiff has been unable to locate, and BANA has been unable to provide, any documentation that Mr. Hughes opted for LPP coverage.

22. Despite having declined to purchase LPP, BANA drafted a monthly charge of $28.40 from the Hughes' account beginning in August 2008 or earlier. Upon information and belief, neither John nor Jane Hughes ever realized that BANA was withdrawing the funds from their account. BANA continued to draft this monthly charge until April of 2015, long after Mr. Hughes' death.

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23. Because no record existed of Mr. Hughes' LPP coverage, his family did not know that Mr. Hughes maintained or paid for any such coverage. His estate thus did not notify BANA of Mr. Hughes passing until receiving the March 2015 notices.

24. Upon receiving notice of Mr. Hughes' death, on May 6, 2015, BANA declined LPP coverage under the plan on the grounds that "[t]he death was the result of disease or treatment of disease or any medical treatment (and/or was not for the treatment of an accidental injury)."

25. Upon request, BANA refunded the payments drawn from the Hughes' account after Hughes death. However, BANA would not refund the payments drawn during Mr. Hughes' lifetime, nor would BANA provide proof or documentation that Mr. Hughes ever elected to purchase LPP.

26. On June 3, 2015, Jane Hughes passed away, and Plaintiff was named as personal representative of her estate.

FOR A FIRST CAUSE OF ACTION

(Violation of the Truth in Lending Act—15 U.S.C. § 1601 *et seq.*)

27. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

28. Residential mortgage loan agreements and line of credit agreements between Defendant BANA and its customers, including the Agreement signed by Jane and John Hughes, are subject to the disclosure requirements of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, and all related regulations, commentary, and interpretive guidance promulgated by the Federal Reserve Board.

29. BANA is a "creditor" as defined by TILA.

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30. BANA is required to clearly, conspicuously, and timely disclose all finance charges, other charges, and third party charges that may be imposed in connection with a mortgage loan or line of credit.

31. Voluntary credit insurance premiums must be included in the finance charges unless:

a. The coverage of the debtor by the insurance is voluntary and this fact is clearly disclosed in writing; and

b. In order to obtain the insurance in connection with the extension of credit, the person to whom the credit is extended must give specific affirmative written indication of his desire to do so.

32. BANA charged Jane and John Hughes for the LPP premiums without specific affirmative written indication of their desire to purchase LPP. In doing so, BANA violated TILA by excluding from the finance charge, as disclosed to Jane and John Hughes, the LPP premium.

33. To the extent that the TILA violation set forth above occurred more than one year prior to the commencement of this action, Plaintiff did not discover and did not have a reasonable opportunity to discover BANA's fraud and nondisclosures until BANA sent its March 17, 2015 cancellation notice.

34. Plaintiff's TILA claim is timely. The statute of limitations on Plaintiff's TILA claim did not begin to run and/or was equitably tolled until such time that she had a reasonable opportunity to discover BANA's TILA violations and complain about such violations. It would be manifestly unjust and inconsistent with the purposes of TILA to apply and enforce an earlier accrual date for Plaintiff's TILA claim.

35. BANA systematically and pervasively engaged in similar violations if TILA to the detriment of other members of the Proposed Class.

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36. As a result of BANA's violations, Plaintiff and the Proposed Class are entitled to recover actual damages and statutory damages as provided by 15 U.S.C. § 1640(a)(1)-(2).

37. Plaintiff and the Proposed Class are also entitled to recovery or attorneys'' fees and costs to be paid by BANA, as provided by 15 U.S.C. § 1640(a)(3).

FOR A SECOND CAUSE OF ACTION

(Fraud)

38. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

39. Defendant BANA made the following false and material representations, among others alleged herein:

a. BANA, with knowledge of the falsity or reckless disregard for the truth of its representation, through its Authorization agreement represented to Jane and John Hughes that BANA would draft funds from the Hughes' account solely for monthly loan payments; and

b. Through its Agreement with the Hughes, BANA represented, with knowledge of the falsity or reckless disregard for the truth of its representation, that LPP was optional coverage that would only be added to the Hughes' credit line upon their request.

40. BANA made these representations to Jane and John Hughes with the intent that the borrowers be induced to enter into the Agreement with BANA and sign the Authorization to grant BANA access to their account for purposes of drafting funds.

41. Jane and John Hughes had no knowledge of the falsity of BANA's representations and had the right to rely on these representations. The Hughes used reasonable prudence and diligence by maintaining in writing their decision to decline LPP coverage.

42. Jane and John Hughes relied on BANA's representations to their detriment, resulting in consequent and proximate injury in that BANA thereafter used its automatic drafting

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authorization to draft payments from the Hughes' account without their knowledge or express permission.

43. Due to the fraudulent nature of BANA's actions, Plaintiff is also entitled to punitive damages.

FOR A THIRD CAUSE OF ACTION

(Fraudulent Concealment)

44. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

45. Pleading in the alternative, Defendant BANA intentionally concealed the material facts that it enrolled John Hughes in LLP and withdrew monthly payments for same from his account.

46. Because the Hughes' entrusted BANA with authorization to draft monies from its account, and expressly reposed a trust in confidence in BANA with respect to automatic drafting transactions, BANA had a duty to disclose to Jane and John Hughes that it unilaterally enrolled John Hughes in the LLP problem and that BANA was drafting payments which were not authorized in the Authorization from the borrowers' account.

47. Alternatively, BANA had a duty to disclose the withdrawals arising from the fiduciary relationship between the parties.

48. As a result of BANA's concealment, Jane and John Hughes suffered monetary damages in the amount of the unauthorized payments which BANA surreptitiously withdrew from their account.

49. Due to the fraudulent nature of BANA's actions, Plaintiff is also entitled to punitive damages.

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FOR A FOURTH CAUSE OF ACTION

(Breach of Contract)

50. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

51. Jane and John Hughes and BANA entered into a binding agreement supported by good and valuable consideration which is represented by the Mortgage, the Agreement, the Authorization, and the Addendum collectively.

52. The Hughes performed all obligations required of it under the agreement, or has had the performance of any obligation excused.

53. Defendant BANA breached the agreement by enrolling John Hughes in the LPP plan without his express agreement, and without having him sign a separate addendum electing such coverage.

54. BANA further breached the agreement by drafting LPP payments from the Hughes' account, thereby exceeding its authority under the agreement, which is limited to drafting loan payments.

55. As a result of these breaches by BANA, Plaintiff's decedent suffered damages in the amount of the unauthorized payments which BANA surreptitiously withdrew from their account.

FOR A FIFTH CAUSE OF ACTION

(Breach of Contract Accompanied by Fraudulent Acts)

56. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

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SPARTANBURG COUNTY
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HOPE BLACKLEY

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57. BANA, in addition to breaching its contract with the Hughes as set forth above, acted fraudulently by concealing that it enrolled John Hughes in its LPP plan without express permission and by drafting unauthorized payments for LPP from the Hughes' Account.

58. BANA had a fiduciary and contractual duty to disclose these facts to Mr. and Mrs. Hughes.

59. As a result of BANA's breach of contract accompanied by fraudulent concealment, Plaintiff's decedent was damaged in that she unknowingly paid for a benefit that was expressly declined.

60. Due to the fraudulent nature of BANA's actions, Plaintiff is also entitled to punitive damages.

JURY TRIAL DEMAND

61. Plaintiff hereby demands that all issues in this case triable before a jury be so tried.

DAMAGES

WHEREFORE, Plaintiff prays for the following relief:

A. For an order certifying the class defined herein, appointing undersigned counsel as class counsel, approving Plaintiff as class representative, and requiring that notice be provided to the class.

B. Actual and punitive damages;

C. Attorney fees and costs;

D. Pre-judgment interest and post-judgment interest; and

E. Such other and further relief as the Court deems just and proper.

Respectfully Submitted,

MIKE KELLY LAW GROUP, LLC

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SPARTANBURG COUNTY
2018 NOV 16 AM 10:21
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November 9, 2015

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2015 NOV 16 AM 10:21
M. HOPE BLACKLEY

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EXHIBIT 2

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(Spartanburg Division)

PHILLIP FRANCIS LUKE HUGHES, on behalf of the Estate of Jane K. Hughes, JOANNE HAFTER, and all others similarly situated, Plaintiffs, vs. BANK OF AMERICA NATIONAL ASSOCIATION, Defendant.	**Civil Action No. 7:15-cv- 05083-MGL** **THIRD AMENDED COMPLAINT** (Jury Trial Demanded) (Class Action)

Plaintiffs, on behalf of the Estate of Jane K. Hughes, Joanne Hafter, and all others similarly situated (the "Class"), would respectfully show unto the court as follows:

1. Plaintiff Phillip Hughes is the son of John P. Hughes, Sr. (Mr. Hughes) and Jane K. Hughes (Mrs. Hughes) and has standing to bring this claim after being appointed as Personal Representative of the Estate of Jane K. Hughes by the Spartanburg County Probate Court. Prior to her death, Mrs. Hughes was a citizen and resident of Spartanburg County, South Carolina.

2. Plaintiff Joanne Hafter is a citizen and resident of Lexington County, South Carolina.

3. Bank of America National Association ("BANA") is one of the world's largest financial institutions. Upon information and belief, BANA was at all times relevant to this Complaint a nationally-chartered bank, regulated by the Office of the Comptroller of the Currency, with its principal place of business in North Carolina.

4. This Court has jurisdiction over this matter because there is a complete diversity of citizenship between Plaintiffs and Defendant, the amount in controversy claimed by Plaintiffs

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exceeds $75,000.00, and this is an action based on Defendant's violation of federal law. 28 U.S.C. §§ 1331, 1332(a).

5. Venue is proper because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in Spartanburg County and Lexington County, South Carolina. 28 U.S.C. § 1391(b)(2).

FACTUAL ALLEGATIONS

6. At all relevant times, BANA and its agents marketed a purportedly optional financial product promising "mortgage protection" to its clients. Such plans, including BANA's "Line Protection Plan," are essentially a specialized life insurance limited to paying specific portions of a mortgage payment under specific conditions. These plans are marketed, usually at the time of closing, as an *option* to assist survivors in making mortgage payments following the disability or death of a mortgagor. A "mortgage protection" plan is *not* "Private Mortgage Insurance" (widely referred to as "PMI"), which is *required* by lenders to protect a mortgagee in case of default by a mortgagor.

7. BANA, and other companies, market mortgage protection plans because they are extremely profitable. This profitability resulted in such abuses of unsophisticated customers that Congress established explicit disclosure and authorization requirements to protect citizens from being duped into unknowingly paying for unwanted mortgage protection plans. *See, e.g.*, 15 U.S.C. §§ 1604, 1637(c)(5), 1639(l); 12 C.F.R. § 226.4.

8. On June 13, 2006, Mr. and Mrs. Hughes opened a line of credit from BANA in the amount of $120,000, secured by a mortgage ("Hughes Mortgage") on their Spartanburg County homestead. The line of credit is governed by a document entitled "Bank of America

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Maximizer Agreement and Disclosure Statement" ("Agreement") signed by both borrowers on June 13, 2006.

9. At the same time, Mr. and Mrs. Hughes signed an acknowledgement and authorization ("Authorization") which allowed BANA to automatically draft "loan payments" from the Hughes's BANA bank account.

10. During the meeting to complete the Hughes Mortgage transaction, BANA presented Mr. and Mrs. Hughes with a document entitled "Optional Line Protection Plan Addendum ("Addendum")." As stated on the form, the "Line Protection Plan only provide protection on the variable portion of your credit line" and "This Product Is Optional." As understood by the Hughes, if they elected it, the Line Protection Plan allowed the cancellation of all or some monthly loan payments in the event of disability, accidental death, or involuntary unemployment. At the time that BANA presented the plan to the Hughes, LPP offered six protection options, with the monthly fee ranging in cost from 4.5% to 13.5% of the minimum monthly payment on the borrowers' credit line.

11. The Agreement explicitly stated that the borrowers "must specifically request" the Line Protection Plan.

12. Mr. and Mrs. Hughes both signed a 2-page document captioned "OPTIONAL LINE PROTECTION PLAN ADDENDUM ("ADDENDUM")" which stated that BANA had provided them with the Line Protection Plan information. The Hughes designated their election to decline the purportedly optional Line Protection Plan by clearly and conspicuously checking a box next to "DECLINE to purchase any Protection on this Credit Line" option. *See* attached Exhibit A (OPTIONAL LINE PROTECTION PLAN ADDENDUM dated June 13, 2006).

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13. In June 2006, Mr. Hughes was age 86. Mrs. Hughes was age 85 in June 2006 and underwent major heart surgery, suffered from dementia, and experienced vision impairments, including cataracts and eye surgery, from June 2006 until her death. Mrs. Hughes also suffered a broken hip after June 2006 that required hospitalization and extensive rehabilitation at White Oak Manor Nursing Home in Spartanburg, South Carolina.

14. John P. Hughes died on October 22, 2008, at the age of 87. Mr. Hughes left his estate to his wife, Jane K. Hughes.

15. Over six years after Mr. Hughes's death, on or around March 17, 2015, BANA sent a boilerplate form cancellation notice addressed to the Mr. and Mrs. Hughes, informing them that the Line Protection Plan would be cancelled on September 30, 2015. The notice also indicated that John P. Hughes was a "protected" borrower.

16. By letter dated March 17, 2015, BANA notified Mr. and Mrs. Hughes that "The optional Line Protection Plan will be cancelled on September 30, 2015," and that "You're no longer being charged for the Protection Plan as of April 1, 2015." *See* attached Exhibit B.

17. Curiously, the BANA notice to the Hughes also stated that "Going forward, any payments that would have previously been applied to Protection Plan fees will be applied to other amounts owed as described in your loan documents, unless refunded to you. If we apply the payment to other amounts owed and you later determine that you mistakenly paid Protection Plan fees and prefer to have a refund of these amounts, please contact us at 1.866.731.4210." Ex. B. at 1.

18. Although Mr. and Mrs. Hughes never elected to purchase any "Protection Plan," BANA sent a second letter dated March 25, 2015, stating that Mr. Hughes had selected "6

month, Involuntary Unemployment, Disability, Accidental Death and Hospitalization" protection at a monthly rate of 9.5% of the Hughes' Minimum Monthly Payment.

19. In response to an inquiry from Mrs. Hughes, BANA stated in a May 6, 2015, letter that "The Line Protection Plan (Plan) addendum for your Bank of America loan ending in 4699 is enclosed, per your request" and enclosed an 8-page document entitled "OPTIONAL LINE PROTECTION PLAN ADDENDUM ("ADDENDUM")." *See* attached Exhibit C.

20. The 8-page "ADDENDUM" provided by BANA in May 2015 is not the 2-page "ADDENDUM" signed by Mr. and Mrs. Hughes in 2006, and does not contain or provide for signatures or a place for election or rejection of the "protection."

21. In any event, BANA did not provide the 8-page ADDENDUM to Mr. or Mrs. Hughes before May 2015.

22. The Line Protection Plan premium did not appear on the mortgage finance charge disclosed to Mr. and Mrs. Hughes in 2006.

23. Before March 2015, BANA did not provide any statement, notice, or communication of any sort to Mr. or Mrs. Hughes revealing that BANA believed that the Hughes had elected any "Protection Plan" or that an amount was to be or was being charged to them for such a plan.

24. To date, Plaintiff has been unable to locate, and BANA has been unable to provide, any documentation that Mr. or Mrs. Hughes ever elected or agreed to pay for any "Protective Plan" coverage of any sort.

25. Despite having declined to purchase the Line Protection Plan, BANA withdrew a monthly charge of $28.40 from the Hughes's BANA joint checking account beginning on or about June 2006. This charge was ambiguously listed as "Ad Insurance Des:XXXXXX4374 ID:

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R# XXXXXXX1070 Indn:Hughes Sr, John P Co ID:XXXXXX4660 Ppd" and appeared amid numerous other monthly charges. *See* attached Exhibit D.

26. All other charges from BANA or its subsidiaries appearing on the Hughes's bank statements during the relevant period were clearly designated as transactions with "Bank of America" or "BkofAmerica" and other insurance transactions were clearly identified with the name of the charging company (i.e., "Patrons Mutual," "Travelers Insur").

27. In addition, none of the numbers in the Line Protection Plan transaction description were related to the Hughes's BANA mortgage or line of credit.

28. As neither Mr. or Mrs. Hughes had elected Line Protection Plan coverage or had received any notice that BANA had issued such a plan to them, they were not expecting to be charged for any such service and they did not have any reason to expect that "Ad Insurance Des:XXXXXX4374 ID: R# XXXXXXX1070 Indn:Hughes Sr, John P Co ID:XXXXXX4660 Ppd" was a BANA charge generally or a "Line Protection Plan" charge specifically until receiving the March 2015 BANA notices.

29. Upon receiving notice of Mr. Hughes's death, on May 6, 2015, BANA declined coverage under the Line Protection Plan on the grounds that "[t]he death was the result of disease or treatment of disease or any medical treatment (and/or was not for the treatment of an accidental injury)."

30. Upon request, BANA refunded the payments drawn from the Hughes's joint account after Mr. Hughes's death.

31. BANA refused and continues to refuse to refund the payments drawn during Mr. Hughes's lifetime.

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32. On June 3, 2015, Jane K. Hughes passed away, and Plaintiff was named as personal representative of her estate.

33. In October 2008, Joanne Hafter obtained a home-equity loan from BANA in the amount of $30,000.00, secured by a mortgage ("Hafter Mortgage") on her Lexington County homestead. During the closing of the Hafter Mortgage, Ms. Hafter rejected any offer of a Line Protection Plan or mortgage protection services and has never since authorized BANA to withdraw any funds for a Line Protection Plan or any other similar "plan."

34. Despite her rejection of the Line Protection Plan, BANA charged Ms. Hafter a monthly fee for this rejected and unwanted product, beginning in October 2008 and extending through 2015. The charge was listed only as "LPP Fee Assessment" on the monthly transaction summary for her home equity loan. The monthly charges for the Line Protection Plan ranged from approximately three dollars ($3.00) to forty dollars ($40.00) per month from 2008 until 2015.

35. In 2015, BANA notified Ms. Hafter that she would no longer be charged for the Line Protection Plan.

36. On March 9, 2016, Defendant's counsel sent Mrs. Hafter's counsel a partial copy of two documents, each purportedly containing Mrs. Hafter's signature. The first document was a copy of a document entitled "Bank of America Equity Maximizer Agreement and Disclosure Statement" ("Agreement"). The second document was "Page 1 of 9" of a document with the Bank of America logo and "IMPORTANT NOTICE" on the top of the page and which states that it is a "Confirmation Letter."

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37. The signature dated "9-26-08" on Agreement page 9 of 10 that purports to be that of "Joanne C Hafter" is not Mrs. Hafter's true signature and was not placed on this document by Mrs. Hafter.

38. The Confirmation Letter "Page 1 of 9" indicates that the signatory elected to "ACCEPT Line Protection Plan" coverage with the election box and supporting information typed in the appropriate locations. The "X" used to designate acceptance of the product and the supporting information on the Confirmation Letter appears to have been prepared and placed on the document by Defendant before the document could have been presented to Mrs. Hafter. As presented, the document offered no option for Mrs. Hafter to decline the offered product.

ALLEGATIONS AS TO THE CLASS

39. Bank of America has been involved in or condoned similar fraudulent "protection" plan schemes in the past. *See* http://topclassactions.com/lawsuit-settlements/lawsuit-news/2798-bank-of-america-credit-protection-class-action-settlement/.

40. Upon information and belief, the Line Protection Plan and similar "mortgage protection" plans are a very profitable business line for BANA.

41. The Named Plaintiffs seek damages on behalf of themselves and all others similarly situated, against the Defendant in an amount to be determined at trial.

42. This civil action is brought by the Named Plaintiffs as a class action on behalf of themselves and all others similarly situated under the provisions of Federal Rule of Civil Procedure 23.

43. The Class consists of BANA customers who, without the customer's express and informed written consent or in direct contradiction of the rejection of an offered plan, were

enrolled in and charged for protection plan insurance products referred variously as "Borrower's Protection Plan," "Line Protection Plan," or other similar monikers.

44. Under Federal Rule of Civil Procedure 23, a class action is appropriate in this case because:

a. Based on Defendant's volume of "protection plan" participants, both knowing and unknowing, the class is so numerous that joinder of all members is impractical;

b. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. These questions include:

i. Whether BANA's unilateral enrollment of the Proposed Class into a "protection plan" program constitutes a violation of the Truth in Lending Act, fraud, breach of contract, or a breach of the duty of good faith and fair dealing;

ii. Whether BANA committed fraudulent acts or otherwise was in breach of contract by drafting payments from the financial accounts of the Proposed Class without express authorization and in violation of the customer's clear contrary election;

c. The claims of the Named Plaintiffs are typical of the class members' claims. All are based on the same facts and legal theories;

d. The Named Plaintiffs will fairly and adequately represent the class members' interests. All claims are based on the same facts and legal theories and Plaintiffs' interests are consistent with the interests of the class; and

e. The Named Plaintiffs have retained counsel experienced in bringing class actions.

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45. The Named Plaintiffs' claims are typical of the claims of the members of the Proposed Class because: 1) the Named Plaintiffs satisfy each of the criteria of the Proposed Class; 2) all other members of the Proposed Class have suffered or may suffer the identical harm as the Proposed Class's plaintiff representative as a result of Defendant's violations of law as alleged herein; 3) the remedy sought by the Named Plaintiffs is also sought by each of the other members of the Proposed Class and is directed towards Defendant's conduct perpetrated on the Proposed Class as a whole.

46. A class action is superior for the fair and efficient adjudication of the class members' claims. The injury suffered by each individual class member in this action is likely to be disproportionate to the burden and expense of individual prosecution of complex and extensive litigation to proscribe Defendant's conduct and practices. Additionally, effective redress for each and every class member against Defendant may be limited or even impossible where serial, duplicitous, or concurrent litigation occurs on these disputes. Individualized litigation may lead to incongruous and conflicting judgments against Defendant. A class action procedure involving all class members, Defendant and the court present fewer management difficulties, and provide the benefit of a single adjudication, economy of scale, and judicial efficiency and fairness.

FOR A FIRST CAUSE OF ACTION

(Violation of the Truth in Lending Act—15 U.S.C. § 1601 *et seq.*)

47. Plaintiffs restate and reallege each and every allegation as if repeated herein verbatim.

48. Residential mortgage loan agreements and line of credit agreements between Defendant BANA and its customers, including the Agreements signed by Mr. and Mrs. Hughes

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and Ms. Hafter are subject to the disclosure requirements of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, and related regulations, commentary, and interpretive guidance promulgated by the Federal Reserve Board.

49. BANA is a "creditor" as defined by TILA.

50. BANA is required to clearly, conspicuously, and timely disclose all finance charges, other charges, and third party charges that may be imposed in connection with a mortgage loan or line of credit.

51. Voluntary credit insurance premiums must be included in the finance charges unless:

a. The coverage of the debtor by the insurance is voluntary and this fact is clearly disclosed in writing; and

b. In order to obtain the insurance in connection with the extension of credit, the person to whom the credit is extended must give specific affirmative written indication of his desire to do so.

52. BANA charged Ms. Hafter and Mr. and Mrs. Hughes for Line Protection Plan premiums not only without specific affirmative written indication of their desire to purchase Line Protection Plan, but contrary to an explicit written declination of the purportedly "optional" plan. In doing so, BANA violated TILA by excluding the plan premium from the finance charge disclosed to Joanne Hafter and Jane and John Hughes.

53. Plaintiffs' TILA claim is timely because BANA illegally charged Plaintiffs for the declined Line Protection Plan in 2015, which is within one year of the initially filed Complaint. Further, to the extent that the TILA violations set forth above occurred more than one year prior to the commencement of this action, Plaintiffs did not discover and did not have a reasonable

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opportunity to discover BANA's illegal conduct because of BANA's fraudulent nondisclosures and misleading charge description, Mrs. Hughes age- and health- related cognitive difficulties, until March 2015 when BANA first advised Plaintiffs of the plan's cancellation.

54. BANA systematically and pervasively engaged in similar violations of TILA to the detriment of other members of the Proposed Class.

55. As a result of BANA's violations, Plaintiffs and the Proposed Class are entitled to recover actual damages and statutory damages as provided by 15 U.S.C. § 1640(a)(1)-(2).

56. Plaintiffs and the Proposed Class are also entitled to recovery or attorneys' fees and costs to be paid by BANA, as provided by 15 U.S.C. § 1640(a)(3).

FOR A SECOND CAUSE OF ACTION

(Fraud)

57. Plaintiffs restate and reallege each and every allegation as if repeated herein verbatim.

58. Defendant BANA made the following false and material representations and engaged in the following fraudulent conduct, among others alleged herein:

a. BANA, with knowledge of the falsity or reckless disregard for the truth of its representation, represented to Ms. Hafter and Mr. and Mrs. Hughes that BANA would draft funds from their respective accounts solely for monthly loan payments;

b. Through its agreements with Plaintiffs, BANA represented, with knowledge of the falsity or reckless disregard for the truth of its representation, that a protection plan, including the Line Protection Plan, was optional coverage that would only be added to the Plaintiffs' credit line and home equity loan with their consent;

c. The purported signature of Ms. Hafter appearing on the Agreement is not her true signature and was not placed there by her.

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59. BANA made these representations to Plaintiffs with the intent that Plaintiffs be induced to enter into the Agreement with BANA and sign the Authorization to grant BANA access to their account for purposes of drafting funds.

60. Plaintiffs had no knowledge of the falsity of BANA's representations and had the right to rely on those representations. Plaintiffs used reasonable prudence and diligence by documenting in writing their decision to decline LPP coverage.

61. Plaintiffs relied on BANA's representations to their detriment, resulting in consequent and proximate injury in that BANA thereafter wrongly used its automatic drafting capability to improperly deduct payments from Plaintiffs' financial accounts to pay for the Line Protection Plan without their knowledge and despite their rejection of that plan.

62. Due to the fraudulent nature of BANA's actions, Plaintiffs are also entitled to punitive damages.

FOR A THIRD CAUSE OF ACTION

(Fraudulent Concealment)

63. Plaintiffs restate and reallege each and every allegation as if repeated herein verbatim.

64. Pleading in the alternative, Defendant BANA intentionally concealed the material facts that it enrolled Plaintiffs in the Line Protection Plan by not providing any notice to them of the enrollment.

65. Defendant BANA wrongly withdrew monthly payments for the Line Protection Plan from the Hughes's account under the confusing and non-descript transaction of "Ad Insurance Des:XXXXXX4374 ID: R# XXXXXXX1070 Indn:Hughes Sr, John P Co

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ID:XXXXXX4660 Ppd" with the intention that the Hughes's not identify the true nature of the transaction.

66. Because the Plaintiffs entrusted BANA with authorization to draft monies from their accounts, and expressly reposed a trust in confidence in BANA with respect to automatic drafting transactions, BANA had a duty to disclose to Plaintiffs that it unilaterally enrolled them in the Line Protection Program and that BANA was withdrawing payments t which were not authorized by the borrowers.

67. Alternatively, BANA had a duty to disclose the withdrawals arising from the fiduciary relationship between the parties.

68. As a result of BANA's concealment, Plaintiffs suffered monetary damages in the amount of the unauthorized payments which BANA surreptitiously withdrew from their account.

69. Due to the fraudulent nature of BANA's actions, Plaintiffs are also entitled to punitive damages.

FOR A FOURTH CAUSE OF ACTION

(Breach of Contract)

70. Plaintiffs restate and reallege each and every allegation as if repeated herein verbatim.

71. Plaintiffs and BANA entered into a binding agreement supported by good and valuable consideration which is represented by the Hughes Mortgage, the Hafter Mortgage, the Agreement, the Authorization, and the Addendum collectively.

72. Plaintiffs performed all obligations required of them under the Agreement or has had the performance of any obligation excused.

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73. Defendant BANA breached the agreements between them and Plaintiffs by enrolling Plaintiffs in the Line Protection Plan without their express agreement, and without having them sign a separate addendum explicitly electing such coverage.

74. BANA further breached the agreement by drafting Line Protection Plan payments from the Plaintiffs' financial accounts, thereby exceeding its authority under the agreements between the parties, which are limited only to drafting loan payments.

75. As a result of these breaches by BANA, Plaintiffs suffered damages in the amount of the unauthorized payments which BANA surreptitiously withdrew from their bank accounts.

FOR A FIFTH CAUSE OF ACTION

(Breach of Contract Accompanied by Fraudulent Acts)

76. Plaintiffs restate and reallege each and every allegation as if repeated herein verbatim.

77. BANA, in addition to breaching its contract with Mr. and Mrs. Hughes and Ms. Hafter as set forth above, acted fraudulently by concealing that it enrolled Plaintiffs in its Line Protection Plan without express permission and by drafting unauthorized payments for the product from Plaintiffs' respective bank accounts.

78. BANA had a fiduciary and contractual duty to disclose these facts to Mr. and Mrs. Hughes and Ms. Hafter.

79. As a result of BANA's breach of contract accompanied by fraudulent concealment, Plaintiffs were damaged in that they unknowingly paid for a benefit that was expressly declined.

80. Due to the fraudulent nature of BANA's actions, Plaintiffs are also entitled to punitive damages.

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FOR A SIXTH CAUSE OF ACTION

(Breach of Duty of Good Faith and Fair Dealing)

81. Plaintiffs restate and reallege each and every allegation as if repeated herein verbatim.

82. BANA breached the duty of good faith and fair dealing implied in the transaction and owed to Plaintiffs, inasmuch as BANA undertook the fraudulent, unfair, and deceptive conduct described herein. Further, in marketing and selling insurance (i.e., the "Line Protection Plan") under the guise of mortgage "protection," BANA violated S.C. Code Ann. § 38-25-110, et. seq., by engaging in the unauthorized business of insurance because BANA is not licensed to transact insurance business in South Carolina.

83. As a direct and proximate result of this breach of duty, Plaintiffs have suffered damages.

84. BANA is vicariously liable for this cause of action for the actions of its employees, agents, contractors and/or servants under the doctrine of respondeat superior.

JURY TRIAL DEMAND

85. Plaintiffs hereby demand that all issues in this case triable before a jury be so tried.

DAMAGES

WHEREFORE, Plaintiffs pray for the following relief:

A. For an order certifying the class defined herein, appointing undersigned counsel as class counsel, approving Plaintiffs as class representatives, and requiring that notice be provided to the class;

B. Actual and punitive damages in excess of $75,000.00, as determined at trial;

C. Attorney fees and costs;

D. Pre-judgment interest and post-judgment interest; and

E. Such other and further relief as the Court deems just and proper.

Respectfully Submitted,

MIKE KELLY LAW GROUP, LLC

BY: /s/ Brad D. Hewett

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Bank of America

OPTIONAL LINE PROTECTION PLAN ADDENDUM ("ADDENDUM")

Borrower(s):

JOHN P HUGHES SR

JANE K HUGHES

Credit Line Agreement Date: JUNE 13, 2006

Protection Date: JUNE 13, 2006

Credit Line Number. 4699

IMPORTANT INFORMATION ABOUT BANK OF AMERICA'S LINE PROTECTION PLAN

LINE PROTECTION PLAN ONLY PROVIDES PROTECTION ON THE VARIABLE PORTION OF YOUR CREDIT LINE. THIS PLAN DOES NOT PROVIDE PROTECTION FOR ANY FIXED RATE LOAN OPTIONS INCLUDED IN YOUR CREDIT LINE.

This Product is Optional. I understand that the purchase of Line Protection Plan is optional. Whether or not I purchase Line Protection Plan will not affect My application for credit or the terms of any existing credit agreement I have with Bank of America.

Termination of Line Protection Plan: I have the right to cancel Line Protection Plan at any time by making a written request. Bank of America has the right to cancel Line Protection Plan upon sixty (60) days notice to Me.

Line Protection Plan will automatically terminate in any of the following circumstances:

1. Any Monthly Fee remains unpaid ninety (90) days after its due date;
2. The Credit Line is charged off to profit and loss;
3. The Credit Line is closed or refinanced;
4. The Credit Line and its servicing is transferred to an unaffiliated lender;
5. Ten (10) years from the Agreement Date listed above.

Amount of Fee: The Monthly Fee for the selected Line Protection Plan option is _____ percent of My Minimum Monthly Payment.

Eligibility Requirements, Conditions and Exclusions: I understand there are eligibility requirements, conditions and exclusions that could prevent Me from receiving benefits under Line Protection Plan. The following sections of the Line Protection Plan Addendum contain a complete explanation of eligibility requirements, conditions and exclusions:

For **Definitions**, refer to Section I

For **Disability Protection**, refer to Section III A

For **Involuntary Unemployment Protection**, refer to Section III B

For **Accidental Death Protection**, refer to Section III C

FOR BANK USE ONLY:

Associate Name: _____ Telephone Number: _____

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Credit Line Number: .4699

Initial Below Next to the Option Selected	Protection Options	Type of Protection	Benefit Period	Monthly Fee as a Percentage of My Minimum Monthly Payment
BPG ( )	Disability (DIS)/Accidental Death (AD)	Single	6 months	4.5%
BPH ( )	Disability (DIS)/Accidental Death (AD)	Joint	6 months	8.5%
BPI ( )	Involuntary Unemployment (IU)/Accidental Death (AD)	Single	6 months	5.5%
BPJ ( )	Involuntary Unemployment (IU)/Accidental Death (AD)	Joint	6 months	9.5%
BPK ( )	Disability (DIS)/Involuntary Unemployment (IU)/Accidental Death (AD)	Single	6 months	8.0%
BPL ( )	Disability (DIS)/Involuntary Unemployment (IU)/Accidental Death (AD)	Joint	6 months	13.5%

PLEASE NOTE ALL PROTECTED BORROWERS MUST INITIAL THIS DOCUMENT NEXT TO THE OPTION SELECTED ABOVE.

Refer to section III for specific details pertaining to these options.

If selected, the above protection will be provided subject to the terms of this Addendum. Protection will expire ten (10) years from Agreement Date listed on Page 1 of this document regardless of the Protection Date. By signing below, each Borrower acknowledges that they have read and agreed to the terms of this Addendum.

☐ **I/We ELECT single protection** for the Borrower listed below.

Print Protected Borrower's Name: _____

☐ **I/We ELECT joint protection** for the two Borrowers listed below.

Print 1st Protected Borrower's Name: _____

Print 2nd Protected Borrower's Name: _____

☑ **I/We DECLINE to purchase any Protection on this Credit Line.**

By signing below, I/we acknowledge receipt of the Important Information shown on page 1 and the above product disclosures. After reviewing the above information about Line Protection Plan and having full opportunity to read the Addendum and ask questions, I/we make the choice selected above.

Please Print Borrower's Name: JOHN P HUGHES SR

Borrower's Signature

Please Print Borrower's Name: JANE K HUGHES

Borrower's Signature

Please Print Borrower's Name:

Borrower's Signature

Please Print Borrower's Name:

Borrower's Signature

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March 25, 2015

0000037-0000243 SWADF 001 459709

000037-000243
John P Hughes
632 Crystal Dr
Spartanburg, SC 29302

Dear John P Hughes:

The Protection Plan® (Plan) addendum for your Bank of America loan ending in 4699 is enclosed, per your request.

Listed below is the protection plan you selected and the details of that protection.

6 month, Involuntary Unemployment, Disability, Accidental Death and Hospitalization protecting the following protected borrower(s):
John P Hughes

Cost of protection. The monthly Plan fee for the selected Line Protection Plan option is 9.50 percent of your Minimum Monthly Payment. The monthly Plan fee will be reflected on your statement for each month there is a balance on your account.

There's nothing you need to do. This document is for your records only.

We're pleased to serve your credit needs. If you have questions or need future benefit requests, please call us at 1.866.317.5116, Monday through Friday from 8 a.m. to 8 p.m. Eastern or write to us at:

Protection Plan Services
PO Box 961290
Fort Worth, TX
76161-0290

Sincerely,

Protection Plan Services

AREESUT5 R050214

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AMENDED COMPLAINT EXHIBIT C

May 6, 2015

0001492-0003089 SNADF 001 468002

001492-003089
John P Hughes
632 Crystal Dr
Spartanburg, SC 29302

John P Hughes:

The Line Protection Plan® (Plan) addendum for your Bank of America loan ending in 4699 is enclosed, per your request.

Listed below is the protection plan you selected and the details of that protection.

6 month, Involuntary Unemployment, Disability, Accidental Death and Hospitalization protecting the following protected borrower(s):

John P Hughes

As of April 1, 2015, you will not be charged a monthly Plan fee for the Plan. You should have received a communication that your Plan will be cancelled effective September 30, 2015 unless terminated earlier pursuant to the terms and conditions of your Plan. You may cancel your enrollment in your Plan at any time prior to September 30, 2015.

You can still request benefits for qualifying events that occur prior to the cancellation effective date; however, you must request benefits within 365 days of the start of the event. Please note that the loan will not be eligible for any Plan benefits for events that occur after the Plan cancellation effective date.

There's nothing you need to do. This document is for your records only.

If you have questions regarding past Plan fees, or would like to request a benefit, please call us at 1.866.317.5116, Monday through Friday from 8 a.m. to 8 p.m. Eastern or write to us at:

Protection Plan Services
PO Box 961290
Fort Worth, TX
76161-0290

Protection Plan Services

ARR3KC5K R032715

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OPTIONAL LINE PROTECTION PLAN™
ADDENDUM ("ADDENDUM")

This Addendum amends the Agreement ("Agreement" refers to the Credit Line Agreement). In this Addendum, the term "I", "Me", and "My" refers to each Protected Borrower named above, jointly and severally, and "You" and "Yours" refers to Bank of America, N.A. Unless otherwise defined in this Addendum, all capitalized terms shall have the same meaning as set forth in the Agreement.

THIS ADDENDUM PROVIDES FOR THE CANCELLATION OF ALL OR PART OF THE OUTSTANDING BALANCE, INCLUDING INTEREST, UNDER THE AGREEMENT UPON THE OCCURRENCE OF CERTAIN EVENTS. EXCEPT FOR REFUNDING THE MONTHLY FEE AS SPECIFIED BELOW, IN NO CASE DOES THIS ADDENDUM OBLIGATE THE BANK TO PAY ANY AMOUNT TO THE PROTECTED BORROWER(S).

TYPES OF PROTECTION YOU SELECTED. The protection I selected is shown on page 2 of this Addendum. I understand that other Protection packages are available.

I. DEFINITIONS

"Accidental Death" means that the Protected Borrower's death meets all of the following criteria:

1. Is directly due to accidental injury;
2. Is independent of all other causes, except accidental injury;
3. Is unintended, unexpected, and unforeseen;
4. Occurs after the Protection Date; and
5. Occurs within ninety (90) days after the date of accidental injury.

"Credit Line" means the line of credit issued by Bank of America, N.A. For purposes of the Line Protection Plan, Credit Line does NOT include any portions of the line of credit that are part of a Fixed Rate Loan Option. For Agreements originated in Texas, Credit Line is referred to as "Account."

"Disability" or **"Disabled"** means that after the Protection Date:

1. I become and remain unable to perform the major duties of My occupation at the time I became disabled, and I am not working for wages or profit during the disability;
2. I am under the continuous care of a licensed physician (other than Myself);
3. I have been disabled longer than thirty (30) consecutive days;
4. I have sent You satisfactory proof of My disability from the treating physician; and
5. I am disabled as a result of an injury or sickness not otherwise excluded.

"Draw Date" means the date upon which I take a credit advance on My Credit Line.

"Expiration Date" means the date ten (10) years from the Agreement Date upon which Protection automatically expires.

"Full Time Work" means working for wages or profit at least thirty (30) hours per week for the same employer.

"Initial Draw Date" means the date upon which I first take a credit advance on My Credit Line.

"Involuntary Unemployment" or **"Involuntarily Unemployed"** means that after the Protection Date I become and remain unemployed due to one of the following:

1. Layoff - a suspension of employment by My employer, which continues more than thirty (30) days;
2. Termination - a complete and permanent severance of employment by My employer;
3. Strike - an authorized, unionized labor dispute, that continues more than thirty (30) days, by a chartered or previously organized trade or labor union, through the coalition of its members (including Me), to obtain higher wages, shorter hours of employment, better working conditions or some other concession from My employer, by the employees stopping work at a pre-concerted time, which involves a combination of persons and not a single individual. Non-union collective bargaining is not included in this definition;

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4. Lockout - My employer's discharge of employees (including Me) or temporary closing of a place of employment, in response to organized employee activity, that continues more than thirty (30) days.

"Minimum Monthly Payment" means the minimum amount required by You for the payment of principal and interest under the Agreement. Minimum Monthly Payment does NOT include any past due principal or interest, or other fees or services.

"Monthly Fee" means the amount charged by You for My Line Protection Plan as stated under the Cost of Protection below.

"Monthly Payment" means the minimum amount required by You for the payment of principal and interest under the Agreement, plus the Monthly Fee. Monthly Payment does NOT include any past due principal or interest, or other fees or services.

"Monthly Payment Period" means the period in which the monthly principal and interest payment plus the Monthly Fee is due.

"Monthly Periodic Statement" means the monthly statement that You will send to Me if I have an Outstanding Balance on My Credit Line that will show, among other things, credit advances, finance charges, other charges, payments made, other credits, My previous Outstanding Balance, and My new Outstanding Balance.

"Outstanding Balance" means the balance of the Credit Line which, if applicable, includes credit advances, accrued interest on the outstanding credit advances, and fees and charges. For purposes of Line Protection Plan, Outstanding Balance does NOT include any amounts that are part of a Fixed Rate Loan Option.

"Payment Option" means the repayment schedule that I have chosen for any credit advances taken on this Credit Line.

"Protection Date" means the date upon which My Line Protection Plan becomes effective as shown on Page 1 of this document. No benefits are available under Line Protection Plan for any Disability, Involuntary Unemployment or Accidental Death that occurs prior to the Protection Date.

II. YOUR COST OF PROTECTION

A. MONTHLY COST OF PROTECTION.

The Monthly Fee is shown on page 2 and shall be payable at the same time and place as payments of principal and interest under the Agreement and any related documents. As the amount of the Minimum Monthly Payment changes, You will recalculate the Monthly Fee as shown above. No Monthly Fee will be charged for any month in which there is no Minimum Monthly Payment due to You. I understand that You retain the right to adjust the Monthly Fee as a percentage of My Minimum Monthly Payment if you provide me with sixty (60) days advance notice of such adjustment and an opportunity to cancel the Protection without penalty before the adjustment becomes effective.

B. APPLICATION OF PAYMENTS.

Payments made on the Agreement will be applied first to the Monthly Fee and then to the other amounts due under the Agreement and Security Instrument. All additional amounts shall be applied as stated in the Agreement and Security Instrument.

III. PROTECTION OPTIONS

A. DISABILITY PROTECTION

BENEFITS: You will cancel up to a maximum of six (6) Monthly Payments regardless of the number of occurrences of Disability. If Joint Protection is purchased, You will cancel up to a maximum six (6) Monthly Payments for the Disability of each Protected Borrower, regardless of the number of occurrences of Disability. In order for You to cancel any Monthly Payments:

1. I must be Disabled longer than thirty (30) consecutive days to activate this feature. Once I have been Disabled longer than thirty (30) days, You will cancel Monthly Payments from the first day of My Disability, assuming all other eligibilityrequirements have been met and no exclusions apply. Cancellation of Monthly Payments will stop when I am no longer continuously Disabled or when a total of six (6) Monthly Payments have been cancelled, whichever occurs first.

2. In any Monthly Payment Period in which I am Disabled for less than the entire period, You will cancel a portion of the Monthly Payment based on the number of days I am Disabled times a daily amount equal to one-thirtieth (1/30) of the Monthly Payment.

3. I do not have to use all of My Monthly Payments for Disability at one time. If I am Disabled for less than six (6) months, You will cancel the remaining Monthly Payments during future periods of Disability, up to a cumulative total of six (6) Monthly Payments.

4. Cancellation of all or a portion of a Monthly Payment will be applied within seven (7) business days of You receiving satisfactory proof of My Disability for the applicable Monthly Payment Period.

5. If I return to work and then become Disabled again within ninety (90) days, I do not have to wait another thirty (30) days to receive Protection unless the causes of each Disability are different and unrelated. You will not cancel any part of My Monthly Payment for the period I return to work and I am responsible for making My Monthly Payments.

6. Disability ends when I no longer meet the definition of Disability.

ELIGIBILITY

1. I must have worked Full Time for wages or profit at least thirty (30) hours per week, for the same employer, on a continuous basis during the three-month period immediately preceding the date of My Disability.

2. I am **NOT** eligible for Disability Protection if I retire or become unemployed after the Protection Date.

EXCLUSIONS:

1. You will **NOT** cancel Monthly Payments if My **Disability** is a result of:

   a. Normal pregnancy or childbirth;
   b. Attempted suicide or intentionally self-inflicted injury, while sane or insane;
   c. Participation in a riot or commission of an assault or felony; or
   d. An injury or sickness that occurs prior to the Protection Date.

CALCULATION OF BENEFITS:

1. For purposes of cancellation, the Monthly Payment that will be cancelled will be equal to the Monthly Payment as shown on My Monthly Periodic Statement immediately preceding the date of My Disability.
2. If I was under the treatment of, or consulted with, a licensed physician for the medical condition related to My Disability within the ninety (90) days prior to My Disability and I took a credit advance or changed My Payment Option in that same ninety (90) day period, You will cancel the Monthly Payment as shown on My Monthly Periodic Statement date just prior to that credit advance or Payment Option change. If I changed My Payment Option more than once or took more than one credit advance within the 90-day period before My Disability, You will use the Monthly Periodic Statement prior to the earliest of any credit advances or Payment Option changes taken in the 90-day period.
3. The maximum amount that can be cancelled in any one month is $750.00 plus the Monthly Fee.
4. Monthly Payments will not be cancelled during any benefit period if the Outstanding Balance protected for that benefit reaches zero ($0), even if the qualifying Disability continues.

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5. Is due to termination as a result of willful misconduct (a transgression of some established and definite rule of action, a forbidden act or omission, or an act or omission involving dishonesty, or a dereliction of duty, active or passive, which is willful in character and beyond simple negligence) or criminal misconduct (unlawful behavior as determined by local, State or Federal law);
6. Is due to seasonal employment, business failure if self-employed, or a severing of employment relationship if an independent contractor;
7. Is due to any act of war, declared or undeclared.

In addition, Monthly Payments will not be cancelled if I am receiving severance pay, salary continuation or any other compensation from My employer until I have been Involuntarily Unemployed longer than thirty (30) consecutive days after the end of the period covered by the severance pay, salary continuation, or other compensation, including the period of time for which lump sum amounts were paid.

CALCULATION OF BENEFITS:

1. For purposes of cancellation, the Monthly Payment that will be cancelled will be equal to the Monthly Payment as shown on My Monthly Periodic Statement immediately preceding the date of My Involuntary Unemployment.
2. If I took a credit advance or changed My Payment Option within the ninety (90) days prior to My Involuntary Unemployment, You will cancel the Monthly Payment as shown on My Monthly Periodic Statement date just prior to that credit advance or Payment Option change. If I changed My Payment Option more than once or took more than one credit advance within the 90-day period before My Involuntary Unemployment, You will use the Monthly Periodic Statement prior to the earliest of any credit advances or Payment Option changes taken in the 90-day period.
3. The maximum amount that can be cancelled in any one month is $750.00 plus the Monthly Fee.
4. Monthly Payments will not be cancelled during any benefit period if the Outstanding Balance protected for that benefit reaches zero ($0), even if the qualifying Involuntary Unemployment continues.

C. ACCIDENTAL DEATH PROTECTION

BENEFITS: Upon the Accidental Death of either Protected Borrower, You will pay the Benefit Amount not to exceed the lesser of the Outstanding Balance on the Credit Line or $50,000 for each Protected Borrower. Under no circumstances shall the Benefit Amount for one or both Protected Borrowers exceed the Outstanding Balance on the Credit Line as of the date of Accidental Death.

The "Benefit Amount" is equal to the Outstanding Balance of the Credit Line, including late fees and accrued interest, if any, as of the date of Accidental Death of a Protected Borrower, not to exceed a total of $50,000 per protected Borrower.

ELIGIBILITY

All Protected Borrowers are eligible for Accidental Death Protection.

EXCLUSIONS: You will **NOT** cancel the Outstanding Balance of the Credit Line if **Death** results from:

1. Suicide or intentionally self-inflicted injury, while sane or insane;
2. Disease or treatment of disease, or any medical treatment unless for the treatment of an accidental injury;
3. Infection, unless the infection is a direct result of the accidental injury;
4. The use of alcohol or other intoxicants;
5. The use of any drug, sedative or narcotic, unless prescribed by a physician;
6. Participation in a riot or commission of an assault or felony;
7. Operation or riding in an aircraft, unless as a fare-paying passenger or acting as a crew member on a regularly scheduled airline; or
8. War or act of war, declared or undeclared.

Additionally, You will **NOT** cancel the Outstanding Balance of the Credit Line if **Death** occurs prior to the Protection Date.

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3. If the request and proof of death are received within sixty (60) days of the date of Accidental Death, You will cancel the Benefit Amount as of the date of death, and any remaining Borrower will not be obligated to pay any interest or fees that accrue on the Benefit Amount after the date of death.
4. If the request and proof of Accidental Death are received more than sixty (60) days after the date of death, You will cancel the Benefit Amount as of the date of receipt, and any remaining Borrower or the estate of the Protected Borrower shall be liable for any interest or fees that accrue on the Benefit Amount after the date of Accidental Death.
5. To avoid additional interest and late fees on the Agreement, any remaining Borrowers should continue to make scheduled Monthly Payments until the benefit feature is activated.

D. ADDITIONAL PROCEDURES FOR DISABILITY OR INVOLUNTARY UNEMPLOYMENT

If the protected Disability or Involuntary Unemployment covers all of My missed Monthly Payments, You CANNOT TRY TO COLLECT WHAT I OWE OR FORECLOSE UPON OR REPOSSESS ANY COLLATERAL UNTIL THREE (3) CALENDAR MONTHS AFTER My first missed Monthly Payment is due or until My claim is accepted or rejected by You, whichever comes first. You can, however, try to collect, foreclose, or repossess if I have money due and owing or I am otherwise in default when My Disability or Involuntary Unemployment claim is made or if a senior mortgage or lien holder is foreclosing.

If My request for benefits is accepted within the three (3) calendar months, You must cancel My Monthly Payments as though I had paid on time. If My request for benefits is rejected within the three (3) calendar months, I will have thirty-five (35) days from the date that the rejection is sent to pay any past due payments, plus late charges. I can contact You and You will tell Me how much I owe. After that time, You can take action to collect or foreclose or repossess any collateral I may have given.

If My request for benefits is accepted but requires that I send in additional forms to remain eligible for continued benefits, I will send in these completed additional forms no later than required. If I do not send in these forms on time, My benefits may be stopped and You may then be able to take action to collect or foreclose or repossess any collateral I may have given.

V. TERMINATION

A. All Protections terminate when the first of the following occurs:

1. The Monthly Fee for any Monthly Payment Period remains unpaid ninety (90) days after its due date;
2. The Credit Line evidenced by the Agreement is subject to charge off by You.
3. The Credit Line is closed or refinanced;
4. The Credit Line is transferred to another (non-affiliated) creditor and is no longer serviced by You;
5. You receive a written request from Me to terminate the Protection. The written request should be sent to: Line Protection Plan, NC4-105-02-09, PO Box 21848, Greensboro, NC 27420 or by calling 1.888.356.4892. If I terminate Protection within sixty (60) days of the Agreement Date, You will return any Monthly Fee paid by Me, without interest;
6. The Expiration Date is reached;
7. I change the payment requirement from monthly to any other period; or
8. Sixty (60) days after You notify Me that the Protection is being terminated. If You send Me such notice or otherwise attempt to modify this Addendum, I may immediately cancel the Protection without penalty.
9. My obligation on the Agreement is assumed by other borrower(s) and any Protected Borrower is released from liability under the Agreement.

B. Effects of Termination

1. If the termination event occurs in the first five (5) days of my Monthly Payment Period, then the effective date of termination is the last day of the prior Monthly Payment Period and the Fee for the current Monthly Payment Period will be unearned and I will not owe this Fee. Otherwise, the effective date of termination is the last day of the current Monthly Payment Period and the Fee will be earned. I will pay the full Monthly Payment, including the Fee, for the Monthly Payment Period in which my Protection is terminated.

2. Unless the Agreement has been closed or refinanced, if a protected event occurs prior to the effective date of termination, You will continue to provide the related Protection after the effective date of termination in accordance with the provisions in this Addendum.

3. I will be billed for any Monthly Fees accrued up to the date of termination. These Monthly Fees may post on subsequent billing statements.

VI. OTHER PROVISIONS

A. TAX IMPACT OF THE LINE PROTECTION PLAN. I understand that cancellation of all or a part of the Credit Line may be taxable income to Me, My estate or that of My survivors. If I have any questions, I should contact a financial advisor concerning the tax impact of the Protection.

B. JOINT PROTECTION:

1. The Bank may rely upon the instructions or notice of either Protected Borrower with respect to the Protection, and such instructions or notice shall be binding on all Borrowers.

2. If both Protected Borrowers are entitled to Protection at the same time, for example both are Disabled, You will cancel only one Monthly Payment at a time, but I may instruct You which of us to treat as the Protected Borrower with respect to the cancelled Monthly Payments.

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H

JANE K HUGHES
JANE HUGHES WARNER
PHILLIP L HUGHES

Advantage Statement
Page 2 of 6 5940
Statement Period
02-25-09 through 03-26-09
B 17 0 A P PA 17
Number of checks enclosed: 0

Important Information

All balances in your interest bearing checking accounts are now fully guaranteed by the FDIC through 12/31/09. To qualify your accounts for this FDIC guarantee, we must limit the variable interest rate on your accounts to not more than 0.50% through that date. Currently, the rate is less than 0.50%.

Deposit Accounts

Interest Checking

JANE K HUGHES JANE HUGHES WARNER
PHILLIP L HUGHES

Your Account at a Glance

Account Number		5940
Beginning Balance on 02-25-09	$	3,664.98
Deposits and Other Additions	+	2,023.14
Checks Posted	-	886.97
ATM and Debit Card Subtractions	-	399.63
Service Charges and Other Fees	-	20.00
Other Subtractions	-	2,332.59
Ending Balance on 03-26-09	$	**2,048.93**

Annual Percentage Yield Earned this Statement Period: 0.05%
Interest Paid Year to Date: $0.54

Your Advantage Pricing Relationship

Account Name	Account Number	Qualifying Balance ($)	Type of Balance	Date
Interest Checking	5940	3,586.82	Average	03-25
Regular Savings	4890	198.27	Average	03-25
	Total Qualifying Balance	**$3,785.09**		

Thank you for banking with us. A monthly maintenance fee was applied to your account this statement cycle. You can avoid this fee by maintaining the qualifying balance. If your banking needs have changed, please call Customer Service or visit any Bank of America banking center to help find the checking solution that best meets your needs.

Interest Checking Additions and Subtractions

Date Posted	Amount($)	Resulting Balances($)	Transactions
02-25	399.91-	3,265.07	Bank Of America Des:Line Pymt ID: Indn:Hughes Joh Co ID:
02-26	307.88-	2,957.19	Check 7684
02-26	266.00-	2,691.19	Check 7683
02-26	43.00-	2,648.19	Check 7682
03-02	923.00+	3,571.19	Dfas-Cleveland Des:AR Ann Pay ID:xxxxx8950 Indn:Hughes Jane K Co ID:
03-02	135.96-	3,435.23	Travelers Insur Des:Insurance ID:xxxxx7004 Indn:Hughes Jane K Co ID:

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H

Advantage Statement
Page 3 of 6 5940
Statement Period
02-25-09 through 03-26-09
B 17 0 A P PA 17 0006513
Number of checks enclosed: 0

JANE K HUGHES
JANE HUGHES WARNER
PHILLIP L HUGHES

Interest Checking Additions and Subtractions

Date Posted	Amount($)	Resulting Balances($)	Transactions
03-02	21.52-	3,413.71	Verizon Arc Des:Check Pymt Check #:7680 Indn: Co ID:
03-02	16.88-	3,396.83	AT&T Consumer Des:Checkpaymt Check #:7681 Indn: Co ID:
03-02	10.44-	3,386.39	Bi-Lo 519 02/28 # Purchase Bi-Lo 519 Spartanburg SC
03-02	0.56-	3,385.83	Keep The Change Transfer To Acct 4890 For 03/02/09
03-04	1,100.00+	4,485.83	Deposit
03-04	33.06-	4,452.77	Ingles #45 03/04 # Purchase Ingles #45 Spartanburg SC
03-04	0.94-	4,451.83	Keep The Change Transfer To Acct 4890 For 03/04/09
03-05	72.00-	4,379.83	Patrons Mutual Des:Pmi EFT ID: Indn:John P & Jane K Hughe Co ID:
03-09	67.52-	4,312.31	Cns Ikea Charl 03/07 # Purchase Cns Ikea Charlott Charlotte NC
03-09	51.88-	4,260.43	Bi-Lo 408 03/07 # Purchase Bi-Lo 408 Spartanburg SC
03-09	21.26-	4,239.17	CheckCard 0307 Raceway6751 66467515 Spartanburg SC 24164079067978112880672
03-09	1.34-	4,237.83	Keep The Change Transfer To Acct 4890 For 03/09/09
03-10	63.27-	4,174.56	AT&T Services Des:Checkpaymt Check #:7686 Indn: Co ID:
03-10	49.58-	4,124.98	Check 7685
03-10	28.40-	4,096.58	Ad Insurance Des: ID: R#
			Indn:Hughes Sr, John P Co ID:
03-16	109.32-	3,987.26	Check 7690
03-16	96.79-	3,890.47	Charter Communic Des:Charter Co ID:
			Indn:Hughes Warner,Jane Co ID:
03-16	43.00-	3,847.47	Check 7691
03-17	222.50-	3,624.97	Piedmont Nat Gas Des:Checkpymt Check #:7688 Indn: Co ID:
03-17	68.19-	3,556.78	Check 7687
03-19	100.00-	3,456.78	BkofAmerica ATM 03/19 # Withdrwl Spartanburg Main Spartanburg SC
03-23	377.17-	2,579.61	Bank Of America Des:Line Pymt ID:
			Indn:Hughes Joh Co ID:
03-23	115.47-	2,464.14	Ingles #45 03/23 # Purchase Ingles #45 Spartanburg SC
03-23	0.53-	2,463.61	Keep The Change Transfer To Acct 4890 For 03/23/09
03-25	394.82-	2,068.79	Bank Of America Des:Line Pymt ID:
			Indn:Hughes Joh Co ID:
03-26	0.14+	2,068.93	Interest Earned
03-26	20.00-	2,048.93	Advantage Monthly Maintenance Fee

Checks Posted in Numerical Order

Check #	Posting Date	Amount($)	Check #	Posting Date	Amount($)	Check #	Posting Date	Amount($)
7682	02-26	43.00	7685	03-10	49.58	7691	03-16	43.00
7683	02-26	266.00	7687*	03-17	68.19			
7684	02-26	307.88	7690*	03-16	109.32			

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EXHIBIT 3

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(Spartanburg Division)

PHILLIP FRANCIS LUKE HUGHES, on behalf of the Estate of Jane K. Hughes, JOANNE HAFTER, and all others similarly situated, Plaintiffs, vs. BANK OF AMERICA NATIONAL ASSOCIATION, Defendant.	Civil Action No. 7:15-cv- 05083-MGL NOTICE OF DISMISSAL WITHOUT PREJUDICE BY ESTATE OF JANE K. HUGHES FOR CAUSES OF ACTION FOR FRAUD, FRAUDULENT CONCEALMENT, AND BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACTS

Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i), Plaintiff Phillip Francis Luke Hughes on behalf of the Estate of Jane K. Hughes hereby files this Notice of Dismissal Without Prejudice for its claims for fraud, fraudulent concealment, and breach of contract accompanied by fraudulent acts alleged in Plaintiffs' Third Amended Complaint, ECF No. 23. Plaintiffs submit that these claims are meritorious, but recognize there is controlling precedent that may bar recovery for these particular claims by virtue of Jane Hughes's death. Plaintiffs concede that any relief for these particular causes of action may properly derive from the South Carolina Supreme Court, and thus dismiss only these particular causes of action without prejudice. Plaintiffs will proceed with all other claims for the Estate of Jane K. Hughes and for all claims presently alleged for Joanne Hafter.

Respectfully Submitted,

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EXHIBIT 4

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

PHILLIP FRANCIS LUKE HUGHES, on behalf of the ESTATE OF JANE K. HUGHES, JOANNE HAFTER, and all others similarly situated, Plaintiffs,	§	
vs.	§	CIVIL ACTION NO. 7:15-5083-MGL
BANK OF AMERICA, N.A., Defendant.	§	

MEMORANDUM OPINION AND ORDER
GRANTING DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

In Plaintiffs Francis Luke Hughes and Joanne Hafter (collectively, Plaintiffs)'s Third Amended Complaint, they allege the following causes of action against Defendant: violations of the Truth in Lending Act, 15 U.S.C. § 1601 (TILA), fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent act, and breach of duty of good faith and fair dealing. The Court has federal question jurisdiction over Plaintiffs' TILA claims, 28 U.S.C. § 1331, and supplemental jurisdiction over Plaintiffs' state claims, 28 U.S.C. § 1367.

Pending before the Court is Defendant's motion to dismiss for Plaintiffs' failure to state a claim, Fed. R. Civ. P. 12(b)(6). Having considered the motion, the response, the reply, the record, and the applicable law, the Court will grant the motion.

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II. FACTUAL AND PROCEDURAL HISTORY

Plaintiff Hughes is the personal representative of Jane Hughes. Jane Hughes and her husband, John Hughes (collectively, the Hughes), opened a line of credit with Defendant on June 13, 2006. The Hughes agreed at the time to allow Defendant to draft their payments automatically from their bank account. This account was with Defendant. Viewing the facts in the light most favorable to Plaintiff Hughes, the Hughes declined to purchase the mortgage insurance Defendant offered them when they opened their line of credit. Nevertheless, from 2006 to 2015, Defendant charged them for the product. On or about March 17, 2015, Defendant sent a notice to the Hughes stating their mortgage insurance would be cancelled on September 30, 2015.

Plaintiff Hafter obtained a home equity line from Defendant in October 2008. Viewing the facts in the light most favorable to Plaintiff Hafter, she never authorized Defendant to withdraw any funds from her banking account to pay for mortgage insurance. Even so, Defendant charged her for the product from 2008 until 2015 when Defendant informed Plaintiff Hafter it would no longer do so.

Plaintiffs filed their Third Amended Complaint with this Court after which Defendant filed the instant motion to dismiss. Having been fully briefed on the relevant issues, the Court is prepared to discuss the merits of the motion.

III. STANDARD OF REVIEW

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,

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570 (2007)). The Court is "not required to accept as true the legal conclusions set forth in a plaintiff's complaint." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir.1999). Indeed, "[t]he presence of a few conclusory legal terms does not insulate a complaint from dismissal under Rule 12(b)(6) when the facts alleged in the complaint cannot support" the legal conclusion. *Young v. City of Mount Ranier*, 238 F.3d 567, 577 (4th Cir. 2001). In addition, when analyzing a Rule 12(b)(6) motion to dismiss, the Court may consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs. Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

IV. CONTENTIONS OF THE PARTIES

Defendant argues all of Plaintiffs' claims are time barred and equitable tolling is inapplicable. It also contends Plaintiffs fail to state a claim upon which relief can be granted.

Plaintiffs maintain their claims have been equitably tolled. Although Plaintiffs agree certain of their claims should be dismissed, they assert the remaining causes of action ought to go forward. The Court details below which claims Plaintiffs aver should survive this motion.

V. DISCUSSION AND ANALYSIS

As noted above, Plaintiffs brought claims against Defendant for violations of the TILA, fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent act, and breach of duty of good faith and fair dealing. Plaintiffs, however, subsequently agreed their claims for breach of duty of good faith and fair dealing should be dismissed, ECF No. 28 at 29. They also consent to the dismissal without prejudice of Plaintiff Hughes' causes of action for

fraud, fraudulent concealment, and breach of contract accompanied by fraudulent act. ECF No. 31.

Defendant contends all of Plaintiffs' remaining claims are time barred. The Court agrees. Plaintiffs fail to dispute they neglected to file their lawsuit before the pertinent statutes of limitations expired. Instead, they rely on the doctrine of equitable tolling to argue their claims are timely.

Plaintiffs must establish the following elements before equitable tolling applies: "(1) the party pleading the statute of limitations fraudulently concealed facts that are the basis of the plaintiff's claim, and (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." *Supermarket of Marlinton v. Meadow Gold Dairies*, 71 F.3d 119, 122 (4th Cir. 1995); *Am. Legion Post 15 v. Horry Cty.*, 674 S.E.2d 181, 184 (S.C. Ct. App. 2009) (emphasizing the need for due diligence before allowing for equitable tolling). Assuming without deciding Plaintiffs are able to satisfy the first requirement, their arguments they can meet the other two elements are unavailing.

The charge for the mortgage insurance appeared on the Hughes' monthly checking account statements from 2006 to 2015. Thus, any argument they failed to discover the purported wrongdoing by Defendant during this period of time, although they exercised due diligence, is bereft of any merit. Assertions Joanne Hughes "underwent major heart surgery, suffered from dementia, experienced vision impairments, including cataracts and eye surgery, and suffered a broken hip that required hospitalization and extensive rehabilitation at White Oak Manor Nursing Home in Spartanburg, South Carolina," ECF No. 28 at 3, although unfortunate, are simply insufficient to satisfy the due diligence requirement.

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As to Plaintiff Hafter's claims, she admits in her complaint the charge for the insurance appeared on her home equity statement each month, from 2008 until 2015. Accordingly, any argument she failed to discover Defendant's alleged nefarious acts during this time, although she exercised due diligence, strains the bounds of credulity.

The fact equitable tolling is to be employed sparingly is so established as so make citation to authority unnecessary. For the Court to adopt Plaintiffs' position their claims are entitled to equitable tolling would mean statutes of limitations are inconsequential. And, of course, that is not so.

VI. CONCLUSION

Therefore, based on the foregoing discussion and analysis, Defendant's Motion to Dismiss is **GRANTED**.

IT IS SO ORDERED.

Signed this 13th day of February, 2017, in Columbia, South Carolina.

s/ Mary Geiger Lewis
MARY GEIGER LEWIS
UNITED STATES DISTRICT JUDGE

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EXHIBIT 5

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1202

PHILLIP FRANCIS LUKE HUGHES, on behalf of the Estate of Jane K. Hughes, and all others similarly situated; JOANNE HAFTER, and all others similarly situated,

Plaintiffs - Appellants,

v.

BANK OF AMERICA NATIONAL ASSOCIATION,

Defendant - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Spartanburg. Mary G. Lewis, District Judge. (7:15-cv-05083-MGL)

Submitted: August 31, 2017 Decided: September 11, 2017

Before FLOYD, THACKER, and HARRIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Jamie N. Smith, Bradley D. Hewett, D. Michael Kelly, MIKE KELLY LAW GROUP, LLC, Columbia, South Carolina, for Appellants. Matthew Allen Fitzgerald, Bryan Alan Fratkin, Garrett H. Hooe, MCGUIRE WOODS LLP, Richmond, Virginia, Robert A. Muckenfuss, MCGUIRE WOODS LLP, Charlotte, North Carolina, Elizabeth M.Z. Timmermans, MCGUIRE WOODS LLP, Raleigh, North Carolina, for Appellee.

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Unpublished opinions are not binding precedent in this circuit.

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PER CURIAM:

Phillip Francis Luke Hughes and Joanne Hafter appeal the district court's order granting Bank of America National Association's motion to dismiss for failure to state a claim upon which relief can be granted. The district court concluded that Appellants' claims were barred by the applicable statutes of limitations and that Appellants failed to establish grounds for equitable tolling. We affirm.

We review de novo a district court's dismissal of an action under Fed. R. Civ. P. 12(b)(6). *Trejo v. Ryman Hosp. Props., Inc.*, 795 F.3d 442, 445-46 (4th Cir. 2015). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

In conducting this analysis, we "accept[] as true the complaint's factual allegations and draw[] all reasonable inferences in favor of the plaintiff." *Elyazidi v. SunTrust Bank*, 780 F.3d 227, 233 (4th Cir. 2015) (internal quotation marks omitted). However, we need not accept as true "legal conclusions, elements of a cause of action, . . . bare assertions devoid of further factual enhancement[,] . . . unwarranted inferences, unreasonable conclusions, or arguments." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (internal quotation marks omitted). The complaint must offer "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), but ultimately

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"need only give the defendant fair notice of what the claim is and the grounds upon which it rests," *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011) (internal quotation marks omitted). And, "[a]lthough a motion pursuant to Rule 12(b)(6) invites an inquiry into the legal sufficiency of the complaint, not an analysis of potential defenses to the claims set forth therein, dismissal nevertheless is appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense." *Brockington v. Boykins*, 637 F.3d 503, 506 (4th Cir. 2011) (internal quotation marks omitted).

Generally, parties "are entitled to equitable tolling only if they show that they have pursued their rights diligently and extraordinary circumstances prevented them from filing on time." *Raplee v. United States*, 842 F.3d 328, 333 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 2274 (2017). "[E]quitable tolling is reserved for those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result." *Id.* at 333 (internal quotation marks omitted). "[T]he use of equitable tolling must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes." *Lawrence v. Lynch*, 826 F.3d 198, 204 (4th Cir. 2016) (internal quotation marks omitted). Where a plaintiff has alleged fraudulent concealment of his cause of action, equitable tolling requires a plaintiff to demonstrate that "(1) the party pleading the statute of limitations fraudulently concealed facts that are the basis of the plaintiff's claim, and (2) the plaintiff failed to discover those facts within the statutory

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period, despite (3) the exercise of due diligence." *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995).

With these standards in mind, we have reviewed the briefs and the record before us and conclude that the district court did not err in granting the motion to dismiss Appellants' claims. Accordingly, we affirm for the reasons stated by the district court. *Hughes v. Bank of Am. Nat'l Ass'n*, No. 7:15-cv-05083-MGL (D.S.C. Feb. 13, 2017). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

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EXHIBIT 6

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
(Spartanburg Division)

PHILLIP FRANCIS LUKE HUGHES, on behalf of the Estate of Jane K. Hughes, JOANNE HAFTER, and all other similarly situated, Plaintiffs, v. BANK OF AMERICA NATIONAL ASSOCIATION, Defendant.	Civil Action No.: 7:15-cv-05083-MGL **MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

Plaintiffs hereby oppose Defendant's motion and respectfully submit that they have properly and sufficiently stated claims and alleged sufficient facts to obtain relief for the pleaded causes of action. Defendant illegally charged the named Plaintiffs for mortgage and loan protection plans. While Defendant sprinkles its motion with selected facts, it has no explanation for or defense against the signature forged on Joanne Hafter's documents or for charging Decedent Jane Hughes for mortgage protection despite an explicit rejection of the product.

In light of such egregious conduct, Defendant should be equitably estopped from asserting the statute of limitations as a defense. Further, whether Plaintiff Hughes can recover for the fraud committed on Decedent Jane Hughes should be certified to the South Carolina Supreme Court as it is an outdated judicial construct enabling predators to prey on the state's most vulnerable citizens with impunity. Defendant's motion, therefore, is properly denied.

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Stipulation of Facts & Background

At all relevant times, BANA and its agents marketed a purportedly optional financial product promising "mortgage protection" to its clients. Such plans, including BANA's "Line Protection Plan," are essentially a specialized life insurance limited to paying specified portions of a mortgage payment under specified conditions. These plans are marketed, usually at the time of closing, as an *option* to assist survivors in making mortgage payments following the disability or death of a mortgagor.

BANA, and other companies, market mortgage protection plans because they are extremely profitable. This profitability resulted in such abuses of unsophisticated customers that Congress established explicit disclosure and authorization requirements to protect citizens from being duped into unknowingly paying for unwanted mortgage protection plans. *See, e.g.*, 15 U.S.C. §§ 1604, 1637(c)(5), 1639(l); 12 C.F.R. § 226.4. This case shines a bright light on the lengths BANA and its agents went to maintain its profits in the face of these requirements.

Hughes Transaction

On June 13, 2006, Mr. and Mrs. Hughes opened a line of credit from BANA in the amount of $120,000.00, secured by a mortgage on their Spartanburg County homestead ("Hughes Mortgage"). This line of credit is governed by a document entitled "Bank of America Maximizer Agreement and Disclosure Statement" ("Agreement") signed by both borrowers on June 13, 2006. At the same time, Mr. and Mrs. Hughes signed an acknowledgement and authorization ("Authorization") which allowed BANA to automatically draft "loan payments" from the Hughes's BANA bank account.

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During the closing of the Hughes Mortgage, BANA presented Mr. and Mrs. Hughes with a document entitled "Optional Line Protection Plan Addendum ("Addendum")." As stated on the form, the "Line Protection Plan" only provided "protection on the variable portion of your credit line" and "This Product Is Optional." As understood by the Hughes, if they elected it, the Line Protection Plan allowed the cancellation of all or some monthly loan payments in the event of specific incidents of disability, accidental death, or involuntary unemployment. At the time that BANA presented the plan to the Hughes, LPP offered six protection options, with the monthly fee ranging in cost from 4.5% to 13.5% of the minimum monthly payment on the borrowers' credit line. The Agreement explicitly stated that the borrowers "must specifically request" the Line Protection Plan.

Mr. and Mrs. Hughes both signed a *2-page* document captioned "OPTIONAL LINE PROTECTION PLAN ADDENDUM ("ADDENDUM")" which stated that BANA had provided them with the Line Protection Plan information. The Hughes designated their election to *decline* the purportedly optional Line Protection Plan by clearly and conspicuously checking a box next to "DECLINE to purchase any Protection on this Credit Line" option. *See* attached Exhibit A (OPTIONAL LINE PROTECTION PLAN ADDENDUM dated June 13, 2006).

In June 2006, Mr. John P. Hughes was age 85. He died in October 2008 at age 87. Mrs. Jane K. Hughes was age 85 in June 2006 and underwent major heart surgery, suffered from dementia, experienced vision impairments, including cataracts and eye surgery, and suffered a broken hip that required hospitalization and extensive rehabilitation at White Oak Manor Nursing Home in Spartanburg, South Carolina, between June 2006 and her death in June 2015.

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Over six years after Mr. Hughes's death, on or around March 17, 2015, BANA sent a boilerplate form cancellation notice addressed to Mr. and Mrs. Hughes, informing them that the Line Protection Plan would be cancelled on September 30, 2015. The notice also indicated that John P. Hughes was a "protected" borrower. By letter dated March 17, 2015, BANA notified the Hughes that "You're no longer being charged for the Protection Plan as of April 1, 2015." *See* attached Exhibit B.

Curiously, the BANA notice to the Hughes also stated that "Going forward, any payments that would have previously been applied to Protection Plan fees will be applied to other amounts owed as described in your loan documents, unless refunded to you. If we apply the payment to other amounts owed and you later determine that you mistakenly paid Protection Plan fees and prefer to have a refund of these amounts, please contact us at 1.866.731.4210." Ex. B. at 1.

Although Mr. and Mrs. Hughes never elected to purchase any "Protection Plan" – to the contrary, they explicitly *declined* the product – BANA sent a second letter dated March 25, 2015, stating that Mr. Hughes had selected "6 month, Involuntary Unemployment, Disability, Accidental Death and Hospitalization" protection at a monthly rate of 9.5% of the Hughes' Minimum Monthly Payment. In response to an inquiry on behalf of Mrs. Hughes, BANA stated in a May 6, 2015, letter that "The Line Protection Plan (Plan) addendum for your Bank of America loan ending in 4699 is enclosed, per your request" and enclosed an *8-page* document entitled "OPTIONAL LINE PROTECTION PLAN ADDENDUM ("ADDENDUM")." *See* attached Exhibit C (May 6, 2015 letter to John P. Hughes).

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The *8-page* "ADDENDUM" provided by BANA in May 2015 is *not* the *2-page* "ADDENDUM" signed by Mr. and Mrs. Hughes in 2006 *declining* coverage, and does not contain or provide for signatures or a place for election or rejection of the "protection." In any event, BANA did not provide the 8-page ADDENDUM to Mr. or Mrs. Hughes before May 2015.

The Line Protection Plan premium did not appear on the mortgage finance charge disclosed to Mr. and Mrs. Hughes in 2006. Further, before March 2015, BANA did not provide any statement, notice, or communication of any sort to Mr. or Mrs. Hughes revealing that BANA believed that the Hughes had elected any "Protection Plan" or that an amount was to be or was being charged to them for such a plan.

To date, BANA has been unwilling or unable to provide any documentation that Mr. or Mrs. Hughes ever elected or agreed to pay for any "Protective Plan" coverage of any sort. Yet, despite possessing a document unequivocally establishing that the Hughes had *declined* to purchase the Line Protection Plan, BANA still withdrew a monthly charge of $28.40 from the Hughes's BANA joint checking account beginning on or about June 2006. This charge was ambiguously listed as "Ad Insurance Des:XXXXXX4374 ID: R# XXXXXXX1070 Indn:Hughes Sr, John P Co ID:XXXXXX4660 Ppd" and appeared amid numerous other monthly charges. *See* attached Exhibit D.

All other charges from BANA or its subsidiaries appearing on the Hughes's bank statements during the relevant period were clearly designated as transactions with "Bank of America" or "BkofAmerica" and other insurance transactions were clearly identified with the

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name of the charging company (e.g., "Patrons Mutual," "Travelers Insur"). In addition, none of the numbers in the Line Protection Plan transaction description were related to the Hughes's BANA mortgage or line of credit. . . .

As neither Mr. or Mrs. Hughes had elected Line Protection Plan coverage or had received any notice that BANA had issued such a plan to them, they were not expecting to be charged for any such service and they did not have any reason to expect that "Ad Insurance Des:XXXXXX4374 ID: R# XXXXXXX1070 Indn:Hughes Sr, John P Co ID:XXXXXX4660 Ppd" was a BANA charge generally or a "Line Protection Plan" charge specifically until receiving the March 2015 BANA notices. Adding further insult, upon receiving notice of Mr. Hughes's death, BANA denied any coverage under the Line Protection Plan on the grounds that "[t]he death was the result of disease or treatment of disease or any medical treatment (and/or was not for the treatment of an accidental injury)." *See* attached Exhibit E (May 6, 2015 letter to Estate of John Hughes).

When requested, BANA refunded the payments drawn from the Hughes's joint account after Mr. Hughes's death. BANA, however, refused and continues to refuse to refund the payments drawn during Mr. Hughes's lifetime.

Upon the death of Jane K. Hughes in June 2015, Plaintiff Phillip Francis Luke Hughes was named as personal representative of her estate.

Hafter Transaction

In October 2008, Joanne Hafter obtained a home equity loan from BANA in the amount of $30,000.00, secured by a mortgage on her Lexington County homestead ("Hafter Mortgage").

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Mrs. Hafter has never authorized BANA to withdraw any funds for a Line Protection Plan or any other similar "plan." Despite the absence of such authorization to be charged for the Line Protection Plan, BANA charged Mrs. Hafter a monthly fee for this unwanted product, beginning in October 2008 and extending through 2015. The charge was listed only as "LPP Fee Assessment" on the monthly transaction summary for her home equity loan. The monthly charges for the Line Protection Plan ranged from approximately three dollars ($3.00) to forty dollars ($40.00) per month from 2008 until 2015.

In 2015, BANA notified Mrs. Hafter that she would no longer be charged for the Line Protection Plan. On March 9, 2016, Defendant's counsel sent Mrs. Hafter's counsel a partial copy of two documents, each purportedly containing Mrs. Hafter's signature. The first document was a copy of a document entitled "Bank of America Equity Maximizer Agreement and Disclosure Statement" ("Agreement"). *See* Exhibit F. The second document was "Page 1 of 9" of a document with the Bank of America logo and "IMPORTANT NOTICE" on the top of the page and which states that it is a "Confirmation Letter." *See* Exhibit G.

The signature dated "9-26-08" on Agreement page 9 of 10 that purports to be that of "Joanne C Hafter" is *not* Mrs. Hafter's true signature and was *not* placed on this document by Mrs. Hafter. The Confirmation Letter "Page 1 of 9" indicates that the signatory elected to "ACCEPT Line Protection Plan" coverage with the election box and supporting information typed in the appropriate locations. The "X" used to designate acceptance of the product and the supporting information on the Confirmation Letter could not have been typed into the BANA document by Mrs. Hafter, it had to be placed on the document by Defendant either before or

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after the document was presented to Mrs. Hafter, if it ever was presented to her. Thus, if presented to Mrs. Hafter at the mortgage closing, as asserted by Defendant, the document offered *no* option for Mrs. Hafter to decline the offered product.

Plaintiffs filed their Third Amended Complaint on March 23, 2016, seeking, among other things, compensatory and punitive damages and class certification for BANA's fraudulent and illegal conduct of charging customers for mortgage protection plans that were explicitly rejected or otherwise unwanted. The Third Amended Complaint included causes of action for violations of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* ("TILA"), fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent act, and breach of duty of good faith and fair dealing.

Plaintiffs proposed to Defendant that the parties engage in limited discovery prior to the Rule 26(f) conference, specifically to discuss any documents related to the Hughes and Hafter transactions. Defendant never responded to this request. Defendant's only response to this request was to file its Motion to Dismiss with a supporting memorandum of law ("Defs' Mem.") on April 21, 2016. *See* Dkt. No. 25.

Standard of Review

A motion to dismiss under Federal Rule of Civil Procedure 12 tests the sufficiency of the complaint: it does not resolve conflicts of facts. A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). In considering a motion to dismiss, the factual allegations in the complaint are accepted as true and

the plaintiff is afforded the benefit of all reasonable inferences that can be drawn from those allegations. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Mylan Laboratories v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Discussion

I. Defendant's Fraudulent and Illegal Behavior Tolls the Statute of Limitations.

Despite the opportunity to do so, Defendant has failed to produce any argument excusing its deceptive and illegal practice of charging Jane Hughes and Joanne Hafter for services that were explicitly rejected or based on forged acceptance. *See, e.g.*, Ex. A. (Hughes election to decline Optional Line Protection Plan); ECF No. 18-2 (Affidavit of Joanne Hafter disputing that she signed the Bank of America Equity Maximizer Agreement). Consequently, Defendant is equitably estopped from asserting the statute of limitations as a defense in this matter. The statute of limitations for all claims should be equitably tolled.

A. Plaintiffs' TILA Claims Are Equitably Tolled.

While there may be a one year statute of limitations applicable to Plaintiffs' claims, Defendants' fraudulent concealment justifies equitably tolling this time period. Defendant violated TILA, which provides that "in order to obtain the insurance in connection with the extension of credit, the person to whom the credit is extended must give specific affirmative written indication of his desire to do so after written disclosure to him of the cost thereof." 15 U.S.C. §1605(b). The Fourth Circuit has explained that the doctrine of equitable tolling allows a plaintiff to sue after the statute of limitations has expired because she was "induced or tricked by

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[her] adversary's misconduct into allowing a filing deadline to pass." *Chao v. Virginia Dep't of Trans.*, 291 F.3d 276, 283 (4th Cir. 2002) (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)). "'Equitable tolling' is the doctrine under which plaintiffs may sue after the statutory time period has expired if they have been prevented from doing so due to inequitable circumstances." *See Bailey v. Glover*, 88 U.S. 342, 347 (1874).

Despite Defendant's tortured logic that because there is no on-point decision in this circuit equitable tolling is unavailable to Plaintiffs, TILA's one year statute of limitations is subject to equitable tolling. While the Fourth Circuit has not opined on the issue, "every other circuit that has considered the issue has held that TILA is subject to equitable tolling." *Barnes v. West, Inc.* 243 F.Supp.2d 559, 561-62 (E.D. Va. 2003); *see Ramadan v. Chase Manhattan Corp.* 156 F.3d 499 (3rd Cir. 1998); *Heil v. Wells Fargo Bank, N.A.*, 298 Fed. Appx. 703 (10th Cir. 2008); *Philibotte v. Nisource Corporate Services Co.*, 793 F.3d 159 (1st Cir. 2015); *King v. State of Cal.*, 784 F.2d 910, 914 (9th Cir. 1986) ("district courts...can evaluate specific claims of fraudulent concealment and equitable tolling to determine if the general rule would be unjust or frustrate the purpose of the Act and adjust the limitations period accordingly."). This Court, therefore, can and should apply the analyses in these consistent decisions here.

The legal bases for such a ruling are well-defined. "Unless Congress states otherwise, equitable tolling should be read into every federal statute of limitations.'" *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 706 (11th Cir. 1998) (citing *Holmberg v. Armbrecht*, 327 U.S. 392, 395-96, 66 S.Ct. 582, 90 L.Ed. 743 (1946)); *Jones v. TransOhio Savings Ass'n*, 747 F.2d 1037, 1041 (6th Cir. 1984) ("Only if Congress clearly manifests its intent to limit the

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federal court's jurisdiction will it be precluded from addressing allegations of fraudulent concealment"). "Congress did not state otherwise with respect to TILA's one-year statute of limitations, and thus, the operation of this statute is subject to equitable tolling." *Id.* This case raised well-supported assertions of intentional violations of product elections, forging of signatures, and concealment of payments, and equitable tolling is, therefore, appropriate to allow a full and fair examination of the alleged misbehavior.

The Eleventh Circuit's *Ellis* decision and the Sixth Circuit's *Jones* decision are particularly instructive and persuasive. Both decisions "emphasize TILA's remedial purpose, and appropriately conclude that TILA should be construed liberally in favor of the consumer." *Barnes,* 243 F.Supp.2d at 562. "In *Ellis,* the Eleventh Circuit reasoned that if equitable tolling did not apply to TILA, the 'anomalous result' would be that a 'statute designed to remediate the effects of fraud would instead reward those perpetrators who concealed their fraud long enough to time-bar their victims' remedy.'" *Id.* (quoting *Ellis,* 160 F.3d at 708). In *Jones*, the Sixth Circuit held that the very nature of fraudulent concealment "serve[s] to make compliance with the limitations period imposed by Congress an impossibility." *Id.* (quoting *Jones,* 747 F.2d at 1041). As presciently described in *Ellis* and *Jones*, Defendant seeks dismissal here because it so successfully concealed its actions from its victims.

TILA is thus properly subject to equitable tolling when, as here, there has been fraudulent concealment. As the Sixth Circuit provided, "to conclude otherwise is to accede to the machinations of those who would hope to thwart Congress' purpose and the ability of the federal courts to ensure that purpose's fruition: the prevention of fraud in consumer credit transactions."

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Id. When the doctrine of fraudulent concealment is invoked, the statute of limitations period does not begin to run until the plaintiff discovers the fraud. *See Supermarket of Marlinton Inc. v. Meadow Gold Diaries, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995). "Plaintiff's proof may include acts of concealment involved in the TILA violation itself." *Id.*

Plaintiffs satisfy the test for equitable tolling. To invoke the doctrine of fraudulent concealment as a ground for equitable tolling, a plaintiff must demonstrate three elements: "(1) the party pleading the statute of limitations fraudulently concealed the facts that are the basis of the plaintiff's claims; (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." *Id.* Indeed, the fraudulent concealment tolling doctrine is to be "read into every federal statute of limitation." *Holmberg*, 327 U.S. at 397. The "*sine qua non* of fraudulent concealment is that the defendant fraudulently concealed from the plaintiff his cause of action during the time in which plaintiff could have brought that action." *Cardiello v. The Money Store*, 2001 WL 604007 *4 (S.D.N.Y. 2001). Even now, Defendant continues to conceal the actual documents present at Plaintiffs' closings. *See, e.g.*, ECF 25-3 at 12 (containing only "Page 1 of 9").

Defendant's reliance on *Davis v. Edgemere Fin. Co.*, 523 F. Supp. 1121 (D. Md. 1981), is misplaced. Plaintiffs are not requesting that the Court toll or otherwise extend the limitations period only because Defendant's deplorable conduct continued beyond the first year of the transactions. Plaintiffs are requesting equitable tolling because Defendant's fraudulent conduct *was concealed* beyond the first year of transactions. Defendant defrauded Jane Hughes, a vulnerable elderly woman in her late 80s, by taking advantage of her physical and mental

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infirmities to prevent inquiry into Defendant's obtuse billing for a product she had explicitly declined. Defendant defrauded Joanne Hafter by forging her signature at least once and then failing to properly identify the resulting charges to her pursuant to its own stated requirements. As a result of this *intentional* misconduct, tolling is necessary to prevent Defendant from profiting off its own illegal conduct. Any other result would reward skilled fraudsters and provide a perverse incentive to continue a fraud once successfully past the statute of limitations for the initial fraudulent act.

Defendant's reference to *Croft v. Bayview Loan Servicing,* No. 3:14-04630, 2016 WL 524257 (D.S.C. Feb. 10, 2016) is misdirected. The *Croft* decision was issued at the summary judgment stage after the parties were afforded the opportunity to conduct discovery. The application of inquiry notice to Plaintiffs in this case is entirely inconsistent with the facts in *Croft*. The claimant in *Croft* was actually named as a party to a lawsuit as a guarantor and her own insurance carrier alerted her that there was a foreclosure claim on her credit report. Additionally, the *Croft* claimant submitted a credit dispute to the loan servicing company prior to filing suit. In sum, although the *Croft* claimant admitted to signing the loan, was named as a part in a foreclosure suit, was alerted by her own insurance carrier about the foreclosure claim, and filed a credit dispute, she still waited several years before filing suit.

The case at bar is substantively distinguishable from *Croft*. Unlike in *Croft,* Jane Hughes explicitly rejected Defendant's product and was unable to discover that she was being defrauded because of her own physical and mental ailments and Defendant's fraudulent concealment of the charges in indecipherable descriptions. Also distinguishable from *Croft*, Joanne Hafter's

signature was forged and Defendant disregarded its own requirements related to the identification of the charge on Ms. Hafter's monthly statements which would have alerted her to the unwarranted charges. Further, no Plaintiff received any notice regarding their (unwanted) participation of Defendant's product until the 2015 letters.

Thus, Plaintiffs were not put on "inquiry notice" until Defendant issued a cancellation notice in 2015 for a product that both Plaintiffs had rejected. Inquiry notice is not equivalent to actual notice and is a fact specific determination with differing applications depending on the area of law, e.g., securities fraud, real estate transaction, antitrust, etc. *See Strother v. Lexington County Recreation Com'n*, 332 S.C. 54, 63-64, 504 S.E.2d 117, 122 (S.C. 1998). Importantly, inquiry notice does *not* impose a duty to inquire. *Id.*; *see also GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170 (4th Cir. 2007). "[T]oo sensitive a trigger will have parties rushing to the courthouse at the first hint of suspicion to avoid having their claims go stale." *Id.*, 508 F.3d at 178. Even if *some* persons may have inquired about Defendant's misleading charges, it was not unreasonable for *these* plaintiffs to trust their banker not to ignore their rejection of an "optional" product.

Moreover, the "ultimate fact [of when the plaintiffs were on notice] is ordinarily a question for the trier of facts going to the merits." *Baysinger v. Schmid Products Company*, 514 A.2d 1, 4 (Md. 1986). "Whether a claimant knew or should have known that they had a cause of action is question for the jury." *Johnston v. Bowen*, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (S.C. 1993). As there is certainly conflicting evidence as to when Plaintiffs knew or should have known that a claim against Defendant existed, a jury should properly decide the issue in this

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case. Indeed, Plaintiffs' underlying assertions of fraudulent concealment themselves involve factual determinations not properly resolved at this point in the litigation.

In sum, the factual context of Plaintiffs' claims is in stark contrast to those in *Croft* and so that Court's reasoning is not applicable here. Further, the rationale in *Davis* relied upon by Defendant, is similarly inapplicable to the equitable tolling analysis of Plaintiffs' TILA claims. Moreover, assertions of fraudulent concealment and equitable tolling inexorably involve factual determinations not properly resolved at this point in the litigation. Thus, the notice question is one properly reserved for the jury. Plaintiffs, therefore, respectfully request that this Court deny Defendant's motion and order the parties to proceed with discovery.

i. Equitable Tolling For The Claims of The Estate of Jane Hughes.

Until family members informed her of the BANA cancellation letter in 2015, Mrs. Hughes was unaware that she was being illegally charged for a product that had been expressly rejected. As opposed to making a separate payment by credit card, check, or requiring other affirmative action to remit payment, BANA further hid the charge for the home equity line of credit in an automatic monthly withdrawal. *See* ECF 23-4 (Bank Statement of Jane Hughes). Mrs. Hughes had long banked with Defendant and until that time had little reason to suspect that her own banker was illegally withdrawing funds from her account each month.

In addition, from the time of the closing until the time of her death, Mrs. Hughes struggled with many ailments, including failing eyesight and dementia. As of 2012, Mrs. Hughes was totally dependent for bathing, toileting and dressing, was disoriented at times, and was often noted to be confused and agitated. She was diagnosed with impaired cognition and

mobility, atypical psychosis, confusion, dementia, blindness, renal insufficiency, heart failure, and was noted to lack decisional capacity. Exhibit H (Affidavit of Phillip Francis Luke Hughes).

As a result of her physical and mental maladies, Mrs. Hughes was unable to detect, and much less challenge, Defendant's surreptitious actions until Defendant sent the 2015 cancellation notices. During that period, the gibberishly-described deduction continued on automatic, buried in pages of other charges. Once Defendant issued the cancellation notices in 2015, Mrs. Hughes was questioned by family members about the mortgage protection plan and the associated charges. These concerned individuals determined that Mrs. Hughes knew nothing about the service and was completely ignorant that she had been wrongfully charged by Defendant over the course of several years.

The currently available documents unequivocally establish that Defendant fraudulently, and illegally, enrolled Mrs. Hughes into the Line Protection Plan, despite an *explicit* election to decline the program. Not only was Mrs. Hughes unable to read her own bank statements, but even if she could have, the charge description contained no indication that it was a Bank of America charge associated with the Home Equity Line of Credit or the declined protection plan.

As discussed above, BANA has been unable or unwilling to provide any documentation that Mr. or Mrs. Hughes ever elected or agreed to pay for any "Protective Plan" coverage of any sort after their explicit rejection at the 2006 closing, despite having months to produce such documentation. Thus, Defendant's fraudulent concealment and illegal conduct, along with the physical and mental infirmities suffered by Mrs. Hughes in the years preceding her death, should toll the statute of limitations for the TILA claim of The Estate of Jane Hughes.

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ii. Equitable Tolling For The Claims of Joanne Hafter.

Perhaps equally egregious to its embezzlement of funds from an elderly couple that expressly rejected its product, documents *provided by Defendant* contain at least one forged signature of Joanne Hafter. The documents purportedly evidence Mrs. Hafter's election of a mortgage protection plan when she obtained a home equity loan from Defendant in October 2008. Contrary to the forged documentation, Mrs. Hafter recalls that the closing transaction was brief, and *that only the closing attorney was present*. *See* attached Exhibit I (Affidavit of Joanne Hafter). A Bank of America representative *did not attend* the closing and Ms. Hafter disputes that there was any form that was electronically presented to her nor was she offered any mortgage insurance plan by the closing attorney. *Id.*, ¶¶4-6.

Mrs. Hafter also attested that the Bank of America Equity Maximizer Agreement and Disclosure does not contain her signature. *See* ECF No. 18-2. Thus, the available evidence is that Defendant's representatives forged Mrs. Hafter's name on the plan acceptance documents and illegally enrolled her in the Line Protection Plan without her permission or knowledge. Defendant's own documents gut its assertions of what occurred, which in any event is an issue of fact for which discovery, potentially including expert handwriting analysis, is appropriate.

Moreover, even if Mrs. Hafter had elected to receive the product, the monthly fee was required to be reflected on her monthly statement under "Optional Products" for each month that there was a balance on her account. *See* ECF No. 25-3 at 12, item 1. Yet, nowhere on any of her monthly statements from 2008-2015 is there a line item for "Optional Products" as required by Defendant's own confirmation letter. Instead, there is only a charge for "LPP Fee Assessment"

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that Mrs. Hafter reasonably believed was a form of financing charge for the home equity loan. *See* attached Exhibit J (Bank Statement of Joanne Hafter). This is another affirmative act by Defendant to conceal its actions.

Mrs. Hafter was only reasonably alerted to the potential for unauthorized charges of this sort upon receiving the 2015 cancellation notice. *See* attached Exhibit K (Cancellation Letter to Joanne Hafter). Once Mrs. Hafter received this notice and discovered that suit had been filed against Defendant for such misconduct, she exercised due diligence by contacting counsel for additional information. Accordingly, the TILA claim of Mrs. Hafter should also be equitably tolled. *See Ellis, Jones.*

At a minimum, and independent of Mrs. Hughes' factual issues, there is a genuine issue of material fact created by Mrs. Hafter's assertion – supported by Defendant's own documents – that Defendant forged her name on documents enrolling her in the Line Protection Plan. Defendant rejected the opportunity to engage in discovery limited to the Hughes and Hafter transactions prior to the Rule 26(f) conference, as permitted by Rule 26(d)(1), but instead chose to unfairly reveal cherry-picked partial documents in a failed attempt to rebut Mrs. Hafter's allegations.

Even now, Defendant has produced only portions of documents it contends that Mrs. Hafter executed, apparently believing it "had the goods" on her. Yet, even Defendant's cherry-picked documents support Plaintiffs' assertions and equitable tolling in this case. *See* ECF No. 25-3 (containing only "Page 1 of 9" for the Confirmation Letter). In addition to revealing an entirely new line of fraudulent actions, Defendant's extra-discovery actions conceded that it has

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relevant, if not dispositive, information regarding this matter not possessed by Plaintiffs. This information should be subject to discovery, not buried by a premature dismissal.

B. Plaintiffs' State Law Claims Are Timely, Or In The Alternative, Should Be Equitably Tolled.

Plaintiffs' state law claims for fraud, breach of contract, fraudulent concealment, and breach of contract accompanied by fraudulent acts should be tolled for the same reasons as Defendant's TILA violations. South Carolina law provides for tolling of the applicable statute of limitations period by statute in certain circumstances. *See* S.C. Code Ann. § 15-3-30 (2005) (stating exceptions to the running of the statute of limitations when the defendant is out of the state); *id.* § 15-3-40 (providing exceptions for persons under a disability, including being underage or insane). "In addition to these statutory tolling mechanisms, however, '[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations.'" *Hooper v. Ebenezer Sr. Services and Rehabilitation Center*, 386 S.C. 108, 113, 687 S.E.2d 29, 32 (S.C. 2009) (quoting 54 C.J.S. Limitations of Actions § 115 (2005)). "Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." *Id.*, quoting *Rodriguez v. Superior Court,* 176 Cal. App. 4th 1461 (2009). "The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." *Hooper*, 687 S.E.2d at 33 (quoting *Hausman v. Hausman,* 199 S.W.3d 38, 42 (Tex. App. 2006)).

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As discussed above, Defendant is alleged to have deceived and defrauded a frail, elderly couple, who expressly declined its product. Defendant is also alleged to have forged the name of a customer on one or more documents electing the insurance product and mislabeled the charges on her monthly statements, contrary to its own plan documents. On these facts, this Court has the equitable authority to ensure fairness in the adjudication of this matter and to allow a trial on the merits.

It is not reasonably debated that harsh results would flow from a strict, literalistic application of the three year statute of limitations for Plaintiffs' state law claims in this case. A sophisticated financial institution systematically took advantage of modern technology to conceal its actions to defraud some of South Carolina's most vulnerable citizens. It is not equitable that Defendant be the beneficiary of its trusting relationship with and technological advantage over these citizens to avoid responsibility for its behavior. Public policy and the interests of justice weigh heavily in favor of allowing Plaintiffs' state law claims to proceed. Plaintiffs request that this Court exercise its inherent power to formulate rules of procedure as justice demands in this case and to equitably toll the statute of limitations for Plaintiffs' state law claims.

II. Plaintiffs Sufficiently Pled Fraud, Fraudulent Concealment, and Breach of Contract Accompanied by Fraudulent Act.

Plaintiffs' Third Amended Complaint adequately alleges that Defendant engaged in fraud, fraudulent concealment, and breach of contract accompanied by fraudulent act. "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Third Amended Complaint

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complies with Federal Rules of Civil Procedure 8, 9, and 84, which enables practitioners to rely upon a set of rules that emphasize simplicity and brevity. *Automated Transactions, LLC v. First Niagra Fin. Group, Inc.,* 2010 U.S. Dist. Lexis 141275 (W.D.N.Y. Aug. 31, 2010). The Third Amended Complaint alleges sufficient facts to show that Plaintiffs are entitled to relief because the claims are supported by viable allegations that Defendant engaged in improper acts, which is all that is required at this stage in the proceedings.

To establish a cause of action for fraud and deceit based upon misrepresentation, the following elements must be shown by clear, cogent and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance of its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Kahn Construction Co. v. South Carolina National Bank of Charleston*, 275 S.C. 381, 384, 271 S.E.2d 414 (1980); *Hooters of Am. v. Phillips*, 39 F.Supp.2d 582 (D.S.C. 1998) *aff'd*, 173 F.3d 933 (4th Cir. 1999).

Defendant does not argue with any conviction, nor can it, that Plaintiffs failed to satisfy the Federal Rules and dictates of *Twombly* in pleading fraud, fraudulent concealment, and breach of contract accompanied by fraudulent act. The better part of 6 pages and 32 paragraphs of the Third Amended Complaint assert facts regarding Defendant's fraudulent and illegal conduct. *See* ECF No. 23, ¶¶ 12-38. Plaintiffs meticulously presented the facts supporting allegations of fraud in these paragraphs, thus complying with Federal Rules 8 and 9(b) in pleading their claims of fraud, fraudulent concealment, and breach of contract accompanied by a fraudulent act. *See*

ECF No. 23, ¶¶58-60, 64-68, 77-79. Defendant's arguments regarding these claims are, therefore, baseless.

Plaintiffs have also specifically alleged that they were ignorant of the falsity of Defendant's misrepresentations, relied on Defendant's representations that only payments for the home equity loans would be withdrawn from their account, and suffered injury by Defendant's withdrawals for a product that was not selected by Plaintiffs. Contrary to Defendant's assertions, Plaintiffs adequately alleged fraud:

1. Defendant charged Jane Hughes for an optional product that was expressly rejected. Third Amended Comp. ¶¶ 10-12, 18-20, 58.
2. Defendant concealed its actions and Jane Hughes was ignorant that she was being defrauded. *Id.* ¶¶ 13, 18-28.
3. Defendant charged Joanne Hafter for a product she did not accept and produced only partial documentation of the transaction, which contain forged signatures of Mrs. Hafter. *Id.* ¶¶ 33-34, 36-38, 58.
4. Defendant concealed its conduct of enrolling Plaintiffs in a product without their express permission. *Id.* ¶ 77.
5. Defendant made false representations to Plaintiffs that only authorized charges would be withdrawn, with the intent that Plaintiffs rely on such representations. *Id.* ¶¶ 58-60.
6. Defendants wrongly, and inconspicuously, withdrew payments from Plaintiffs. *Id.* ¶¶ 25-28, 64-67.

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7. Plaintiffs relied on Defendant's representations to their detriment, and suffered proximate injury by Defendant's fraudulent conduct. *Id.* ¶¶ 31, 61, 68, 79 .

Plaintiffs' claims for fraud, fraudulent concealment, and breach of contract accompanied by fraudulent act are sufficiently particular and fully comply with the Federal Rules.

Plaintiffs provided much more than a formulaic recitation of the elements of the causes of action for fraud. Fairly read, the Third Amended Complaint alleged that Defendant committed fraud by enrolling Plaintiffs in a product that was expressly rejected, and withdrawing payments in a misleading manner. Plaintiffs sufficiently alleged Defendant's acts so that any reasonable person could understand the allegations as describing the swindling of an elderly couple and falsifying documents to take advantage of another customer for its own profit. As discussed below, Plaintiffs request the issue of the survivability of the fraud claim of the Estate of Jane Hughes be certified to the South Carolina Supreme Court.

III. The question of whether a fraud claim survived the death of Jane Hughes should be certified to the South Carolina Supreme Court.

Defendant argues that a cause of action for fraud does not survive under SC Code Ann. § 15-5-90, South Carolina's general survival statute, and thus Plaintiff Hughes' claim for fraud should be dismissed. Plaintiffs challenge this antiquated exception to the survival statute and, for the reasons set forth below, move this Court to certify the following question to the South Carolina Supreme Court.[1]

[1] Plaintiff acknowledges that SCACR 244(a) limits certification to those questions unanswered by controlling precedent.

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1. Does Jane Hughes fraud claim survive her death in light of allegations that Bank of America's fraudulent conduct caused her and her heirs loss of personal property?;

2. Does Jane Hughes fraud claim survive her death since the interpretation of South Carolina's survivability statute has broadened significantly since the ruling in *Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 15 S.E.2d 117 (1941) over 75 years ago?;

3. Does Jane Hughes fraud claim survive her death because the state of mind of the deceased is not an issue because all of the evidence of the alleged fraud are documents created prior to her death?;[2] and

4. Does excluding fraud from the survivability statute violate public policy?

A. Scope of the South Carolina Survival Statute

i. *Mattison v. Palmetto State Life Ins. Co.*

South Carolina enacted legislation to allow for the survival of certain claims that were historically barred by the claimant's death. *Bennett v. Spartanburg Ry., Gas & Elec. Co.*, 97 S.C. 27, 81 S.E. 189, 189 (1914). South Carolina enacted the survival statute in 1905, which provided that "any and all injuries to the person or to personal property" survive the death of a party. *Id.* South Carolina's survival statute has remained intact, and the language essentially unchanged, from 1905 to present. The Courts have relied and still rely upon early judicial interpretations of the statutory language and legislative intent in answering contemporary questions regarding the survivability of actions under the act.

[2] See *Campus Sweater and Sportswear Co. v. M.B. Kahn Const. Co.*, 515 F. Supp. 64 (D.S.C. 1979), aff'd sub nom. *Campus Sweater & Sportswear Co. v. M.B. Kahn Const.*, 644 F.2d 877 (4th Cir. 1981), allowing the admissibility of documents to prove intent for fraud cause of action.

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South Carolina first addressed the question of whether fraud survives the death of a party under the survivability statute in *Mattison v. Palmetto State Life Ins. Co.* 197 S.C. 256, 15 S.E.2d 117 (1941). In *Mattison*, the estate brought an action against Palmetto State Life Insurance Company for perpetrating a fraudulent scheme intended to cheat the deceased of his rights under an insurance contract. *Id.* The South Carolina Supreme Court granted certiorari to hear the case on several questions, the relevant question being whether the cause of action of fraud survived. *Id.*

In determining whether the fraud claim survived, the *Mattison* Court reviewed the survival statute to assess whether fraud fell within the scope of the statutory language. At that time, the applicable statute read:[3]

> Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to *personal property*, shall survive both to and against the personal or real representative (as the case may be) of the deceased persons, and the legal representatives of insolvent persons, and defunct or insolvent corporations, any law or rule to the contrary notwithstanding.

1932 Code § 419 (emphasis added).

The *Mattison* Court succinctly opined that fraud did not fall within the scope of the statutory language, and therefore the Legislature did not intend that claims of fraud survive death. The *Mattison* Court further provided that:

> It is readily seen that under the above quoted Section, there are but two instances wherein a cause of action survives: (1) For and in respect to any and all injuries and trespasses to and upon real estate, and (2) any and all injuries to the person or

[3] The current survival statute is codified at S.C. Code Ann § 15-5-90, and the language is nearly identical to the 1932 Code with only some minor changes in punctuation.

> to *personal property*. And it is just as readily seen that respondent's second cause of action does not come within either of the instances where a cause of action survives.

Mattison at 256, 15 S.E.2d at 119 (original emphasis replaced).

Thus, while the *Mattison* Court narrowly interpreted the survival statute, it failed to explain why fraud does not constitute injury to personal property. In fact, there is no discussion in *Mattison* regarding the elements of fraud or why pecuniary loss caused by fraud is not an injury to personal property. This omission is relevant because the money taken by Defendant from Jane Hughes was personal property. Once Jane Hughes died, interest in her personal property, including her financial holdings, transferred to her Estate. Thus, *Mattison's* principle that fraud does not survive the death of a party in South Carolina is internally inconsistent.

ii. *Fraud as an "exception" to the South Carolina Survival Statute*

Since *Mattison*, and contrary to its narrow view of survivability, the South Carolina Supreme Court has consistently *broadly* interpreted the survival statute. *See, e.g., Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564, 564 S.E.2d 94, 97 (2002) ("[T]he statute's language is broad and ostensibly appears to include almost every conceivable cause of action."); *Layne v. Int'l Bhd. of Elec. Workers, (AFL-CIO), Local No. 382*, 271 S.C. 346, 352, 247 S.E.2d 346, 349 (1978) ("[I]t is the general rule that any cause of action which could have been brought by the deceased in his lifetime survives to his representative under the Survival Act."); *Brewer v. Graydon*, 233 S.C. 124, 128, 103 S.E.2d 767, 769 (1958) ("the Survival Statute must be liberally construed"). These later South Carolina opinions create a tension with *Mattison's* holding fraud is an *exception* to the rule, as opposed to a *cause of action outside of the statute's scope*.

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Despite this tension, the South Carolina Supreme Court has yet to revisit the *Mattison* rationale for the fraud "exception." Indeed, there has been no discussion by South Carolina courts since 1941 on why fraud should be excepted from the survival statute. Plaintiffs, therefore, invite this Court to certify this question of survivability to the South Carolina Supreme Court to determine the viability of the 1941 *Mattison* analysis in 2016.

B. Public Policy Militates that Fraud Survive Jane Hughes Death.

i. *Elderly fraud victims and public policy.*

Public policy should not enable the abuse of elderly and otherwise vulnerable citizens of South Carolina. Jane Hughes was 85 years old when Defendant began withdrawing the fraudulent, unauthorized charges from her account and suffered from dementia and vision impairments in the following years until her death. Studies show that such elderly persons are highly susceptible to being defrauded.

According to a recent study by True Link Financial, approximately 36.9% of American seniors are victims of financial abuse in any five-year span. *The True Link Report on Elder Financial Abuse 2015*, TRUE LINK, January 2015 at 11 (https://truelink-wordpress-assets.s3.amazonaws.com/wp-content/uploads/True-Link-Report-On-Elder-Financial-Abuse-012815.pdf). Fraud and financial abuse costs our seniors an estimated total of $36.48 billion annually. *Id.* Of this, approximately $16.99 billion is lost to financial exploitation, which is defined as "when misleading or confusing language is used – *often combined with social pressure and tactics that take advantage of cognitive decline and memory loss* – to obtain a senior's consent to take his or her money." *Id.* at 1. Not surprisingly, the vulnerability of seniors

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to fraud is in part due to the loss of cognitive functions of these individuals. *Id.* at 19. True Link's research shows that conditions such as dementia and Alzheimer's disease increase vulnerability to fraud, and an individual with a below-average memory is 78% more likely to be a victim of fraud. *Id.*

Notably, as the financial exploitation is accomplished through deception that does not quite rise to a criminal level, only a civil remedy is available. *Id.* at 5. The reality is that the time to identify, investigate, report, and prosecute civil offenses now, unlike in 1941, often takes many years and exceeds the lifetime of the victims. The speed and complexity of today's financial transactions, exacerbated by sophisticated technology, furthers fraud in ways not conceivable in 1941. Thus, the impact of the *Mattison* holding is now much more adverse to those most likely to fall victim to fraud than in 1941.

In sum, the public policy impact of South Carolina's survivability statute is long overdue for review in light of electronic phishing, data mining, electronic databases, and targeted advertising. As such, Plaintiffs respectfully request that these questions be certified to the Supreme Court of South Carolina for due reconsideration.

ii. *Survivability of fraud in other jurisdictions.*

Further supporting certification of the question is that the majority of states allow the survival of fraud claims. Indeed, South Carolina is one of only seven (7) states that do not allow a fraud action to survive; the others being Alabama, Arkansas, Massachusetts, Texas, Vermont, and Wisconsin. The codified survival statute of each state is provided in Exhibit L.

The general consensus among states that have offered policy considerations for the survival of fraud actions is that any action which lessens the value of an estate should survive, as

the modern trend is to remove obstructions to the free transfer of property and rights and interests therein. *See, e.g., Jandera v. Lakefield Farmers' Union*, 150 Minn. 476, 479, 185 N.W. 656, 658 (1921); *Micheletti v. Moidel*, 94 Colo. 587, 591, 32 P.2d 266, 267 (1934); *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 154 Idaho 37, 41, 293 P.3d 661, 665 (2013).

In light of these majority state's policy considerations, in addition to the issues set forth above, Plaintiffs respectfully submit that these questions are ripe to be certified to the Supreme Court of South Carolina for due reconsideration.

IV. Plaintiffs Claim for Breach of Duty of Good Faith and Fair Dealing.

Plaintiffs concede that South Carolina jurisprudence militates a dismissal of their claim for breach of the implied covenant of good faith and fair dealing.

CONCLUSION

Defendant's motion to dismiss lacks bases and should be denied. Plaintiffs sufficiently stated causes of actions and alleged adequate facts to obtain relief from Defendant. Reasonably read, the Third Amended Complaint raises numerous substantive issues of disputed fact requiring that this matter proceed to discovery for a proper and fair resolution. Given Defendant's unclean hands and other substantive reasons, the statute of limitations for Plaintiffs' claims should be equitably tolled. Finally, Plaintiffs pray that the issue of whether the fraud claims belonging to the Estate of Jane Hughes survive be certified to the South Carolina Supreme Court.

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Respectfully Submitted,

MIKE KELLY LAW GROUP, LLC

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Columbia, South Carolina

May 6, 2016

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Bank of America

OPTIONAL LINE PROTECTION PLAN℠ ADDENDUM ("ADDENDUM")

Borrower(s):

JOHN P HUGHES SR

JANE K HUGHES

Credit Line Agreement Date: JUNE 13, 2006

Protection Date: JUNE 13, 2006

Credit Line Number: _____

IMPORTANT INFORMATION ABOUT BANK OF AMERICA'S LINE PROTECTION PLAN

LINE PROTECTION PLAN ONLY PROVIDES PROTECTION ON THE VARIABLE PORTION OF YOUR CREDIT LINE. THIS PLAN DOES NOT PROVIDE PROTECTION FOR ANY FIXED RATE LOAN OPTIONS INCLUDED IN YOUR CREDIT LINE.

This Product is Optional. I understand that the purchase of Line Protection Plan is optional. Whether or not I purchase Line Protection Plan will not affect My application for credit or the terms of any existing credit agreement I have with Bank of America.

Termination of Line Protection Plan: I have the right to cancel Line Protection Plan at any time by making a written request. Bank of America has the right to cancel Line Protection Plan upon sixty (60) days notice to Me.

Line Protection Plan will automatically terminate in any of the following circumstances:

1. Any Monthly Fee remains unpaid ninety (90) days after its due date;
2. The Credit Line is charged off to profit and loss;
3. The Credit Line is closed or refinanced;
4. The Credit Line and its servicing is transferred to an unaffiliated lender;
5. Ten (10) years from the Agreement Date listed above.

Amount of Fee: The Monthly Fee for the selected Line Protection Plan option is _____ percent of My Minimum Monthly Payment.

Eligibility Requirements, Conditions and Exclusions: I understand there are eligibility requirements, conditions and exclusions that could prevent Me from receiving benefits under Line Protection Plan. The following sections of the Line Protection Plan Addendum contain a complete explanation of eligibility requirements, conditions and exclusions:

For **Definitions**, refer to Section I

For **Disability Protection**, refer to Section III A

For **Involuntary Unemployment Protection** refer to Section III B

For **Accidental Death Protection**, refer to Section III C

FOR BANK USE ONLY:

Associate Name: _____ **Telephone Number:** _____

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Credit Line Number: _____

Initial Below Next to the Option Selected	Protection Options	Type of Protection	Benefit Period	Monthly Fee as a Percentage of My Minimum Monthly Payment
BPG ( )	Disability (DIS)/Accidental Death (AD)	Single	6 months	4.5%
BPH ( )	Disability (DIS)/Accidental Death (AD)	Joint	6 months	8.5%
BPI ( )	Involuntary Unemployment (IU)/Accidental Death (AD)	Single	6 months	5.5%
BPJ ( )	Involuntary Unemployment (IU)/Accidental Death (AD)	Joint	6 months	9.5%
BPK ( )	Disability (DIS)/Involuntary Unemployment (IU)/Accidental Death (AD)	Single	6 months	8.0%
BPL ( )	Disability (DIS)/Involuntary Unemployment (IU)/Accidental Death (AD)	Joint	6 months	13.5%

PLEASE NOTE ALL PROTECTED BORROWERS MUST INITIAL THIS DOCUMENT NEXT TO THE OPTION SELECTED ABOVE.

Refer to section III for specific details pertaining to these options.

If selected, the above protection will be provided subject to the terms of this Addendum. Protection will expire ten (10) years from Agreement Date listed on Page 1 of this document regardless of the Protection Date. By signing below, each Borrower acknowledges that they have read and agreed to the terms of this Addendum.

☐ **I/We ELECT single protection** for the Borrower listed below.

Print Protected Borrower's Name: _____

☐ **I/We ELECT joint protection** for the two Borrowers listed below.

Print 1st Protected Borrower's Name: _____

Print 2nd Protected Borrower's Name: _____

☑ **I/We DECLINE to purchase any Protection on this Credit Line.**

By signing below, I/we acknowledge receipt of the Important Information shown on page 1 and the above product disclosures. After reviewing the above information about Line Protection Plan and having full opportunity to read the Addendum and ask questions, I/we make the choice selected above.

Please Print Borrower's Name: JOHN P HUGHES SR

Borrower's Signature

Please Print Borrower's Name: JANE K HUGHES

Borrower's Signature

Please Print Borrower's Name:

Borrower's Signature

Please Print Borrower's Name:

Borrower's Signature

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This Addendum amends the Agreement ("Agreement" refers to the Credit Line Agreement). In this Addendum, the term "I", "Me", and "My" refers to each Protected Borrower named above, jointly and severally, and "You" and "Yours" refers to Bank of America, N.A. Unless otherwise defined in this Addendum, all capitalized terms shall have the same meaning as set forth in the Agreement.

THIS ADDENDUM PROVIDES FOR THE CANCELLATION OF ALL OR PART OF THE OUTSTANDING BALANCE, INCLUDING INTEREST, UNDER THE AGREEMENT UPON THE OCCURRENCE OF CERTAIN EVENTS. EXCEPT FOR REFUNDING THE MONTHLY FEE AS SPECIFIED BELOW, IN NO CASE DOES THIS ADDENDUM OBLIGATE THE BANK TO PAY ANY AMOUNT TO THE PROTECTED BORROWER(S).

TYPES OF PROTECTION YOU SELECTED. The protection I selected is shown on page 2 of this Addendum. I understand that other Protection packages are available.

I. DEFINITIONS

"Accidental Death" means that the Protected Borrower's death meets all of the following criteria:

1. Is directly due to accidental injury;
2. Is independent of all other causes, except accidental injury;
3. Is unintended, unexpected, and unforeseen;
4. Occurs after the Protection Date; and
5. Occurs within ninety (90) days after the date of accidental injury.

"Credit Line" means the line of credit issued by Bank of America, N.A. For purposes of the Line Protection Plan, Credit Line does NOT include any portions of the line of credit that are part of a Fixed Rate Loan Option. For Agreements originated in Texas, Credit Line is referred to as "Account."

"Disability" or **"Disabled"** means that after the Protection Date:

1. I become and remain unable to perform the major duties of My occupation at the time I became disabled, and I am not working for wages or profit during the disability;
2. I am under the continuous care of a licensed physician (other than Myself);
3. I have been disabled longer than thirty (30) consecutive days;
4. I have sent You satisfactory proof of My disability from the treating physician; and
5. I am disabled as a result of an injury or sickness not otherwise excluded.

"Draw Date" means the date upon which I take a credit advance on My Credit Line.

"Expiration Date" means the date ten (10) years from the Agreement Date upon which Protection automatically expires.

"Full Time Work" means working for wages or profit at least thirty (30) hours per week for the same employer.

"Initial Draw Date" means the date upon which I first take a credit advance on My Credit Line.

"Involuntary Unemployment" or **"Involuntarily Unemployed"** means that after the Protection Date I become and remain unemployed due to one of the following:

1. Layoff - a suspension of employment by My employer, which continues more than thirty (30) days;
2. Termination - a complete and permanent severance of employment by My employer;
3. Strike - an authorized, unionized labor dispute, that continues more than thirty (30) days, by a chartered or previously organized trade or labor union, through the coalition of its members (including Me), to obtain higher wages, shorter hours of employment, better working conditions or some other concession from My employer, by the employees stopping work at a pre-concerted time, which involves a combination of persons and not a single individual. Non-union collective bargaining is not included in this definition;
4. Lockout - My employer's discharge of employees (including Me) or temporary closing of a place of employment, in response to organized employee activity, that continues more than thirty (30) days.

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"Minimum Monthly Payment" means the minimum amount required by You for the payment of principal and interest under the Agreement. Minimum Monthly Payment does NOT include any past due principal or interest, or other fees or services.

"Monthly Fee" means the amount charged by You for My Line Protection Plan as stated under the Cost of Protection below.

"Monthly Payment" means the minimum amount required by You for the payment of principal and interest under the Agreement, plus the Monthly Fee. Monthly Payment does NOT include any past due principal or interest, or other fees or services.

"Monthly Payment Period" means the period in which the monthly principal and interest payment plus the Monthly Fee is due.

"Monthly Periodic Statement" means the monthly statement that You will send to Me if I have an Outstanding Balance on My Credit Line that will show, among other things, credit advances, finance charges, other charges, payments made, other credits, My previous Outstanding Balance, and My new Outstanding Balance.

"Outstanding Balance" means the balance of the Credit Line which, if applicable, includes credit advances, accrued interest on the outstanding credit advances, and fees and charges. For purposes of Line Protection Plan, Outstanding Balance does NOT include any amounts that are part of a Fixed Rate Loan Option.

"Payment Option" means the repayment schedule that I have chosen for any credit advances taken on this Credit Line.

"Protection Date" means the date upon which My Line Protection Plan becomes effective as shown on Page 1 of this document. No benefits are available under Line Protection Plan for any Disability, Involuntary Unemployment or Accidental Death that occurs prior to the Protection Date.

II. YOUR COST OF PROTECTION

A. MONTHLY COST OF PROTECTION

The Monthly Fee is shown on page 2 and shall be payable at the same time and place as payments of principal and interest under the Agreement and any related documents. As the amount of the Minimum Monthly Payment changes, You will recalculate the Monthly Fee as shown above. No Monthly Fee will be charged for any month in which there is no Minimum Monthly Payment due to You. I understand that You retain the right to adjust the Monthly Fee as a percentage of My Minimum Monthly Payment if you provide me with sixty (60) days advance notice of such adjustment and an opportunity to cancel the Protection without penalty before the adjustment becomes effective.

B. APPLICATION OF PAYMENTS

Payments made on the Agreement will be applied first to the Monthly Fee and then to the other amounts due under the Agreement and Security Instrument. All additional amounts shall be applied as stated in the Agreement and Security Instrument.

III. PROTECTION OPTIONS

A. DISABILITY PROTECTION

BENEFITS: You will cancel up to a maximum of six (6) Monthly Payments regardless of the number of occurrences of Disability. If Joint Protection is purchased, You will cancel up to a maximum six (6) Monthly Payments for the Disability of **each** Protected Borrower, regardless of the number of occurrences of Disability. In order for You to cancel any Monthly Payments:

1. I must be Disabled longer than thirty (30) consecutive days to activate this feature. Once I have been Disabled longer than thirty (30) days, You will cancel Monthly Payments from the first day of My

Disability, assuming all other eligibility requirements have been met and no exclusions apply. Cancellation of Monthly Payments will stop when I am no longer continuously Disabled or when a total of six (6) Monthly Payments have been cancelled, whichever occurs first.

2. In any Monthly Payment Period in which I am Disabled for less than the entire period, You will cancel a portion of the Monthly Payment based on the number of days I am Disabled times a dailyamount equal to one-thirtieth (1/30) of the Monthly Payment.

3. I do not have to use all of My Monthly Payments for Disability at one time. If I am Disabled for less than six (6) months, You will cancel the remaining Monthly Payments during future periods of Disability, up to a cumulative total of six (6) Monthly Payments.

4. Cancellation of all or a portion of a Monthly Payment will be applied within seven (7) business days of You receiving satisfactory proof of My Disability for the applicable Monthly Payment Period.

5. If I return to work and then become Disabled again within ninety (90) days, I do not have to wait another thirty (30) days to receive Protection unless the causes of each Disability are different and unrelated. You will not cancel any part of My Monthly Payment for the period I return to work and I am responsible for making My Monthly Payments.

6. Disability ends when I no longer meet the definition of Disability.

ELIGIBILITY

1. I must have worked Full Time for wages or profit at least thirty (30) hours per week, for the same employer, on a continuous basis during the three-month period immediately preceding the date of My Disability.

2. I am **NOT** eligible for Disability Protection if I retire or become unemployed after the Protection Date.

EXCLUSIONS:

1. You will **NOT** cancel Monthly Payments if My **Disability** is a result of:

a. Normal pregnancy or childbirth;
b. Attempted suicide or intentionally self-inflicted injury, while sane or insane;
c. Participation in a riot or commission of an assault or felony; or
d. An injury or sickness that occurs prior to the Protection Date.

CALCULATION OF BENEFITS:

1. For purposes of cancellation, the Monthly Payment that will be cancelled will be equal to the Monthly Payment as shown on My Monthly Periodic Statement immediately preceding the date of My Disability.
2. If I was under the treatment of, or consulted with, a licensed physician for the medical condition related to My Disability within the ninety (90) days prior to My Disability and I took a credit advance or changed My Payment Option in that same ninety (90) day period, You will cancel the Monthly Payment as shown on My Monthly Periodic Statement date just prior to that credit advance orPayment Option change. If I changed My Payment Option more than once or took more than one credit advance within the 90-day period before My Disability, You will use the Monthly Periodic Statement prior to the earliest of any credit advances or Payment Option changes taken in the 90-day period.
3. The maximum amount that can be cancelled in any one month is $750.00 plus the Monthly Fee.
4. Monthly Payments will not be cancelled during any benefit period if the Outstanding Balance protected for that benefit reaches zero ($0), even if the qualifying Disability continues.

B. INVOLUNTARY UNEMPLOYMENT PROTECTION

BENEFITS: If My Involuntary Unemployment begins more than ninety (90) days after the Initial Draw Date, You will cancel up to a maximum of six (6) Monthly Payments, regardless of the number of occurrences of Involuntary Unemployment. If Joint Protection is purchased, You will cancel up to a maximum of six (6) Monthly Payments for the Involuntary Unemployment of **each** Protected Borrower, regardless of the number of occurrences of Involuntary Unemployment.

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1. I must be Involuntarily Unemployed longer than thirty (30) consecutive days to activate benefits for Involuntary Unemployment. Once I have been Involuntarily Unemployed for longer than thirty (30) days, You will cancel Monthly Payments from the first day of My Involuntary Unemployment. Cancellation of Monthly Payments will stop when I am no longer continuously Involuntarily Unemployed, when I return to work more than twenty (20) hours per week, or when a total of six (6) Monthly Payments have been cancelled, whichever occurs first:

2. In any Monthly Payment Period in which I am Involuntarily Unemployed for less than the entire period, You will cancel a portion of the Monthly Payment based upon the number of days I am Involuntarily Unemployed times a daily amount equal to one-thirtieth (1/30) of the Monthly Payment.

3. I do not have to use all of My Monthly Payments for Involuntary Unemployment at one time. If I am Involuntarily Unemployed for less than six (6) months, You will cancel the remaining Monthly Payments during future periods of Involuntary Unemployment up to a cumulative total of six (6) Monthly Payments.

4. Cancellation of all or a portion of a Monthly Payment will be applied within seven (7) business days of You receiving satisfactory proof of My Involuntary Unemployment for the applicable Monthly Payment Period.

5. If I return to work and then become Involuntarily Unemployed again within ninety (90) days, You will not require that I wait another thirty (30) days to receive Protection. I understand that You will not cancel any part of My Monthly Payment for the period I return to work and I am responsible for making these payments.

6. If I am receiving severance pay, salary continuation or anyother compensation from My employer, I must be Involuntarily Unemployed longer than thirty (30) consecutive days after the end of the severance pay, salary continuation or any other compensation (including the period of time for which lump sum amounts were paid) before You will cancel Monthly Payments.

ELIGIBILITY

To be eligible for Involuntary Unemployment Protection I must have worked Full Time for wages or profit at least thirty (30) hours per week, for the same employer, on a continuous basis during the three-month period immediately preceding the date of Involuntary Unemployment.

I am **NOT** eligible for Involuntary Unemployment Protection if I am:

1. An independent contractor, meaning a person who exercises an independent business and who is not subject to the immediate direction and control of an employer;

2. Self-employed, meaning a person working for income coming directly from his or her own business, trade, profession or a partnership (a company or entity in which I have a ten percent [10%] or greater equity or ownership interest will be regarded as My own business);

3. A seasonal worker, meaning a person whose occupation can be carried on only during certain seasons or fairly definite portions of the year and where the customary period of employment is less than one thousand (1,000) hours during a calendar year.

EXCLUSIONS: You will **NOT** cancel Monthly Payments if My Involuntary Unemployment:

1. Begins prior to My Protection Date;

2. Is due to a voluntary forfeiture of salary, wages, or employment income;

3. Is due to voluntary resignation or retirement;

4. Is due to disability caused by accident, sickness, disease, pregnancy or childbirth;

5. Is due to termination as a result of willful misconduct (a transgression of some established and definite rule of action, a forbidden act or omission, or an act or omission involving dishonesty, or a dereliction of duty, active or passive, which is willful in character and beyond simple negligence) or criminal misconduct (unlawful behavior as determined by local, State or Federal law);

6. Is due to seasonal employment, business failure if self-employed, or a severing of employment relationship if an independent contractor;

7. Is due to any act of war, declared or undeclared.

In addition, Monthly Payments will not be cancelled if I am receiving severance pay, salary continuation or any other compensation from My employer until I have been Involuntarily Unemployed longer than thirty (30) consecutive days after the end of the period covered by the severance pay, salary continuation, or other compensation, including the period of time for which lump sum amounts were paid.

CALCULATION OF BENEFITS:

1. For purposes of cancellation, the Monthly Payment that will be cancelled will be equal to the Monthly Payment as shown on My Monthly Periodic Statement immediately preceding the date of My Involuntary Unemployment.
2. If I took a credit advance or changed My Payment Option within the ninety (90) days prior to My Involuntary Unemployment, You will cancel the Monthly Payment as shown on My Monthly Periodic Statement date just prior to that credit advance or Payment Option change. If I changed My Payment Option more than once or took more than one credit advance within the 90-day period before My Involuntary Unemployment, You will use the Monthly Periodic Statement prior to the earliest of any credit advances or Payment Option changes taken in the 90-day period.
3. The maximum amount that can be cancelled in any one month is $750.00 plus the Monthly Fee.
4. Monthly Payments will not be cancelled during any benefit period if the Outstanding Balance protected for that benefit reaches zero ($0), even if the qualifying Involuntary Unemployment continues.

C. ACCIDENTAL DEATH PROTECTION

BENEFITS: Upon the Accidental Death of either Protected Borrower, You will pay the Benefit Amount not to exceed the lesser of the Outstanding Balance on the Credit Line or $50,000 for each Protected Borrower. Under no circumstances shall the Benefit Amount for one or both Protected Borrowers exceed the Outstanding Balance on the Credit Line as of the date of Accidental Death.

The "Benefit Amount" is equal to the Outstanding Balance of the Credit Line, including late fees and accrued interest, if any, as of the date of Accidental Death of a Protected Borrower, not to exceed a total of $50,000 per protected Borrower.

ELIGIBILITY

All Protected Borrowers are eligible for Accidental Death Protection.

EXCLUSIONS: You will **NOT** cancel the Outstanding Balance of the Credit Line if **Death** results from:

1. Suicide or intentionally self-inflicted injury, while sane or insane;

2. Disease or treatment of disease, or any medical treatment unless for the treatment of an accidental injury;

3. Infection, unless the infection is a direct result of the accidental injury;

4. The use of alcohol or other intoxicants;

5. The use of any drug, sedative or narcotic, unless prescribed by a physician;

6. Participation in a riot or commission of an assault or felony;

7. Operation or riding in an aircraft, unless as a fare-paying passenger or acting as a crew member on a regularly scheduled airline; or

8. War or act of war, declared or undeclared.

Additionally, You will **NOT** cancel the Outstanding Balance of the Credit Line if **Death** occurs prior to the Protection Date.

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IV. BENEFIT REQUEST PROCEDURES

A. BENEFIT REQUESTS FOR DISABILITY

1. To request cancellation of Monthly Payments for Disability, write to: Line Protection Plan, NC4-105-02-09, PO Box 21848, Greensboro, NC 27420 or call 1.888.356.4892.

2. Forms will be sent for Me to complete within fifteen (15) days after the request. These forms must be completed by Me, My employer and the licensed, treating physician. You will not cancel any Monthly Payments until these forms are properly completed and returned to You.

3. In order to receive benefits for Disability Protection, I must provide written proof satisfactory to You of My Disability. I will provide You written proof of My continuing Disability monthly or upon request. You also retain the right to have Me examined by any doctor of Your choice.

4. Upon request, I will provide You one or more written authorizations to contact My treating physician to discuss My Disability or to obtain relevant medical records.

5. To avoid additional interest and late fees on the Agreement, I should continue to make regularly scheduled Monthly Payments until the benefit feature is activated. See information under "ADDITIONAL PROCEDURES FOR DISABILITY OR INVOLUNTARY UNEMPLOYMENT" for information about Your rights during the claims process.

6. Unless I am legally incapable, I waive My rights to cancellation of Monthly Payments if I fail to notify You within six (6) months of the start of My Disability. I agree to not begin any legal action less than sixty (60) days, or more than three (3) years, after the submission to You of any required form.

B. BENEFIT REQUESTS FOR INVOLUNTARY UNEMPLOYMENT

1. To request cancellation of Monthly Payments for Involuntary Unemployment, write to: Line Protection Plan, NC4-105-02-09, PO Box 21848, Greensboro, NC 27420 or call 1.888.356.4892.

2. Forms will be sent for Me to complete within fifteen (15) days after the request. These forms must be completed by Me and My employer. You will not cancel any Monthly Payments until these forms are properly completed and returned to You.

3. If My Involuntary Unemployment is the result of either involuntary layoff or termination by My employer, I must provide You with satisfactory evidence that I have registered for work with My state employment office or a recognized employment agency, within thirty (30) days after the last day employed. This evidence may include a statement signed by an official of the state employment office or recognized employment agency. I must remain registered during the period in which I have activated Protection, and I must be actively seeking new employment.

4. If My Involuntary Unemployment is the result of a strike or lockout, I must provide You with satisfactory evidence, which may include a statement signed by an officer of My union.

5. I will give You written proof of My continuing Involuntary Unemployment on a monthly basis. This proof must be satisfactory to You.

6. To avoid additional interest and late fees on My Agreement, I should continue to make My scheduled Monthly Payments until the benefit feature is activated. See information under "ADDITIONAL PROCEDURES FOR DISABILITY OR INVOLUNTARY UNEMPLOYMENT". for information about Your rights during the claims process.

7. Unless I am legally incapable, I waive My rights to cancellation of Monthly Payments if I fail to notify You within six (6) months of the start of My Involuntary Unemployment. I agree to not begin any legal action less than sixty (60) days, or more than three (3) years, after the submission to You of any required form.

C. BENEFIT REQUESTS FOR ACCIDENTAL DEATH PROTECTION

1. To request activation of benefits for Accidental Death, write to: Line Protection Plan, NC4-105-02-09, PO Box 21848, Greensboro, NC 27420 or call 1.888.356.4892.

2. Benefit requests for Accidental Death must be made in writing by a remaining Protected Borrower, survivors of the Protected Borrower, or the legal representative of the Protect Borrower's estate and must be accompanied by proof of Accidental Death in the form of a certified death certificate.

3. If the request and proof of death are received within sixty (60) days of the date of Accidental Death, You will cancel the Benefit Amount as of the date of death, and any remaining Borrower will not be obligated to pay any interest or fees that accrue on the Benefit Amount after the date of death.

4. If the request and proof of Accidental Death are received more than sixty (60) days after the date of death, You will cancel the Benefit Amount as of the date of receipt, and any remaining Borrower or the estate of the Protected Borrower shall be liable for any interest or fees that accrue on the Benefit Amount after the date of Accidental Death.

5. To avoid additional interest and late fees on the Agreement, any remaining Borrowers should continue to make scheduled Monthly Payments until the benefit feature is activated.

D. ADDITIONAL PROCEDURES FOR DISABILITY OR INVOLUNTARY UNEMPLOYMENT

If the protected Disability or Involuntary Unemployment covers all of My missed Monthly Payments, You CANNOT TRY TO COLLECT WHAT I OWE OR FORECLOSE UPON OR REPOSSESS ANY COLLATERAL UNTIL THREE (3) CALENDAR MONTHS AFTER My first missed Monthly Payment is due or until My claim is accepted or rejected by You, whichever comes first. You can, however, try to collect, foreclose, or repossess if I have money due and owing or I am otherwise in default when My Disability or Involuntary Unemployment claim is made or if a senior mortgage or lien holder is foreclosing.

If My request for benefits is accepted within the three (3) calendar months, You must cancel My Monthly Payments as though I had paid on time. If My request for benefits is rejected within the three (3) calendar months, I will have thirty-five (35) days from the date that the rejection is sent to pay any past due payments, plus late charges. I can contact You and You will tell Me how much I owe. After that time, You can take action to collect or foreclose or repossess any collateral I may have given.

If My request for benefits is accepted but requires that I send in additional forms to remain eligible for continued benefits, I will send in these completed additional forms no later than required. If I do not send in these forms on time, My benefits may be stopped and You may then be able to take action to collect or foreclose or repossess any collateral I may have given.

V. TERMINATION

A. All Protections terminate when the first of the following occurs:

1. The Monthly Fee for any Monthly Payment Period remains unpaid ninety (90) days after its due date;
2. The Credit Line evidenced by the Agreement is subject to charge off by You.
3. The Credit Line is closed or refinanced;
4. The Credit Line is transferred to another (non-affiliated) creditor and is no longer serviced by You;
5. You receive a written request from Me to terminate the Protection. The written request should be sent to: Line Protection Plan, NC4-105-02-09, PO Box 21848, Greensboro, NC 27420 or by calling 1.888.356.4892. If I terminate Protection within sixty (60) days of the Agreement Date, You will return any Monthly Fee paid by Me, without interest;
6. The Expiration Date is reached;
7. I change the payment requirement from monthly to any other period; or
8. Sixty (60) days after You notify Me that the Protection is being terminated. If You send Me such notice or otherwise attempt to modify this Addendum, I may immediately cancel the Protection without penalty.
9. My obligation on the Agreement is assumed by other borrower(s) and any Protected Borrower is released from liability under the Agreement.

B. Effects of Termination

1. If the termination event occurs in the first fifteen (15) days of my Monthly Payment Period, then the effective date of termination is the last day of the prior Monthly Payment Period and the Fee for the current Monthly Payment Period will be unearned and I will not owe this Fee. Otherwise, the effective date of termination is the last day of the current Monthly Payment Period and the Fee will be earned. I will pay the full Monthly Payment, including the Fee, for the Monthly Payment Period in which my Protection is terminated.

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2. Unless the Agreement has been closed or refinanced, if a protected event occurs prior to the effective date of termination, You will continue to provide the related Protection after the effective date of termination in accordance with the provisions in this Addendum.
3. I will be billed for any Monthly Fees accrued up to the date of termination. These Monthly Fees may post on subsequent billing statements.

VI. OTHER PROVISIONS

A. TAX IMPACT OF THE LINE PROTECTION PLAN. I understand that cancellation of all or a part of the Credit Line may be taxable income to Me, My estate or that of My survivors. If I have any questions, I should contact a financial advisor concerning the tax impact of the Protection.

B. JOINT PROTECTION:
1. The Bank may rely upon the instructions or notice of either Protected Borrower with respect to the Protection, and such instructions or notice shall be binding on all Borrowers.
2. If both Protected Borrowers are entitled to Protection at the same time, for example both are Disabled, You will cancel only one Monthly Payment at a time, but I may instruct You which of us to treat as the Protected Borrower with respect to the cancelled Monthly Payments.

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Bank of America

DE5-011-01-09
P.O. Box 17072
Wilmington, DE 19850

CANCELLATION NOTICE

Loan number ending in
4699

0010409 01 AT 0.403 **AUTO 18 T 7301 29302-271732 -C02-P104194

JOHN HUGHES SR
JANE K HUGHES
632 CRYSTAL DR
SPARTANBURG, SC 29302-2717

Date
March 17, 2015

Customer service
1.866.731.4210

The optional Line Protection Plan® will be cancelled on September 30, 2015.

The Line Protection Plan ("Protection Plan") for the above referenced loan will be cancelled effective September 30, 2015 pursuant to the termination provision of your Plan addendum that was provided at the time of loan closing.

What you need to know

You're no longer being charged for the Protection Plan as of April 1, 2015. Please do not send any further payments for Protection Plan fees.

Going forward, any payments that would have previously been applied to Protection Plan fees will be applied to other amounts owed as described in your loan documents, unless refunded to you. If we apply the payment to other amounts owed and you later determine that you mistakenly paid Protection Plan fees and prefer to have a refund of these amounts, please contact us at 1.866.731.4210.

Unless the Protection Plan terminates earlier pursuant to its terms, it will continue to be provided at no cost until the effective cancellation date of September 30, 2015. During the remainder of the Protection Plan, it will continue to be subject to all terms and conditions of your Protection Plan addendum. Please refer to your Protection Plan addendum for a complete list of termination reasons.

The Protection Plan cancellation doesn't affect any pending benefit requests.

You can still request benefits for qualifying events under the Protection Plan that occur prior to the cancellation effective date of September 30, 2015. The Protection Plan requires that benefits be requested within 365 days of the start of a protected event.

ARLGG64K app 2/20/2015

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0010409-N-LPP-A-4699- - -DBCS

7501-02-00-0010409-0001-0010431

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Line Protection Plan is an optional line protection plan that can, depending on your specific Plan, provide benefits for a qualifying Accidental Death, Loss of Life, Involuntary Unemployment, Disability, Hospitalization or Family Leave event experienced by a protected borrower.

The protected borrower(s) associated with this loan are listed below:
JOHN P HUGHES

We're here to help

If you have questions, please call us at 1.866.731.4210, Monday through Friday from 8 a.m. to 8 p.m. Eastern.

866-317-5116 -

Randolph

IMPORTANT DISCLOSURES

Bank of America N.A., the servicer of your home loan, is required by law to inform you that this communication is from a debt collector.

If you're currently in a bankruptcy proceeding, or have previously obtained a discharge of this debt under applicable bankruptcy law, this notice is for information only and is not an attempt to collect the debt, a demand for payment, or an attempt to impose personal liability for that debt. You're not obligated to discuss your home loan with us or enter into a loan modification or other loan-assistance program. You should consult with your bankruptcy attorney or other advisor about your legal rights and options.

MILITARY PERSONNEL/SERVICEMEMBERS: If you or your spouse is a member of the military, please contact us immediately. The federal Servicemembers Civil Relief Act (SCRA) and comparable state laws afford significant protections and benefits to eligible military service personnel. Please note, however, that military service and/or SCRA qualification may not necessarily prevent foreclosure. If your loan is in default, a court order approval may be obtained for foreclosure to proceed. If you are having difficulty making your payments, please contact the Enterprise Military Benefits Unit at your earliest convenience by calling 1.877.345.0693. If you're calling from outside the U.S., please call 1.817.245.4094. Both numbers are open 24 hours a day, seven days a week to discuss the various home retention options that may be available.

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May 6, 2015

0001492-0003089 SWADF 001 468002

001492-003089
John P Hughes
632 Crystal Dr
Spartanburg, SC 29302

John P Hughes:

The Line Protection Plan® (Plan) addendum for your Bank of America loan ending in 4699 is enclosed, per your request.

Listed below is the protection plan you selected and the details of that protection.

6 month, Involuntary Unemployment, Disability, Accidental Death and Hospitalization protecting the following protected borrower(s):

John P Hughes

As of April 1, 2015, you will not be charged a monthly Plan fee for the Plan. You should have received a communication that your Plan will be cancelled effective September 30, 2015 unless terminated earlier pursuant to the terms and conditions of your Plan. You may cancel your enrollment in your Plan at any time prior to September 30, 2015.

You can still request benefits for qualifying events that occur prior to the cancellation effective date; however, you must request benefits within 365 days of the start of the event. Please note that the loan will not be eligible for any Plan benefits for events that occur after the Plan cancellation effective date.

There's nothing you need to do. This document is for your records only.

If you have questions regarding past Plan fees, or would like to request a benefit, please call us at 1.866.317.5116, Monday through Friday from 8 a.m. to 8 p.m. Eastern or write to us at:

Protection Plan Services
PO Box 961290
Fort Worth, TX
76161-0290

Protection Plan Services

ARR3KC5K R032715

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OPTIONAL LINE PROTECTION PLAN™
ADDENDUM ("ADDENDUM")

This Addendum amends the Agreement ("Agreement" refers to the Credit Line Agreement). In this Addendum, the term "I", "Me", and "My" refers to each Protected Borrower named above, jointly and severally, and "You" and "Yours" refers to Bank of America, N.A. Unless otherwise defined in this Addendum, all capitalized terms shall have the same meaning as set forth in the Agreement.

THIS ADDENDUM PROVIDES FOR THE CANCELLATION OF ALL OR PART OF THE OUTSTANDING BALANCE, INCLUDING INTEREST, UNDER THE AGREEMENT UPON THE OCCURRENCE OF CERTAIN EVENTS. EXCEPT FOR REFUNDING THE MONTHLY FEE AS SPECIFIED BELOW, IN NO CASE DOES THIS ADDENDUM OBLIGATE THE BANK TO PAY ANY AMOUNT TO THE PROTECTED BORROWER(S).

TYPES OF PROTECTION YOU SELECTED. The protection I selected is shown on page 2 of this Addendum. I understand that other Protection packages are available.

I. DEFINITIONS

"Accidental Death" means that the Protected Borrower's death meets all of the following criteria:

1. Is directly due to accidental injury;
2. Is independent of all other causes, except accidental injury;
3. Is unintended, unexpected, and unforeseen;
4. Occurs after the Protection Date; and
5. Occurs within ninety (90) days after the date of accidental injury.

"Credit Line" means the line of credit issued by Bank of America, N.A. For purposes of the Line Protection Plan, Credit Line does NOT include any portions of the line of credit that are part of a Fixed Rate Loan Option. For Agreements originated in Texas, Credit Line is referred to as "Account."

"Disability" or **"Disabled"** means that after the Protection Date:

1. I become and remain unable to perform the major duties of My occupation at the time I became disabled, and I am not working for wages or profit during the disability;
2. I am under the continuous care of a licensed physician (other than Myself);
3. I have been disabled longer than thirty (30) consecutive days;
4. I have sent You satisfactory proof of My disability from the treating physician; and
5. I am disabled as a result of an injury or sickness not otherwise excluded.

"Draw Date" means the date upon which I take a credit advance on My Credit Line.

"Expiration Date" means the date ten (10) years from the Agreement Date upon which Protection automatically expires.

"Full Time Work" means working for wages or profit at least thirty (30) hours per week for the same employer.

"Initial Draw Date" means the date upon which I first take a credit advance on My Credit Line.

"Involuntary Unemployment" or **"Involuntarily Unemployed"** means that after the Protection Date I become and remain unemployed due to one of the following:

1. Layoff - a suspension of employment by My employer, which continues more than thirty (30) days;
2. Termination - a complete and permanent severance of employment by My employer;
3. Strike - an authorized, unionized labor dispute, that continues more than thirty (30) days, by a chartered or previously organized trade or labor union, through the coalition of its members (including Me), to obtain higher wages, shorter hours of employment, better working conditions or some other concession from My employer, by the employees stopping work at a pre-concerted time, which involves a combination of persons and not a single individual. Non-union collective bargaining is not included in this definition;

4. Lockout - My employer's discharge of employees (including Me) or temporary closing of a place of employment, in response to organized employee activity, that continues more than thirty (30) days.

"Minimum Monthly Payment" means the minimum amount required by You for the payment of principal and interest under the Agreement. Minimum Monthly Payment does NOT include any past due principal or interest, or other fees or services.

"Monthly Fee" means the amount charged by You for My Line Protection Plan as stated under the Cost of Protection below.

"Monthly Payment" means the minimum amount required by You for the payment of principal and interest under the Agreement, plus the Monthly Fee. Monthly Payment does NOT include any past due principal or interest, or other fees or services.

"Monthly Payment Period" means the period in which the monthly principal and interest payment plus the Monthly Fee is due.

"Monthly Periodic Statement" means the monthly statement that You will send to Me if I have an Outstanding Balance on My Credit Line that will show, among other things, credit advances, finance charges, other charges, payments made, other credits, My previous Outstanding Balance, and My new Outstanding Balance.

"Outstanding Balance" means the balance of the Credit Line which, if applicable, includes credit advances, accrued interest on the outstanding credit advances, and fees and charges. For purposes of Line Protection Plan, Outstanding Balance does NOT include any amounts that are part of a Fixed Rate Loan Option.

"Payment Option" means the repayment schedule that I have chosen for any credit advances taken on this Credit Line.

"Protection Date" means the date upon which My Line Protection Plan becomes effective as shown on Page 1 of this document. No benefits are available under Line Protection Plan for any Disability, Involuntary Unemployment or Accidental Death that occurs prior to the Protection Date.

II. YOUR COST OF PROTECTION

A. MONTHLY COST OF PROTECTION.

The Monthly Fee is shown on page 2 and shall be payable at the same time and place as payments of principal and interest under the Agreement and any related documents. As the amount of the Minimum Monthly Payment changes, You will recalculate the Monthly Fee as shown above. No Monthly Fee will be charged for any month in which there is no Minimum Monthly Payment due to You. I understand that You retain the right to adjust the Monthly Fee as a percentage of My Minimum Monthly Payment if you provide me with sixty (60) days advance notice of such adjustment and an opportunity to cancel the Protection without penalty before the adjustment becomes effective.

B. APPLICATION OF PAYMENTS.

Payments made on the Agreement will be applied first to the Monthly Fee and then to the other amounts due under the Agreement and Security Instrument. All additional amounts shall be applied as stated in the Agreement and Security Instrument.

III. PROTECTION OPTIONS

A. DISABILITY PROTECTION

BENEFITS: You will cancel up to a maximum of six (6) Monthly Payments regardless of the number of occurrences of Disability. If Joint Protection is purchased, You will cancel up to a maximum six (6) Monthly Payments for the Disability of each Protected Borrower, regardless of the number of occurrences of Disability. In order for You to cancel any Monthly Payments:

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1. I must be Disabled longer than thirty (30) consecutive days to activate this feature. Once I have been Disabled longer than thirty (30) days, You will cancel Monthly Payments from the first day of My Disability, assuming all other eligibilityrequirements have been met and no exclusions apply. Cancellation of Monthly Payments will stop when I am no longer continuously Disabled or when a total of six (6) Monthly Payments have been cancelled, whichever occurs first.

2. In any Monthly Payment Period in which I am Disabled for less than the entire period, You will cancel a portion of the Monthly Payment based on the number of days I am Disabled times a daily amount equal to one-thirtieth (1/30) of the Monthly Payment.

3. I do not have to use all of My Monthly Payments for Disability at one time. If I am Disabled for less than six (6) months, You will cancel the remaining Monthly Payments during future periods of Disability, up to a cumulative total of six (6) Monthly Payments.

4. Cancellation of all or a portion of a Monthly Payment will be applied within seven (7) business days of You receiving satisfactory proof of My Disability for the applicable Monthly Payment Period.

5. If I return to work and then become Disabled again within ninety (90) days, I do not have to wait another thirty (30) days to receive Protection unless the causes of each Disability are different and unrelated. You will not cancel any part of My Monthly Payment for the period I return to work and I am responsible for making My Monthly Payments.

6. Disability ends when I no longer meet the definition of Disability.

ELIGIBILITY

1. I must have worked Full Time for wages or profit at least thirty (30) hours per week, for the same employer, on a continuous basis during the three-month period immediately preceding the date of My Disability.

2. I am **NOT** eligible for Disability Protection if I retire or become unemployed after the Protection Date.

EXCLUSIONS:

1. You will **NOT** cancel Monthly Payments if My **Disability** is a result of:

   a. Normal pregnancy or childbirth;
   b. Attempted suicide or intentionally self-inflicted injury, while sane or insane;
   c. Participation in a riot or commission of an assault or felony; or
   d. An injury or sickness that occurs prior to the Protection Date.

CALCULATION OF BENEFITS:

1. For purposes of cancellation, the Monthly Payment that will be cancelled will be equal to the Monthly Payment as shown on My Monthly Periodic Statement immediately preceding the date of My Disability.
2. If I was under the treatment of, or consulted with, a licensed physician for the medical condition related to My Disability within the ninety (90) days prior to My Disability and I took a credit advance or changed My Payment Option in that same ninety (90) day period, You will cancel the Monthly Payment as shown on My Monthly Periodic Statement date just prior to that credit advance or Payment Option change. If I changed My Payment Option more than once or took more than one credit advance within the 90-day period before My Disability, You will use the Monthly Periodic Statement prior to the earliest of any credit advances or Payment Option changes taken in the 90-day period.
3. The maximum amount that can be cancelled in any one month is $750.00 plus the Monthly Fee.
4. Monthly Payments will not be cancelled during any benefit period if the Outstanding Balance protected for that benefit reaches zero ($0), even if the qualifying Disability continues.

5. Is due to termination as a result of willful misconduct (a transgression of some established and definite rule of action, a forbidden act or omission, or an act or omission involving dishonesty, or a dereliction of duty, active or passive, which is willful in character and beyond simple negligence) or criminal misconduct (unlawful behavior as determined by local, State or Federal law);
6. Is due to seasonal employment, business failure if self-employed, or a severing of employment relationship if an independent contractor;
7. Is due to any act of war, declared or undeclared.

In addition, Monthly Payments will not be cancelled if I am receiving severance pay, salary continuation or any other compensation from My employer until I have been Involuntarily Unemployed longer than thirty (30) consecutive days after the end of the period covered by the severance pay, salary continuation, or other compensation, including the period of time for which lump sum amounts were paid.

CALCULATION OF BENEFITS:

1. For purposes of cancellation, the Monthly Payment that will be cancelled will be equal to the Monthly Payment as shown on My Monthly Periodic Statement immediately preceding the date of My Involuntary Unemployment.
2. If I took a credit advance or changed My Payment Option within the ninety (90) days prior to My Involuntary Unemployment, You will cancel the Monthly Payment as shown on My Monthly Periodic Statement date just prior to that credit advance or Payment Option change. If I changed My Payment Option more than once or took more than one credit advance within the 90-day period before My Involuntary Unemployment, You will use the Monthly Periodic Statement prior to the earliest of any credit advances or Payment Option changes taken in the 90-day period.
3. The maximum amount that can be cancelled in any one month is $750.00 plus the Monthly Fee.
4. Monthly Payments will not be cancelled during any benefit period if the Outstanding Balance protected for that benefit reaches zero ($0), even if the qualifying Involuntary Unemployment continues.

C. ACCIDENTAL DEATH PROTECTION

BENEFITS: Upon the Accidental Death of either Protected Borrower, You will pay the Benefit Amount not to exceed the lesser of the Outstanding Balance on the Credit Line or $50,000 for each Protected Borrower. Under no circumstances shall the Benefit Amount for one or both Protected Borrowers exceed the Outstanding Balance on the Credit Line as of the date of Accidental Death.

The "Benefit Amount" is equal to the Outstanding Balance of the Credit Line, including late fees and accrued interest, if any, as of the date of Accidental Death of a Protected Borrower, not to exceed a total of $50,000 per protected Borrower.

ELIGIBILITY

All Protected Borrowers are eligible for Accidental Death Protection.

EXCLUSIONS: You will **NOT** cancel the Outstanding Balance of the Credit Line if **Death** results from:

1. Suicide or intentionally self-inflicted injury, while sane or insane;
2. Disease or treatment of disease, or any medical treatment unless for the treatment of an accidental injury;
3. Infection, unless the infection is a direct result of the accidental injury;
4. The use of alcohol or other intoxicants;
5. The use of any drug, sedative or narcotic, unless prescribed by a physician;
6. Participation in a riot or commission of an assault or felony;
7. Operation or riding in an aircraft, unless as a fare-paying passenger or acting as a crew member on a regularly scheduled airline; or
8. War or act of war, declared or undeclared.

Additionally, You will **NOT** cancel the Outstanding Balance of the Credit Line if **Death** occurs prior to the Protection Date.

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3. If the request and proof of death are received within sixty (60) days of the date of Accidental Death, You will cancel the Benefit Amount as of the date of death, and any remaining Borrower will not be obligated to pay any interest or fees that accrue on the Benefit Amount after the date of death.
4. If the request and proof of Accidental Death are received more than sixty (60) days after the date of death, You will cancel the Benefit Amount as of the date of receipt, and any remaining Borrower or the estate of the Protected Borrower shall be liable for any interest or fees that accrue on the Benefit Amount after the date of Accidental Death.
5. To avoid additional interest and late fees on the Agreement, any remaining Borrowers should continue to make scheduled Monthly Payments until the benefit feature is activated.

D. ADDITIONAL PROCEDURES FOR DISABILITY OR INVOLUNTARY UNEMPLOYMENT

If the protected Disability or Involuntary Unemployment covers all of My missed Monthly Payments, You CANNOT TRY TO COLLECT WHAT I OWE OR FORECLOSE UPON OR REPOSSESS ANY COLLATERAL UNTIL THREE (3) CALENDAR MONTHS AFTER My first missed Monthly Payment is due or until My claim is accepted or rejected by You, whichever comes first. You can, however, try to collect, foreclose, or repossess if I have money due and owing or I am otherwise in default when My Disability or Involuntary Unemployment claim is made or if a senior mortgage or lien holder is foreclosing.

If My request for benefits is accepted within the three (3) calendar months, You must cancel My Monthly Payments as though I had paid on time. If My request for benefits is rejected within the three (3) calendar months, I will have thirty-five (35) days from the date that the rejection is sent to pay any past due payments, plus late charges. I can contact You and You will tell Me how much I owe. After that time, You can take action to collect or foreclose or repossess any collateral I may have given.

If My request for benefits is accepted but requires that I send in additional forms to remain eligible for continued benefits, I will send in these completed additional forms no later than required. If I do not send in these forms on time, My benefits may be stopped and You may then be able to take action to collect or foreclose or repossess any collateral I may have given.

V. TERMINATION

A. All Protections terminate when the first of the following occurs:

1. The Monthly Fee for any Monthly Payment Period remains unpaid ninety (90) days after its due date;
2. The Credit Line evidenced by the Agreement is subject to charge off by You.
3. The Credit Line is closed or refinanced;
4. The Credit Line is transferred to another (non-affiliated) creditor and is no longer serviced by You;
5. You receive a written request from Me to terminate the Protection. The written request should be sent to: Line Protection Plan, NC4-105-02-09, PO Box 21848, Greensboro, NC 27420 or by calling 1.888.356.4892. If I terminate Protection within sixty (60) days of the Agreement Date, You will return any Monthly Fee paid by Me, without interest;
6. The Expiration Date is reached;
7. I change the payment requirement from monthly to any other period; or
8. Sixty (60) days after You notify Me that the Protection is being terminated. If You send Me such notice or otherwise attempt to modify this Addendum, I may immediately cancel the Protection without penalty.
9. My obligation on the Agreement is assumed by other borrower(s) and any Protected Borrower is released from liability under the Agreement.

B. Effects of Termination

1. If the termination event occurs in the first five (5) days of my Monthly Payment Period, then the effective date of termination is the last day of the prior Monthly Payment Period and the Fee for the current Monthly Payment Period will be unearned and I will not owe this Fee. Otherwise, the effective date of termination is the last day of the current Monthly Payment Period and the Fee will be earned. I will pay the full Monthly Payment, including the Fee, for the Monthly Payment Period in which my Protection is terminated.

2. Unless the Agreement has been closed or refinanced, if a protected event occurs prior to the effective date of termination, You will continue to provide the related Protection after the effective date of termination in accordance with the provisions in this Addendum.

3. I will be billed for any Monthly Fees accrued up to the date of termination. These Monthly Fees may post on subsequent billing statements.

VI. OTHER PROVISIONS

A. TAX IMPACT OF THE LINE PROTECTION PLAN. I understand that cancellation of all or a part of the Credit Line may be taxable income to Me, My estate or that of My survivors. If I have any questions, I should contact a financial advisor concerning the tax impact of the Protection.

B. JOINT PROTECTION:

1. The Bank may rely upon the instructions or notice of either Protected Borrower with respect to the Protection, and such instructions or notice shall be binding on all Borrowers.

2. If both Protected Borrowers are entitled to Protection at the same time, for example both are Disabled, You will cancel only one Monthly Payment at a time, but I may instruct You which of us to treat as the Protected Borrower with respect to the cancelled Monthly Payments.

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H

JANE K HUGHES
JANE HUGHES WARNER
PHILLIP L HUGHES

Important Information

All balances in your interest bearing checking accounts are now fully guaranteed by the FDIC through 12/31/09. To qualify your accounts for this FDIC guarantee, we must limit the variable interest rate on your accounts to not more than 0.50% through that date. Currently, the rate is less than 0.50%.

Deposit Accounts

Interest Checking

JANE K HUGHES JANE HUGHES WARNER
PHILLIP L HUGHES

Your Account at a Glance

Account Number		5940
Beginning Balance on 02-25-09	$	3,664.98
Deposits and Other Additions	+	2,023.14
Checks Posted	-	886.97
ATM and Debit Card Subtractions	-	399.63
Service Charges and Other Fees	-	20.00
Other Subtractions	-	2,332.59
Ending Balance on 03-26-09	$	2,048.93

Annual Percentage Yield Earned this Statement Period: 0.05%
Interest Paid Year to Date: $0.54

Your Advantage Pricing Relationship

Account Name	Account Number	Qualifying Balance ($)	Type of Balance	Date
Interest Checking	5940	3,586.82	Average	03-25
Regular Savings	4890	198.27	Average	03-25
	Total Qualifying Balance $3,785.09			

Thank you for banking with us. A monthly maintenance fee was applied to your account this statement cycle. You can avoid this fee by maintaining the qualifying balance. If your banking needs have changed, please call Customer Service or visit any Bank of America banking center to help find the checking solution that best meets your needs.

Interest Checking Additions and Subtractions

Date Posted	Amount($)	Resulting Balances($)	Transactions
02-25	399.91-	3,265.07	Bank Of America Des:Line Pymt ID: Indn:Hughes Joh Co ID:
02-26	307.88-	2,957.19	Check 7684
02-26	266.00-	2,691.19	Check 7683
02-26	43.00-	2,648.19	Check 7682
03-02	923.00+	3,571.19	Dfas-Cleveland Des:AR Ann Pay ID:xxxxx8950 Indn:Hughes Jane K Co ID:
03-02	135.96-	3,435.23	Travelers Insur Des:Insurance ID:xxxxx7004 Indn:Hughes Jane K Co ID:

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H

Advantage Statement
Page 3 of 6 5940
Statement Period
02-25-09 through 03-26-09
B 17 0 A P PA 17 0006513
Number of checks enclosed: 0

JANE K HUGHES
JANE HUGHES WARNER
PHILLIP L HUGHES

Interest Checking Additions and Subtractions

Date Posted	Amount($)	Resulting Balances($)	Transactions
03-02	21.52-	3,413.71	Verizon Arc Des:Check Pymt Check #:7680 Indn: Co ID:
03-02	16.88-	3,396.83	AT&T Consumer Des:Checkpaymt Check #:7681 Indn: Co ID:
03-02	10.44-	3,386.39	Bi-Lo 519 02/28 # Purchase Bi-Lo 519 Spartanburg SC
03-02	0.56-	3,385.83	Keep The Change Transfer To Acct 4890 For 03/02/09
03-04	1,100.00+	4,485.83	Deposit
03-04	33.06-	4,452.77	Ingles #45 03/04 # Purchase Ingles #45 Spartanburg SC
03-04	0.94-	4,451.83	Keep The Change Transfer To Acct 4890 For 03/04/09
03-05	72.00-	4,379.83	Patrons Mutual Des:Pmi EFT ID: Indn:John P & Jane K Hughe Co ID:
03-09	67.52-	4,312.31	Cns Ikea Charl 03/07 # Purchase Cns Ikea Charlott Charlotte NC
03-09	51.88-	4,260.43	Bi-Lo 408 03/07 # Purchase Bi-Lo 408 Spartanburg SC
03-09	21.26-	4,239.17	CheckCard 0307 Raceway6751 66467515 Spartanburg SC 24164079067978112880672
03-09	1.34-	4,237.83	Keep The Change Transfer To Acct 4890 For 03/09/09
03-10	63.27-	4,174.56	AT&T Services Des:Checkpaymt Check #:7686 Indn: Co ID:
03-10	49.58-	4,124.98	Check 7685
03-10	28.40-	4,096.58	Ao Insurance Des: ID: R/# Indn:Hughes Sr,John P Co ID:
03-16	109.32-	3,987.26	Check 7690
03-16	96.79-	3,890.47	Charter Communic Des:Charter Co ID: Indn:Hughes Warner,Jane Co ID:
03-16	43.00-	3,847.47	Check 7691
03-17	222.50-	3,624.97	Piedmont Nat Gas Des:Checkpymt Check #:7688 Indn: Co ID:
03-17	68.19-	3,556.78	Check 7687
03-19	100.00-	3,456.78	BkofAmerica ATM 03/19 # Withdrwl Spartanburg Main Spartanburg SC
03-23	877.17-	2,579.61	Bank Of America Des:Line Pymt ID: Indn:Hughes Joh Co ID:
03-23	115.47-	2,464.14	Ingles #45 03/23 # Purchase Ingles #45 Spartanburg SC
03-23	0.53-	2,463.61	Keep The Change Transfer To Acct 4890 For 03/23/09
03-25	394.82-	2,068.79	Bank Of America Des:Line Pymt ID: Indn:Hughes Joh Co ID:
03-26	0.14+	2,068.93	Interest Earned
03-26	20.00-	2,048.93	Advantage Monthly Maintenance Fee

Checks Posted in Numerical Order

Check #	Posting Date	Amount($)	Check #	Posting Date	Amount($)	Check #	Posting Date	Amount($)
7682	02-26	43.00	7685	03-10	49.58	7691	03-16	43.00
7683	02-26	266.00	7687*	03-17	68.19			
7684	02-26	307.88	7690*	03-16	109.32			

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Bank of America

May 6, 2015

Estate of John Hughes
632 CRYSTAL DR
SPARTANBURG, SC 29302

RE: Deceased Protected borrower: John Hughes
Loan number ending in: 4699
Benefit reference number: A1500931

Estate of John Hughes:

Thank you for contacting us about your Line Protection Plan® Accidental Death benefits. Unfortunately, we are unable to approve your benefit request because the information received indicates the following:

- The death was the result of disease or treatment of disease or any medical treatment (and/or was not for the treatment of an accidental injury).

This decision was based on the information received and the terms, conditions and exclusions of your specific Line Protection Plan.

This statement amends the terms and conditions of the Line Protection Plan. If you have additional information that you would like us to consider, you have until September 30, 2016 to provide us with the information. On September 30, 2016, your benefit request will be permanently closed, and the previous decision of Protection Plan Services will become final and binding on all parties. Except as amended in this letter, the terms and conditions of the Line Protection Plan will apply to your benefit request.

We value your business and appreciate the opportunity to be of service. If you have any questions, please contact us at 866.317.5116 between the hours of 8 a.m. to 8 p.m. Eastern, Monday through Friday.

Sincerely,

Benefits Team
Protection Plan Services
ARSVLLS6

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BANK OF AMERICA EQUITY MAXIMIZER AGREEMENT AND DISCLOSURE STATEMENT

Property Serving as Security (the "Property"): 324 WHITE FALLS DR, COLUMBIA, LEXINGTON, SOUTH CAROLINA 29212-1234
Borrower's Name and Address: JOANNE C HAFTER, 324 WHITE FALLS DR, COLUMBIA, SOUTH CAROLINA 29212-1234

Lender's Name and Address: Bank of America, NA, National Banking Association, 100 North Tryon Street, Charlotte, North Carolina 28255

Date: SEPTEMBER 26, 2008	**Annual Percentage Rate:** 5.7400	**Draw Period:** 120 Mos.
Loan Number:	**Margin:** .7400	**Repayment Period:** 180 Mos.
Maturity Date: SEPTEMBER 26, 2033	**Max. Interest Rate:** 24.0000	**Billing Cycle:** MONTHLY
Credit Limit: $ 30,000.00		

1. **Introduction.** This Bank of America Equity Maximizer Agreement and Disclosure Statement ("Agreement") governs your Home Equity Line of Credit Account (your "Credit Line" or "Account") with the lender named above ("Lender"). Your Account is a revolving credit arrangement in which we make loans to you by advancing funds ("Advances") at your direction, allowing you to repay those Advances and take additional Advances, subject to the terms of this Agreement. This Agreement will remain in full force and effect notwithstanding that the Account Balance under the Agreement may occasionally be reduced to an amount equal to or less than zero.

In this Agreement, the terms "we," "us," "our" and "Bank" refer to the Lender or to any subsequent assignee or transferee. Except as noted below, the terms "you," "your," "yours" and "Borrower" refer to each person that signs this Agreement or has authority to use the Credit Line. Read this Agreement carefully so that you know how your Account works and keep a copy of this Agreement for your records.

2. **Borrower's Promise to Pay.** You promise to pay to Lender the total of all Advances plus **FINANCE CHARGES**, together with all fees and charges under the terms of this Agreement. You will pay your Account according to the terms set forth below. If there is more than one Borrower, each is jointly and severally liable on this Agreement. This means we can require any Borrower to pay all amounts due under this Agreement, including credit advances made to any Borrower. Each Borrower authorizes any other Borrower, on his or her signature alone, to cancel the Credit Line, to request and receive credit advances, and to do all other things necessary to carry out the terms of this Agreement. We can release any Borrower from responsibility under this Agreement, and the others will remain responsible.

3. **Term.** The term of your Account will begin as of the date of this Agreement ("Opening Date") and will continue until all indebtedness under this Agreement, if not already paid pursuant to the payment provision below, will be due and payable upon maturity. The Draw Period of your Account will begin on the date after the Opening Date, when this Agreement is accepted by us in the State of North Carolina, following the perfection of the Security Instrument and the meeting of all of our other conditions and will continue for one hundred and twenty (120) months. You may obtain credit advances during the Draw Period. After the Draw Period ends, the Repayment Period will begin, and you will no longer be able to obtain credit advances. The length of the Repayment Period is one hundred and eighty (180) months depending on the repayment schedule set forth below. You agree that we may renew or extend the period during which you may obtain credit advances or make payments.

4. Credit Limit. This Agreement covers a revolving line of credit for the principal amount of THIRTY THOUSAND AND 00/100 DOLLARS ($30,000.00) which will be your Credit Limit under this Agreement. You may not request an Advance from your Account that would cause your outstanding balance of Advances to exceed your Credit Limit nor are we obligated to pay any Advance request that would cause your outstanding balance of Advances to exceed your Credit Limit. If we do make an Advance that causes your outstanding balance of Advances to exceed your Credit Limit, this will not constitute an increase in your Credit Limit. You agree to immediately repay the amount by which your outstanding balance of Advances exceeds your Credit Limit.

5. **Security.** All amounts due under the Account are secured by a mortgage, deed of trust, or security deed ("**Security Instrument**") on the Property identified on page one of this Agreement. Borrower agrees to pay all amounts due, and perform all covenants and obligations required of Borrower under the Security Instrument. If it becomes necessary for us to advance funds to you above the Credit Limit to protect our security interest, those amounts in excess of the Credit Limit will be owed by you and will be secured by the Security Instrument unless Applicable Law prohibits the same. The Security Instrument and this Agreement are related documents and a default under either document will be treated as a default under both documents. To the extent permitted by Applicable Law, the lien of the Security Instrument will continue and will have the same priority if, with your consent, we renew, extend, amend, modify or substitute this Agreement. In such event, you agree to execute any additional documents necessary to achieve the action being taken.

6. Terms And Definitions. The following terms are defined as set forth in this Section. Other terms are defined elsewhere in this Agreement.
   - A. "**Billing Cycle**" is an interval of time that occurs regularly during the term of this Agreement and is used to determine the **FINANCE CHARGES** and other fees, charges, and credit insurance premiums that are due on your Account. The number of days in each Billing Cycle may vary from time to time. A Billing Cycle occurs regardless of whether there is a balance or any activity on your Account. Your Billing Cycle is stated on page 1 of this Agreement.
   - B. "**Billing Statement**" is a statement that we will furnish to you periodically that provides important information regarding your Account activity.
   - C. "**Credit Limit**" is the maximum aggregate amount of principal that we will extend to you under this Agreement. Your Credit Limit may change under certain circumstances. Your Credit Limit is stated on page 1.
   - D. "**Draw Period**" is the period of time during which you may request Advances from your Account. The Draw Period is stated on page 1.
   - E. "**Maturity Date**" is the date on which the entire Account Balance under this Agreement is due. The Maturity Date of your Account is stated on page 1.
   - F. "**Minimum Payment**" is the minimum amount you must pay on your Credit Account, as reflected on each periodic Billing Statement for each Billing Cycle. Your Minimum Payment during the Draw Period and during the Repayment Period will be calculated as described below under the heading "Payments."

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G. "Outstanding Balance" is the new balance of the Account, which includes, if applicable, principal, accrued interest on the outstanding principal, fees and charges, Property Expenses and any voluntary insurance, Borrowers' Protection® Plan, or Line Protection™ Plan.

H. "Property Expenses" are expenses we incur because you do not fulfill all obligations of the Security Instrument for the Property that secures this Account.

I. "Repayment Period" is the period of time that begins at the end of the Draw Period. During the Repayment Period, you may no longer request Advances from your Account.

J. "Variable Rate Balance" is the balance during the Draw Period that equals the Outstanding Balance that is not part of a Fixed Rate Loan Option.

K. "Variable Rate Principal Balance" is the principal balance that is not payable under a Fixed Rate Loan Option.

7. Payments.

A. **During the Draw Period.** During the Draw Period, the Total Minimum Payment Due is equal to the sum of: (1) the Variable Rate Balance Minimum Payment (described below); (2) the payment due, if any, for any outstanding Fixed Rate Loan Option; and any past due amounts from prior Billing Cycles. Some Fixed Rate Loan Options may have a different due date and are not figured into the Total Minimum Payment Due. At any time you may pay more than the Total Minimum Payment Due, make additional payments or pay in full or in part the Outstanding Balance. You will be required to pay the Minimum Payment Due each month there is an Outstanding Balance on your Account.

You may choose any of the following monthly payment options. Your billing statement will reflect the option you have chosen. You may change your Draw Period payment option at a later time.

B. **Variable Rate Balance Minimum Payment.** Your "Variable Rate Balance" is all of your Outstanding Balance that is not part of a Fixed Rate Loan Option. Depending on which payment option you choose for the Draw Period, the Variable Rate Balance Minimum Payment may vary. The Variable Rate Balance Minimum Payment will not be less than the amount of accrued interest and any voluntary insurance, plus any unpaid fees.

1. **Payment Options:**

a. **Interest Only (Plus Insurance) Option** - The Minimum Payment if you elect the Interest Only (Plus Insurance) Option will be the amount of accrued interest plus any voluntary insurance, and unpaid fees.

b. **1.5% of Variable Rate Outstanding Balance Option** - The Minimum Payment if you elect the 1.5% of Variable Rate Outstanding Balance Option will be one and one half percent (1.5%) of the Variable Rate Outstanding Balance plus unpaid fees, or fifty dollars ($50), whichever is greater, or the outstanding Variable Rate Balance if less than the Minimum Payment under this option.

c. **Fixed Payment Option.** The Minimum Payment if you elect the Fixed Payment Option will be at least one and one half percent (1.5%) of the Credit Limit plus any voluntary insurance, Line Protection™ Plan and unpaid fees, or fifty dollars ($50), whichever is greater, or the outstanding Variable Rate Balance if less than the Minimum Payment under this option.

C. **During the Repayment Period.** During the Repayment Period you will be required to make a payment each month. The length of Repayment Period will vary depending on the Outstanding Balance at the beginning of the Repayment Period, if any Property Expenses are incurred during the Repayment Period, and if you have any Fixed Rate Loan Options. The amount of the Total Minimum Payment due may vary due to increases or decreases in the Index or if there are any Fixed Rate Loan Options that remain unpaid at the beginning of the Repayment Period.

Payments during the Repayment Period will be calculated as follows. The Total Minimum Payment Due will be an amount equal to the greater of 1/180th of the Variable Rate Principal Balance remaining on the last date of the Draw Period, plus accrued interest, unpaid fees, unpaid Property Expenses, or fifty dollars ($50). If there are any Fixed Rate Loan Options that remain unpaid at the start of the Repayment Period, the Fixed Rate Loan Options payment previously established will continue to be billed.

For purposes of this Repayment Options section, the Variable Rate Principal Balance equals the amount of your Credit Limit on which you have not elected to convert to a Fixed Rate Loan as of the start of your Repayment Period.

D. **Fixed Rate Loan Option Payment Information.** A Fixed Rate Loan Option has a fixed interest rate and fixed term and is payable monthly. You may convert part or all of the Variable Rate Principal Balance, along with accrued interest, fees, and any voluntary insurance charge to a Fixed Rate Loan Option at any time during the Draw Period or the Repayment Period unless you are in default or if your Advance privileges are suspended or terminated. We will help you establish the amount of principal and interest sufficient to amortize the Fixed Rate Loan Option over the term you select. The maximum term of any Fixed Rate Loan Option may not exceed the repayment period maturity date of this Credit Line. The minimum amount for a Fixed Rate Loan Option is $5,000. You may have up to three (3) Fixed Rate Loan Options open at any one time, but may not have more than four (4) Fixed Rate Loan Options open during any one statement period. The Fixed Rate Loan Option **ANNUAL PERCENTAGE RATE** is the Prime Rate plus the Fixed Rate Loan Option margin of 8.00%. However, we may make lower Fixed Rate Loan Option rates available from time to time. Please contact your Banking Center or Customer Service for the Fixed Rate Loan Option rate currently offered. Your payment will be a fixed dollar amount to be determined at the opening of the Fixed Rate Loan Option. You may arrange a different payment date for each Fixed Rate Loan Option. Fixed Rate Loan Option payments will be billed separately from your Regular Payment in accordance with the schedule you have arranged. For Fixed Rate Loan Options, you will receive a separate bill. However, the Variable Rate Balance statement will show all activity, including payments.

8. **Receipt of Payments and Payment Application.** All payments made by check, automatic account debit, electronic funds transfer, money order, or other instrument must be received by us at the remittance address on your periodic Billing Statement. Payments received at that address prior to 2:00 PM at the location specified, or a payment made at one of our banking centers in the state or our address indicated as the remittance address by 2:00 PM on any business day will be credited as of the date received. Business days are Monday through Friday, exclusive of legal holidays. If the due date falls on a Saturday, Sunday, or legal holiday, the due date will not be extended. Unless otherwise agreed or required by applicable law, payments and other credits will be applied to **FINANCE CHARGES**, other charges and fees, and principal in any order we choose without notice.

9. **Advances.** During the Draw Period, you may request Advances from your Account, and any amounts you repay will subsequently be available for Advances, subject to the limitations of this Agreement. If there is more than one of you, each of you may obtain Advances in accordance with the terms of this Agreement. Each of you is individually responsible for payment of the entire Account Balance regardless of who actually requested the Advance.

If there is more than one person authorized to use this Credit Line, you agree not to give us conflicting instructions, such as one Borrower telling us not to give advances to the other.

The words **"Authorized Signer"** on Special Convenience Checks and Bank of America ATM cards or Bank of America Check Card or Account Access cards as used in this Agreement means and includes each person who (a) signs the application for the Credit Line, (b) signs this Agreement, or (c) has executed a separate signature authorization card for this Credit Line.

You may obtain Advances under your Credit Line Account as follows.

A. **Credit Line Checks.** Writing a preprinted **"Special Convenience Check"** that we will supply to you.

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B. Telephone Request. Requesting a credit advance from your Account to be applied to your designated account by telephone upon proper identification and in accordance with procedures established by us. Except for transactions covered by the federal Electronic Fund Transfers Act and unless otherwise agreed in your Deposit Account Agreement, you acknowledge and you agree that we do not accept responsibility for the authenticity of telephone instructions and that we will not be liable for any loss, expense, or cost arising out of any telephone request, including any fraudulent or unauthorized telephone request when acting upon such instructions believed to be genuine.

C. Requests in Person. Requesting a credit advance in person at any of our authorized locations.

D. Automated Teller Machine ("ATM") Access. (Not available in CT; ID, NY, WA or TX) Using your "Bank of America ATM card or Bank of America Check Card or Account Access Card" at any of our designated ATM locations to withdraw or transfer funds in excess of the available collected balance in the account.

E. Bank of America Equity Maximizer VISA® Account Access Card (the "Account Access Card"). (Not available in CT, ID, NY, WA, or TX) Using the Account Access Card as described in this Agreement. Visa is a registered trademark of Visa International Service Association.

F. Online Banking. Transferring funds to a deposit account.

G. Limitations on the Use of Checks. We reserve the right not to honor Special Convenience Checks in the following circumstances:

1. **Credit Limit Violation.** Your Credit Limit has been or would be exceeded by paying the Special Convenience Check.
2. **Post-dated Checks.** Your Special Convenience Check is post-dated. If a post-dated Special Convenience Check is paid and as a result any other check is returned or not paid, we are not responsible.
3. **Stolen Checks.** Your Special Convenience Checks have been reported lost or stolen.
4. **Unauthorized Signatures.** Your Special Convenience Check is not signed by an "Authorized Signer" as defined below.
5. **Termination or Suspension.** Your Credit Line has been terminated or suspended as provided in this Agreement or could be if we paid the Special Convenience Check.
6. **Other Special Convenience Check Limitations.** You may not make a payment on the Account with a Special Convenience Check. You notify us that you wish to stop payment of a Special Convenience Check; however, you will not hold us liable if we try to stop payment of Special Convenience Check and we are unable to do so. You may try to stop payment on a Special Convenience Check by notifying Customer Service at the number listed on your statement. Your stop payment order will remain in effect for six (6) months unless renewed.

If we pay any Special Convenience Check under these conditions, you must repay us, subject to applicable laws, for the amount of the Special Convenience Check. The Special Convenience Check itself will be evidence of your debt to us together with this Agreement. Our liability, if any, for wrongful dishonor of a check is limited to your actual damages. Dishonor for any reason as provided in this Agreement is not wrongful dishonor. We may choose not to return Special Convenience Checks along with your periodic Billing Statements; however, your use of each Special Convenience Check will be reflected on your periodic statement as a credit advance. We do not "certify" Special Convenience Checks drawn on your Credit Line.

H. Limitations on the Use of ATM Cards. We reserve the right not to honor the Bank of America ATM card or Bank of America Check Card or Account Access Cards in the following circumstances:

1. **Credit Limit Violation.** Your Credit Limit has been or would be exceeded by honoring the Bank of America ATM card or Bank of America Check Card or Account Access Card charge.
2. **Stolen ATM Cards.** Your Bank of America ATM card or Bank of America Check Card or Account Access Cards have been reported lost or stolen.
3. **Termination or Suspension.** Your Credit Line has been terminated or suspended as provided in this Agreement or could be if we honored the Credit Line charge.
4. **Other ATM Card Limitations.** If we pay any Advance requested by use of the Bank of America ATM card or Bank of America Check Card or Account Access Card under these conditions, you must repay us, subject to applicable laws, for the amount of the Advance. The Advance itself will be evidence of your debt to us together with this Agreement. Our liability, if any, for wrongful dishonor of an Advance is limited to your actual damages. Dishonor for any reason as provided in this Agreement is not wrongful dishonor. Your use of the Bank of America ATM card or Bank of America Check Card or Account Access Card will be reflected on your periodic statement as a credit advance.

I. Transaction Requirements for Account Access Card. The following transaction limitations will apply to the use of your Credit Line:

1. **Account Access Card Limitations.** The following transaction limitations will apply to your Credit Line and accessing by other methods.
2. **Limitations on the Use of Account Access Card.** We reserve the right not to honor the Account Access Card linked to this Credit Line in the following circumstances.
   a. **Credit Limit Violation.** Your Credit Limit has been or would be exceeded by paying the Account Access Card transaction.
   b. **Stolen Account Access Card.** Your Account Access Card has been reported lost or stolen.
   c. **Unauthorized Signatures.** Your Account Access Card is not used by a Borrower who has been issued one.
   d. **Termination or Suspension.** Your Credit Line has been terminated or suspended as provided in the Agreement or could be if we paid the Account Access Card transaction.
3. **Other Account Access Card Limitations.** If we pay any Advance requested by use of the Account Access Card under these conditions, you must repay us, subject to applicable laws, for the amount of the Advance. The Advance itself will be evidence of your debt to us together with this Agreement. Our liability, if any, for wrongful dishonor of an Advance is limited to your actual damages. Dishonor for any reason as provided in this Agreement is not wrongful dishonor. Your use of the Account Access Card will be reflected on your periodic statement as a credit advance.
4. **Liability for Unauthorized Account Access Card Transactions.** You are not liable for unauthorized use of your Account Access Card. Notify us promptly if you believe your Account Access Card has been lost or stolen or if you discover any unauthorized transactions. We may require you to provide a written statement regarding claims of unauthorized Account Access Card transactions.
5. **Limitations on Lender's Liability.** Lender's liability, if any, for wrongful dishonor of any Advance request is limited to Borrower's actual damages. Lender shall not be liable if any merchant, financial institution or ATM refuses to honor the Account Access Card.

J. Lost Special Convenience Checks and Bank of America ATM card or Bank of America Check Card or Account Access Cards. If you lose your Special Convenience Checks or Bank of America ATM card or Bank of America Check Card or Account Access Card(s) or if someone is using them without your permission you agree to let us know immediately. You can notify us at our address shown at the beginning of this Agreement.

K. Future Credit Line Services. Where permitted by applicable law, your application for this Credit Line also serves as a request to receive any new services (such as access devices), which may be available at some future time as one of our services in connection with this Credit Line. You understand that this request is voluntary and that you may refuse any of these new services at the time they are offered. You further understand that the terms and conditions of this Agreement will govern any transactions made pursuant to any of these new services.

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L. **Credit Line Special Convenience Check, Telephone Request, In Person Request and ATM Access Limitations.** There are no transaction limitations for the writing of Special Convenience Checks, requesting an Advance by telephone, requesting an Advance in person, or using the ATM.

10. **Billing Statements.** If you have a balance owing on your Account or have any Account activity, we will send to you a Billing Statement. Billing Statements will show, as applicable, credit advances, **FINANCE CHARGES**, other charges, payments made, other credits, your previous balance, and/or your new balance. Payments will be due as shown on the Billing Statements.

11. **Automatic Payment.** If you choose to have payments made from a designated account and have arranged with us to do so, we will automatically draft the payment. Drafts will be made on the payment due date or immediately after the payment due date (if the payment due date is on a Saturday, Sunday or legal holiday). If your account does not contain the payment amount due, you understand that it is your obligation without notice from us to make the full payment. Even if you make a manual payment, an automatic payment will be drafted from your designated account, unless you make such manual payment for the full payment due at least three (3) business days prior to the due date; however, if you make less than a full manual payment at least three (3) business days prior to the due date, only the remaining amount currently due will be drafted. To stop an automatic draft, you must contact us at least three (3) business days prior to the scheduled payment draft date. We may accept late payments, partial payments or checks and money orders marked "payment in full" (or similar notations) or payments accompanied by a letter stating that our acceptance of the payment indicates our agreement to the terms set forth in the letter without giving up, waiving or losing any of our rights under law or under this Agreement.

If you have authorized automatic payment above, then the following shall apply:

You hereby authorize the Bank to draft the described account for your loan payments. You agree to the Recurring Automatic Payment Authorization Terms and Conditions that will be enclosed with your Automatic Payment confirmation notice, unless you otherwise notify Lender. If you choose to establish automatic payment to draft your designated Bank of America account, the authorization will remain in full force and effect until the Bank has received written or verbal notification from you of its termination in such time and in such manner as to afford the Bank a reasonable opportunity to act on it. If at any time you select to terminate your automatic payment, your margin will increase by 1/4%.

12. **ANNUAL PERCENTAGE RATE AND FINANCE CHARGE.**

A. **When FINANCE CHARGES Begin to Accrue.** Periodic **FINANCE CHARGES** for Advances under your Credit Line will begin to accrue on the date Advances are posted to your Credit Line. There is no "free ride" period which will allow you to avoid **FINANCE CHARGES** on your Credit Line Advances.

B. **How the Balance on which the FINANCE CHARGE is Calculated is Determined.** The cost of the credit through the Credit Line is disclosed as a Finance Charge. Except for some closing costs (indicated in this Agreement), interest will not accrue until a credit advance is made. You will pay interest on each credit advance until it is fully paid off. We will determine the **FINANCE CHARGE** for each monthly billing period by using the following simple interest rate calculation. A **FINANCE CHARGE** is calculated daily on the Variable Rate Principal Balance, as defined above in the "Definitions" section of this Agreement, by multiplying the daily periodic rate (as indicated in "How The Rate Used To Calculate The Finance Charge Is Determined ") by the daily Variable Rate Principal Balance.

To get the daily Variable Rate Principal Balance we (i) take the beginning Variable Rate Principal Balance for that day (ii) add to that amount all credit advances and sums advanced by us to fulfill any obligations under a Security Instrument (such as a mortgage, deed of trust, or security agreement), if any, for that day, then (iii) subtract all principal balance payments and credits for the Variable Rate Principal Balance for that day. All of the daily Variable Rate Principal Balance **FINANCE CHARGES** for the monthly billing cycle are added together to get the total Variable Rate Principal Balance **FINANCE CHARGE** for the monthly billing cycle. Transaction charges are added to the Variable Rate Principal Balance **FINANCE CHARGE** to get the total **FINANCE CHARGE** for the monthly billing cycle. For Fixed Rate Loan Option balances, the estimated **FINANCE CHARGE** is calculated at the establishment of the Fixed Rate and is included in the fixed payment amount.

C. **How the Rate Used to Calculate the FINANCE CHARGE Is Determined.** The initial Variable Rate Principal Balance daily periodic rate used to compute the Variable Rate Principal Balance **FINANCE CHARGE** is 1/365th of the initial Variable Rate Principal Balance **ANNUAL PERCENTAGE RATE** (as indicated under "Periodic Rate and Corresponding **ANNUAL PERCENTAGE RATE**"). The Variable Rate Principal Balance **ANNUAL PERCENTAGE RATE** is a variable rate involving both an index and a margin, both described under "Periodic Rate and Corresponding **ANNUAL PERCENTAGE RATE**" below. **FINANCE CHARGES** will accrue on an actual 365-day year basis (366 day year basis for leap year). If, however, you participate in a relationship account with a Bank of America Corporation affiliate (as offered from time to time), the Variable Rate Principal Balance Daily Periodic Rate and the Variable Rate Principal **ANNUAL PERCENTAGE RATE** may be reduced below the rates stated in this Agreement. The addition of a fee may cause the actual Variable Rate Principal Balance **ANNUAL PERCENTAGE RATE** for the monthly billing cycle to exceed the Variable Rate Principal Balance **ANNUAL PERCENTAGE RATE** stated in this Agreement.

If the Index is unavailable for any monthly billing cycle, we will use the Index for the most recently preceding monthly billing cycle in which the Index was available. If the Index ceases to be published during the term of this Agreement, we will select a substitute index and margin. The substitute index will be a historical movement substantially similar to the Index, and the substitute index and margin will result in an **ANNUAL PERCENTAGE RATE** at the time it is substituted that is substantially similar to the rate in effect at the time the Index became unavailable.

There is no limitation on the size of any interest rate adjustment or the number of interest rate adjustments that may be made on the Credit Line so long as the maximum **ANNUAL PERCENTAGE RATE** is not exceeded. Any increase or decrease in the Index that occurs would cause a corresponding increase or decrease in the Daily Periodic Rate, **ANNUAL PERCENTAGE RATE**, **FINANCE CHARGES** and possibly the Total Minimum Payment Due. You understand that adjustments based on an Index change will be applied automatically to the Credit Line and you will not receive advance notice of that adjustment.

The Finance Charge on a Fixed Rate Loan Option is determined on a simple interest basis. If you make a Fixed Rate Loan Option payment(s) before or after any date, either the amount of your originally scheduled final payment may be lower or higher than the amount initially established or additional payment(s) may be required.

Under some circumstances, your payment will not cover the **FINANCE CHARGES** that accrue and negative amortization will occur. Negative amortization will increase the total amount you may pay us and reduce the equity in the Property.

13. **Periodic Rate and Corresponding ANNUAL PERCENTAGE RATE.** We will determine the Periodic Rate and the corresponding **ANNUAL PERCENTAGE RATE** as follows. We start with an independent Index, which is the Prime Rate as published daily in the "Money Rates" table of *The Wall Street Journal* (the "Index"). When a range of rates has been published, the higher of the rates will be used. We will use the most recent Index value available to us as of the date of the **ANNUAL PERCENTAGE RATE** adjustment. The Index is not necessarily the lowest rate charged by us on our loans. If the Index becomes unavailable during the term of the Credit Line Account, we may designate a substitute Index (and, if necessary, a new margin) after notice to you.

A. **Rate Computation.** The **ANNUAL PERCENTAGE RATE** during the Draw Period is determined using the Index published as of the last business day prior to the first day of the next monthly Billing Statement plus a margin, as shown below, and will be effective on the first day of the next monthly billing cycle.

To determine the Periodic Rate that will apply during your Draw Period we add the margin shown below to the value of the Index and divide the value by the number of days in a year (daily). This result is the **ANNUAL PERCENTAGE RATE** for your Draw Period. To determine the Periodic Rate that will apply to your Repayment Period, we add the margin shown below to the value of the Index, then divide the value by the number of days in a year (daily). To obtain the **ANNUAL**

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PERCENTAGE RATE we multiply the Periodic Rate by the number of days in a year (daily). This will result in the **ANNUAL PERCENTAGE RATE** for your Repayment Period. The **ANNUAL PERCENTAGE RATE** includes only interest and no other costs.

The current Index is 5.000 % per annum. The margin is .740 %. The initial Periodic Rate and the corresponding **ANNUAL PERCENTAGE RATE** on your Credit Line Account are as stated below:

Current Rates for the Draw Period

Range of Balances or Conditions	Margin Added to Index	ANNUAL PERCENTAGE RATE	Daily Periodic Rate
ALL	.740%	5.740%	0.01573%

Current Rates for the Repayment Period

Range of Balances or Conditions	Margin Added to Index	ANNUAL PERCENTAGE RATE	Daily Periodic Rate
ALL	.740%	5.740%	0.01573%

B. **Limits.** The Periodic Rate and the corresponding **ANNUAL PERCENTAGE RATE** on your Credit Line Account will increase or decrease as the Index increases or decreases from time to time. There is no limit to the amount by which the **ANNUAL PERCENTAGE RATE** can increase or decrease over a 1-year period. Any increase in the Periodic Rate will take the form of higher payment amounts. Adjustments to the Periodic Rate and the corresponding **ANNUAL PERCENTAGE RATE** resulting from changes in the Index will take effect monthly. In no event will the corresponding **ANNUAL PERCENTAGE RATE** be more than the lesser of 24.000% or the maximum rate allowed by applicable law.

Notwithstanding any other provision of this Agreement, we will not charge interest on any undisbursed loan proceeds, except as may be permitted during any Right of Rescission period.

C. **Forgo Rate Increases.** If we forgo an **ANNUAL PERCENTAGE RATE** increase, at the time of a later adjustment we may return to the full Index value plus margin.

14. Closing Costs. In addition to the **FINANCE CHARGES** which will be added to your Credit Line each billing cycle, you will pay the following fees, including real estate closing and security filing fees:

15. Other Charges. You agree to pay the fees and charges listed below if the circumstances triggering their assessment apply. These fees and charges will be added to the Account balance and are payable as set forth in this Agreement.

A. **Late Charge:** If we do not receive the amount of your minimum monthly payment in full within ten (10) days after your payment due date, you will pay us a late charge equal to the greater of $10.00 or five percent (5%) of the unpaid portion of your minimum monthly payment.

B. **Returned Payment Charge:** If a check or any other instrument or payment method with which you have made a payment on the Credit Line Account is returned to us unpaid for any reason, you will be charged a return payment charge of $20.

C. **Returned Special Convenience Check.** $20.

D. **Annual Fee:** $0.

E. **Fixed Rate Conversion Fee:** $0.

F. **Security Instrument Discharge Fee:** As permitted by Applicable Law, Lender may request that at the time you payoff your Credit Line, you pay the Lender's cost to record a discharge of the Security Instrument.

16. Refund of Fees, Charges, and Costs. The terms of this Agreement shall be construed to be consistent with Applicable Law. However, if a court of competent jurisdiction or other qualified authority determines that the loan charges and fees described in this Agreement exceed the limits that Applicable Law allows, the following shall occur. First, any such purportedly excessive charges or fees shall be reduced to the permitted amount. Second, any amounts collected that exceed the permitted amount will be returned to you, either by direct payment or by reducing the principal you owe on your Account. Your receipt of a refund made by direct payment to you or credited to your Account will constitute a waiver of any right of action you may have arising out of overcharges or allegedly excessive loan charges or fees.

17. Property Insurance; Other Charges. You agree to obtain property insurance against loss or damage to the Property, in the amounts, for the time period and against the risks that the Security Instrument and/or we require. You may obtain insurance from an insurance carrier of your choice so long as the insurance carrier is acceptable to us. If you fail to purchase and maintain acceptable property insurance, we may purchase insurance for you or on your behalf and at your expense as

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described in the Security Instrument. We have no obligation to obtain such insurance. Should we take this action, the equity in the Property and contents thereof may not be protected as you desire. Further, the cost of the insurance may significantly exceed the cost of such insurance that you could have obtained; this cost will be treated as an Advance.

18. Additional Rights and Remedies. In addition to the rights described elsewhere in this Agreement and in the Security Instrument, we also have the following rights:

A. **Termination and Acceleration.** We can terminate your Account and require you to pay us the entire outstanding Account Balance under this Agreement in one payment, and charge you certain fees, if any of the following occur: 1) You engage in fraud or make a material misrepresentation at any time in connection with your Account; 2) We do not receive the full amount of any Minimum Payment due or you fail to meet any of the other repayment terms of this Agreement; 3) Your action or inaction adversely affects the Property or our rights in it (for this purpose, the words "you," "your," and "yours" also refer to the owner of the Property, if different than you). Examples of these actions or inactions include, but are not limited to: a) Your death, if you are the sole Borrower on the Account; or the death of all but one Borrower which adversely affects our security; b) Illegal use of the Property, if such use subjects the Property to seizure; c) You transfer all or part of your interest in the Property without our written consent; d) All or part of the Property is taken by condemnation or eminent domain; e) Foreclosure of any senior lien on the Property; f) Failure to maintain required insurance on the Property; g) Waste or destructive use of the Property which adversely affects our security; h) Failure to pay taxes or assessments on the Property; i) Permitting the creation of a senior lien on the Property; j) Filing of a judgment against you, if the amount of the judgment and collateral subject to the judgment is such that our security is adversely affected.

We may, at our option, take lesser action than those described in this Section. Such lesser action may include, without limitation, suspending your Account and not allowing you to obtain any further Advances, reducing your Credit Limit, and/or changing the payment terms on your Account. If we take any such action, this shall not constitute an election of remedies or a waiver of our right to exercise any rights or remedies under the remainder of this Section, the remaining provisions of this Agreement, the Security Instrument, or at law or in equity. We may take action under this Section only after complying with any notice or cure provisions required under Applicable Law. In the event we elect not to terminate the Account or take any lesser action as provided in this Section, we do not forfeit or waive our right to do so at a later time if any of the circumstances described above exists at that time.

B. **Suspension or Reduction.** We can refuse to make additional Advances or reduce your Credit Limit during any period of time in which any of the following are in effect: 1) The value of the Property declines significantly below the value as determined by us at the time you applied for your Account. This includes, for example, a decline such that the initial difference between the Credit Limit and the available equity in the Property is reduced by fifty percent (50%) or more, and may include a smaller decline depending on individual circumstances; 2) We reasonably believe you will not be able to meet the repayment requirements set forth in this Agreement due to a material change in your financial circumstances; 3) You are in default of a material obligation in this Agreement, including, without limitation, your failing to make a Minimum Payment on a date that it is due; 4) Government action prevents us from imposing the ANNUAL PERCENTAGE RATE provided for in this Agreement; 5) Government action impairs our security interest such that the value of our interest is less than 120 percent of your Credit Limit then in effect; 6) A regulatory agency which supervises us has notified us that continued Advances would constitute an unsafe and unsound practice; 7) The maximum ANNUAL PERCENTAGE RATE allowed under this Agreement is reached. If we refuse to make additional Advances or reduce your Credit Limit under this Section, we will send you a written notice stating the reason for such action. If, for any reason, you believe your ability to obtain Advances or your Credit Limit should be reinstated, you must send us a written request for reinstatement and include in the request the reasons why you believe your ability to obtain Advances or your Credit Limit should be reinstated.

19. Collection Costs. If you are in default and we require you to pay us immediately in full, we may also require that you pay our collection costs and expenses to the extent not prohibited by law. If we bring a lawsuit to collect, you will pay our attorneys' fees and court costs allowed by Applicable Law and set by the court.

20. Suspension or Termination by You. Each of you has the right, upon proper written notice to us, to suspend the privilege of obtaining new Advances. A request to suspend the privilege of obtaining Advances, even if made only by one of you, will be effective against all of you. Advances will be reinstated upon our receipt and acceptance of a written reinstatement request signed by each of you, provided that no event(s) permitting a suspension then exist.

To do so, you must notify us in writing. If one of you requests termination of the Account, the Account will be terminated for all of you. At our option, we may release some of you from liability under this Agreement and/or under Applicable Law without releasing all of you.

If you cancel your right to Advances under this Agreement, you must notify us and return all Special Convenience Checks and any other access devices. Any use of Special Convenience Checks or other access devices following suspension or termination may be considered fraud. You will also remain liable for any further use of the Special Convenience Checks or other Credit Line access devices not returned to us.

21. Effect of Suspension of Your Account. If your Account is suspended or terminated for any reason, you will nonetheless remain obligated to pay the Account Balance in accordance with the terms of this Agreement. Upon termination of your Account by either you or us, you must return to us all Checks, Credit Cards, or other Account access devices given to you. If either you or we terminate your Account, you will not be entitled to a refund of any FINANCE CHARGES, fees, charges, or credit insurance premiums paid or payable under the Account.

22. Change in Terms. After you open your Account, we may modify or amend the terms of this Agreement and/or the other loan documents pertaining to the Account if any of the following conditions exist: 1) You consent in writing to our proposed modification or amendment at that time; 2) The modification or amendment unequivocally benefits you throughout the remainder of the term of this Agreement; 3) The modification or amendment results only in an insignificant change to the terms of this Agreement and/or the other loan documents; 4) The modification or amendment involves the substitution of a new Index and Margin, as provided in Section 9 above. Any Account balance on the effective date of any modification or amendment is subject to the modification or amendment

23. Prepayment. You may prepay all or any amounts owing under this Credit Line at any time without penalty. However, we will be entitled to receive all accrued FINANCE CHARGES and any other accrued fees or charges.

24. Tax Consequences. You acknowledge that we (including our employees and representatives) have given you no assurances, representations or warranties that the FINANCE CHARGES and other fees and charges paid on your Account are tax deductible. You should consult your own tax advisor concerning the deductibility of the FINANCE CHARGES and other fees and charges for the Account.

25. Review of Your Account. Upon our request, you will provide us with current financial and credit information and will sign any additional or corrective documents in connection with this Agreement or the Account. You authorize us to release information about you to our affiliates or third parties as described in our privacy policy and our Fair Credit Reporting Act notice, provided you do not opt out of the applicable policy or as permitted by applicable law. You also authorize us to obtain credit reports on you at any time, at our sole option, and expense, for any reason, including but not limited to determining whether there has been an adverse change in your financial condition. We also may from time to time obtain a new valuation of the Property that secures the Credit Line at any time, including internal inspection, at our sole option and expense.

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26. Use of the Credit Line. You may use the Credit Line Account subject to the following limitations:

A. Legal Transactions. Borrower agrees that Borrower will only use the Credit Line for transactions that are legal where Borrower resides. For example, Internet gambling transactions may be illegal in Borrower's state. Display by an on-line merchant of either Lender's logo or a Card Company's logo does not mean that an Internet transaction is legal where Borrower resides. Lender will not be liable if Borrower engages in an illegal transaction.

B. Authorizations. Some transactions require lender's prior authorization. For security purposes, lender may from time to time place or change limits on the number or amounts of transactions Borrower makes in a day at ATMs or point-of-sale terminals. Such limitations may not be the same at every ATM or point-of-sale terminal. The limitations placed on a "Bank of America ATM Card" or "Bank of America Check Card" when using an ATM or point-of-sale terminal may not be the same as the limitations placed on an Account Access Card used at the same ATM or point-of-sale terminal. No such limits are placed on the number or amounts of transactions Borrower makes: at lender's banking centers, by writing a Special Convenience Check, by conducting an Overdraft Protection transaction (subject to the ATM limits, above), or by telephone. In addition, lender may deny authorization to any method of accessing the Credit Line if the Credit Line has been suspended or terminated or if Lender suspects fraudulent activity, lender shall not be liable for any failure to authorize a transaction for any of these reasons. However, Borrower is liable for any transaction Lender authorizes even if Lender should not have authorized it because Borrower is or would be in default as a result of the transaction.

C. No Security Interest on Purchases. This Agreement does not grant Lender a security interest in purchases Borrower charges to the Credit Line.

D. Transactions With Merchants (a) If a merchant discloses a policy such as "no returns", "no refund", "no return or credit without receipt", "as is", "store credit only", or "all sales final", or similar language, Borrower will be bound by that policy when Borrower uses the Credit Line to buy goods or services from that merchant. (b) When using the Credit Line to make travel or lodging reservations, Borrower must obtain the merchant's cancellation policy and follow it if Borrower cancels. If Borrower cancels, Borrower must obtain the cancellation number that the merchant is required to give Borrower. The merchant may charge Borrower for a cancelled transaction unless Borrower can provide Lender with a correct cancellation number. If Borrower makes reservations or purchases of any kind, such as lodging reservation for several nights stay or a mail order purchase, the Credit Line may be immediately charged for the full amount of the reservation or purchase, regardless whether Borrower has received the goods or services requested at the time the Credit Line is charged. (c) If Borrower authorizes a merchant to charge the Credit Line for repeat transactions without the Account Access Card, then Borrower must notify the merchant when Borrower wants to discontinue the repeat transactions or if the Credit Line is closed or if a new Credit Line or Account Access Card number is issued by Lender. Otherwise, Borrower will be responsible to Lender for the amount of all such repeat transactions. (d) If Borrower disagrees with a transaction on Borrower's statement or has a dispute with a merchant as a result of a transaction, Borrower will provide Lender with information or assistance Lender reasonably requests. Otherwise, Borrower will pay Lender for any resulting loss Lender has, unless Lender is prohibited by applicable law from holding Borrower liable for Lender's loss. (e) If Borrower makes a transaction in a currency other than U.S. dollars, Visa will convert the charge or credit into a U.S. dollar amount. The conversion rate will be determined using Visa currency conversion procedures that are disclosed to institutions issuing Visa cards. The conversion rate on the processing date may differ from the rate on the date of Borrower's transaction. Currently, Visa uses a currency conversion rate of either: (1) a rate selected by VISA from a range of rates available in the wholesale currency markets for the applicable central processing date, which rate may vary from the rate VISA itself receives or (2) the government mandated rate in effect for the central processing date. In each case, Visa uses the rate in effect one day before the conversion date. In the event Visa chooses to change the currency conversion rate or the day on which the currency conversion rate is determined, then transactions on the Credit Line made in a foreign currency and processed after the change will reflect the change.

E. Special Rule for Account Access Card Purchases. If Borrower has a problem with the quality of goods or services that Borrower purchased with an Account Access Card, and Borrower has tried in good faith to correct the problem with the merchant, Borrower may not have to pay the remaining amount due on the goods or services. Borrower has this protection only when the purchase price was more than $50 and the purchase was made in Borrower's home state or within 100 miles of Borrower's mailing address. (If Lender owns or operates the merchant, or if Lender mailed Borrower the advertisement for the property or services, all purchases are covered regardless of amount or location of purchase.).

F. Overdraft Protection and Linked Accounts. If the Credit Line Account is not blocked, suspended or terminated, you may request that the Credit Line Account be set up to provide overdraft protection for an associated checking or Money Market Savings account. If the total amount of checks, debit card or ATM transactions or other debits for a business day exceeds the available associated account balance, then an Advance will be made from the Credit Line Account ("Overdraft Protection"). If the Credit Line Account is used for Overdraft Protection, the minimum transfer amount is one hundred dollars ($100) and incremental transfer amounts will be in multiples of one hundred dollars ($100). However, if there is not $100 available, but the available Credit Line amount can cover the overdraft transaction, then the amount of the available Credit Line will be advanced to cover the overdraft. For Idaho and Washington, the incremental advance is $25. If the available credit on your Credit Line will not allow a $25 increment to be advanced, no transfer will be made. If the associated account is closed or blocked, Overdraft Protection will stop. If you request that the Credit Line Account be connected to or "linked" to another Bank of America product, you understand and agree that a user on the "linked" account can make a transaction that exceeds the available balance on the "linked" account and cause an Advance to be made. Also, if an ATM access card is given to a user on the "linked" account, that user when using the ATM access card may access the Credit Line Account and obtain an Advance without making a transaction directly on the "linked" account. That user may or may not be a party obligated for this Agreement.

G. Skip Payment Feature. At our discretion, from time to time we may offer a feature that will allow you to skip one or more payments. FINANCE CHARGES will continue to accrue on the principal balance at the applicable interest rate. At the end of the skip payment period, the payment terms of this Agreement will be reinstated automatically without further notice.

27. Borrowers Protection® Plan and Line Protection™ Plan (Borrowers' Protection® Plan and Line Protection™ Plan are registered trademarks of Bank of America Corporation). Fixed Rate Loan Options may be protected by the Borrowers' Protection® Plan, and Variable Rate Balances that are not subject to a Fixed Rate Loan Option may be protected by the Line Protection™ Plan. Protection options for both plans include Disability, Involuntary Unemployment, and Accidental Death; or Disability and Accidental Death; or Involuntary Unemployment and Accidental Death. Borrowers' Protection® Plan and Line Protection™ Plan are optional and are not required to obtain a Credit Line. For each new Credit Line, you must specifically request Borrowers' Protection® Plan or Line Protection™ Plan. In addition, you must sign a separate Addendum to your Credit Line Agreement, even if you obtained Borrowers' Protection® Plan or Line Protection™ Plan for a prior Credit Line Agreement with Bank of America. Two Borrowers may purchase Protection for each Fixed Rate Loan Option, but they must select the same protection option, and there may be restrictions on which Borrowers may apply.

Fees for the Borrowers' Protection® Plan and Line Protection™ Plan are based on and payable with the regularly scheduled monthly payment of the Credit Line Agreement. Credit Line Agreements repaid in quarterly payments are not eligible for the Borrowers' Protection® Plan. Interest is not charged on the fees for Borrowers' Protection® Plan or Line Protection™ Plan.

The maximum term of the Borrowers' Protection® Plan is the shorter of the Credit Line Agreement term or 120 months.

We may allow you to exceed the Credit Limit temporarily and from time to time, to accommodate the premiums for any voluntary insurance or the fees for Borrowers' Protection® Plan or Line Protection™ Plan.

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There are eligibility requirements, conditions and exclusions that can prevent you from receiving benefits under the Borrowers' Protection© Plan or Line Protection™ Plan as set forth in the Addendum describing the plan.

28. Miscellaneous. If this Agreement represents a renewal, modification, extension, substitution or consolidation of an obligation owed to us, then you acknowledge and agree that there are no claims, setoffs, avoidances, counterclaims or defenses or rights to claims, setoffs, avoidances, counterclaims or defenses to payment or enforcement of the prior obligation. If this Agreement is a renewal of a prior note or agreement with you, then it is the intent of the parties that the note or Agreement evidencing the original extension of credit not be extinguished by the renewal unless required by applicable state law. Our records shall be evidence that this Agreement is a renewal.

You agree that if this Agreement is in default, including the failure to make a Minimum Payment by the due date, you will accept calls regarding the collection of this Agreement at any residence or place of employment. The calls can be automatically dialed and a recorded message may be played. You agree such calls will not be "unsolicited calls" for purposes of any federal, state or local law. To improve customer service and security our calls with you may be recorded. You agree that monitoring or recording may be done and that no additional notice to you or additional approval from you is needed. You authorize us, our parent company, Bank of America Corporation (or any successor company) and Bank of America Corporation's affiliates and subsidiaries ("Affiliates") to: (a) obtain other information deemed necessary concerning your credit experience and other information from credit reporting agencies, creditors, and any department of motor vehicle or similar state agency, your employer (past, present and future) and other persons (and all entities may release and/or verify such information to us at any time without notification to you or without your consent), and (b) share information with our Affiliates, except to the extent that you have opted out of such sharing as provided in our Privacy Policy for consumers.

29. Entire Understanding. This Agreement together with the Security Instrument constitutes the entire understanding and agreement between the parties as to the matters set forth in this Agreement and the Security Instrument and supercede all prior understanding and correspondences, written or oral, with respect to the subject hereof.

30. Delay in Enforcement. We reserve the right to defer or delay the date certain changes are to occur without notice and without being liable for such delay or deferment. A court decree for divorce or separation or no-court approved mutual agreement does not affect, eliminate or reduce any person's liability for the Agreement or the Account balance if we are not a party to the decree or agreement.

31. Governing Law. In addition to applicable federal law, this Agreement will be governed by and interpreted in accordance with federal law and the laws of the State of SOUTH CAROLINA, except for matters related to the exportation of interest (as defined by federal law) which will be governed by and interpreted in accordance with the laws of the State of North Carolina. However, if there ever is a question about whether any provision of this Agreement is valid or enforceable, the provision that is questioned will be governed by whichever state or federal law would find the provision to be valid and enforceable. The loan transaction, which is evidenced by the Credit Agreement and this Agreement has been approved, made, and funded, and all necessary loan documents have been accepted by us in the State of North Carolina.

32. Severability. If any portion of this Agreement conflicts with, contradicts or otherwise controverts applicable federal, state, tribal, or local law, then to the extent possible such portion shall be construed as being consistent with such Applicable Law, and further will be deemed changed to the extent necessary to accomplish this end. If any such conflicting or contradicting portion of this Agreement cannot be so construed or changed, it will be deemed severed from this Agreement and will not affect other provisions of this Agreement, which shall be given full effect without regard to the conflicting or contradicting portions.

33. Irregular Payments. We may accept late payments, partial payments, and items marked "payment in full" even if they are not full payments, without losing any of our rights under this Agreement, and you will remain obligated to pay amounts owed under this Agreement. All written communications concerning disputed amounts including any checks or other instruments that indicate a payment constitutes "payment in full" of the amount owed or that is tendered with other conditions or limitations as full satisfaction of a disputed amount must be mailed or delivered to us at the address shown on your periodic statement.

34. Waiver of Notice. Subject to Applicable Law, you waive presentment for payment, demand, protest, and notice of dishonor, notice of acceleration, notice of intent to accelerate, and notice of nonpayment.

35. Sending of Notices. Except as otherwise provided in this Agreement, all notices must be in writing. Notice to any of you shall be deemed notice to all of you. Any Billing Statement or notice to you under this Agreement will be sufficiently given if sent to your address on file in connection with the Account or to a new address of which you have notified us in writing at least 20 calendar days before the sending of the Billing Statement or notice. Any notice that you give to us must be provided to us at the address listed on page 1, or a different address if you are notified of the same.

36. Transfer and Assignment. We may transfer or assign this Credit Line Agreement, the Security Instrument and any other loan document relating to the Account to any person or entity without notice to you. You may not transfer, assign or delegate your duties under this Agreement. Subject to applicable law this Agreement is binding on you, your successors, heirs and personal and legal representatives.

37. Assumption. This Account is not assumable. This means that someone buying the Property may not take over this Account as his/her own obligation on the terms of this Agreement or on any other terms.

38. Caption Headings. Caption headings are for convenience purposes only and are not to be used to interpret or define the provisions of this Agreement.

JOANNE C HAFTER/

Acknowledgement. You understand and agree to the terms and conditions of this Agreement. By signing this Agreement, you acknowledge that you have read this Agreement. You also acknowledge receipt of a completed copy of this Agreement, including the Fair Credit Billing Notice and the early home equity line of credit application disclosure, in addition to the handbook entitled *When Your Home is On the Line: What You Should Know About Home Equity Lines of Credit* provided to you at application.

WITNESS: ACCEPTED AND AGREED TO:

Joanne Hafter 9-26-08

Borrower JOANNE C HAFTER Date

Borrower Date

Borrower Date

Borrower Date

Borrower Date

Borrower Date

Borrower Date

Borrower Date

JOANNE C HAFTER/

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BILLING ERROR RIGHTS
YOUR BILLING RIGHTS

KEEP THIS NOTICE FOR FUTURE USE

This notice contains important information about your rights and our responsibilities under the Fair Credit Billing Act.

NOTIFY US IN CASE OF ERRORS OR QUESTIONS ABOUT YOUR BILL

If you think your bill is wrong, or if you need more information about a transaction on your bill, write us on a separate sheet at the address listed on your bill. Write to us as soon as possible. We must hear from you no later that sixty (60) days after we sent you the first bill on which the error or problem appeared. You can telephone us, but doing so will not preserve your rights.

In your letter give us the following information:

Your name and account number;

The dollar amount of the suspected error;

Describe the error and explain, if you can, why you believe there was an error. If you need more information, describe the item you think is wrong.

YOUR RIGHTS AND RESPONSIBILITIES AFTER WE RECEIVE YOUR WRITTEN NOTICE

We must acknowledge your letter within thirty (30) days, unless we have corrected the error by then. Within ninety (90) days, we must either correct the error or explain why we believe the bill is correct.

After we receive your letter, we cannot try and collect any amount you question, or report you as delinquent. We can continue to bill you for the amount in question, including FINANCE CHARGES, and we can apply any unpaid amount against your Credit Line. You do not have to pay any questioned amount while we are investigating, but you are still obligated to pay the parts of your bill that are not in question.

If we find we made a mistake on your bill, you will not have to pay FINANCE CHARGES related to any questioned amount. If we didn't make a mistake, you may have to pay FINANCE CHARGES, and you will have to make up any missed payments on the questioned amount. In either case, we will send you a statement of the amount you owe and the date on which it is due.

If you fail to pay us the amount that we think you owe, we may report you as delinquent. However, if your explanation does not satisfy us and you write to us within ten (10) days telling us that you still refuse to pay, we will tell anyone we report you to that you have a question about your bill. And, we must tell you the name of anyone we reported you to. We must tell anyone that we report you to that the matter has been settled between us when it finally is.

If we do not follow these rules, we can't collect the first $50 of the questioned amount, even if your bill is correct.

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Bank of America

IMPORTANT NOTICE

This is the plan you requested.
You may enroll in the plan now, by signing below.

CLOSING AGENTS: This document must be included in the closing package you return to Bank of America. The borrower(s) must accept or decline the plan and all borrowers must sign this page.

Confirmation Letter

Account Number:

Congratulations and thank you for choosing Bank of America for your home equity line of credit. Our records indicate that you previously asked to enroll in the Line Protection Plan®. Below is the plan you requested.

Financial relief when you need it most. The Line Protection Plan may cancel your minimum monthly payment for up to six months if you experience certain unexpected events, such as:

- Involuntary Unemployment
- Disability
- Hospitalization
- Loss of Life

You may cancel the plan at any time. You cannot request the plan to your line of credit after this closing.

NEXT STEPS: You must make a final selection below. In order to complete your enrollment and activate protection, you must accept a protection option, the protected borrower(s) and sign below. **If you decline protection, you will not be entitled to any benefits provided by the Line Protection Plan (LPP).**

1. **ACCEPT Line Protection Plan®**

☒ Single, 6-month, Involuntary Unemployment, Disability, Hospitalization and Loss of Life: Amount of Fee: The Monthly Fee for the selected Line Protection Plan option is 9.000 percent of your Minimum Monthly Payment. The monthly fee will be reflected on your statement under "Optional Products" for each month there is a balance on your account. The Protection Date is:
SEPTEMBER 26, 2008
Protected Borrower:
JOANNE C HAFTER

☐ Joint, 6-month, Involuntary Unemployment, Disability, Hospitalization and Loss of Life: Amount of Fee: The Monthly Fee for the selected Line Protection Plan option is percent of your Minimum Monthly Payment. The monthly fee will be reflected on your statement under "Optional Products" for each month there is a balance on your account. The Protection Date is:

Protected Borrowers:

DECLINE Line Protection Plan®

☐ I/We decline Protection. I/We forfeit any future claim to benefits provided by the Line Protection Plan. If you are declining protection, please mark through the pre-selected plan above.

2. **All borrowers must acknowledge their above selections, by signing below.**
If accepted, the undersigned Borrower(s) agree to the terms of the optional Line Protection Plan Addendum and acknowledge that I/we have received a full and completed copy of the Addendum (regardless if my/our signatures(s) appear(s) on the copy). The undersigned Borrowers also acknowledge that I/we have received the Important Information about Bank of America's Line Protection Plan.

Joann C. Hafter 9-26-08
Borrower JOANNE C HAFTER Date

Borrower Date

Borrower Date

Borrower Date

Borrower Date

Borrower Date

Borrower Date

ELECTRONICALLY FILED - 2018 Feb 20 12:30 PM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4202834

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(Spartanburg Division)

PHILLIP FRANCIS LUKE HUGHES, on behalf of the Estate of Jane K. Hughes, JOANNE HAFTER, and all others similarly situated, Plaintiffs, vs: BANK OF AMERICA NATIONAL ASSOCIATION, Defendant.	**Civil Action No. 7:15-cv-05083-MGL** **AFFIDAVIT OF PHILLIP FRANCIS LUKE HUGHES**

The undersigned having been duly sworn, affiant Phillip Francis Luke Hughes does hereby testify as follows:

1. My name is Phillip Francis Luke Hughes and I am over eighteen years of age, and I am fully competent to give this affidavit.

2. I am the son of Jane K. Hughes and the co-Personal Representative of the Estate of Jane K. Hughes.

3. In the years leading to her death in 2015, my mother underwent major heart surgery and suffered from dementia. My mother also suffered from cataracts and underwent eye surgery. As a result of her vision impairments, my mother could not see well enough to read documents for several years prior to her death.

4. My mother suffered a broken hip after June 2006 that required hospitalization and extensive rehabilitation at White Oak Manor Nursing Home in Spartanburg, South Carolina.

5. As a result of her physical and mental ailments, my mother was unable to read or understand her monthly bank statements from Bank of America in the years prior to her death.

FURTHER AFFIANT SAYETH NOT.

Phillip Francis Luke Hughes

Sworn to and subscribed before me
this 6th day of May, 2016

(L.S.)
Notary Public for South Carolina
My Commission Expires: August 27, 2023

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IN THE UNITED STATES DISTRICT COURT
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(Spartanburg Division)

PHILLIP FRANCIS LUKE HUGHES, on behalf of the Estate of Jane K. Hughes, JOANNE HAFTER, and all others similarly situated, Plaintiffs, vs. BANK OF AMERICA NATIONAL ASSOCIATION, Defendant.	**Civil Action No. 7:15-cv- 05083-MGL** **AFFIDAVIT OF JOANNE HAFTER**

The undersigned having been duly sworn, affiant Joanne Hafter does hereby testify as follows:

1. My name is Joanne Hafter and I am over eighteen years of age, and I am fully competent to give this affidavit.

2. I applied for a home equity loan from Bank of American in 2008 in the amount of $30,000.00.

3. The meeting to close the home equity loan was brief and only the closing attorney was present, except for a short time when I recall another individual entering the room to witness my signature on the loan paperwork.

4. I specifically recall that no Bank of America representative was present before, during, or after the closing.

5. I was not presented with any form by anyone before, during, or after the closing providing information regarding a mortgage insurance plan, nor did I knowingly agree to participate in any mortgage insurance plan at that time.

6. In addition, I do not recall being approached by anyone or presented with any form by anyone at any time since the closing providing information regarding a mortgage insurance plan, nor did I knowingly agree to participate in any mortgage insurance plan at any time.

FURTHER AFFIANT SAYETH NOT.

Joanne Hafter

Sworn to and subscribed before me
this 3rd day of May, 2016
Michelle R Moore (L.S.)
Notary Public for South Carolina
My Commission Expires: 8/9/2020

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Bank of America Home Loans

BANK OF AMERICA, N.A.
P.O. BOX 941000
SIMI VALLEY, CA 93094-1000

BP 12-29-14

+ [redacted]
JOANNE C HAFTER
324 WHITE FALLS DR
COLUMBIA SC 29212-1234

Account Number: [redacted]
Page 1 of 3

Variable Rate Snapshot

Statement Period: 11/07/2014-12/07/2014

Previous Outstanding Variable Balance:	$12,033.49
New Outstanding Variable Balance:	$11,780.96
Credit Limit:	$30,000.00
Total Principal Balance:	$11,746.75
Available Credit:	$18,253.25
Current Payment Due:	$44.01
Past Due Amount:	$0.00
Total Minimum Payment Due:	$44.01
Payment Due Date:	01/01/2015

Payment shown above does not include Fixed Rate Loan Options. Any Fixed Rate Loan Options you have will be billed separately.

Bank of America Equity Maximizer

Account Summary

Account Type	Principal Balance	Account Number
Variable Rate:	$11,746.75	[redacted]

Fixed Rate Loan Options are available. Please call customer service for current rates. Information about your transactions are included on the next page of this statement.

Variable Rate Portion Summary

ANNUAL PERCENTAGE RATE	3.990%
Daily Periodic Rate	.01093%
Corresponding ANNUAL PERCENTAGE RATE	3.990%
Days in Billing Cycle	31
Periodic FINANCE CHARGE	$40.38
Other FINANCE CHARGE	$0.00
Outstanding Fees/Charges/Insurance	$0.00

Messages

The interest rate for your next billing cycle will be 3.990%.

Your automatic payment in the amount of $44.01 will be deducted on 01/01/2015 from the account you designated.

Customer Service Information

Billing Error Notices:
Bank of America, N.A.
Attention: Billing Error Notice
PO Box 941657
Simi Valley, CA 93094-1657

General Inquiries
Bank of America, N.A.
P.O. Box 21848
Greensboro, NC 27420-1848

www.bankofamerica.com

1.800.934.LOAN (5626) Home Equity Customer Service
TDD 1.866.345.1260
Se habla Español: 1.800.688.6086
Customer Service Hours:
Monday through Friday
7:00 a.m. - 7:00 p.m. Local Time

420140

Payment Coupon - Please return with your payment

JOANNE C HAFTER
324 WHITE FALLS DR
COLUMBIA SC 29212-1234

Minimum Payment Due $44.01

Additional Principal: $ [redacted]

Payment Enclosed: $ [redacted]

Equity Maximizer Number:	[redacted]
Current Payment Due:	$44.01
Past Due Amount:	$0.00
Total Minimum Payment Due:	$44.01
Payment Due Date:	01/01/15

If payment is received after 01/11/2015 please pay $54.01, which includes a $10.00 late fee.

Please refer to Important disclosures, account and payment information found elsewhere on this statement.

Bank of America, N.A.
P. O. Box 15025
Wilmington, DE 19886-5025

[redacted]

[redacted]

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Transaction Summary

Variable Rate Portion:

Beginning Outstanding Balance: $12,033.39 **Ending Outstanding Balance:** $11,790.76

Effective Date	Detail	Transaction Total	Principal	FINANCE CHARGES	Fees/Chgs/Ins	Principal Balance
11/07/2014	Beginning Balance					$11,990.07
11/28/2014	Online scheduled payment from CHK 5561 Confirmation# 3117006579	-$243.32	-$200.00	-$39.75	-$3.57	$11,789.07
12/01/2014	Auto Payment Account 000775175561	-$43.32	-$43.32			$11,745.75
12/07/2014	LPP Fee Assessment	$3.63			$3.63	$11,745.75
12/07/2014	FINANCE CHARGE/Interest	$40.38		$40.38		$11,786.13
12/07/2014	Ending Balance					$11,786.13

Itemization of FINANCE CHARGES for this statement period: *NOTE: Any fees whether financed or paid in cash, will cause the ANNUAL PERCENTAGE RATE to be higher than the corresponding ANNUAL PERCENTAGE RATE.

Type	Variable Rate Portion	Fixed Rate Option 1	Fixed Rate Option 2	Fixed Rate Option 3	Fixed Rate Option 4	Account Total
Interest resulting from Daily Periodic Rate:	$40.38	$0.00	$0.00	$0.00	$0.00	$40.38
Total FINANCE CHARGES:	$40.38	$0.00	$0.00	$0.00	$0.00	$40.38

Additional Messages

Variable Rate Portion Summary

You'll see a change in the terminology used in the Variable Rate Portion Summary starting with this statement. "Outstanding Fees/Charges/Insurance" appears now instead of "Outstanding Fees (due upon payoff)." To ensure you're aware of all amounts owed on your account, this field will now reflect the total of all outstanding fees and charges owed on your account, whether they're currently due or due at payoff. The total amount owed under this field may have increased because other fees and charges due on your account were not previously included in this field. If you have any questions, please call 1.800.934.5626 Monday through Friday, 7:00 a.m. - 7:00 p.m. local time.

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Bank of America

DE5-011-01-09
P.O. Box 17072
Wilmington, DE 19850

CANCELLATION NOTICE

Loan number ending in 4799

0001008 [illegible]

JOANNE HAFTER
324 WHITE FALLS DR
COLUMBIA, SC 29212-1234

Date
March 17, 2015

Customer service
1.866.731.4210

The optional Line Protection Plan® will be cancelled on September 30, 2015.

The Line Protection Plan ("Protection Plan") for the above referenced loan will be cancelled effective September 30, 2015 pursuant to the termination provision of your Plan addendum that was provided at the time of loan closing.

What you need to know

You're no longer being charged for the Protection Plan as of April 1, 2015. Please do not send any further payments for Protection Plan fees.

Going forward, any payments that would have previously been applied to Protection Plan fees will be applied to other amounts owed as described in your loan documents, unless refunded to you. If we apply the payment to other amounts owed and you later determine that you mistakenly paid Protection Plan fees and prefer to have a refund of these amounts, please contact us at 1.866.731.4210.

Unless the Protection Plan terminates earlier pursuant to its terms, it will continue to be provided at no cost until the effective cancellation date of September 30, 2015. During the remainder of the Protection Plan, it will continue to be subject to all terms and conditions of your Protection Plan addendum. Please refer to your Protection Plan addendum for a complete list of termination reasons.

The Protection Plan cancellation doesn't affect any pending benefit requests.

You can still request benefits for qualifying events under the Protection Plan that occur prior to the cancellation effective date of September 30, 2015. The Protection Plan requires that benefits be requested within 365 days of the start of a protected event.

ARLG664K app. 2/20/2015

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Line Protection Plan is an optional line protection plan that can, depending on your specific Plan, provide benefits for a qualifying Accidental Death, Loss of Life, Involuntary Unemployment, Disability, Hospitalization or Family Leave event experienced by a protected borrower.

The protected borrower(s) associated with this loan are listed below:
JOANNE C HAFTER

We're here to help

If you have questions, please call us at 1.866.731.4210, Monday through Friday from 8 a.m. to 8 p.m. Eastern.

IMPORTANT DISCLOSURES

Bank of America N.A., the servicer of your home loan, is required by law to inform you that this communication is from a debt collector.

If you're currently in a bankruptcy proceeding, or have previously obtained a discharge of this debt under applicable bankruptcy law, this notice is for information only and is not an attempt to collect the debt, a demand for payment, or an attempt to impose personal liability for that debt. You're not obligated to discuss your home loan with us or enter into a loan modification or other loan-assistance program. You should consult with your bankruptcy attorney or other advisor about your legal rights and options.

MILITARY PERSONNEL/SERVICEMEMBERS: If you or your spouse is a member of the military, please contact us immediately. The federal Servicemembers Civil Relief Act (SCRA) and comparable state laws afford significant protections and benefits to eligible military service personnel. Please note, however, that military service and/or SCRA qualification may not necessarily prevent foreclosure. If your loan is in default, a court order approval may be obtained for foreclosure to proceed. If you are having difficulty making your payments, please contact the Enterprise Military Benefits Unit at your earliest convenience by calling 1.877.345.0693. If you're calling from outside the U.S., please call 1.817.245.4094. Both numbers are open 24 hours a day, seven days a week to discuss the various home retention options that may be available.

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State	Does Fraud Survive?	Authority
Alabama	No	Ala. Code § 6-5-462
Alaska	Yes	Alaska Stat. Ann. § 09.55.570 (West)
Arizona	Yes	Ariz. Rev. Stat. Ann. § 14-3110
Arkansas	No	Ark. Code Ann. § 16-62-101 (West)
California	Yes	Cal. Civ. Proc. Code § 377.20 (West)
Colorado	Yes	Colo. Rev. Stat. Ann. § 13-20-101 (West)
Connecticut	Yes	Conn. Gen. Stat. Ann. § 52-599 (West)
Delaware	Yes	Del. Code Ann. tit. 10, § 3701 (West)
Florida	Yes	Fla. Stat. Ann. § 46.021 (West)
Georgia	Yes	Ga. Code Ann. § 9-2-41 (West)
Hawaii	Yes	Haw. Rev. Stat. Ann. § 663-7 (West)
Idaho	Yes	Idaho Code Ann. § 5-327 (West)
Illinois	Yes	755 Ill. Comp. Stat. Ann. 5/27-6
Indiana	Yes	Ind. Code Ann. § 34-9-3-1 (West)
Iowa	Yes	Iowa Code Ann. § 611.20 (West)
Kansas	Yes	Kan. Stat. Ann. § 60-1801 (West)
Kentucky	Yes	Ky. Rev. Stat. Ann. § 411.140 (West)
Louisiana	Yes	La. Civ. Code Ann. art. 2315.1
Maine	Yes	Me. Rev. Stat. tit. 18-A, § 3-817
Maryland	Yes	Md. Code Ann., Cts. & Jud. Proc. § 6-401 (West)
Massachusetts	No	Mass. Gen. Laws Ann. ch. 228, § 1 (West)
Michigan	Yes	Mich. Comp. Laws Ann. § 600.2921 (West)
Minnesota	Yes	Minn. Stat. Ann. § 573.01 (West)
Mississippi	Yes	Miss. Code. Ann. § 91-7-233 (West)
Missouri	Yes	Mo. Ann. Stat. § 537.010 (West)
Montana	Yes	Mont. Code Ann. § 27-1-501 (West)
Nebraska	Yes	Neb. Rev. Stat. Ann. § 25-1401 (West)
Nevada	Yes	Nev. Rev. Stat. Ann. § 41.100 (West)
New Hampshire	Yes	N.H. Rev. Stat. Ann. § 556:15
New Jersey	Yes	N.J. Stat. Ann. § 2A:15-3 (West)
New Mexico	Yes	N.M. Stat. Ann. § 37-2-1 (West)
New York	Yes	N.Y. Est. Powers & Trusts Law § 11-3.2 (McKinney)
North Carolina	Yes	N.C. Gen. Stat. Ann. § 28A-18-1

North Dakota	Yes	ND ST § 28-01-26.1 (West)
Ohio	Yes	Ohio Rev. Code Ann. § 2305.21 (West)
Oklahoma	Yes	Okla. Stat. Ann. tit. 12, § 1051 (West)
Oregon	Yes	Or. Rev. Stat. Ann. § 115.305 (West)
Pennsylvania	Yes	20 Pa.C.S.A. § 3371 (West)
Rhode Island	Yes	R.I. Gen. Laws § 9-1-6 (West)
South Carolina	No	S.C. Code Ann. § 15-5-90
South Dakota	Yes	S.D. Codified Laws § 15-4-1
Tennessee	Yes	Tenn. Code Ann. § 20-5-102 (West)
Texas	No	Tex. Civ. Prac. & Rem. Code Ann. § 71.021 (West)
Utah	Yes	Utah Code Ann. § 78B-2-105 (West)
Vermont	No	Vt. Stat. Ann. tit. 14, § 1451 (West)
Virginia	Yes	Va. Code Ann. § 8.01-25 (West)
Washington	Yes	Wash. Rev. Code Ann. § 4.20.046 (West)
West Virginia	Yes	W. Va. Code Ann. § 55-7-8a (West)
Wisconsin	No	Wis. Stat. Ann. § 895.01 (West);
Wyoming	Yes	Wyo. Stat. Ann. § 1-4-101 (West)
DC	Yes	D.C. Code Ann. § 12-101 (West)

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EXHIBIT 7

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IN THE UNITED STATES DISTRICT COURT
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(Spartanburg Division)

PHILLIP FRANCIS LUKE HUGHES, on behalf of the ESTATE OF JANE K. HUGHES, JOANNE HAFTER, and all others similarly situated, Plaintiff, v. BANK OF AMERICA, N.A. Defendant.	Case No. 7:15-cv-05083-MGL

DEFENDANT BANK OF AMERICA, N.A.'S
MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT

Defendant Bank of America, N.A. moves this Court to dismiss Plaintiffs' Third Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the following grounds:

1. The statute of limitations bars all of Plaintiffs' claims for (1) violations of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, (2) fraud, (3) fraudulent concealment, (4) breach of contract, (5) breach of contract accompanied by a fraudulent act, and (6) breach of duty of good faith and fair dealing.

2. The Third Amended Complaint fails to state a claim upon which relief can be granted against Defendant, whether under Rule 8 or 9 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(6).

In support of this Motion, Defendant submits its Memorandum of Law containing arguments and citations of authorities.

WHEREFORE, Defendant prays for the following relief:

(a) That the Third Amended Complaint be dismissed with prejudice; and

(b) For such other relief as the Court deems just and proper.

Dated: April 21, 2016

Respectfully submitted,

BANK OF AMERICA, N.A.

By Counsel

/s/ Robert A. Muckenfuss
Robert Muckenfuss
Federal Bar # 7333
McGuireWoods LLP
201 North Tryon Street
Suite 3000
Charlotte, NC 28202-2146
(704) 343-2052 (Telephone)
(704) 444-8707 (Facsimile)
rmuckenfuss@mcguirewoods.com

Attorney for Defendant

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CERTIFICATE OF SERVICE

I certify that on this 21st day of April, 2016, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the attorneys of record registered with the CM/ECF system. I further certify that a true and accurate copy of the foregoing was sent by U.S. Mail to the following:

D. Michael Kelly
Brad D. Hewett
Jamie N. Smith
500 Taylor Street
Post Office Box 8113
Columbia, SC 29201
mkelly@mklawgroup.com
bhewett@mklawgroup.com
jsmith@mklawgroup.com
Attorneys for Plaintiff

/s/ Robert A. Muckenfuss
Robert A. Muckenfuss

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
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PHILLIP FRANCIS LUKE HUGHES, on behalf of the ESTATE OF JANE K. HUGHES, JOANNE HAFTER, and all others similarly situated, Plaintiff, v. BANK OF AMERICA, N.A. Defendant.	Case No. 7:15-cv-05083-MGL

MEMORANDUM IN SUPPORT OF DEFENDANT BANK OF AMERICA, N.A.'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT

Plaintiffs Phillip Francis Luke Hughes (as the personal representative of his mother's estate) and Joanne Hafter bring a third amended, and still stale, class action suit against Bank of America, N.A. ("BANA") related to an insurance product—called a Line Protection Plan, or LPP—which protected Hughes's parents and Hafter if they failed to make their periodic loan payments due to unemployment, accidental death, disability or illness. Hughes claims that his parents declined insurance coverage on a line of credit obtained from BANA in 2006. Despite being presented with documents confirming that she elected LPP coverage, Hafter still maintains that she declined the coverage on a line of credit obtained from BANA in 2008. For nearly a decade, both the Hugheses and Hafter dutifully paid for the LPP coverage offered by BANA.

Plaintiffs have now sued, alleging that by charging for LPP coverage, BANA committed fraud, fraudulent concealment, breach of contract, and breach of the implied duty of good faith and fair dealing and violated the Truth in Lending Act.

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Notwithstanding Plaintiffs' repeated attempts to amend their futile allegations, this Court should dismiss these claims, with prejudice, for the following reasons:

- The statute of limitations expired for all of Plaintiffs' claims years ago;
- Hafter signed up for LPP coverage at the closing of her loan;
- The fraud claims did not survive the death of Hughes' parents; and
- Plaintiffs fail to state facts sufficient to entitle them to relief.

FACTUAL ALLEGATIONS

I. Phillip Hughes' Factual Allegations.

Hughes, as personal representative of the estate of his mother, Jane Hughes, alleges that his late parents opened a $120,000 line of credit from BANA on June 13, 2006, secured by a mortgage on their Spartanburg, South Carolina home. (Third Am. Compl. "TAC" ¶ 8.) Hughes alleges that his parents signed the mortgage, a Bank of America Maximizer Agreement and Disclosure Statement (which governs the line of credit), and an acknowledgement and authorization permitting BANA to automatically draft payments from their account. (*Id.* ¶¶ 8-9.)

Hughes claims that on June 13, 2006, BANA also presented his parents with policy documentation concerning optional LPP coverage. (*Id.* ¶ 10.) The supplemental LPP would enable a borrower to cancel some or all of the monthly payments on the variable portion of a credit line due to events like disability, accidental death, or involuntary unemployment. (*Id.*) Hughes asserts that his parents declined to purchase LPP coverage when they received the $120,000 line of credit. (*Id.* ¶ 12.)

Hughes alleges that "*beginning on or about June 2006*," BANA drafted a monthly charge of $28.40 from his parents' account for LPP coverage, and that only his father received LPP coverage. (*Id.* ¶¶ 15, 25 (emphasis added).) Hughes identifies the monthly LPP charge

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description on his parents' joint checking account to be "Ad Insurance Des:XXXXXX4374 ID:R# XXXXXXX1070 Indn:Hughes Sr., John P Co ID:XXXXXX4660 Ppd." (*Id.* ¶ 25.) Hughes contends this charge was "ambiguous" and that "all other charges from BANA . . . were clearly designated . . . and other insurance transactions were clearly identified with the name of the charging company." (*Id.* ¶¶ 25-26.)

In March 2015, BANA informed the Hugheses that it would cancel Mr. Hughes' LPP coverage effective September 30, 2015. (*Id.* ¶ 15.) Shortly thereafter, Mr. Hughes' estate notified BANA that he had passed away seven years earlier. (*Id.* ¶ 29.) BANA then refunded all LPP premium payments drawn on the Hugheses' account after Hughes' father's death in October 2008. (*Id.* ¶ 30.) On June 3, 2015, Hughes' mother passed away, and Hughes was named personal representative of her estate. (*Id.* ¶ 32.)

II. Joanne Hafter's Factual Allegations.

Hafter alleges that in 2008 she obtained a $30,000 home equity loan from BANA, secured by a mortgage on her home. (*Id.* ¶ 33; Exhibit A [Mortgage].)[1] Hafter contends that, "[d]uring the closing of the Hafter Mortgage, [she] rejected any offer of a Line Protection Plan or mortgage protection services and has never since authorized BANA to withdraw any funds for a Line Protection Plan or any other similar 'plan.'" (TAC ¶ 33.) In fact, Hafter signed up for LPP coverage in conjunction with the closing of her mortgage on September 26, 2008. (*See* Exhibit B [BANA Equity Maximizer Agreement ("HELOC Agreement") and LPP Confirmation Letter].)[2]

---

[1] When considering a motion to dismiss, a court may take judicial notice of a publicly-available document without converting the motion into one for summary judgment. *See Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

[2] While Hafter failed to attach these documents to the TAC, this Court may consider them as part of BANA's motion to dismiss without transforming the motion into one for summary judgment, because the document is integral to and explicitly relied on by her for all of her

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Hafter does not allege that the signature on the LPP Confirmation letter is not her signature. (*See* TAC ¶¶ 33-38.)[3] Instead, she alleges that the LPP Confirmation Letter, when presented to her, already contained a pre-printed "'X' used to designate acceptance of the product," and "offered no option for Mrs. Hafter to decline the offered product." (*Id.* ¶ 38.) Contrary to her allegations, the LPP Confirmation Letter incorporated into the TAC provides the following instructions for declining LPP coverage:

> **DECLINE Line Protection Plan®**
>
> ☐ I/We decline Protection. I/We forfeit any future claim to benefits provided by the Line Protection Plan. If you are declining protection, please mark through the pre-selected plan above.

(Exhibit B [LPP Confirmation Letter].)

Hafter paid for LPP coverage "*beginning in October 2008* and extending through 2015." (TAC ¶ 34 (emphasis added).) She admits that the charge was labeled "as 'LPP Fee Assessment' on the monthly transaction summary for her home equity loan." (*Id.*)

III. Procedural History.

On November 16, 2015, Hughes filed a class action Complaint in the Spartanburg Court of Common Pleas, No. 2015-CP-42-4748, asserting federal and state law claims relating to the LPP coverage. BANA timely removed the case to this Court under federal question jurisdiction

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claims. *See* (TAC ¶¶ 36-38); *Am. Chiropractic v. Trigon Healthcare*, 367 F.3d 212, 234 (4th Cir. 2004) (quoting *Phillips v. LCI Int'l Inc.*, 190 F.3d 609, 618 (4th Cir. 1999)); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) ("What is critical is whether the claims in the complaint are 'based' on an extrinsic document and not merely whether the extrinsic document was explicitly cited." (citations omitted)).

[3] In her affidavit in support of her Motion to Amend the Second Amended Complaint, Hafter declares that "[a]fter careful inspection of [the LPP Confirmation Letter], the signature affixed to the document appears to be similar to my signature but I cannot confirm as much at this time." (ECF No. 18-2 ¶ 6.) Rather, she declares that as of the date of her affidavit (March 10, 2016), she did "not recall signing" the LPP Confirmation Letter during the September 26, 2008 HELOC closing. (*Id.* ¶ 5.)

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thirty days later, on December 30, 2015. (*See* ECF No. 1.) Hafter joined the suit in February 2016 with the filing of Plaintiffs' Second Amended Complaint. (ECF No. 13.)

On March 14, 2016, Plaintiffs moved to amend their complaint for a third time, purportedly to allege "significant new allegations of fraud." (*See* ECF No. 18.) The TAC contains just three new paragraphs of facts, all of which relate to Hafter. (*Id.*) By text order on March 22, 2016, this Court granted Plaintiffs' motion for leave to amend. (*See* ECF No. 22.)

In the TAC, Plaintiffs claim that BANA's charging for the LPP, when the Hugheses and Hafter allegedly declined coverage, amounted to fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent acts, breach of duty of good faith and fair dealing, and a violation of the Truth in Lending Act. Plaintiffs also seek to represent a class of "BANA customers who, without the customer's express and informed written consent, were enrolled in and charged for a protection plan insurance products referred variously as 'Borrower's Protection Plan,' 'Line Protection Plan,' or other similar monikers." (TAC ¶ 43.) For the reasons detailed below, this court should dismiss Plaintiffs' complaint.

STANDARD OF REVIEW

To survive a motion to dismiss, the "factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the allegations in the complaint are true." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A plaintiff must plead sufficient "factual content [to] allow the Court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). The complaint must be dismissed if it fails to allege "enough facts to state a claim for relief that is plausible on its face," *Twombly*, 550 U.S. at 570, and the Court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments," *Eastern Shore Mkts., Inc. v.*

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J.D. Assocs. Ltd. P'ship, 213 F.3d 175, 180 (4th Cir. 2000). Indeed, the United States Court of Appeals for the Fourth Circuit has concluded that it is now "more favorable" to dismiss a complaint at the earliest stages of a case since the Supreme Court's *Twombly* decision. *Giarranto v. Johnson*, 521 F.3d 298, 306 n.3 (4th Cir. 2008).

ARGUMENT

I. Plaintiffs' Claims Are Barred by the Statute of Limitations.

Plaintiffs seek to prosecute claims that arise from conduct occurring "on or about June 2006" for the Hugheses and "beginning in October 2008" for Hafter. (TAC ¶¶ 25, 33.) Just like with their preceding three Complaints, all of Plaintiffs' claims are barred by the applicable statutes of limitation and must be dismissed as untimely.

A. Plaintiffs' TILA claims are untimely.

Plaintiffs claim BANA violated TILA by failing to include LPP charges with the Hugheses and Hafter's finance charge, specifically quoting 15 U.S.C. § 1605(b) in their suit. (TAC ¶ 51.) That section requires an entity to include voluntary credit insurance premiums in a consumer's total finance charge unless (1) the coverage is voluntary; (2) that fact is disclosed in writing; and (3) the consumer gives specific affirmative written indication of their desire to obtain coverage. For the Hugheses, the alleged violation occurred in June 2006. (TAC ¶¶ 22, 52.) For Hafter, the alleged violation occurred in October 2008. (*Id.* ¶¶ 33, 52.)

TILA requires that an aggrieved person bring a civil suit within one year of the claimed violation.[4] 15 U.S.C. § 1640(e). Notably, "[section 1640(e)] does not require [the plaintiff to

[4] The one-year statute of limitations under TILA applies to claims brought under section 1605(b). 15 U.S.C. § 1640(e) (applying one year statute of limitations to "any action brought under [TILA]" except for those under §§ 1639, 1639b, or 1639c). While Plaintiffs do not specifically cite to that TILA section as the one they claim BANA violated, paragraph 51 of the Third Amended Complaint quotes that section verbatim. As such, BANA assumes that

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have] an element of knowledge" before TILA's limitations period begins to run. *See Schmidt v. Citibank (South Dakota) N.A. (CBSD)*, 677 F. Supp. 687, 691 (D. Conn. 1987). "A TILA violation occurs when the transaction is consummated, which is generally the day the loan agreement is entered into." *Espejo v. George Mason Mortg., LLC*, No. 1:09cv1295, 2010 U.S. Dist. LEXIS 8190, at *14 (E.D. Va. Feb. 1, 2010) (citing *Davis v. Edgemere Fin. Co.*, 523 F. Supp. 1121, 1123 (D. Md. 1981)). Because Plaintiffs affirmatively allege that BANA's improper conduct occurred in June 2006 and October 2008, (TAC ¶¶ 25, 33), the statute of limitations on the Hugheses' TILA claim ran in June 2007 or earlier, and the statute ran on Hafter's claim in October 2009.

Recognizing their obvious statute of limitations problem, Plaintiffs assert that their "TILA claim is timely because BANA illegally charged Plaintiffs for the declined [LPP] in 2015, which is within one year of the initially filed Complaint." (*Id.* ¶ 53.) The law is clear, however, that "the fact that the violation continues after the credit is extended does not toll or otherwise extend the limitations period." *See Davis*, 523 F. Supp. at 1123 (citing cases from six different jurisdictions).

Plaintiffs also argue that equitable tolling ought to save their TILA claim. (TAC ¶ 53.) While other courts have held that equitable tolling may apply to TILA claims for money damages where a plaintiff demonstrates fraudulent concealment, the Fourth Circuit has not addressed the issue yet. *Espejo*, 2010 U.S. Dist. LEXIS 8190, at *15. So, equitable tolling cannot save Plaintiff's TILA allegations.

Even if the doctrine applies to TILA, however, Plaintiffs cannot satisfy it. To trigger equitable tolling, a plaintiff must meet three elements: "(1) the party pleading the statute of

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Plaintiffs are bringing their TILA claim under § 1605(b), which is governed by the one-year statute of limitations.

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limitations fraudulently concealed facts that are the basis of the plaintiff's claim, and (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." *Supermarket of Marlinton v. Meadow Gold Dairies*, 71 F.3d 119, 122 (4th Cir. 1995); *see also Espejo*, 2010 U.S. Dist. LEXIS 8190, at *16 (applying elements to a TILA claim at the motion to dismiss stage).[5]

To satisfy the first element, a plaintiff must allege sufficient facts to show "affirmative 'acts of concealment [by Defendants].'" *Espejo*, 2010 U.S. Dist. LEXIS 8190, at *16 (quoting *Supermarket of Marlinton*, 71 F.3d at 122). The essence of such concealment is that a plaintiff "has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Chao v. Virginia Dep't of Transp.*, 291 F.3d 276, 283 (4th Cir. 2002) (citation omitted). Therefore, equitable tolling requires a plaintiff to allege more than mere nondisclosure. Even then, "any invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes." *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000); *see Futterman v. Wash. Mut. Bank, F.A.*, No. 1:10-cv-01002, 2010 U.S. Dist. LEXIS 128809, at *4-5 (N.D.N.Y. 2010).

Here, Plaintiffs do not allege *any* affirmative acts of concealment. In fact, they allege the exact opposite. Hafter admits that a charge for "LPP Fee Assessment" appeared on her home equity loan transaction summary *every single month* from 2008 through 2015. (TAC ¶ 34.) Similarly, Hughes alleges that the LPP charge appeared on his parents' monthly checking

[5] Oddly, Hughes alleges that he did not discover BANA's supposed "illegal conduct because of fraudulent nondisclosures and misleading charge description [and] Mrs. Hughes' age- and health- related cognitive difficulties." (TAC ¶ 53.) Hughes' conclusory allegations addressing only his knowledge—rather than the knowledge of his parents—cannot establish the elements of equitable tolling under *Supermarket of Marlinton*.

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account statement from 2006 to 2015, but contends that the monthly charges were ambiguous. (*Id.* ¶¶ 25, 53.) To sufficiently meet the hefty burden of pleading affirmative concealment by BANA, however, Hughes must allege more than ambiguity. *See Chao*, 291 F.3d at 283. The allegations in the TAC thus fall well short of demonstrating affirmative concealment.

As to the second prong of the test, lack of notice, monthly disclosure of the LPP charge put Plaintiffs on notice of those very charges. "Inquiry notice is triggered by evidence of the possibility of fraud, not by complete exposure of the alleged scam." *See Latham v. Matthews*, 662 F. Supp. 2d 441, 456 (D.S.C. 2009) (quotations omitted). In other words, inquiry notice "is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts. Therefore, the person is presumed to have actual knowledge of the undisclosed facts." *Strother v. Lexington Cnty. Recreation Comm'n*, 504 S.E.2d 117, 122 n.6 (S.C. 1998).

This Court has very recently applied inquiry notice to dismiss untimely federal claims. *Croft v. Bayview Loan Servicing*, No. 3:14-04630, 2016 U.S. Dist. LEXIS 16014, at *9 (D.S.C. Feb. 10, 2016) (dismissing FCRA claim as untimely owing to plaintiff's inquiry notice of the parties' dispute). Here, even if Plaintiffs did not realize from their monthly statements that they were being charged for LPP coverage, they knew they were being charged by BANA for some additional product beyond their home equity loan. Thus, they had inquiry notice of unknown charges and had a duty to investigate.

Plaintiffs also fail to allege *any* due diligence efforts to discover that they were being charged for the LPP, as required for equitable tolling. Plaintiffs admit that they incurred charges each month beginning in June 2006 and October 2008. (TAC ¶¶ 25, 34.) But the only statement related to their "diligence" is contained in Plaintiffs' fraud claim: "Plaintiffs used reasonable

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prudence and diligence by documenting in writing their decision to decline LPP coverage." (*Id.* ¶ 60.) This plain statement does not address Plaintiffs' efforts, if any, to discover allegedly fraudulently concealed facts. Separately, Hughes claims he has been unable to locate any documentation that his father opted for LPP coverage. (*Id.* ¶ 24.) Paragraph 24, however, concerns only his diligence, not his father's.

For these reasons, even if equitable tolling applies to the TILA claim, Plaintiffs have not alleged facts sufficient to invoke that doctrine. Thus, the Court should dismiss their TILA claim.

B. Plaintiffs' state law claims are also untimely.

South Carolina's three-year statute of limitations period for both breach of contract and fraud also requires dismissal of Plaintiffs' state law claims. *See* S.C. Code §§ 15-3-530(1) (contract-based claims); 15-3-530(7) (fraud-based claims). The relevant statutes of limitation began to run on Plaintiffs' state law claims when they could or should have known, using reasonable diligence, that a cause of action might exist. *Mitchell v. Holler*, 429 S.E.2d 793, 795 (S.C. 1993) (articulating the "discovery rule"); *Maher v. Tietex Corp.*, 500 S.E.2d 204, 207 (S.C. Ct. App. 1998) (applying rule in breach of contract action); *Berry v. McLeod*, 492 S.E.2d 794, 799 (S.C. Ct. App. 1997) (fraud action). A party must act with "some promptness" when facts and circumstances would put a reasonable person on notice that her rights have been invaded. *Mitchell*, 429 S.E.2d at 795 (quoting *Snell v. Columbia Gun Exch., Inc.*, 278 S.E.2d 333, 334 (S.C. 1981)).

Again, Plaintiffs knew or should have known that BANA was charging them for LPP coverage based on the monthly LPP charges and monthly bank and/or home equity loan statements identifying those charges. Hughes specifically alleges that "BANA withdrew a monthly charge of $28.40 from the Hughes's BANA joint checking account beginning on or

about June 2006" for his father's LPP coverage. (TAC ¶ 25.) Hughes also states that the LPP fee appeared on his parents' checking account statements. (*Id.*) As a result, the statutes of limitation ran on his parents' state law claims in June 2009—over six years before the filing of the Complaint.

Similarly, Hafter received monthly statements listing an "LPP Fee Assessment" beginning in October 2008. (*Id.* ¶ 34.) The statutes of limitations thus ran on her state law claims in October 2011—over four years before she joined this suit.

Unlike their TILA claim, Plaintiffs do not allege that equitable tolling applies to save their state law claims. Yet, even if they did, Plaintiffs plead no facts to support application of the doctrine. *See Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 687 S.E.2d 29, 33 (S.C. 2009) ("Equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use.").

II. All of Hafter's Claims Against BANA Fail Because She Signed Up for LPP Coverage at the Closing of Her 2008 Mortgage.

While Hafter's allegations in the TAC are sparse, she admits to entering into a HELOC Agreement for $30,000 in early fall 2008 but alleges that she rejected BANA's written offer of LPP coverage at her mortgage closing in 2008. (TAC ¶ 33.) This allegation is simply not true and directly conflicts with the documents she incorporates into the TAC. Indeed, the September 26, 2008 LPP Confirmation Letter unquestionably demonstrates her acceptance of the optional product. (*See* Exhibit B [LPP Confirmation Letter].) Because Hafter requested and was provided with LPP coverage, she fails to plead allegations against BANA pursuant to Rules 8 or 9 of the Federal Rules of Civil Procedure that amount to fraud, fraudulent concealment, breach

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of contract, breach of contract accompanied by fraudulent acts, breach of duty of good faith and fair dealing, and a violation of the TILA. As a result, all of Hafter's claims must be dismissed.[6]

III. Hughes' Claims for Fraud and Fraudulent Concealment Do Not Survive the Deaths of His Parents.

Hughes affirmatively alleges that his father passed away in 2008 and his mother passed away in 2015. (TAC ¶¶ 14, 32.) While the South Carolina survivability statute generally allows that "causes of action for injuries to a person survive the death of the person," *Ferguson v. Charleston Lincoln Mercury, Inc.*, 564 S.E.2d 94, 97 (S.C. 2002) (citing S.C. Code § 15-5-90), "[the South Carolina Supreme Court] has created certain exceptions to the survivability statute," *id.* (citing *Mattison v. Palmetto State Life Ins. Co.*, 15 S.E.2d 117 (S.C. 1941)). "South Carolina case law has continued to recognize a common law exception [to the survivability statute] regarding causes of action for fraud or deceit." *Id.*; *see also Brailsford v. Brailsford*, 669 S.E.2d 342, 345 (S.C. Ct. App. 2008) ("South Carolina . . . has long recognized several exceptions to the survivability of a claim, including an exception for fraud.").

The South Carolina Supreme Court in *Ferguson* analyzed the survivability of fraud and fraudulent concealment-based allegations brought by a plaintiff's estate against a car dealership. The Court held:

> The essence of Mr. Ferguson's allegation was that [the defendant] CLM included an improper fee in the purchase price and concealed the fee through fraudulent and deceptive actions. Whether Mr. Ferguson labeled CLM's actions

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[6] Hafter's new allegation that she did not sign the September 26, 2008 HELOC Agreement (TAC ¶ 37), is contrary to her claims and does not save her causes of action. Indeed, as noted above, Hafter admits to entering into a line of credit with BANA for $30,000 in fall 2008. (*Id.* ¶ 33.) Furthermore, she does not deny that she signed the LPP Confirmation Letter, but she appears to take issue instead with BANA's use of a pre-printed LPP Confirmation Letter. (*Id.* ¶ 38.) The form, however, specifically includes an option to decline the LPP coverage and the following instruction: "If you are declining protection, please mark through the pre-selected plan above." (Exhibit B [LPP Confirmation Letter].) Hafter did not do so—she executed the document and elected the LPP coverage.

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> as unfair, misleading, or deceptive is irrelevant. At the core of Mr. Ferguson's complaint was the allegation that CLM misled him into paying more for the car than he should have paid, and concealed the overcharge either through intentionally deceptive actions or through grossly negligent disclosure practices. Allegations of such fraud and deceit are exempted from the general survival statute and do not survive the plaintiff's death. Accordingly, we hold that Mr. Ferguson's cause of action did not survive his death.

Ferguson, 564 S.E.2d at 97-98.

Here, much like in *Ferguson*, Hughes alleges that BANA "made false and material representations" relating to the LPP coverage or "in the alternative, Defendant BANA intentionally concealed the material facts that it enrolled Plaintiffs in [the LPP]." (TAC ¶¶ 58–64.) Hughes asserts that "[d]ue to the fraudulent nature of BANA's actions," he is entitled to damages, including punitive damages. (*Id.* ¶¶ 59, 66.) But, "[a]llegations of such fraud and deceit are exempted from the general survival statute and do not survive the plaintiff's death." *Ferguson*, 564 S.E.2d at 97–98. Accordingly, Hughes' fraud and fraudulent concealment claims do not survive his parents' death and must be dismissed.

IV. Plaintiffs Fail to Meet the Pleading Standards for Their Claims.

In addition to the survivability and statute of limitations issues evident on the face of the TAC, Plaintiffs' fraudulent concealment claim is implausible and their implied covenant of good faith and fair dealing claim is not a cognizable claim under South Carolina law.

A. Plaintiffs' fraudulent concealment claim is implausible and fails to meet the pleading standards to survive dismissal.

Under South Carolina law, the elements of a cause of action for fraud include: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Ardis v. Cox*, 431 S.E.2d 267, 269 (S.C.

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Ct. App. 1993). "Non-disclosure becomes fraudulent concealment only when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction." *Lawson v. Citizens & S. Nat'l Bank of S.C.*, 259 S.C. 477, 481–82 (1972).

Plaintiffs generically plead that in the alternative to their fraud claim, "Defendant BANA intentionally concealed the material facts that it enrolled Plaintiffs in the Line Protection Plan by not providing any notice to them of the enrollment." (TAC ¶ 61.) As an initial matter, Plaintiffs' allegation that BANA concealed their LPP enrollment defies logic. A complaint must be dismissed if it fails to allege "enough facts to state a claim for relief that is plausible on its face," *Twombly*, 550 U.S. at 570, and the Court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments," *Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship,* 213 F.3d 175, 180 (4th Cir. 2000).

Here, Plaintiffs implausibly claim that BANA concealed their LPP enrollment, while simultaneously alleging that for years BANA charged their bank accounts each month, and sent them monthly summary statements identifying the LPP fee assessment. Such implausible allegations simply cannot survive the plausibility requirements of *Twombly*.

Plaintiffs also allege that "BANA had a duty to disclose the withdrawals arising from the fiduciary relationship between the parties." (TAC ¶ 67.) Plaintiffs' own allegations, however, make clear that BANA disclosed the monthly withdrawals in a variety of ways. Furthermore, contrary to Plaintiffs' allegation, South Carolina law is clear "that the normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature." *Regions Bank v. Schmauch*, 582 S.E.2d 432, 444 (S.C. Ct. App. 2003) (citing *Burwell v. South Carolina Nat'l Bank*, 340 S.E.2d 786, 790 (S.C. 1986)); *see also Ellie, Inc. v. Miccichi*, 594 S.E.2d 485, 497 (S.C. Ct. App. 2004). Only when a bank undertakes to advise a depositor does a fiduciary

duty inure to a bank. *Schmauch*, 582 S.E.2d at 444. Plaintiffs do not allege that BANA undertook to advise them with regard to the monthly LPP assessments. As a result, even under Plaintiffs' alternative pleading attempts, their fraudulent concealment claim fails.

B. Plaintiffs' Breach of Duty of Good Faith and Fair Dealing cause of action is not a cognizable claim.

In South Carolina, "the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract." *Rotec Servs. v. Encompass Servs.*, 597 S.E.2d 881, 884 (S.C. Ct. App. 2004). Therefore, Plaintiffs have not stated a cognizable claim against BANA separate from their breach of contract claim. In an attempt to bolster their failed claim, Plaintiffs allege in conclusory fashion that BANA violated S.C. Code § 38-25-110, which requires that an entity obtain a certificate of authority before transacting insurance business in South Carolina. (TAC ¶ 82.) Section 38-25-310 of the South Carolina Code, however, vests the right of action under this provision with the South Carolina government—not private citizens. And debt cancellation contracts and debt suspension agreements are banking products, not insurance. 67 Fed. Reg. at 58962, 58975. As a result, this Court should dismiss Plaintiff's claim for breach of duty of good faith and fair dealing.

CONCLUSION

For the above reasons, BANA respectfully requests that this Court grant its Motion to Dismiss and dismiss Plaintiffs' Third Amended Complaint with prejudice.

Dated: April 21, 2016

Respectfully submitted,

BANK OF AMERICA, N.A.

By Counsel

/s/ Robert A. Muckenfuss

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CERTIFICATE OF SERVICE

I certify that on this 21st day of April, 2016, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the attorneys of record registered with the CM/ECF system. I further certify that a true and accurate copy of the foregoing was sent by U.S. Mail to the following:

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EXHIBIT A

[illegible] FILED, RECORDED, INDEXED
2008-10-15 09:44:05:810
REC FEE: $19.00 ST FEE: $0.00
CO FEE: $0.00 Pages: 13
Lexington County R.O.D. Debra M. Gunter
MORTGAGE Bk:Pg 13200:94

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After Recording Return To:
Bank of America, NA
Consumer Post Closing Review FL9-700-04-21
9000 Southside Blvd, Bld 700
Jacksonville, Florida 32256
Loan Number: 68118001294799

[Space Above This Line For Recording Data]

MORTGAGE

DEFINITIONS

(A) **"Security Instrument"** means this document, which is dated SEPTEMBER 26, 2008 , together with all Riders to this document.
(B) **"Borrower"** is JOANNE C HAFTER

the party or parties who have signed this Security Instrument.
Borrower is the Mortgagor under this Security Instrument.
(C) **"Lender"** is Bank of America, NA

Lender is a National Banking Association organized and existing under the laws of THE UNITED STATES OF AMERICA
Lender's address is 100 North Tryon Street, Charlotte, North Carolina 28255
Lender is the Mortgagee under this Security Instrument.
(D) **"Agreement"** means the Home Equity Line of Credit Agreement signed by the Borrowers.
(E) **"Account"** means the Home Equity Line of Credit Account pursuant to which the Lender makes Advances to the Borrower at the Borrower's direction, allowing the Borrower to repay those Advances and take additional Advances, subject to the terms of the Agreement.
(F) **"Credit Limit"** means the maximum aggregate amount of principal that may be secured by this Security Instrument at any one time. The Credit Limit is $30,000.00 . Except to the extent prohibited by Applicable Law, the Credit Limit does not apply to interest, Finance Charges, and other fees and charges validly incurred by Borrower under the Agreement and this Security Instrument. The Credit Limit also does not apply to other advances made under the terms of this Security Instrument to protect Lender's security and to perform any of the covenants contained in this Security Instrument.
(G) **"Account Balance"** is the total unpaid principal of the Account, plus earned but unpaid Finance Charges, outstanding fees, charges, and costs.
(H) **"Maturity Date"** is the date on which the entire Account Balance under the Agreement is due. The entire Account Balance on your Account, as defined in the Agreement and this Security Instrument, is due on SEPTEMBER 26, 2033 .
(I) **"Property"** means the Property that is described below under the heading "Transfer of Rights in the Property."

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(J) "Secured Debt" means:

(1) All amounts due under your Account, including principal, interest, Finance Charges, and other fees, charges, and costs incurred under the terms of this Security Instrument and all extensions, modifications, substitutions or renewals thereof.

(2) Any advances made and expenses incurred by Lender under the terms of this Security Instrument.

(K) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

☐ 1-4 Family	☐ Condominium Rider	☐ Escrow Rider
☐ Second Home	☐ Planned Unit Development Rider	☐ Mortgage Insurance Rider
☐ Other(s)		

(L) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(M) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(N) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(O) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(P) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Agreement and/or this Security Instrument.

(Q) "Approved Prior Loan" means a lien which is and which lender acknowledges and agrees will continue to have priority over the lien created by this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to Lender and Lender's successors and assigns the following described property located in the

COUNTY of LEXINGTON :

[Type of Recording Jurisdiction] [Name of Recording Jurisdiction]

SCHEDULE A ATTACHED HERETO AND MADE A PART OF.

which currently has the address of 324 WHITE FALLS DR
[Street]

COLUMBIA [City] SOUTH CAROLINA [State] 292121234 [Zip Code] ("Property Address"):

TO HAVE AND TO HOLD this property unto Lender and Lender's successors and assigns, forever, together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

ADVANCES. During the Draw Period described in the Agreement, the Borrower may repeatedly take and repay any advances that Lender makes to Borrower under the terms of the Agreement and this Security Instrument, subject to the terms that the Agreement and this Security Instrument impose. The Agreement and this Security Instrument will remain in full force and effect notwithstanding that the Account Balance under the Agreement may occasionally be reduced to an amount of equal to or less than zero.

Any amounts that Lender advances to Borrower in excess of the Credit Limit will be secured by the terms of this Security Instrument unless applicable law prohibits the same. Lender shall not be obligated to increase the Credit Limit formally or to make additional Advances in excess of the Credit Limit stated in the Agreement even though the Credit Limit has been exceeded one or more times. The Draw Period may or may not be followed by a Repayment Period, as described in the Agreement, during which additional Advances are not available. During both the Draw Period and the Repayment Period the Lender may, at its option, make Advances from the Account to pay fees, charges, or credit insurance premiums due under the Agreement or this Security Instrument, or make other Advances as allowed by this Security Instrument.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Secured Debt. Borrower shall pay when due all Secured Debt in accordance with the Agreement and this Security Instrument. All payments shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Agreement or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Agreement or Security Instrument be by a method of Lender's choosing. These methods include, but are not limited to: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Billing Statement or at such other location as may be designated by Lender in accordance with the notice provisions provided in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Account current. Lender may accept any payment or partial payment insufficient to bring the Account current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Agreement and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. All payments accepted by Lender shall be applied to the Secured Debt under this Security Instrument as provided in the Agreement unless Applicable Law provides otherwise. Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Agreement shall not extend or postpone the due date, or change the amount, of the Minimum Payment.

3. Funds for Escrow Items. Borrower shall not be required to pay into escrow amounts due for taxes, assessments, leasehold payments, or other insurance premiums unless otherwise agreed in a separate writing.

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4. Charges; Liens; Prior Security Interests. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in a manner provided in Section 3.

Borrower shall promptly discharge any lien, other than the Approved Prior Loan, which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, other than the Approved Prior Loan, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth in this Section.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with the Agreement. Borrower shall pay when due, or shall cause to be paid when due, all sums required under the loan documents evidencing the Approved Prior Loan and shall perform or cause to be performed all of the covenants and agreements of Borrower or the obligor set forth in such loan documents. All of Lender's rights under this Covenant shall be subject to the rights of the Holder of the Approved Prior Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Agreement. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section shall become additional Secured Debt of Borrower and secured by this Security Instrument. These amounts shall be subject to the terms of the Agreement and the Security Instrument.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgagee clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgagee clause and shall name Lender as mortgagee and/or as an additional loss payee and Borrower further agrees to generally assign rights to insurance proceeds to the holder of the Agreement up to the amount of the outstanding Agreement Account Balance.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened.

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During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Agreement or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Agreement or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of the Agreement and Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower resides on the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Home Equity Line of Credit Application Process; Default. Borrower shall be in default if, during the Account application process, or at any time during the term of the Agreement, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Account. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

Borrower is also in default if: 1) Borrower engages in fraud or makes a material misrepresentation at any time in connection with Borrower's Account; 2) Lender does not receive the full amount of any Minimum Payment due or Borrower fails to meet any of the other repayment terms of the Agreement; 3) Borrower's action or inaction adversely affects the Property or Lender's rights in it. Examples of these actions or inactions include, but are not limited to: a) Borrower's's death, if Borrower is the sole person on the Account; or the death of all but one borrower which adversely affects Lender's security; b) Illegal use of the Property, if such use subjects the Property to seizure; c) Transfer of all or part of the Borrower's interest in the Property without Lender's written consent; d) All or part

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of the Property is taken by condemnation or eminent domain; e) Foreclosure of any senior lien on the Property; f) Failure to maintain required insurance on the Property; g) Waste or destructive use of the Property which adversely affects Lender's security; h) Failure to pay taxes or assessments on the Property; i) Permitting the creation of a senior lien on the Property other than an Approved Prior Loan; j) Filing of a judgment against Borrower, if the amount of the judgment and collateral subject to the judgment is such that Lender's security is adversely affected.

Lender may, at its option, take lesser actions than those described at the beginning of this Section. Such lesser actions may include, without limitation, suspending Borrower's Account and not allowing Borrower to obtain any further Advances, reducing Borrower's Credit Limit, and/or changing the payment terms on Borrower's Account. If Lender takes any such actions, this shall not constitute an election of remedies or a waiver of Lender's right to exercise any rights or remedies under the remainder of this Section, the remaining provisions of the Agreement, the Security Instrument, or at law or in equity. Lender may take action under this Section only after complying with any notice or cure provisions required under Applicable Law. In the event Lender elects not to terminate the Account or take any lesser action as provided in this Section, Lender does not forfeit or waive its right to do so at a later time if any of the circumstances described above exists at that time.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Lender may without notice, perform or cause to be performed any covenant of Borrower in this Security Instrument, and Borrower appoints Lender as attorney in fact to sign Borrower's name. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take this action, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section.

Any amounts disbursed by Lender under this Section shall become additional Secured Debt of Borrower secured by this Security Instrument, payable according to the terms of the Agreement and this Security Instrument. These amounts shall bear interest at the Agreement rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment. If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. Borrower shall not surrender the leasehold estate and interests herein conveyed or terminate or cancel the ground lease. Borrower shall not, without the express written consent of Lender, alter or amend the ground lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. Borrower is not required to obtain Mortgage Insurance unless otherwise agreed in writing.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or

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Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in the Agreement and this Security Instrument.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the Secured Debt immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the Secured Debt immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, and Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be otherwise applied in the order provided for in Section 2.

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the this Security Instrument granted by Lender to Borrower or any Successors in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Agreement (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Agreement without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability

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under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender.

14. Agreement/Account Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Account is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other Account charges collected or to be collected in connection with the Account exceed the permitted limits, then: (a) any such Account charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Agreement or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Agreement). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Agreement conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Agreement which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Agreement and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower

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must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender or causes Lender to be paid all sums which then would be due under this Security Instrument and the Agreement as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Change of Servicer; Notice of Grievance. The Agreement or a partial interest in the Agreement (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Servicer") that collects the amounts due under the Agreement and this Security Instrument and performs other mortgage loan servicing obligations under the Agreement, this Security Instrument, and Applicable Law. There also might be one or more changes of the Servicer unrelated to a sale of the Agreement. If the Agreement is sold and thereafter the Agreement is serviced by a Servicer other than the purchaser of the Agreement, the servicing obligations to Borrower will remain with the Servicer or be transferred to a successor Servicer and are not assumed by the Agreement purchaser unless otherwise provided.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party and allowed the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and reasonable time to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized

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to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice as required by Applicable Law prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument or the Agreement (but not prior to acceleration under Section 18 of the Security Instrument unless Applicable Law provides otherwise), Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute a written notice of the occurrence of an event of default and of Lender's election to cause the Property to be sold. Trustee shall cause this notice to be recorded in each county in which any art of the Property is located. Lender or Trustee shall mail copies of the notice as prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

23. Release. Upon Borrower's request, and upon payment of all sums secured by this Security Instrument, this Security Instrument shall become null and void. Lender shall release this Security Instrument. Borrower shall pay any recordation costs. Lender may charge Borrower a fee for releasing this Security Instrument, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under Applicable Law.

24. Homestead Waiver. Borrower waives all rights of homestead exemption in the Property to the extent allowed by Applicable Law.

25. Waiver of Appraisal Rights. The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within 30 days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. TO THE EXTENT PERMITTED BY LAW, THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY. This waiver shall not apply so long as the Property is used as a dwelling place as defined in Section 12-37-250 of the South Carolina Code of Laws.

26. Future Advances. The lien of this Security Instrument shall secure the existing indebtedness under the Agreement and any future advances, whether optional or obligatory, made under this Security Instrument up to 150% of the Credit Limit plus interest thereon, attorneys' fees and court costs.

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MORTGAGEE REQUESTS NOTICE OF ANY ADVERSE ACTION THAT A PRIORITY LIEN HOLDER TAKES WITH REGARD TO THE PROPERTY, INCLUDING DEFAULT AND FORECLOSURE

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Joanne C Hafter (Seal)
JOANNE C HAFTER -Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

Witness:

Witness:

[Space Below This Line For Acknowledgment]

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

Personally appeared before me Meta R. James

(first witness) and made oath that he/she saw the within named JOANNE C HAFTER

(grantor) sign, seal, and as his/her act and deed, deliver the within written mortgage, and that he/she, with Tameika Isaac Devine (second witness), witnessed the execution thereof.

Witness

SWORN to before me this 26th day of September, 2008.

Notary Public for South Carolina (LS)

(Seal)

My commission expires: 1-20-2018

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EXHIBIT A
of Mortgage

Lender:	Bank of America	**Date:** September 26, 2008
Borrower:	Joanne C. Hafter	**Loan No.:** [redacted]
Property Address:	324 White Falls Drive Columbia, SC 29212	

LEGAL DESCRIPTION

All that certain piece, parcel or lot of land, with the improvements thereon, situate, lying and being located in the County of Lexington, in the State of South Carolina; being shown and designated as Lot 5, Block S, on a plat of The Estates of Coldstream prepared by McMillan Engineering Company, dated December 19, 1967, revised April 7, 1970 and recorded in Plat Book 71-G at Page 147, and being more fully shown and on a plat of the subject property prepared for Richard A. Hafter and Joanne C. Hafter by Cox and Dinkins, Inc., dated June 6, 1988 and recorded in Plat Book 225 at Page 448 in the Office of the Register of Deeds for Lexington County, and having such boundaries and measurements as are shown on said latter plat, reference to which is hereby craved for more complete and accurate description, be all measurements little more or less.

Derivation: This being the same property conveyed to Richard A. Hafter and Joanne C. Hafter by Deed of Ray P. Rust and Joy S. Rust, dated June 13, 1988 and recorded June 14, 1988 in the Office of the Register of Deeds for Lexington County in Book 1113 at Page 230, with a one-half (1/2) interest being devised to Joanne Hafter by the Estate of Richard A. Hafter, dated July 14, 2005 and recorded July 15, 2005 in Book 10293 at Page 1.

Lexington County Tax Map No.: 002730-02-005

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EXHIBIT B

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BANK OF AMERICA EQUITY MAXIMIZER AGREEMENT AND DISCLOSURE STATEMENT

Property Serving as Security (the "Property"): 324 WHITE FALLS DR, COLUMBIA, LEXINGTON, SOUTH CAROLINA 29212-1234
Borrower's Name and Address: JOANNE C HAFTER, 324 WHITE FALLS DR, COLUMBIA, SOUTH CAROLINA 29212-1234

Lender's Name and Address: Bank of America, NA, National Banking Association, 100 North Tryon Street, Charlotte, North Carolina 28255

Date: SEPTEMBER 26, 2008
Loan Number: [redacted]
Maturity Date: SEPTEMBER 26, 2033
Credit Limit: $ 30,000.00

Annual Percentage Rate: 5.7400
Margin: .7400
Max. Interest Rate: 24.0000

Draw Period: 120 MOS.
Repayment Period: 180 MOS.
Billing Cycle: MONTHLY

1. **Introduction.** This Bank of America Equity Maximizer Agreement and Disclosure Statement ("Agreement") governs your Home Equity Line of Credit Account (your "Credit Line" or "Account") with the lender named above ("Lender"). Your Account is a revolving credit arrangement in which we make loans to you by advancing funds ("Advances") at your direction, allowing you to repay those Advances and take additional Advances, subject to the terms of this Agreement. This Agreement will remain in full force and effect notwithstanding that the Account Balance under the Agreement may occasionally be reduced to an amount equal to or less than zero.

In this Agreement, the terms "we," "us," "our" and "Bank" refer to the Lender or to any subsequent assignee or transferee. Except as noted below, the terms "you," "your," "yours" and "Borrower" refer to each person that signs this Agreement or has authority to use the Credit Line. Read this Agreement carefully so that you know how your Account works and keep a copy of this Agreement for your records.

2. **Borrower's Promise to Pay.** You promise to pay to Lender the total of all Advances plus **FINANCE CHARGES**, together with all fees and charges under the terms of this Agreement. You will pay your Account according to the terms set forth below. If there is more than one Borrower, each is jointly and severally liable on this Agreement. This means we can require any Borrower to pay all amounts due under this Agreement, including credit advances made to any Borrower. Each Borrower authorizes any other Borrower, on his or her signature alone, to cancel the Credit Line, to request and receive credit advances, and to do all other things necessary to carry out the terms of this Agreement. We can release any Borrower from responsibility under this Agreement, and the others will remain responsible.

3. **Term.** The term of your Account will begin as of the date of this Agreement ("Opening Date") and will continue until all indebtedness under this Agreement, if not already paid pursuant to the payment provision below, will be due and payable upon maturity. The Draw Period of your Account will begin on the date after the Opening Date, when this Agreement is accepted by us in the State of North Carolina, following the perfection of the Security Instrument and the meeting of all of our other conditions and will continue for one hundred and twenty (120) months. You may obtain credit advances during the Draw Period. After the Draw Period ends, the Repayment Period will begin, and you will no longer be able to obtain credit advances. The length of the Repayment Period is one hundred and eighty (180) months depending on the repayment schedule set forth below. You agree that we may renew or extend the period during which you may obtain credit advances or make payments.

4. **Credit Limit.** This Agreement covers a revolving line of credit for the principal amount of THIRTY THOUSAND AND 00/100 DOLLARS ($30,000.00) which will be your Credit Limit under this Agreement. You may not request an Advance from your Account that would cause your outstanding balance of Advances to exceed your Credit Limit nor are we obligated to pay any Advance request that would cause your outstanding balance of Advances to exceed your Credit Limit. If we do make an Advance that causes your outstanding balance of Advances to exceed your Credit Limit, this will not constitute an increase in your Credit Limit. You agree to immediately repay the amount by which your outstanding balance of Advances exceeds your Credit Limit.

5. **Security.** All amounts due under the Account are secured by a mortgage, deed of trust, or security deed ("Security Instrument") on the Property identified on page one of this Agreement. Borrower agrees to pay all amounts due, and perform all covenants and obligations required of Borrower under the Security Instrument. If it becomes necessary for us to advance funds to you above the Credit Limit to protect our security interest, those amounts in excess of the Credit Limit will be owed by you and will be secured by the Security Instrument unless Applicable Law prohibits the same. The Security Instrument and this Agreement are related documents and a default under either document will be treated as a default under both documents. To the extent permitted by Applicable Law, the lien of the Security Instrument will continue and will have the same priority if, with your consent, we renew, extend, amend, modify or substitute this Agreement. In such event, you agree to execute any additional documents necessary to achieve the action being taken.

6. **Terms And Definitions.** The following terms are defined as set forth in this Section. Other terms are defined elsewhere in this Agreement.
   - A. **"Billing Cycle"** is an interval of time that occurs regularly during the term of this Agreement and is used to determine the **FINANCE CHARGES** and other fees, charges, and credit insurance premiums that are due on your Account. The number of days in each Billing Cycle may vary from time to time. A Billing Cycle occurs regardless of whether there is a balance or any activity on your Account. Your Billing Cycle is stated on page 1 of this Agreement.
   - B. **"Billing Statement"** is a statement that we will furnish to you periodically that provides important information regarding your Account activity.
   - C. **"Credit Limit"** is the maximum aggregate amount of principal that we will extend to you under this Agreement. Your Credit Limit may change under certain circumstances. Your Credit Limit is stated on page 1.
   - D. **"Draw Period"** is the period of time during which you may request Advances from your Account. The Draw Period is stated on page 1.
   - E. **"Maturity Date"** is the date on which the entire Account Balance under this Agreement is due. The Maturity Date of your Account is stated on page 1.
   - F. **"Minimum Payment"** is the minimum amount you must pay on your Credit Account, as reflected on each periodic Billing Statement for each Billing Cycle. Your Minimum Payment during the Draw Period and during the Repayment Period will be calculated as described below under the heading "Payments."

G. **"Outstanding Balance"** is the new balance of the Account, which includes, if applicable, principal, accrued interest on the outstanding principal, fees and charges, Property Expenses and any voluntary insurance, Borrowers' Protection® Plan, or Line Protection™ Plan.

H. **"Property Expenses"** are expenses we incur because you do not fulfill all obligations of the Security Instrument for the Property that secures this Account.

I. **"Repayment Period"** is the period of time that begins at the end of the Draw Period. During the Repayment Period, you may no longer request Advances from your Account.

J. **"Variable Rate Balance"** is the balance during the Draw Period that equals the Outstanding Balance that is not part of a Fixed Rate Loan Option.

K. **"Variable Rate Principal Balance"** is the principal balance that is not payable under a Fixed Rate Loan Option.

7. **Payments.**

A. **During the Draw Period.** During the Draw Period, the Total Minimum Payment Due is equal to the sum of: (1) the Variable Rate Balance Minimum Payment (described below); (2) the payment due, if any, for any outstanding Fixed Rate Loan Option; and any past due amounts from prior Billing Cycles. Some Fixed Rate Loan Options may have a different due date and are not figured into the Total Minimum Payment Due. At any time you may pay more than the Total Minimum Payment Due, make additional payments or pay in full or in part the Outstanding Balance. You will be required to pay the Minimum Payment Due each month there is an Outstanding Balance on your Account.

You may choose any of the following monthly payment options. Your billing statement will reflect the option you have chosen. You may change your Draw Period payment option at a later time.

B. **Variable Rate Balance Minimum Payment.** Your **"Variable Rate Balance"** is all of your Outstanding Balance that is not part of a Fixed Rate Loan Option. Depending on which payment option you choose for the Draw Period, the Variable Rate Balance Minimum Payment may vary. The Variable Rate Balance Minimum Payment will not be less than the amount of accrued interest and any voluntary insurance, plus any unpaid fees.

1. **Payment Options:**

a. **Interest Only (Plus Insurance) Option** - The Minimum Payment if you elect the Interest Only (Plus Insurance) Option will be the amount of accrued interest plus any voluntary insurance, and unpaid fees.

b. **1.5% of Variable Rate Outstanding Balance Option** - The Minimum Payment if you elect the 1.5% of Variable Rate Outstanding Balance Option will be one and one half percent (1.5%) of the Variable Rate Outstanding Balance plus unpaid fees, or fifty dollars ($50), whichever is greater, or the outstanding Variable Rate Balance if less than the Minimum Payment under this option.

c. **Fixed Payment Option.** The Minimum Payment if you elect the Fixed Payment Option will be at least one and one half percent (1.5%) of the Credit Limit plus any voluntary insurance, Line Protection™Plan and unpaid fees, or fifty dollars ($50), whichever is greater, or the outstanding Variable Rate Balance if less than the Minimum Payment under this option.

C. **During the Repayment Period.** During the Repayment Period you will be required to make a payment each month. The length of Repayment Period will vary depending on the Outstanding Balance at the beginning of the Repayment Period, if any Property Expenses are incurred during the Repayment Period, and if you have any Fixed Rate Loan Options. The amount of the Total Minimum Payment due may vary due to increases or decreases in the Index or if there are any Fixed Rate Loan Options that remain unpaid at the beginning of the Repayment Period.

Payments during the Repayment Period will be calculated as follows. The Total Minimum Payment Due will be an amount equal to the greater of 1/180th of the Variable Rate Principal Balance remaining on the last date of the Draw Period, plus accrued interest, unpaid fees, unpaid Property Expenses, or fifty dollars ($50). If there are any Fixed Rate Loan Options that remain unpaid at the start of the Repayment Period, the Fixed Rate Loan Options payment previously established will continue to be billed.

For purposes of this Repayment Options section, the Variable Rate Principal Balance equals the amount of your Credit Limit on which you have not elected to convert to a Fixed Rate Loan as of the start of your Repayment Period.

D. **Fixed Rate Loan Option Payment Information.** A Fixed Rate Loan Option has a fixed interest rate and fixed term and is payable monthly. You may convert part or all of the Variable Rate Principal Balance, along with accrued interest, fees, and any voluntary insurance charge to a Fixed Rate Loan Option at any time during the Draw Period or the Repayment Period unless you are in default or if your Advance privileges are suspended or terminated. We will help you establish the amount of principal and interest sufficient to amortize the Fixed Rate Loan Option over the term you select. The maximum term of any Fixed Rate Loan Option may not exceed the repayment period maturity date of this Credit Line. The minimum amount for a Fixed Rate Loan Option is $5,000. You may have up to three (3) Fixed Rate Loan Options open at any one time, but may not have more than four (4) Fixed Rate Loan Options open during any one statement period. The Fixed Rate Loan Option **ANNUAL PERCENTAGE RATE** is the Prime Rate plus the Fixed Rate Loan Option margin of 8.00%. However, we may make lower Fixed Rate Loan Option rates available from time to time. Please contact your Banking Center or Customer Service for the Fixed Rate Loan Option rate currently offered. Your payment will be a fixed dollar amount to be determined at the opening of the Fixed Rate Loan Option. You may arrange a different payment date for each Fixed Rate Loan Option. Fixed Rate Loan Option payments will be billed separately from your Regular Payment in accordance with the schedule you have arranged. For Fixed Rate Loan Options, you will receive a separate bill. However, the Variable Rate Balance statement will show all activity, including payments.

8. **Receipt of Payments and Payment Application.** All payments made by check, automatic account debit, electronic funds transfer, money order, or other instrument must be received by us at the remittance address on your periodic Billing Statement. Payments received at that address prior to 2:00 PM at the location specified, or a payment made at one of our banking centers in the state or our address indicated as the remittance address by 2:00 PM on any business day will be credited as of the date received. Business days are Monday through Friday, exclusive of legal holidays. If the due date falls on a Saturday, Sunday, or legal holiday, the due date will not be extended. Unless otherwise agreed or required by applicable law, payments and other credits will be applied to **FINANCE CHARGES**, other charges and fees, and principal in any order we choose without notice.

9. **Advances.** During the Draw Period, you may request Advances from your Account, and any amounts you repay will subsequently be available for Advances, subject to the limitations of this Agreement. If there is more than one of you, each of you may obtain Advances in accordance with the terms of this Agreement. Each of you is individually responsible for payment of the entire Account Balance regardless of who actually requested the Advance.

If there is more than one person authorized to use this Credit Line, you agree not to give us conflicting instructions, such as one Borrower telling us not to give advances to the other.

The words **"Authorized Signer"** on Special Convenience Checks and Bank of America ATM cards or Bank of America Check Card or Account Access cards as used in this Agreement means and includes each person who (a) signs the application for the Credit Line, (b) signs this Agreement, or (c) has executed a separate signature authorization card for this Credit Line.

You may obtain Advances under your Credit Line Account as follows.

A. **Credit Line Checks.** Writing a preprinted **"Special Convenience Check"** that we will supply to you.

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B. Telephone Request. Requesting a credit advance from your Account to be applied to your designated account by telephone upon proper identification and in accordance with procedures established by us. Except for transactions covered by the federal Electronic Fund Transfers Act and unless otherwise agreed in your Deposit Account Agreement, you acknowledge and you agree that we do not accept responsibility for the authenticity of telephone instructions and that we will not be liable for any loss, expense, or cost arising out of any telephone request, including any fraudulent or unauthorized telephone request when acting upon such instructions believed to be genuine.

C. Requests in Person. Requesting a credit advance in person at any of our authorized locations.

D. Automated Teller Machine ("ATM") Access. (Not available in CT; ID, NY, WA or TX) Using your "Bank of America ATM card or Bank of America Check Card or Account Access Card" at any of our designated ATM locations to withdraw or transfer funds in excess of the available collected balance in the account.

E. Bank of America Equity Maximizer VISA® Account Access Card (the "Account Access Card"). (Not available in CT, ID, NY, WA, or TX) Using the Account Access Card as described in this Agreement. Visa is a registered trademark of Visa International Service Association.

F. Online Banking. Transferring funds to a deposit account.

G. Limitations on the Use of Checks. We reserve the right not to honor Special Convenience Checks in the following circumstances:

1. **Credit Limit Violation.** Your Credit Limit has been or would be exceeded by paying the Special Convenience Check.
2. **Post-dated Checks.** Your Special Convenience Check is post-dated. If a post-dated Special Convenience Check is paid and as a result any other check is returned or not paid, we are not responsible.
3. **Stolen Checks.** Your Special Convenience Checks have been reported lost or stolen.
4. **Unauthorized Signatures.** Your Special Convenience Check is not signed by an "Authorized Signer" as defined below.
5. **Termination or Suspension.** Your Credit Line has been terminated or suspended as provided in this Agreement or could be if we paid the Special Convenience Check.
6. **Other Special Convenience Check Limitations.** You may not make a payment on the Account with a Special Convenience Check. You notify us that you wish to stop payment of a Special Convenience Check; however, you will not hold us liable if we try to stop payment of Special Convenience Check and we are unable to do so. You may try to stop payment on a Special Convenience Check by notifying Customer Service at the number listed on your statement. Your stop payment order will remain in effect for six (6) months unless renewed.

If we pay any Special Convenience Check under these conditions, you must repay us, subject to applicable laws, for the amount of the Special Convenience Check. The Special Convenience Check itself will be evidence of your debt to us together with this Agreement. Our liability, if any, for wrongful dishonor of a check is limited to your actual damages. Dishonor for any reason as provided in this Agreement is not wrongful dishonor. We may choose not to return Special Convenience Checks along with your periodic Billing Statements; however, your use of each Special Convenience Check will be reflected on your periodic statement as a credit advance. We do not "certify" Special Convenience Checks drawn on your Credit Line.

H. Limitations on the Use of ATM Cards. We reserve the right not to honor the Bank of America ATM card or Bank of America Check Card or Account Access Cards in the following circumstances:

1. **Credit Limit Violation.** Your Credit Limit has been or would be exceeded by honoring the Bank of America ATM card or Bank of America Check Card or Account Access Card charge.
2. **Stolen ATM Cards.** Your Bank of America ATM card or Bank of America Check Card or Account Access Cards have been reported lost or stolen.
3. **Termination or Suspension.** Your Credit Line has been terminated or suspended as provided in this Agreement or could be if we honored the Credit Line charge.
4. **Other ATM Card Limitations.** If we pay any Advance requested by use of the Bank of America ATM card or Bank of America Check Card or Account Access Card under these conditions, you must repay us, subject to applicable laws, for the amount of the Advance. The Advance itself will be evidence of your debt to us together with this Agreement. Our liability, if any, for wrongful dishonor of an Advance is limited to your actual damages. Dishonor for any reason as provided in this Agreement is not wrongful dishonor. Your use of the Bank of America ATM card or Bank of America Check Card or Account Access Card will be reflected on your periodic statement as a credit advance.

I. Transaction Requirements for Account Access Card. The following transaction limitations will apply to the use of your Credit Line:

1. **Account Access Card Limitations.** The following transaction limitations will apply to your Credit Line and accessing by other methods.
2. **Limitations on the Use of Account Access Card.** We reserve the right not to honor the Account Access Card linked to this Credit Line in the following circumstances.
   a. **Credit Limit Violation.** Your Credit Limit has been or would be exceeded by paying the Account Access Card transaction.
   b. **Stolen Account Access Card.** Your Account Access Card has been reported lost or stolen.
   c. **Unauthorized Signatures.** Your Account Access Card is not used by a Borrower who has been issued one.
   d. **Termination or Suspension.** Your Credit Line has been terminated or suspended as provided in the Agreement or could be if we paid the Account Access Card transaction.
3. **Other Account Access Card Limitations.** If we pay any Advance requested by use of the Account Access Card under these conditions, you must repay us, subject to applicable laws, for the amount of the Advance. The Advance itself will be evidence of your debt to us together with this Agreement. Our liability, if any, for wrongful dishonor of an Advance is limited to your actual damages. Dishonor for any reason as provided in this Agreement is not wrongful dishonor. Your use of the Account Access Card will be reflected on your periodic statement as a credit advance.
4. **Liability for Unauthorized Account Access Card Transactions.** You are not liable for unauthorized use of your Account Access Card. Notify us promptly if you believe your Account Access Card has been lost or stolen or if you discover any unauthorized transactions. We may require you to provide a written statement regarding claims of unauthorized Account Access Card transactions.
5. **Limitations on Lender's Liability.** Lender's liability, if any, for wrongful dishonor of any Advance request is limited to Borrower's actual damages. Lender shall not be liable if any merchant, financial institution or ATM refuses to honor the Account Access Card.

J. Lost Special Convenience Checks and Bank of America ATM card or Bank of America Check Card or Account Access Cards. If you lose your Special Convenience Checks or Bank of America ATM card or Bank of America Check Card or Account Access Card(s) or if someone is using them without your permission you agree to let us know immediately. You can notify us at our address shown at the beginning of this Agreement.

K. Future Credit Line Services. Where permitted by applicable law, your application for this Credit Line also serves as a request to receive any new services (such as access devices), which may be available at some future time as one of our services in connection with this Credit Line. You understand that this request is voluntary and that you may refuse any of these new services at the time they are offered. You further understand that the terms and conditions of this Agreement will govern any transactions made pursuant to any of these new services.

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L. Credit Line Special Convenience Check, Telephone Request, In Person Request and ATM Access Limitations. There are no transaction limitations for the writing of Special Convenience Checks, requesting an Advance by telephone, requesting an Advance in person, or using the ATM.

10. Billing Statements. If you have a balance owing on your Account or have any Account activity, we will send to you a Billing Statement. Billing Statements will show, as applicable, credit advances, **FINANCE CHARGES**, other charges, payments made, other credits, your previous balance, and/or your new balance. Payments will be due as shown on the Billing Statements.

11. Automatic Payment. If you choose to have payments made from a designated account and have arranged with us to do so, we will automatically draft the payment. Drafts will be made on the payment due date or immediately after the payment due date (if the payment due date is on a Saturday, Sunday or legal holiday). If your account does not contain the payment amount due, you understand that it is your obligation without notice from us to make the full payment. Even if you make a manual payment, an automatic payment will be drafted from your designated account, unless you make such manual payment for the full payment due at least three (3) business days prior to the due date; however, if you make less than a full manual payment at least three (3) business days prior to the due date, only the remaining amount currently due will be drafted. To stop an automatic draft, you must contact us at least three (3) business days prior to the scheduled payment draft date. We may accept late payments, partial payments or checks and money orders marked "payment in full" (or similar notations) or payments accompanied by a letter stating that our acceptance of the payment indicates our agreement to the terms set forth in the letter without giving up, waiving or losing any of our rights under law or under this Agreement.

If you have authorized automatic payment above, then the following shall apply:

You hereby authorize the Bank to draft the described account for your loan payments. You agree to the Recurring Automatic Payment Authorization Terms and Conditions that will be enclosed with your Automatic Payment confirmation notice, unless you otherwise notify Lender. If you choose to establish automatic payment to draft your designated Bank of America account, the authorization will remain in full force and effect until the Bank has received written or verbal notification from you of its termination in such time and in such manner as to afford the Bank a reasonable opportunity to act on it. If at any time you select to terminate your automatic payment, your margin will increase by 1/4%.

12. ANNUAL PERCENTAGE RATE AND FINANCE CHARGE.

A. When FINANCE CHARGES Begin to Accrue. Periodic **FINANCE CHARGES** for Advances under your Credit Line will begin to accrue on the date Advances are posted to your Credit Line. There is no "free ride" period which will allow you to avoid **FINANCE CHARGES** on your Credit Line Advances.

B. How the Balance on which the FINANCE CHARGE is Calculated is Determined. The cost of the credit through the Credit Line is disclosed as a Finance Charge. Except for some closing costs (indicated in this Agreement), interest will not accrue until a credit advance is made. You will pay interest on each credit advance until it is fully paid off. We will determine the **FINANCE CHARGE** for each monthly billing period by using the following simple interest rate calculation. A **FINANCE CHARGE** is calculated daily on the Variable Rate Principal Balance, as defined above in the "Definitions" section of this Agreement, by multiplying the daily periodic rate (as indicated in "How The Rate Used To Calculate The Finance Charge Is Determined ") by the daily Variable Rate Principal Balance.

To get the daily Variable Rate Principal Balance we (i) take the beginning Variable Rate Principal Balance for that day (ii) add to that amount all credit advances and sums advanced by us to fulfill any obligations under a Security Instrument (such as a mortgage, deed of trust, or security agreement), if any, for that day, then (iii) subtract all principal balance payments and credits for the Variable Rate Principal Balance for that day. All of the daily Variable Rate Principal Balance **FINANCE CHARGES** for the monthly billing cycle are added together to get the total Variable Rate Principal Balance **FINANCE CHARGE** for the monthly billing cycle. Transaction charges are added to the Variable Rate Principal Balance **FINANCE CHARGE** to get the total **FINANCE CHARGE** for the monthly billing cycle. For Fixed Rate Loan Option balances, the estimated **FINANCE CHARGE** is calculated at the establishment of the Fixed Rate and is included in the fixed payment amount.

C. How the Rate Used to Calculate the FINANCE CHARGE Is Determined. The initial Variable Rate Principal Balance daily periodic rate used to compute the Variable Rate Principal Balance **FINANCE CHARGE** is 1/365th of the initial Variable Rate Principal Balance **ANNUAL PERCENTAGE RATE** (as indicated under "Periodic Rate and Corresponding **ANNUAL PERCENTAGE RATE**"). The Variable Rate Principal Balance **ANNUAL PERCENTAGE RATE** is a variable rate involving both an index and a margin, both described under "Periodic Rate and Corresponding **ANNUAL PERCENTAGE RATE**" below. **FINANCE CHARGES** will accrue on an actual 365-day year basis (366 day year basis for leap year). If, however, you participate in a relationship account with a Bank of America Corporation affiliate (as offered from time to time), the Variable Rate Principal Balance Daily Periodic Rate and the Variable Rate Principal **ANNUAL PERCENTAGE RATE** may be reduced below the rates stated in this Agreement. The addition of a fee may cause the actual Variable Rate Principal Balance **ANNUAL PERCENTAGE RATE** for the monthly billing cycle to exceed the Variable Rate Principal Balance **ANNUAL PERCENTAGE RATE** stated in this Agreement.

If the Index is unavailable for any monthly billing cycle, we will use the Index for the most recently preceding monthly billing cycle in which the Index was available. If the Index ceases to be published during the term of this Agreement, we will select a substitute index and margin. The substitute index will be a historical movement substantially similar to the Index, and the substitute index and margin will result in an **ANNUAL PERCENTAGE RATE** at the time it is substituted that is substantially similar to the rate in effect at the time the Index became unavailable.

There is no limitation on the size of any interest rate adjustment or the number of interest rate adjustments that may be made on the Credit Line so long as the maximum **ANNUAL PERCENTAGE RATE** is not exceeded. Any increase or decrease in the Index that occurs would cause a corresponding increase or decrease in the Daily Periodic Rate, **ANNUAL PERCENTAGE RATE**, **FINANCE CHARGES** and possibly the Total Minimum Payment Due. You understand that adjustments based on an Index change will be applied automatically to the Credit Line and you will not receive advance notice of that adjustment.

The Finance Charge on a Fixed Rate Loan Option is determined on a simple interest basis. If you make a Fixed Rate Loan Option payment(s) before or after any date, either the amount of your originally scheduled final payment may be lower or higher than the amount initially established or additional payment(s) may be required.

Under some circumstances, your payment will not cover the **FINANCE CHARGES** that accrue and negative amortization will occur. Negative amortization will increase the total amount you may pay us and reduce the equity in the Property.

13. Periodic Rate and Corresponding ANNUAL PERCENTAGE RATE. We will determine the Periodic Rate and the corresponding **ANNUAL PERCENTAGE RATE** as follows. We start with an independent Index, which is the Prime Rate as published daily in the "Money Rates" table of *The Wall Street Journal* (the "Index"). When a range of rates has been published, the higher of the rates will be used. We will use the most recent Index value available to us as of the date of the **ANNUAL PERCENTAGE RATE** adjustment. The Index is not necessarily the lowest rate charged by us on our loans. If the Index becomes unavailable during the term of the Credit Line Account, we may designate a substitute Index (and, if necessary, a new margin) after notice to you.

A. Rate Computation. The **ANNUAL PERCENTAGE RATE** during the Draw Period is determined using the Index published as of the last business day prior to the first day of the next monthly Billing Statement plus a margin, as shown below, and will be effective on the first day of the next monthly billing cycle.

To determine the Periodic Rate that will apply during your Draw Period we add the margin shown below to the value of the Index and divide the value by the number of days in a year (daily). This result is the **ANNUAL PERCENTAGE RATE** for your Draw Period. To determine the Periodic Rate that will apply to your Repayment Period, we add the margin shown below to the value of the Index, then divide the value by the number of days in a year (daily). To obtain the **ANNUAL**

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PERCENTAGE RATE we multiply the Periodic Rate by the number of days in a year (daily). This will result in the ANNUAL PERCENTAGE RATE for your Repayment Period. The ANNUAL PERCENTAGE RATE includes only interest and no other costs.

The current Index is 5.000 % per annum. The margin is .740 %. The initial Periodic Rate and the corresponding ANNUAL PERCENTAGE RATE on your Credit Line Account are as stated below:

Current Rates for the Draw Period

Range of Balances or Conditions	Margin Added to Index	ANNUAL PERCENTAGE RATE	Daily Periodic Rate
ALL	.740%	5.740%	0.01573%

Current Rates for the Repayment Period

Range of Balances or Conditions	Margin Added to Index	ANNUAL PERCENTAGE RATE	Daily Periodic Rate
ALL	.740%	5.740%	0.01573%

B. Limits. The Periodic Rate and the corresponding ANNUAL PERCENTAGE RATE on your Credit Line Account will increase or decrease as the Index increases or decreases from time to time. There is no limit to the amount by which the ANNUAL PERCENTAGE RATE can increase or decrease over a 1-year period. Any increase in the Periodic Rate will take the form of higher payment amounts. Adjustments to the Periodic Rate and the corresponding ANNUAL PERCENTAGE RATE resulting from changes in the Index will take effect monthly. In no event will the corresponding ANNUAL PERCENTAGE RATE be more than the lesser of 24.000% or the maximum rate allowed by applicable law.

Notwithstanding any other provision of this Agreement, we will not charge interest on any undisbursed loan proceeds, except as may be permitted during any Right of Rescission period.

C. Forgo Rate Increases. If we forgo an ANNUAL PERCENTAGE RATE increase, at the time of a later adjustment we may return to the full Index value plus margin.

14. Closing Costs. In addition to the FINANCE CHARGES which will be added to your Credit Line each billing cycle, you will pay the following fees, including real estate closing and security filing fees:

15. Other Charges. You agree to pay the fees and charges listed below if the circumstances triggering their assessment apply. These fees and charges will be added to the Account balance and are payable as set forth in this Agreement.

A. Late Charge: If we do not receive the amount of your minimum monthly payment in full within ten (10) days after your payment due date, you will pay us a late charge equal to the greater of $10.00 or five percent (5%) of the unpaid portion of your minimum monthly payment.

B. Returned Payment Charge: If a check or any other instrument or payment method with which you have made a payment on the Credit Line Account is returned to us unpaid for any reason, you will be charged a return payment charge of $20.

C. Returned Special Convenience Check. $20.

D. Annual Fee: $0.

E. Fixed Rate Conversion Fee: $0.

F. Security Instrument Discharge Fee: As permitted by Applicable Law, Lender may request that at the time you payoff your Credit Line, you pay the Lender's cost to record a discharge of the Security Instrument.

16. Refund of Fees, Charges, and Costs. The terms of this Agreement shall be construed to be consistent with Applicable Law. However, if a court of competent jurisdiction or other qualified authority determines that the loan charges and fees described in this Agreement exceed the limits that Applicable Law allows, the following shall occur. First, any such purportedly excessive charges or fees shall be reduced to the permitted amount. Second, any amounts collected that exceed the permitted amount will be returned to you, either by direct payment or by reducing the principal you owe on your Account. Your receipt of a refund made by direct payment to you or credited to your Account will constitute a waiver of any right of action you may have arising out of overcharges or allegedly excessive loan charges or fees.

17. Property Insurance; Other Charges. You agree to obtain property insurance against loss or damage to the Property, in the amounts, for the time period and against the risks that the Security Instrument and/or we require. You may obtain insurance from an insurance carrier of your choice so long as the insurance carrier is acceptable to us. If you fail to purchase and maintain acceptable property insurance, we may purchase insurance for you or on your behalf and at your expense as

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described in the Security Instrument. We have no obligation to obtain such insurance. Should we take this action, the equity in the Property and contents thereof may not be protected as you desire. Further, the cost of the insurance may significantly exceed the cost of such insurance that you could have obtained; this cost will be treated as an Advance.

18. Additional Rights and Remedies. In addition to the rights described elsewhere in this Agreement and in the Security Instrument, we also have the following rights:

A. Termination and Acceleration. We can terminate your Account and require you to pay us the entire outstanding Account Balance under this Agreement in one payment, and charge you certain fees, if any of the following occur: 1) You engage in fraud or make a material misrepresentation at any time in connection with your Account; 2) We do not receive the full amount of any Minimum Payment due or you fail to meet any of the other repayment terms of this Agreement; 3) Your action or inaction adversely affects the Property or our rights in it (for this purpose, the words "you," "your," and "yours" also refer to the owner of the Property, if different than you). Examples of these actions or inactions include, but are not limited to: a) Your death, if you are the sole Borrower on the Account; or the death of all but one Borrower which adversely affects our security; b) Illegal use of the Property, if such use subjects the Property to seizure; c) You transfer all or part of your interest in the Property without our written consent; d) All or part of the Property is taken by condemnation or eminent domain; e) Foreclosure of any senior lien on the Property; f) Failure to maintain required insurance on the Property; g) Waste or destructive use of the Property which adversely affects our security; h) Failure to pay taxes or assessments on the Property; i) Permitting the creation of a senior lien on the Property; j) Filing of a judgment against you, if the amount of the judgment and collateral subject to the judgment is such that our security is adversely affected.

We may, at our option, take lesser action than those described in this Section. Such lesser action may include, without limitation, suspending your Account and not allowing you to obtain any further Advances, reducing your Credit Limit, and/or changing the payment terms on your Account. If we take any such action, this shall not constitute an election of remedies or a waiver of our right to exercise any rights or remedies under the remainder of this Section, the remaining provisions of this Agreement, the Security Instrument, or at law or in equity. We may take action under this Section only after complying with any notice or cure provisions required under Applicable Law. In the event we elect not to terminate the Account or take any lesser action as provided in this Section, we do not forfeit or waive our right to do so at a later time if any of the circumstances described above exists at that time.

B. Suspension or Reduction. We can refuse to make additional Advances or reduce your Credit Limit during any period of time in which any of the following are in effect: 1) The value of the Property declines significantly below the value as determined by us at the time you applied for your Account. This includes, for example, a decline such that the initial difference between the Credit Limit and the available equity in the Property is reduced by fifty percent (50%) or more, and may include a smaller decline depending on individual circumstances; 2) We reasonably believe you will not be able to meet the repayment requirements set forth in this Agreement due to a material change in your financial circumstances; 3) You are in default of a material obligation in this Agreement, including, without limitation, your failing to make a Minimum Payment on a date that it is due; 4) Government action prevents us from imposing the **ANNUAL PERCENTAGE RATE** provided for in this Agreement; 5) Government action impairs our security interest such that the value of our interest is less than 120 percent of your Credit Limit then in effect; 6) A regulatory agency which supervises us has notified us that continued Advances would constitute an unsafe and unsound practice; 7) The maximum **ANNUAL PERCENTAGE RATE** allowed under this Agreement is reached. If we refuse to make additional Advances or reduce your Credit Limit under this Section, we will send you a written notice stating the reason for such action. If, for any reason, you believe your ability to obtain Advances or your Credit Limit should be reinstated, you must send us a written request for reinstatement and include in the request the reasons why you believe your ability to obtain Advances or your Credit Limit should be reinstated.

19. Collection Costs. If you are in default and we require you to pay us immediately in full, we may also require that you pay our collection costs and expenses to the extent not prohibited by law. If we bring a lawsuit to collect, you will pay our attorneys' fees and court costs allowed by Applicable Law and set by the court.

20. Suspension or Termination by You. Each of you has the right, upon proper written notice to us, to suspend the privilege of obtaining new Advances. A request to suspend the privilege of obtaining Advances, even if made only by one of you, will be effective against all of you. Advances will be reinstated upon our receipt and acceptance of a written reinstatement request signed by each of you, provided that no event(s) permitting a suspension then exist.

To do so, you must notify us in writing. If one of you requests termination of the Account, the Account will be terminated for all of you. At our option, we may release some of you from liability under this Agreement and/or under Applicable Law without releasing all of you.

If you cancel your right to Advances under this Agreement, you must notify us and return all Special Convenience Checks and any other access devices. Any use of Special Convenience Checks or other access devices following suspension or termination may be considered fraud. You will also remain liable for any further use of the Special Convenience Checks or other Credit Line access devices not returned to us.

21. Effect of Suspension of Your Account. If your Account is suspended or terminated for any reason, you will nonetheless remain obligated to pay the Account Balance in accordance with the terms of this Agreement. Upon termination of your Account by either you or us, you must return to us all Checks, Credit Cards, or other Account access devices given to you. If either you or we terminate your Account, you will not be entitled to a refund of any **FINANCE CHARGES**, fees, charges, or credit insurance premiums paid or payable under the Account.

22. Change in Terms. After you open your Account, we may modify or amend the terms of this Agreement and/or the other loan documents pertaining to the Account if any of the following conditions exist: 1) You consent in writing to our proposed modification or amendment at that time; 2) The modification or amendment unequivocally benefits you throughout the remainder of the term of this Agreement; 3) The modification or amendment results only in an insignificant change to the terms of this Agreement and/or the other loan documents; 4) The modification or amendment involves the substitution of a new Index and Margin, as provided in Section 9 above. Any Account balance on the effective date of any modification or amendment is subject to the modification or amendment

23. Prepayment. You may prepay all or any amounts owing under this Credit Line at any time without penalty. However, we will be entitled to receive all accrued **FINANCE CHARGES** and any other accrued fees or charges.

24. Tax Consequences. You acknowledge that we (including our employees and representatives) have given you no assurances, representations or warranties that the **FINANCE CHARGES** and other fees and charges paid on your Account are tax deductible. You should consult your own tax advisor concerning the deductibility of the **FINANCE CHARGES** and other fees and charges for the Account.

25. Review of Your Account. Upon our request, you will provide us with current financial and credit information and will sign any additional or corrective documents in connection with this Agreement or the Account. You authorize us to release information about you to our affiliates or third parties as described in our privacy policy and our Fair Credit Reporting Act notice, provided you do not opt out of the applicable policy or as permitted by applicable law. You also authorize us to obtain credit reports on you at any time, at our sole option, and expense, for any reason, including but not limited to determining whether there has been an adverse change in your financial condition. We also may from time to time obtain a new valuation of the Property that secures the Credit Line at any time, including internal inspection, at our sole option and expense.

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26. **Use of the Credit Line.** You may use the Credit Line Account subject to the following limitations:

A. Legal Transactions. Borrower agrees that Borrower will only use the Credit Line for transactions that are legal where Borrower resides. For example, Internet gambling transactions may be illegal in Borrower's state. Display by an on-line merchant of either Lender's logo or a Card Company's logo does not mean that an Internet transaction is legal where Borrower resides. Lender will not be liable if Borrower engages in an illegal transaction.

B. Authorizations. Some transactions require lender's prior authorization. For security purposes, lender may from time to time place or change limits on the number or amounts of transactions Borrower makes in a day at ATMs or point-of-sale terminals. Such limitations may not be the same at every ATM or point-of-sale terminal. The limitations placed on a "Bank of America ATM Card" or "Bank of America Check Card" when using an ATM or point-of-sale terminal may not be the same as the limitations placed on an Account Access Card used at the same ATM or point-of-sale terminal. No such limits are placed on the number or amounts of transactions Borrower makes: at lender's banking centers, by writing a Special Convenience Check, by conducting an Overdraft Protection transaction (subject to the ATM limits, above), or by telephone. In addition, lender may deny authorization to any method of accessing the Credit Line if the Credit Line has been suspended or terminated or if Lender suspects fraudulent activity, lender shall not be liable for any failure to authorize a transaction for any of these reasons. However, Borrower is liable for any transaction Lender authorizes even if Lender should not have authorized it because Borrower is or would be in default as a result of the transaction.

C. No Security Interest on Purchases. This Agreement does not grant Lender a security interest in purchases Borrower charges to the Credit Line.

D. Transactions With Merchants (a) If a merchant discloses a policy such as "no returns", "no refund", "no return or credit without receipt", "as is", "store credit only", or "all sales final", or similar language, Borrower will be bound by that policy when Borrower uses the Credit Line to buy goods or services from that merchant. (b) When using the Credit Line to make travel or lodging reservations, Borrower must obtain the merchant's cancellation policy and follow it if Borrower cancels. If Borrower cancels, Borrower must obtain the cancellation number that the merchant is required to give Borrower. The merchant may charge Borrower for a cancelled transaction unless Borrower can provide Lender with a correct cancellation number. If Borrower makes reservations or purchases of any kind, such as lodging reservation for several nights stay or a mail order purchase, the Credit Line may be immediately charged for the full amount of the reservation or purchase, regardless whether Borrower has received the goods or services requested at the time the Credit Line is charged. (c) If Borrower authorizes a merchant to charge the Credit Line for repeat transactions without the Account Access Card, then Borrower must notify the merchant when Borrower wants to discontinue the repeat transactions or if the Credit Line is closed or if a new Credit Line or Account Access Card number is issued by Lender. Otherwise, Borrower will be responsible to Lender for the amount of all such repeat transactions. (d) If Borrower disagrees with a transaction on Borrower's statement or has a dispute with a merchant as a result of a transaction, Borrower will provide Lender with information or assistance Lender reasonably requests. Otherwise, Borrower will pay Lender for any resulting loss Lender has, unless Lender is prohibited by applicable law from holding Borrower liable for Lender's loss. (e) If Borrower makes a transaction in a currency other than U.S. dollars, Visa will convert the charge or credit into a U.S. dollar amount. The conversion rate will be determined using Visa currency conversion procedures that are disclosed to institutions issuing Visa cards. The conversion rate on the processing date may differ from the rate on the date of Borrower's transaction. Currently, Visa uses a currency conversion rate of either: (1) a rate selected by VISA from a range of rates available in the wholesale currency markets for the applicable central processing date, which rate may vary from the rate VISA itself receives or (2) the government mandated rate in effect for the central processing date. In each case, Visa uses the rate in effect one day before the conversion date. In the event Visa chooses to change the currency conversion rate or the day on which the currency conversion rate is determined, then transactions on the Credit Line made in a foreign currency and processed after the change will reflect the change.

E. Special Rule for Account Access Card Purchases. If Borrower has a problem with the quality of goods or services that Borrower purchased with an Account Access Card, and Borrower has tried in good faith to correct the problem with the merchant, Borrower may not have to pay the remaining amount due on the goods or services. Borrower has this protection only when the purchase price was more than $50 and the purchase was made in Borrower's home state or within 100 miles of Borrower's mailing address. (If Lender owns or operates the merchant, or if Lender mailed Borrower the advertisement for the property or services, all purchases are covered regardless of amount or location of purchase.).

F. Overdraft Protection and Linked Accounts. If the Credit Line Account is not blocked, suspended or terminated, you may request that the Credit Line Account be set up to provide overdraft protection for an associated checking or Money Market Savings account. If the total amount of checks, debit card or ATM transactions or other debits for a business day exceeds the available associated account balance, then an Advance will be made from the Credit Line Account ("Overdraft Protection"). If the Credit Line Account is used for Overdraft Protection, the minimum transfer amount is one hundred dollars ($100) and incremental transfer amounts will be in multiples of one hundred dollars ($100). However, if there is not $100 available, but the available Credit Line amount can cover the overdraft transaction, then the amount of the available Credit Line will be advanced to cover the overdraft. For Idaho and Washington, the incremental advance is $25. If the available credit on your Credit Line will not allow a $25 increment to be advanced, no transfer will be made. If the associated account is closed or blocked, Overdraft Protection will stop. If you request that the Credit Line Account be connected to or "linked" to another Bank of America product, you understand and agree that a user on the "linked" account can make a transaction that exceeds the available balance on the "linked" account and cause an Advance to be made. Also, if an ATM access card is given to a user on the "linked" account, that user when using the ATM access card may access the Credit Line Account and obtain an Advance without making a transaction directly on the "linked" account. That user may or may not be a party obligated for this Agreement.

G. Skip Payment Feature. At our discretion, from time to time we may offer a feature that will allow you to skip one or more payments. FINANCE CHARGES will continue to accrue on the principal balance at the applicable interest rate. At the end of the skip payment period, the payment terms of this Agreement will be reinstated automatically without further notice.

27. **Borrowers Protection® Plan and Line Protection™ Plan** (Borrowers' Protection® Plan and Line Protection™ Plan are registered trademarks of Bank of America Corporation). Fixed Rate Loan Options may be protected by the Borrowers' Protection® Plan, and Variable Rate Balances that are not subject to a Fixed Rate Loan Option may be protected by the Line Protection™ Plan. Protection options for both plans include Disability, Involuntary Unemployment, and Accidental Death; or Disability and Accidental Death; or Involuntary Unemployment and Accidental Death. Borrowers' Protection® Plan and Line Protection™ Plan are optional and are not required to obtain a Credit Line. For each new Credit Line, you must specifically request Borrowers' Protection® Plan or Line Protection™ Plan. In addition, you must sign a separate Addendum to your Credit Line Agreement, even if you obtained Borrowers' Protection® Plan or Line Protection™ Plan for a prior Credit Line Agreement with Bank of America. Two Borrowers may purchase Protection for each Fixed Rate Loan Option, but they must select the same protection option, and there may be restrictions on which Borrowers may apply.

Fees for the Borrowers' Protection® Plan and Line Protection™ Plan are based on and payable with the regularly scheduled monthly payment of the Credit Line Agreement. Credit Line Agreements repaid in quarterly payments are not eligible for the Borrowers' Protection® Plan. Interest is not charged on the fees for Borrowers' Protection® Plan or Line Protection™ Plan.

The maximum term of the Borrowers' Protection® Plan is the shorter of the Credit Line Agreement term or 120 months.

We may allow you to exceed the Credit Limit temporarily and from time to time, to accommodate the premiums for any voluntary insurance or the fees for Borrowers' Protection® Plan or Line Protection™ Plan.

There are eligibility requirements, conditions and exclusions that can prevent you from receiving benefits under the Borrowers' Protection® Plan or Line Protection™ Plan as set forth in the Addendum describing the plan.

28. Miscellaneous. If this Agreement represents a renewal, modification, extension, substitution or consolidation of an obligation owed to us, then you acknowledge and agree that there are no claims, setoffs, avoidances, counterclaims or defenses or rights to claims, setoffs, avoidances, counterclaims or defenses to payment or enforcement of the prior obligation. If this Agreement is a renewal of a prior note or agreement with you, then it is the intent of the parties that the note or Agreement evidencing the original extension of credit not be extinguished by the renewal unless required by applicable state law. Our records shall be evidence that this Agreement is a renewal.

You agree that if this Agreement is in default, including the failure to make a Minimum Payment by the due date, you will accept calls regarding the collection of this Agreement at any residence or place of employment. The calls can be automatically dialed and a recorded message may be played. You agree such calls will not be "unsolicited calls" for purposes of any federal, state or local law. To improve customer service and security our calls with you may be recorded. You agree that monitoring or recording may be done and that no additional notice to you or additional approval from you is needed. You authorize us, our parent company, Bank of America Corporation (or any successor company) and Bank of America Corporation's affiliates and subsidiaries ("Affiliates") to: (a) obtain other information deemed necessary concerning your credit experience and other information from credit reporting agencies, creditors, and any department of motor vehicle or similar state agency, your employer (past, present and future) and other persons (and all entities may release and/or verify such information to us at any time without notification to you or without your consent), and (b) share information with our Affiliates, except to the extent that you have opted out of such sharing as provided in our Privacy Policy for consumers.

29. Entire Understanding. This Agreement together with the Security Instrument constitutes the entire understanding and agreement between the parties as to the matters set forth in this Agreement and the Security Instrument and supercede all prior understanding and correspondences, written or oral, with respect to the subject hereof.

30. Delay in Enforcement. We reserve the right to defer or delay the date certain changes are to occur without notice and without being liable for such delay or deferment. A court decree for divorce or separation or no-court approved mutual agreement does not affect, eliminate or reduce any person's liability for the Agreement or the Account balance if we are not a party to the decree or agreement.

31. Governing Law. In addition to applicable federal law, this Agreement will be governed by and interpreted in accordance with federal law and the laws of the State of SOUTH CAROLINA, except for matters related to the exportation of interest (as defined by federal law) which will be governed by and interpreted in accordance with the laws of the State of North Carolina. However, if there ever is a question about whether any provision of this Agreement is valid or enforceable, the provision that is questioned will be governed by whichever state or federal law would find the provision to be valid and enforceable. The loan transaction, which is evidenced by the Credit Agreement and this Agreement has been approved, made, and funded, and all necessary loan documents have been accepted by us in the State of North Carolina.

32. Severability. If any portion of this Agreement conflicts with, contradicts or otherwise controverts applicable federal, state, tribal, or local law, then to the extent possible such portion shall be construed as being consistent with such Applicable Law, and further will be deemed changed to the extent necessary to accomplish this end. If any such conflicting or contradicting portion of this Agreement cannot be so construed or changed, it will be deemed severed from this Agreement and will not affect other provisions of this Agreement, which shall be given full effect without regard to the conflicting or contradicting portions.

33. Irregular Payments. We may accept late payments, partial payments, and items marked "payment in full" even if they are not full payments, without losing any of our rights under this Agreement, and you will remain obligated to pay amounts owed under this Agreement. All written communications concerning disputed amounts including any checks or other instruments that indicate a payment constitutes "payment in full" of the amount owed or that is tendered with other conditions or limitations as full satisfaction of a disputed amount must be mailed or delivered to us at the address shown on your periodic statement.

34. Waiver of Notice. Subject to Applicable Law, you waive presentment for payment, demand, protest, and notice of dishonor, notice of acceleration, notice of intent to accelerate, and notice of nonpayment.

35. Sending of Notices. Except as otherwise provided in this Agreement, all notices must be in writing. Notice to any of you shall be deemed notice to all of you. Any Billing Statement or notice to you under this Agreement will be sufficiently given if sent to your address on file in connection with the Account or to a new address of which you have notified us in writing at least 20 calendar days before the sending of the Billing Statement or notice. Any notice that you give to us must be provided to us at the address listed on page 1, or a different address if you are notified of the same.

36. Transfer and Assignment. We may transfer or assign this Credit Line Agreement, the Security Instrument and any other loan document relating to the Account to any person or entity without notice to you. You may not transfer, assign or delegate your duties under this Agreement. Subject to applicable law this Agreement is binding on you, your successors, heirs and personal and legal representatives.

37. Assumption. This Account is not assumable. This means that someone buying the Property may not take over this Account as his/her own obligation on the terms of this Agreement or on any other terms.

38. Caption Headings. Caption headings are for convenience purposes only and are not to be used to interpret or define the provisions of this Agreement.

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Acknowledgement. You understand and agree to the terms and conditions of this Agreement. By signing this Agreement, you acknowledge that you have read this Agreement. You also acknowledge receipt of a completed copy of this Agreement, including the Fair Credit Billing Notice and the early home equity line of credit application disclosure, in addition to the handbook entitled *When Your Home is On the Line: What You Should Know About Home Equity Lines of Credit* provided to you at application.

WITNESS: ACCEPTED AND AGREED TO:

Joanne Hafter 9-26-08

Borrower JOANNE C HAFTER Date

Borrower Date

Borrower Date

Borrower Date

Borrower Date

Borrower Date

Borrower Date

Borrower Date

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BILLING ERROR RIGHTS
YOUR BILLING RIGHTS

KEEP THIS NOTICE FOR FUTURE USE

This notice contains important information about your rights and our responsibilities under the Fair Credit Billing Act.

NOTIFY US IN CASE OF ERRORS OR QUESTIONS ABOUT YOUR BILL

If you think your bill is wrong, or if you need more information about a transaction on your bill, write us on a separate sheet at the address listed on your bill. Write to us as soon as possible. We must hear from you no later that sixty (60) days after we sent you the first bill on which the error or problem appeared. You can telephone us, but doing so will not preserve your rights.

In your letter give us the following information:

Your name and account number;

The dollar amount of the suspected error;

Describe the error and explain, if you can, why you believe there was an error. If you need more information, describe the item you think is wrong.

YOUR RIGHTS AND RESPONSIBILITIES AFTER WE RECEIVE YOUR WRITTEN NOTICE

We must acknowledge your letter within thirty (30) days, unless we have corrected the error by then. Within ninety (90) days, we must either correct the error or explain why we believe the bill is correct.

After we receive your letter, we cannot try and collect any amount you question, or report you as delinquent. We can continue to bill you for the amount in question, including **FINANCE CHARGES**, and we can apply any unpaid amount against your Credit Line. You do not have to pay any questioned amount while we are investigating, but you are still obligated to pay the parts of your bill that are not in question.

If we find we made a mistake on your bill, you will not have to pay **FINANCE CHARGES** related to any questioned amount. If we didn't make a mistake, you may have to pay **FINANCE CHARGES**, and you will have to make up any missed payments on the questioned amount. In either case, we will send you a statement of the amount you owe and the date on which it is due.

If you fail to pay us the amount that we think you owe, we may report you as delinquent. However, if your explanation does not satisfy us and you write to us within ten (10) days telling us that you still refuse to pay, we will tell anyone we report you to that you have a question about your bill. And, we must tell you the name of anyone we reported you to. We must tell anyone that we report you to that the matter has been settled between us when it finally is.

If we do not follow these rules, we can't collect the first $50 of the questioned amount, even if your bill is correct.

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Bank of America

IMPORTANT NOTICE

This is the plan you requested.
You may enroll in the plan now, by signing below.

CLOSING AGENTS: This document must be included in the closing package you return to Bank of America. The borrower(s) must accept or decline the plan and all borrowers must sign this page.

Confirmation Letter

Account Number: [redacted]

Congratulations and thank you for choosing Bank of America for your home equity line of credit. Our records indicate that you previously asked to enroll in the Line Protection Plan®. Below is the plan you requested.

Financial relief when you need it most. The Line Protection Plan may cancel your minimum monthly payment for up to six months if you experience certain unexpected events, such as:

- Involuntary Unemployment
- Disability
- Hospitalization
- Loss of Life

You may cancel the plan at any time. You cannot request the plan to your line of credit after this closing.

NEXT STEPS: You must make a final selection below. In order to complete your enrollment and activate protection, you must accept a protection option, the protected borrower(s) and sign below. **If you decline protection, you will not be entitled to any benefits provided by the Line Protection Plan (LPP).**

1. **ACCEPT Line Protection Plan®**

[X] Single, 6-month, Involuntary Unemployment, Disability, Hospitalization and Loss of Life: **Amount of Fee:** The Monthly Fee for the selected Line Protection Plan option is 9.000 percent of your Minimum Monthly Payment. The monthly fee will be reflected on your statement under "Optional Products" for each month there is a balance on your account. The Protection Date is:
SEPTEMBER 26, 2008
Protected Borrower:
JOANNE C HAFTER

[ ] Joint, 6-month, Involuntary Unemployment, Disability, Hospitalization and Loss of Life: **Amount of Fee:** The Monthly Fee for the selected Line Protection Plan option is percent of your Minimum Monthly Payment. The monthly fee will be reflected on your statement under "Optional Products" for each month there is a balance on your account. The Protection Date is:

Protected Borrowers:

DECLINE Line Protection Plan®

[ ] I/We decline Protection. I/We forfeit any future claim to benefits provided by the Line Protection Plan. If you are declining protection, please mark through the pre-selected plan above.

2. **All borrowers must acknowledge their above selections, by signing below.**
If accepted, the undersigned Borrower(s) agree to the terms of the optional Line Protection Plan Addendum and acknowledge that I/we have received a full and completed copy of the Addendum (regardless if my/our signatures(s) appear(s) on the copy). The undersigned Borrowers also acknowledge that I/we have received the Important Information about Bank of America's Line Protection Plan.

Joann C. Hafter 9-26-08
Borrower JOANNE C HAFTER Date

Borrower Date

Borrower Date

Borrower Date

Borrower Date

Borrower Date

Borrower Date

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EXHIBIT 8

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(Spartanburg Division)

PHILLIP FRANCIS LUKE HUGHES, on behalf of the ESTATE OF JANE K. HUGHES, JOANNE HAFTER, and all others similarly situated, Plaintiffs, v. BANK OF AMERICA, N.A. Defendant.	Case No. 7:15-cv-05083-MGL

REPLY IN SUPPORT OF DEFENDANT BANK OF AMERICA, N.A.'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT

In an attempt to salvage their futile and untimely causes of action, Plaintiffs seek to amend their Complaint *for a fourth time* by making new, unsupported allegations; ask this Court to apply pre-*Iqbal* pleading standards; omit discussing lynchpin elements of equitable tolling; and ignore recent South Carolina jurisprudence affirming the fraud exception to the survivability statute.

After amending their Complaint three times, Plaintiffs' Third Amended Complaint ("TAC") remains as vulnerable as ever to dismissal. Indeed, dismissal is appropriate because:

- Plaintiffs' claims are all barred by the applicable statutes of limitations;
- Joanne Hafter signed up for LPP coverage; and
- Phillip Hughes' fraud claims expired with the death of his parents.

Accordingly, BANA respectfully requests that this Court grant its motion to dismiss and dismiss the TAC with prejudice.

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I. Plaintiffs ignore the standard of review at the motion to dismiss stage.

"[I]t is well-settled that a complaint cannot be amended by a plaintiff's briefs in opposition to a motion to dismiss." *Sheppard v. LPA Group, Inc.*, No. 2:07-564-JFA-RSC, 2008 U.S. Dist. LEXIS 11724, at *7 (D.S.C. Feb. 15, 2008) (citing *Mylan Laboratories, Inc. v. Akzo, N.V.*, 770 F. Supp. 1053, 1059 (D. Md. 1991)). Here, despite three amendments, and in a last-ditch attempt to avoid the relevant statutes of limitations that require dismissal of all of their causes of action, Plaintiffs improperly attempt to amend their pleadings yet again by attaching external documents and affidavits to their opposition briefing. Plaintiffs' improper attempts to further amend their TAC should be disregarded by this Court.

Additionally, Plaintiffs appeal to several pre-*Twombly* and *Iqbal* decisions in asking the Court to apply the "no set of facts" standard of review to the TAC. This, of course, is not the appropriate standard at the motion to dismiss stage under *Iqbal*; instead, a complaint must contain sufficient factual allegations that, if accepted as true, state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plaintiffs fail to meet this standard and their TAC must be dismissed, with prejudice.

II. Plaintiffs have not pleaded facts to invoke the disfavored doctrine of equitable estoppel to save their untimely state and federal claims.

Plaintiffs do not appear to dispute that, unless equitable tolling applies, all of their claims are time-barred. To trigger equitable tolling, a plaintiff must allege three elements: "(1) the party pleading the statute of limitations fraudulently concealed facts that are the basis of the plaintiff's claim, and (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." *Supermarket of Marlinton v. Meadow Gold Dairies*, 71 F.3d 119, 122 (4th Cir. 1995).

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While Plaintiffs correctly identify these elements in their opposition briefing, they have failed to plead facts in the TAC to trigger equitable tolling. Indeed, Plaintiffs do not cite the TAC once in their equitable tolling opposition briefing. (*See* Pls.' Opp. 9-20.) Plaintiffs simply have not met the basic requisites for equitable tolling as set forward by the Fourth Circuit in *Supermarket of Marlinton*, and the TAC must be dismissed.

A. Plaintiffs fail to plead acts of fraudulent concealment by BANA that could trigger equitable tolling of their individual, untimely claims.

To demonstrate the first element of equitable tolling—fraudulent concealment—a plaintiff must allege sufficient facts to show "affirmative 'acts of concealment [by Defendants].'" *Espejo v. George Mason Mortg., LLC*, No. 1:09-cv-1295, 2010 U.S. Dist. LEXIS 8190, at *16 (E.D. Va. Feb. 1, 2010) (quoting *Supermarket of Marlinton*, 71 F.3d at 122). Here, Plaintiffs allege the exact opposite: that BANA charged monthly premiums for the LPP coverage that appeared on their monthly bank and account statements beginning in 2006 for the Hugheses and 2008 for Hafter. (TAC ¶¶ 25, 34.)

For instance, Hafter admits that a charge for "LPP Fee Assessment" appeared on her home equity loan transaction summary *every single month* from 2008 through 2015. (*Id.* ¶ 34.) This allegation stands in stark contrast with Plaintiffs' contention in their opposition briefing that "no Plaintiff received any notice regarding their (unwanted) participation of Defendant's product until the 2015 letters." (Pls.' Opp. 14.) Plaintiffs cannot escape the plain allegations in their TAC. Thus, as set forth in BANA's Motion to Dismiss, Hafter has failed to plead affirmative concealment.

Similarly, Hughes alleges that BANA charged his parents for the LPP product, with the charge appearing on his parents' monthly checking account statement from 2006 to 2015. (TAC ¶ 25.) Hughes contends that the label of the monthly charge was ambiguous. (*Id.*) To meet the

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hefty burden of pleading affirmative concealment, however, Hughes must allege more than mere ambiguity. Rather, the circumstances under which equitable tolling applies are "quite narrow," and equitable tolling is appropriate only when "extraordinary circumstances beyond plaintiffs' control made it impossible to file the claims on time." *See Chao v. Virginia Dep't of Transp.*, 291 F.3d 276, 283 (4th Cir. 2002). The TAC is devoid of any allegations that BANA prevented Plaintiffs from filing their lawsuit. On the contrary, by Plaintiffs' own admissions, BANA provided monthly statements to them beginning in 2006 and 2008.

Plaintiffs have failed to plead any facts demonstrating affirmative concealment by BANA. They therefore cannot rely on equitable tolling to save their untimely federal and state claims.

B. Plaintiffs fail to plead that they exercised any due diligence that could allow for equitable tolling of their individual, untimely claims.

With regard to the second and third elements of equitable tolling, the TAC is devoid of any allegations that the Hugheses and Hafter failed to discover BANA's fraudulent concealment of facts giving rise to their claims *despite the exercise of due diligence*. As discussed in BANA's Motion to Dismiss, the only statement related to the Hugheses' "diligence" is contained in Plaintiffs' fraud claim: "Plaintiffs used reasonable prudence and diligence by documenting in writing their decision to decline LPP coverage." (*See* TAC ¶ 60.) Again, this allegation fails to address the Hugheses' efforts, if any, to discover allegedly fraudulently concealed facts, because it only concerns election of LPP coverage—not their efforts to discover BANA's alleged conduct within the limitations period.

In the opposition briefing, Hafter now argues that she "exercised due diligence by contacting counsel for additional information" once she discovered that BANA had been sued in 2015. (Pls.' Opp. 18.) Hafter's argument ignores the requirement that her due diligence occur

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during the relevant limitations period. Any communications with her counsel happened long after the limitations period expired.

Furthermore, and fatal to all of Hafter's claims, she does not dispute that the LPP Confirmation Letter contains her signature. (*See* ECF No. 18-2 [Hafter Affidavit] ¶ 5; ECF No. 28-9 [Hafter MTD Affidavit].) Instead, she alleges in the TAC that the document gave her no option to decline the offered product. (TAC ¶ 38); *see* (ECF No. 18-2 [Hafter Affidavit] ¶¶ 5–6).[1] Of course, this assertion ignores the plain language of the document: "If you are declining this protection, please mark through the pre-selected plan above." (*See* ECF No. 25-3 [LPP Confirmation Letter], Ex. B to Mem. in Support of Motion to Dismiss.) But, more importantly, her assertion does nothing to dispute the fact that she signed the LPP Confirmation Letter.

For the reasons stated above, Plaintiffs have not pleaded facts sufficient to trigger equitable tolling for either their state or federal claims. Thus, the respective statutes of limitations bar every claim in the TAC.

III. Plaintiffs fail to state a claim for fraudulent concealment.

Plaintiffs contend BANA fraudulently concealed that it enrolled them in LPP coverage and that "BANA had a duty to disclose the withdrawals arising from the fiduciary relationship between the parties." (TAC ¶¶ 64, 67.) Yet, Plaintiffs' allegations are implausible under *Iqbal/Twombly* and are premised on fiduciary duties that do not exist as a matter of law. (Mem. in Support of Mot. to Dismiss at 14–15.) Plaintiffs do not address these arguments in their opposition brief, contending instead that their "claims for fraud, fraudulent concealment, and breach of contract accompanied by fraudulent acts are sufficiently particular and fully comply

[1] As set forth in BANA's Motion to Dismiss, Hafter's allegation that her signature on the HELOC Agreement is forged is in contrast to her affirmative allegations that she entered into a HELOC Agreement with BANA in 2006 in the amount of $30,000. (TAC ¶ 33.)

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with the Federal Rules." (Pls.' Opp. 23.) But BANA's argument does not concern the particularity requirements under the Federal Rules; rather, it attacks the plausibility requirements under *Iqbal/Twombly*.

Plaintiffs' assertion that BANA concealed the LPP charges from them while simultaneously identifying the charges on monthly bank and account statements is simply not a plausible claim.

Similarly, Plaintiffs' assertion that fraudulent concealment arose out of an alleged breach of fiduciary duty misstates the law. "Non-disclosure becomes fraudulent concealment only when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction." *Lawson v. Citizens & S. Nat'l Bank of S.C.*, 193 S.E.2d 124, 126 (S.C. 1972). While Plaintiffs contend that "BANA had a duty to disclose the withdrawals arising from the fiduciary relationship between the parties," (TAC ¶ 67), Plaintiffs cannot create fiduciary duties where South Carolina courts have declined to do so: "the normal relationship between a bank and its customer is one of creditor-debtor and is *not fiduciary in nature*," *Regions Bank v. Schmauch*, 582 S.E.2d 432, 444 (S.C. Ct. App. 2003) (citing *Burwell v. South Carolina Nat'l Bank*, 340 S.E.2d 786, 790 (S.C. 1986)) (emphasis added); *see Ellie, Inc. v. Miccichi*, 594 S.E.2d 485, 497 (S.C. Ct. App. 2004). Only when a bank undertakes to advise a depositor does a fiduciary duty inure to a bank. *Schmauch*, 582 S.E.2d at 444. Plaintiffs do not allege that BANA undertook any advisory role during the transactions at issue, and they therefore cannot establish that BANA owed them a duty.

Because Plaintiffs do not address BANA's arguments that Plaintiffs' fraudulent concealment claim is both implausible and premised on a non-existent duty of BANA, BANA's arguments are unopposed and Plaintiffs' cause of action must be dismissed.

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IV. The South Carolina Supreme Court has regularly and recently re-affirmed the fraud exception to the survivability doctrine.

Plaintiffs seek to certify South Carolina's fraud exception to the survivability statute because, according to Plaintiffs, the Supreme Court has not addressed this issue since *Mattison v. Palmetto State Life Insurance Co.*, 15 S.E.2d 117 (S.C. 1941), and that Court "failed to explain why fraud does not constitute injury to personal property," (Pls.' Opp. 26). Even if Plaintiffs' representation to this Court were accurate, they admit that Rule 244 of the South Carolina Appellate Court permits certification *only* when there is no controlling precedent in the decisions of the South Carolina Supreme Court. (Pls.' Opp. 23 n.1); *see Liberty Mut. Fire Ins. Co. v. J.T. Walker Indus.*, 817 F. Supp. 2d 784, 785 (D.S.C. 2011) (certifying question to South Carolina Supreme Court only when this Court determined that no South Carolina case addressed the question to be certified). The fraud exception to the survivability statute does not meet this standard, and Hughes's fraud-based claims must be dismissed.

As set forth in BANA's Motion to Dismiss, the South Carolina Supreme Court affirmed the vitality of the fraud exception to the survivability statute in 2002: "South Carolina case law has continued to recognize a common law exception [to the survivability statute] regarding causes of action for fraud or deceit." *Ferguson v. Charleston Lincoln Mercury, Inc.*, 564 S.E.2d 94, 97 (S.C. 2002); *see also Brailsford v. Brailsford*, 669 S.E.2d 342, 345 (S.C. Ct. App. 2008) ("South Carolina . . . has long recognized several exceptions to the survivability of a claim, including an exception for fraud"); (Mem. in Support of Mot. to Dismiss at 12–13) (discussing *Ferguson* at length).

Plaintiffs' position is contrary to the South Carolina appellate rules, this Court's precedent for certification, and the unambiguous decisions of the state's highest court. Plaintiffs' request that this Court certify to the South Carolina Supreme Court four questions relating to the

fraud exception to South Carolina's survivability statute must therefore be denied. Hughes's fraud, fraudulent concealment, and breach of contract accompanied by fraudulent act claims do not survive the deaths of his parents, and those claims must be dismissed.

V. Plaintiffs concede that their claim for the breach of the covenant of good faith and fair dealing must be dismissed.

Plaintiffs have rightly conceded that they cannot state a claim for breach of the covenant of good faith and fair dealing. Thus, this Court should dismiss this claim.

VI. Conclusion.

For these and the reasons in BANA's Motion to Dismiss and supporting briefing, BANA respectfully requests that this Court grant its Motion to Dismiss and dismiss Plaintiffs' Third Amended Complaint, with prejudice.

Dated: May 26, 2016

Respectfully submitted,

BANK OF AMERICA, N.A.

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CERTIFICATE OF SERVICE

I certify that on this 26th day of May, 2016, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the attorneys of record registered with the CM/ECF system. I further certify that a true and accurate copy of the foregoing was sent by U.S. Mail to the following:

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	Civil Action No.: 2017-CP-42-02834
PHILLIP FRANCIS LUKE HUGHES, on behalf of the Estate of Jane K. Hughes,	)	
	)	
Plaintiff,	)	**PLAINTIFF'S MEMORANDUM IN OPPOSITION OF DEFENDANT'S MOTION TO DISMISS OR STAY PROCEEDINGS**
	)	
vs.	)	
	)	
BANK OF AMERICA NATIONAL ASSOCIATION,	)	
	)	
Defendant.	)	
	)	

INTRODUCTION

Plaintiff Phillip Francis Luke Hughes, as personal representative of the Estate of Jane K. Hughes, respectfully submits the following Memorandum in Opposition of Defendant Bank of America National Association's ("BANA") Motion to Dismiss or, in the Alternative, Stay Plaintiff's Complaint. Plaintiff has stated claims in his Complaint for which relief should be granted and, therefore, Plaintiff's case should not be dismissed.

STATEMENT OF FACTS

Plaintiff previously filed an action in this Court in 2015 based upon the same facts that establish his claim for relief in the current action, and Plaintiff incorporates those facts alleged in his current Complaint herein. Plaintiff's 2015 Complaint was filed as a putative class action law suit against BANA for violation of the Truth in Lending Act, Fraud, Fraudulent Concealment, Breach of Contract, and Breach of Contract Accompanied by Fraudulent Acts. Defendant BANA removed the action to federal court, and filed a motion to dismiss in lieu of an answer. Prior to the District Court's decision on the motion, Plaintiff stipulated to the dismissal, without prejudice, of all claims against BANA *except* breach of contract and violation of TILA. As such, Plaintiff's

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claims of fraud, fraudulent concealment, and breach of contract accompanied by a fraudulent acts have neither been considered nor ruled upon by any court and, for the reasons set forth below, are properly brought before the South Carolina Court of Common Pleas.

STANDARD OF REVIEW

A court must deny a motion to dismiss if the plaintiff has stated facts sufficient to constitute a cause of action. S.C. R. Civ. P. 12(b)(6). In considering a motion to dismiss, the trial court must base its ruling solely upon the allegations set forth on the face of the complaint. *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 66-67, 651 S.E.2d 305, 307 (2007). The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). Therefore, a motion to dismiss must be denied if the facts alleged in the complaint, and the inferences that can be drawn therefrom, would entitle the plaintiff to relief under *any* theory. *Doe*, 375 S.C. at 66-67, 651 S.E.2d at 307 (emphasis added).

ARGUMENT

Defendant's motion asserts that Plaintiff's claims are barred by the statute of limitations and, due to the filing of a prior suit based upon the same facts as the current case, the doctrines of *res judicata* and collateral estoppel. In sum, Plaintiff denies that these doctrines apply to Plaintiff's fraud-based claims, which were voluntarily withdrawn from the district court proceedings in order to file them in state court, where Plaintiff seeks to petition for the reevaluation of state precedent pertaining to the survival of fraud claims in South Carolina. Because the District Court could not hear these claims pursuant to South Carolina Appellate Court Rule 244(a), *res judicata* is inapplicable. Likewise, the District Court did not touch upon the issues of whether Plaintiff's fraud-based claims are time-barred and, if so, whether the doctrine of equitable tolling would apply

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to preserve the same. Rather, the outcome-determinative issue in the District Court opinion was an issue of fact—that Jane Hughes failed to exercise due diligence to discovery wrongdoing. For the reasons below, that issue is neither dispositive nor particularly relevant to the Court's considerations in the current matter.

I. Plaintiff's Claims are Timely and are not Barred by the Doctrines of *Res Judicata* or Collateral Estoppel.

A. Res Judicata

Though Plaintiff's claims in the current matter arise from the same set of facts on which he brought a previous action against BANA, the claims in the current action are not barred under the doctrine of *res judicata.*

Res judicata prohibits a party from bringing a claim against a second party when that claim has already been, or could have been, litigated. In order to establish that a claim should be barred by *res judicata*, BANA must show that the current claim involves 1) the same parties; 2) the same subject matter; and 3) an issue previously adjudicated in another suit. *Sealy v. Dodge*, 289 S.C. 543, 347 S.E.2d 504 (1986). Because Plaintiff's fraud-based claims (fraud, breach of contract accompanied by a fraudulent act, and fraudulent concealment) were voluntarily dismissed without prejudice in the District Court proceeding, these claims were not previously adjudicated and thus do not meet the third element of *res judicata.*

While Plaintiff acknowledges that *res judicata* can potentially bar subsequent actions by the same party when the claims rise from the same transaction or occurrence that was a subject of a prior action, the fraud-based claims could *not* be included in the prior lawsuit after BANA removed the action to federal court, thus prompting Plaintiff to voluntarily dismiss those claims and refile them in state court. Particularly, had Plaintiff pursued those matters in the federal courts, the District Court would have had to dismiss Plaintiff's fraud-based claims pursuant to South

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Carolina's survival statute, S.C. Code Ann § 15-5-90, and the state court's interpretation thereof to exclude fraud. Plaintiff seeks reexamination of this interpretation for reasons set forth in Section II, *infra,* which can only be accomplished by pursuing the fraud-based claims in state court. *See Mattison v. Palmetto State Life Ins. Co.* 197 S.C. 256, 15 S.E.2d 117 (1941).

South Carolina Appellate Court Rule 244(a) only allows certification of questions to the South Carolina Supreme Court by the United States District Court on questions unanswered by controlling precedent. Because *Mattison* provides controlling precedent as to the survivability of fraud, Plaintiff could not—after BANA removed the prior action to federal court—challenge the validity of controlling precedent through that action and fully pursue his fraud-based claims. As such, those claims are not barred by the doctrine of *res judicata,* and Plaintiff filed this action in state court to pursue examination of its position in proper legal form.

Additionally, Plaintiff included an action under S.C. Code Ann. § 39-5-20, the South Carolina Unfair Trade Practices Act (SCUTPA). This claim, too, could not be included in the original action against BANA. Plaintiff initially filed a putative class action; SCUTPA actions, however, cannot be classed. S.C. Code Ann. § 39-5-140. Thus, Plaintiff—by bringing the former action on behalf of others similarly situated—could not bring a claim for SCUTPA in the initial suit.

B. Collateral Estoppel and Statute of Limitations

Likewise, the issues decided in the 2015 action against BANA are not precluded from being heard by this court pursuant to the doctrine of collateral estoppel. To successfully establish that collateral estoppel applies to this case, BANA must prove that the issue it claims is precluded was actually litigated and directly determined in the prior action, and that the matter or fact directly at issue was necessary to support the final judgment. *Nelson v. QHG of South Carolina, Inc. et al,*

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354 S.C. 290, 306, 580 S.E.2d 171 (S.C. App. 2003). When determining whether the issues raised in the initial suit were actually litigated, the following: "whether privity exists, whether the doctrine is used offensively or defensively, and whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action." *Id.*

The issue decided on by the United States District Court in dismissing Plaintiff's claims in his 2015 law suit is whether the facts as pled in the complaint sufficiently established that Jane Hughes exercised due diligence to discover wrongful charges against her account, so as to warrant equitable tolling of the statute of limitations as to the claims of violation of TILA and breach of contract. The District Court decided that the claims brought by Plaintiff were time barred, and determined from the facts as plead did not warrant the invocation of the doctrine of equitable tolling of these remaining causes of action because Mrs. Hughes did not fail to discover the charges despite exercising due diligence.

The issues at hand here, though, were not decided by the District Court: 1) whether Plaintiff filed the fraud-based claims within the statute of limitations and, if not, 2) whether those claims are equitably tolled under South Carolina law. The statute of limitation for claims of fraud does not accrue until the complaining party has knowledge of fraud itself or knowledge of sufficient facts to put a party on inquiry. *See Burgess v. American Cancer Soc., South Carolina Div., Inc.*, 300 S.C. 182, 386 S.E.2d 798, 789 (S.C. App., 1989). Plaintiff asserts that, viewing the facts as alleged in the pleadings in the light most favorable to the Plaintiff, the statute of limitations began to run in March 2015 upon receiving a notice from BANA of charges to Jane Hughes' account for an unselected, optional mortgage service. The discovery rule requires this Court to examine when Plaintiff's cause of action accrued—an issue not examined by the District Court and a question of fact improperly decided at the pleadings stage. Thus, Plaintiff's fraud-based claims are not

collaterally estopped.

C. Equitable Tolling

Moreover, Plaintiff asserts that even if the court finds that the statute of limitations for the fraud-based claims has expired, the claim was equitably tolled until March 2015 when Mrs. Hughes received a notice from BANA regarding the cancellation of a service that she expressly declined.

The issue of whether equitable tolling is applicable to Plaintiff's fraud-based claims and/or SCUTPA claim is not one that the District Court ruled on in its Order, and thus is not precluded from being heard by this Court. In fact, the dispositive issue ruled upon by the federal court was whether Jane Hughes exercised due diligence to discover wrongful charges against her. In deciding that Plaintiff's TILA and breach of contract claims were not equitably tolled, and thus barred by their respective statutes of limitation, the District Court, relying upon *Supermarket of Marlinton v. Meadow Gold Dairies*, applied a single federal test that allows for the application of equitable tolling where "(1) the party pleading the statute of limitations fraudulently concealed the facts that are the basis of the plaintiff's claims; (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." The District Court's opinion relied exclusively on this test to decide whether equitable tolling applied and opined that, because the facts did not satisfy the due diligence prong of the test, equitable tolling was not warranted. The District Court notably rendered no opinion as to whether state law would allow any of Plaintiff's claims to be equitably tolled.

South Carolina's stance on equitable tolling, however, is more lenient than that of the federal courts, and in order to determine whether Plaintiff's fraud based, state law claims are tolled, this Court must apply a wholly separate standard than that relied upon by the District Court. The

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issue of due diligence is not a dispositive one in a state court evaluation of the application of the doctrine. In South Carolina, the parameters used by sister states and federal courts to decide on the doctrine's application "do not constitute an exclusive list of circumstances that justify the application of equitable tolling." *Hooper v. Ebenezer Sr. Services and Rehabilitation Center*, 386 S.C. 108, 113, 687 S.E.2d 29, 32 (S.C. 2009). Instead, equitable tolling may be applied where it is justified under all circumstances of a case, typically when a plaintiff does not file within the statute of limitations due to "an extraordinary event beyond his or her control"; this is a far broader consideration than that applied by the District Court. *Id.*

Rather than applying the tests for the application of equitable tolling adopted in other jurisdictions, our state holds that "'[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations.'" *Id.* quoting 54 C.J.S. Limitations of Actions § 115 (2005). "Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." *Id.*, quoting *Rodriguez v. Superior Court,* 176 Cal. App. 4th 1461 (2009). "The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." *Id.*, quoting *Hausman v. Hausman,* 199 S.W.3d 38, 42 (Tex. App. 2006).

The allegations in the case at hand are that BANA—an international financial institution—deceived and defrauded a frail, elderly couple by surreptitiously charging them for a product they expressly declined. The charges against their account for these services continued after the death of John Hughes and while Jane Hughes suffered debilitating ailments, including dementia, vision

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impairments resulting in surgery, heart problems resulting in surgery, and a broken hip that required hospitalization and extensive rehabilitative care. Surely, death and dementia constitute "extraordinary circumstances beyond [one's] control" so as to justify equitable tolling under *Hooper*.

Additionally, the determination of the when the statute of limitations began is properly reserved for a jury. "Whether a claimant knew or should have known that they had a cause of action is question for the jury." *Johnston v. Bowen*, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (S.C. 1993). At this stage in the case, there is conflicting evidence as to when Ms. Hughes knew or should have known that a claim against Defendant existed. Thus, a jury should properly decide the issue.

D. Exceptions to Res Judicata and Collateral Estoppel

Should the Court ultimately determine that the doctrines of *res judicata* or collateral estoppel apply in this case, our courts have found that *res judicata* is not "an 'ironclad' bar to a later lawsuit." *Judy v. Judy,* 393 S.C. 160, 712 S.E.2d 408, 412 (2011) (citing *Garris v. Governing Bd. of the South Carolina Reinsurance Facility*, 333 S.C. 432, 449, 511 S.E.2d 48, 57 (1998)). Likewise, "[t]he doctrine of collateral estoppel should not be rigidly or mechanically applied. Thus, even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it." *Carolina Renewal v. Dept. of Transp.*, 684 S.E.2d 779, 385 S.C. 550 (S.C. App., 2009).

South Carolina has adopted the Restatement (Second) of Judgements Sections 27, 28 and 29, which provide exceptions to the doctrines of *res judicata* and collateral estoppel. Specifically, Section 28 provides exceptions to *res judicata* where a new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by

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factors relating to the allocation of jurisdiction between them; or there is a clear and convincing need for a new determination of the issue because of the adverse impact of the determination on the public interest or interests of persons not themselves party in the initial action; or because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. *Pye v. Aycock,* 325 S.C. 426, 437-30, 480 S.E.2d 455, 460-61 (S.C. App.1997).

Exceptions to the doctrine of collateral estoppel include those enumerated in Section 28 of the Restatement (Second) of Judgements as well as Section 29, which further provides relevant exclusions when the forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined; or, the issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based; or, other compelling circumstances make it appropriate that the party be permitted to relitigate the issue. *Beall v. Doe,* 281 S.C. 363 371, 315 S.E.2d 186, 190-191 (S.C. App. 1984).

Should the court find that either of these doctrines apply in this matter, relevant exceptions—adopted by South Carolina Courts—would allow for the matter to be heard in spite of *res judicata* or collateral estoppel. The case at hand pertains to a claim that could not be heard in the appropriate forum after BANA removed the case to federal court; reconsidering the issue in State Court allows for the reexamination of the issue of whether fraud should remain an exception of the South Carolina statute; and, for reasons set forth in Section II, *infra*, there exists a public need for this issue to be heard in state court.

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As such—though Plaintiff maintains that his action is timely and is not subject to the doctrines of *res judicata* or collateral estoppel, even if either or both of these doctrines are applicable in this matter, Plaintiff's claim falls within the exceptions to these rules and should be heard by the State Court of Common Pleas.

II. Plaintiff's Claims for Relief Based on Elements of Fraud Should Survive the death of Jane Hughes.

Defendant argues that a cause of action for fraud does not survive under SC Code Ann. § 15-5-90, South Carolina's general survival statute, and Plaintiff's fraud-based claims should be dismissed. Plaintiff challenges this antiquated exception to the survival statute and, for the reasons set forth below, asks this court to reconsider precedent to better reflect the rights of persons in a modern society.

A. Scope of the South Carolina Survival Statute

i. Mattison v. Palmetto State Life Ins. Co.

South Carolina enacted legislation to allow for the survival of certain claims that were historically barred by the claimant's death. *Bennett v. Spartanburg Ry., Gas & Elec. Co.*, 97 S.C. 27, 81 S.E. 189, 189 (1914). South Carolina enacted the survival statute in 1905, which provided that "any and all injuries to the person or to personal property" survive the death of a party. *Id.* South Carolina's survival statute has remained intact, and the language essentially unchanged, from 1905 to present. The courts have relied and still rely upon early judicial interpretations of the statutory language and legislative intent in answering contemporary questions regarding the survivability of actions under the act.

South Carolina first addressed the question of whether fraud survives the death of a party under the survivability statute in *Mattison v. Palmetto State Life Ins. Co.* 197 S.C. 256, 15 S.E.2d 117 (1941). In *Mattison*, the estate brought an action against Palmetto State Life Insurance

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Company for perpetrating a fraudulent scheme intended to cheat the deceased of his rights under an insurance contract. *Id.* The South Carolina Supreme Court granted certiorari to hear the case on several questions, the relevant question being whether the cause of action of fraud survived. *Id.*

In determining whether the fraud claim survived, the *Mattison* Court reviewed the survival statute to assess whether fraud fell within the scope of the statutory language. At that time, the applicable statute read:[1]

> Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to *personal property*, shall survive both to and against the personal or real representative (as the case may be) of the deceased persons, and the legal representatives of insolvent persons, and defunct or insolvent corporations, any law or rule to the contrary notwithstanding.

1932 Code § 419 (emphasis added).

The *Mattison* Court succinctly opined that fraud did not fall within the scope of the statutory language, and therefore the Legislature did not intend that claims of fraud survive death. The *Mattison* Court further provided that:

> It is readily seen that under the above quoted Section, there are but two instances wherein a cause of action survives: (1) For and in respect to any and all injuries and trespasses to and upon real estate, and (2) any and all injuries to the person or to *personal property*. And it is just as readily seen that respondent's second cause of action does not come within either of the instances where a cause of action survives.

Mattison at 256, 15 S.E.2d at 119 (original emphasis replaced).

Thus, while the *Mattison* court narrowly interpreted the survival statute, it failed to explain why fraud does not constitute injury to personal property. In fact, there is no discussion in *Mattison* regarding the elements of fraud or why pecuniary loss caused by fraud is not an injury to personal property. This omission is relevant because the money taken by BANA from Jane Hughes was

[1] The current survival statute is codified at S.C. Code Ann § 15-5-90, and the language is nearly identical to the 1932 Code with only some minor changes in punctuation.

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personal property. Once Jane Hughes died, interest in her personal property, including her financial holdings, transferred to her Estate. Thus, *Mattison's* principle that fraud does not survive the death of a party in South Carolina is internally inconsistent.

ii. Fraud as an "exception" to the South Carolina Survival Statute

Since *Mattison*, and contrary to its narrow view of survivability, the South Carolina Supreme Court has consistently *broadly* interpreted the survival statute. *See, e.g., Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564, 564 S.E.2d 94, 97 (2002) ("[T]he statute's language is broad and ostensibly appears to include almost every conceivable cause of action."); *Layne v. Int'l Bhd. of Elec. Workers, (AFL-CIO), Local No. 382*, 271 S.C. 346, 352, 247 S.E.2d 346, 349 (1978) ("[I]t is the general rule that any cause of action which could have been brought by the deceased in his lifetime survives to his representative under the Survival Act."); *Brewer v. Graydon,* 233 S.C. 124, 128, 103 S.E.2d 767, 769 (1958) ("the Survival Statute must be liberally construed"). These later South Carolina opinions create a tension with *Mattison's* holding fraud is an *exception* to the rule, as opposed to a *cause of action outside of the statute's scope.*

Despite this tension, the South Carolina Supreme Court has yet to revisit the *Mattison* rationale for the fraud "exception." Indeed, there has been no discussion by South Carolina courts since 1941 on why fraud should be excepted from the survival statute. Plaintiff, therefore, invites this Court to reexamine this question of survivability and to determine viability of the 1941 *Mattison* analysis in 2018.

B. Public Policy

i. Clear evidence of mindset defeats policy reasons for exception

Perhaps the only attempt at explanation for South Carolina's fraud exception comes from the Fourth Circuit opinion in *Faircloth v. Finesod*, 938 F.2d 513, 517 (4th Cir. 1991). The plaintiff in Faircloth challenged the fraud exception to the South Carolina survival statute as violating the

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Equal Protection Clause, and the South Carolina District Court agreed. On appeal, the Fourth Circuit, applying a minimum scrutiny standard, supplied its "feasible attempt for [the] legislative distinction":

> [F]raud is a tort that requires a special quality of proof, and the states of mind of the victim (e.g., whether he knew the statement was false, relied upon it, and was justified in so relying) and the perpetrator are especially vital. . . . [A] legislature could rationally conclude that the difficulty and potential unfairness of proving the state of mind of a dead party to a fraudulent transaction justified excepting fraud from the survival statute.

Faircloth at 517.

Assuming that the rationale proffered by the Fourth Circuit in *Faircloth* is, in fact, the underlying basis for the common law fraud exclusion, as a matter of public policy, the common law exclusion should be overturned or, at the very least, excepted in those circumstances where the state of mind of the deceased party is readily identifiable, as in the current case, where Jane and John Hughes expressly declined, through an executed document, to enroll in a program offered by BANA. The instant case, where the policy supporting the exclusion is defeated, in consideration with the additional policy reasons set forth below, cries for a reevaluation of the fraud exclusion to the survival statute.

ii. Elderly fraud victims and public policy

Public policy should not enable the abuse of elderly and otherwise vulnerable citizens of South Carolina. Jane Hughes was 85 years old when Defendant began withdrawing the fraudulent, unauthorized charges from her account and suffered from dementia and vision impairments in the following years until her death. Studies show that such elderly persons are highly susceptible to being defrauded.

According to a 2015 study by True Link Financial, approximately 36.9% of American seniors are victims of financial abuse in any five-year span. *The True Link Report on Elder*

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Financial Abuse 2015, TRUE LINK, January 2015 at 11 (https://truelink-wordpress-assets.s3.amazonaws.com/wp-content/uploads/True-Link-Report-On-Elder-Financial-Abuse-012815.pdf). Fraud and financial abuse costs our seniors an estimated total of $36.48 billion annually. *Id.* Of this, approximately $16.99 billion is lost to financial exploitation, which is defined as "when misleading or confusing language is used – *often combined with social pressure and tactics that take advantage of cognitive decline and memory loss* – to obtain a senior's consent to take his or her money." *Id.* at 1. Not surprisingly, the vulnerability of seniors to fraud is in part due to the loss of cognitive functions of these individuals. *Id.* at 19. True Link's research shows that conditions such as dementia and Alzheimer's disease increase vulnerability to fraud, and an individual with a below-average memory is 78% more likely to be a victim of fraud. *Id.*

Notably, as the financial exploitation is accomplished through deception that does not quite rise to a criminal level, only a civil remedy is available. *Id.* at 5. The reality is that the time to identify, investigate, report, and prosecute civil offenses now, unlike in 1941, often takes many years and exceeds the lifetime of the victims. The speed and complexity of today's financial transactions, exacerbated by sophisticated technology, furthers fraud in ways not conceivable in 1941. Thus, the impact of the *Mattison* holding is now much more adverse to those most likely to fall victim to fraud than in 1941.

In sum, the public policy impact of South Carolina's survivability statute is long overdue for review in light of electronic phishing, data mining, electronic databases, and targeted advertising, and Plaintiff asks this Court to initiate that reevaluation.

iii. Survivability of fraud in other jurisdictions

Further supporting certification of the question is that the majority of states allow the survival of fraud claims. Indeed, South Carolina is one of only seven (7) states that do not allow

a fraud action to survive; the others being Alabama, Arkansas, Massachusetts, Texas, Vermont, and Wisconsin.

The general consensus among states that have offered policy considerations for the survival of fraud actions is that any action which lessens the value of an estate should survive, as the modern trend is to remove obstructions to the free transfer of property and rights and interests therein. *See, e.g., Jandera v. Lakefield Farmers' Union*, 150 Minn. 476, 479, 185 N.W. 656, 658 (1921); *Micheletti v. Moidel*, 94 Colo. 587, 591, 32 P.2d 266, 267 (1934); *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 154 Idaho 37, 41, 293 P.3d 661, 665 (2013).

In light of the policy considerations put forth by South Carolina's sister states regarding the impact of survivability on property rights, Plaintiff would urge this court to examine the question of whether excepting fraud from the South Carolina survival statute violates public policy.

CONCLUSION

Plaintiff sufficiently stated causes of actions and alleged adequate facts to obtain relief from Defendant. Moreover, Plaintiff's claims are not barred by the statute of limitations, nor the doctrines of collateral estoppel and *res judicata.* Under any reasonable reading of the Complaint and review of the facts available there are numerous substantive issues of disputed fact requiring that this matter proceed to discovery for a proper and fair resolution on a complete record. Finally, Plaintiff prays that the issue of whether the fraud is excluded from South Carolina's survival statute be reconsidered in light of the aforementioned factors. Plaintiff thus prays that this Court deny Defendant's motion and allow this action to proceed.

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Respectfully Submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Court Judge

Case No.: 2017-CP-42-02834

Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes.....Appellant,

v.

Bank of America National Association.....Respondent.

NOTICE OF APPEAL

Pursuant to Rule 203 of the South Carolina Appellate Court Rules, Plaintiff Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes ("Appellant") hereby appeals the order of the Honorable R. Keith Kelly, dated March 19, 2018, granting the motion to dismiss on behalf of Respondent Bank of America National Association.

Copies of the order granting the motion to dismiss on behalf of Respondent are attached hereto and incorporated herein as Exhibit A.

Respectfully Submitted,

By: _____

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STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF SPARTANBURG	)	**IN THE COURT OF COMMON PLEAS**
	)	
	)	
PHILLIP FRANCIS LUKE HUGHES, on behalf of the Estate of Jane K. Hughes, Plaintiff,	)	**Civil Action No.: 2017- CP-42-02834**
	)	
vs.	)	
	)	**ORDER ON MOTION TO DISMISS**
BANK OF AMERICA NATIONAL ASSOCIATION	)	
	)	
Defendant.	)	

This matter came before this Court for a hearing on the Motion to Dismiss filed by the Defendant, Bank of America, N.A. ("BANA"), on February 22, 2018. Present at the hearing were the following: Brad D. Hewett, Esquire, on behalf of the Plaintiff; and Robert Muckenfuss, Esquire and Elizabeth Timmermans, Esquire on behalf of BANA. Having heard arguments from counsel, and after careful consideration of the pleadings, motion, memoranda, and exhibits filed by the parties, this Court hereby grants BANA's Motion to Dismiss, with prejudice.

FACTS ALLEGED

Plaintiff's late parents opened a $120,000 line of credit from BANA on June 13, 2006, secured by a mortgage on their Spartanburg, South Carolina home. (Compl. ¶ 7.) Plaintiff alleges that on that same day, BANA presented his parents with policy documentation concerning optional line protection coverage ("LPP"). (*Id.* ¶ 11.) The optional LPP would enable a borrower to cancel some or all of the monthly payments on the variable portion of a credit line due to events like disability, accidental death, or involuntary unemployment. (*Id.*) Plaintiff asserts that his parents declined to purchase LPP coverage when they received the

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$120,000 line of credit. (*Id.*) Plaintiff alleges that, despite his parents' declining LPP coverage, "for several years," BANA drafted a monthly charge of $28.40 from his parents' account for LPP coverage for his father. (*Id.* ¶ 23.)[1] Plaintiff's father passed away in October 2008. (Compl. ¶ 27.) In or about March 2015, BANA notified Mrs. Hughes that it would stop charging for the LPP fee, and upon learning of Mr. Hughes' death, refunded all LPP payments drawn on the Hughes' account after October 2008. (Compl. ¶15, TAC ¶30). In June 2015, Mrs. Hughes also passed away. (Compl. ¶ 29.)

PROCEDURAL HISTORY

This is not Plaintiff's first time suing BANA relating to the LPP product. In 2015, Plaintiff (on behalf of his mother's estate) filed suit against BANA in this court and asserted almost identical factual allegations as those made in this matter, bringing claims of fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent acts, breach of duty of good faith and fair dealing, and a violation of the Truth in Lending Act ("TILA"). BANA removed the action to the United States District Court for the State of South Carolina, Spartanburg Division, Civil Action No. 7:15-cv-05083-MGL (the "2015 Federal Action".) After Plaintiff amended his complaint three times, BANA moved to dismiss Plaintiff's

[1] As discussed herein, Plaintiff previously filed suit against BANA for the LPP product charges and contended in his prior lawsuit that the monthly charges began "on or about June 2006," and that a $28.40 fee was listed on his parents' monthly account statements. (2015 Federal Action Third Am. Compl., Dkt. No. 23, Civil Action No. 7:15-cv-05083-MGL ("TAC") ¶ 25.) In Plaintiff's Response to BANA's Motion to Dismiss the operative Complaint, Plaintiff incorporated the allegations made in his prior 2015 Federal Action TAC into this Complaint. (Pl. Opp. to Motion to Dismiss, pg. 1) This Court may take judicial notice of the allegations made in the TAC, and may consider those allegations without converting Defendant's motion into a motion for summary judgment. *See Lucht v. Youngblood*, 266 S.C. 127, 134, 221 S.E.2d 854, 858 (S.C. 1976) ("Generally, the prior pleadings in an action may be received in evidence against the pleader."); *see also Teilabs, Inc. v. Makor Issues & Right, Ltd.*, 531 U.S. 308, 322-323, 127 S. Ct. 2499, 2509 (S.C. 2007) (noting a court may take judicial notice of publicly-available court documents without converting a motion to dismiss into one for summary judgment.).

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Third Amended Complaint. Prior to the District Court's ruling on the motion to dismiss, Plaintiff voluntarily dismissed his fraud-based claims (fraud, fraudulent concealment, and breach of contract accompanied by fraudulent acts). (2015 Federal Action, Dkt. No. 31.) On February 13, 2017, District Court Judge Mary Geiger Lewis granted BANA's motion to dismiss the remaining claims, holding that Plaintiff's breach of contract and TILA claims were time-barred and that equitable tolling did not apply to save the untimely claims. (2015 Federal Action, Dkt. No. 33 at 4.)

Plaintiff appealed the District Court Order to the Fourth Circuit Court of Appeals. On September 22, 2017, after a *de novo* review, the Fourth Circuit affirmed the trial court's order and held that Plaintiff's claims relating to the LPP product were time barred and not subject to equitable tolling. *Hughes, on behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n*, 697 F. App'x 191, 193 (4th Cir. 2017). Plaintiff petitioned the Supreme Court of the United States for a *writ of certiorari.* On January 22, 2018, the Supreme Court denied Plaintiff's writ. *Hughes, on Behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n*, No. 17-884, 2018 WL 491558, at *1 (U.S. Jan. 22, 2018).

While Plaintiff's appeal of the District Court's Order in the 2015 Federal Action was still pending before the Court of Appeals, Plaintiff filed this lawsuit (again in a representative capacity on behalf of his mother's estate). While Plaintiff again alleged that BANA improperly charged his parents for an unwanted LPP product, Plaintiff brought claims for fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), breach of fiduciary duty, and conversion. Plaintiff also asserts a statutory survival cause of action in an effort to enforce his six substantive causes of actions.

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LEGAL CONCLUSIONS

The Court hereby grants BANA's Motion to Dismiss on the several grounds articulated by BANA in its motion to dismiss and during the hearing on its motion, namely that the claims are barred by the doctrine of *res judicata*. In addition to *res judicata*, Plaintiff's fraud-related claims are all barred as those claims did not survive the death of the Plaintiff's parents; the SCUTPA statute itself does not allow Plaintiff to bring a claim in a representative capacity; and all of Plaintiff's claims are barred by the applicable statutes of limitations.

A. THE DOCTRINE OF RES JUDICATA BARS PLAINTIFF'S CLAIMS.

Plaintiff's Complaint involves the same parties and is based on the same transaction, same occurrence, and same issues (BANA's allegedly wrongful charging of Plaintiff's parents for the LPP product) that were previously litigated and adjudicated by the District Court. Plaintiff's claims are therefore barred under the doctrine of *res judicata*.

"*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (S.C. 1999); *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 190–92, 417 S.E.2d 569, 571 (S.C. 1992). "Under the doctrine of *res judicata*, [a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Plum Creek*, 334 S.C. at 34, 512 S.E.2d at 109 (quoting *Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (S.C. 1987)); *see also id.* ("To establish *res judicata*, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit.").

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Pursuant to the doctrine of *res judicata*, Plaintiff is barred from re-litigating his claims before this Court. First, in both this action and the 2015 Federal Action, Plaintiff sued Defendant BANA. Second, the subject matter of the two lawsuits is identical. Both lawsuits seek damages for the alleged injury resulting from BANA charging Plaintiff's parents for the LPP product in connection with a 2006 loan.

Finally, Plaintiff's claims relating to the LPP product were already adjudicated in the 2015 Federal Action. In the 2015 Federal Action, the District Court held that Plaintiff's claims were time-barred under a three year statute of limitations. Here, all of Plaintiff's claims have a statute of limitations period of three years. Thus, if Plaintiff's claims were time-barred in 2015, his 2017 claims before this Court are likewise barred.

The District Court and the Court of Appeals also considered the record and rejected Plaintiff's request to apply the scarcely used equitable tolling doctrine to save his claims. The District Court squarely held that "the charge for the mortgage insurance appeared on the Hughes' monthly checking account statements from 2006 to 2015. Thus any argument they failed to discover the purported wrongdoing by Defendant during this period of time, although they exercised due diligence, is bereft of any merit." (2015 Federal Action, Dkt. No. 23 at 4.) The Fourth Circuit reviewed the dismissal of the action, *de novo*, and affirmed the District Court's holding on equitable tolling:

> Generally, parties "are entitled to equitable tolling only if they show that they have pursued their rights diligently and extraordinary circumstances prevented them from filing on time." *Raplee v. United States*, 842 F.3d 328, 333 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 2274 (2017). "[E]quitable tolling is reserved for those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result." *Id.* "[T]he use of equitable tolling must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes." *Lawrence v. Lynch*, 826 F.3d 198, 204 (4th Cir. 2016) (internal quotation marks omitted). Where a plaintiff has alleged fraudulent

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> concealment of his cause of action, equitable tolling requires a plaintiff to demonstrate that "(1) the party pleading the statute of limitations fraudulently concealed facts that are the basis of the plaintiff's claim, and (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995). With these standards in mind, we have reviewed the briefs and the record before us and conclude that the district court did not err in granting the motion to dismiss Appellants' claims.

Hughes, on behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n, 697 F. App'x 191, 192-193 (4th Cir. 2017).

That Plaintiff's causes of action in this suit are not identical to the causes of action in the 2015 Federal Action does not save his barred claims. All of Plaintiff's claims were equally available, and within the scope and purview of suit at the time of the 2015 Federal Action. *See e.g. Sub-Zero Freezer Co.*, 308 S.C. at 192, 417 S.E.2d at 571 ("The claims were either litigated in the prior actions or could have been so litigated. Thus, the trial court properly held that Clarkson's claims were barred by *res judicata* ...".). In fact, Plaintiff previously brought identical fraud-based claims against BANA in the 2015 Federal Action but subsequently dismissed them. Plaintiff is therefore barred from re-litigating previously dismissed claims and new claims based on the allegations already adjudicated in federal court.

B. PLAINTIFF'S FRAUD-RELATED CLAIMS AND SCUTPA CLAIM CANNOT BE BROUGHT BY AN ESTATE.

Plaintiff is barred from bringing fraud-related claims on behalf of his deceased mother under both the South Carolina's survivability and SCUTPA statutes. *See* S.C. Code Ann. §§ 15-5-90, and 39-5-140. Although the survivability statute generally allows causes of action for personal injuries to survive the death of a person, the South Carolina Supreme Court has expressly ruled that fraud-related claims do not survive a person's death. *Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 15 S.E.2d 117, 119 (S.C. 1941) (holding that a cause of action

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for fraud did not survive the death of a person). The South Carolina Supreme Court affirmed that fraud claims do not survive death in 2002. In *Ferguson v. Charleston Lincoln Mercury, Inc.*, the South Carolina Supreme Court analyzed the survivability of fraud and fraudulent concealment-based allegations brought by a plaintiff's estate against a car dealership. The Court held:

> South Carolina case law has continued to recognize a common law exception [to the survivability statute] regarding causes of action for fraud or deceit. . . . At the core of Mr. Ferguson's complaint was the allegation that CLM misled him into paying more for the car than he should have paid, and concealed the overcharge either through intentionally deceptive actions or through grossly negligent disclosure practices. Allegations of such fraud and deceit are exempted from the general survival statute and do not survive the plaintiff's death. Accordingly, we hold that Mr. Ferguson's cause of action did not survive his death.

Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563-64, 564 S.E.2d 94, 97-98 (S.C. 2002). More recently, in 2008, the South Carolina Court of Appeals reaffirmed this long-standing exception to the survivability of a fraud claim in *Brailsford v. Brailsford.* The court noted:

> South Carolina . . . has long recognized several exceptions to the survivability of a claim, including an exception for fraud. . . . The fraud exception to survivability is not limited only to a cause of action titled "fraud." In *Ferguson,* our supreme court recognized that although Ferguson's cause of action arose under the "Dealer Act,"5 the essence of the Defendant's alleged conduct amounted to misleading Mr. Ferguson, and concealing overcharges by either intentional deception or gross negligence. The court held that because such actions fit within the ambit of fraudulent or deceptive conduct, it was insignificant what "label" the Plaintiff gave to such conduct.

Brailsford v. Brailsford, 380 S.C. 443, 449-450, 669 S.E.2d 342, 345 (S.C. Ct. App. 2008) (internal citations omitted). Accordingly, Plaintiff's claims for fraud, fraudulent concealment, and breach of contract with fraudulent intent are all barred.[2]

---

[2] In addition, because Plaintiff's SCUTPA claim is also based on fraud and fraudulent concealment, the SCUTPA claim is also barred by the common law application of the survivability statute. *See e.g. Davis v. Life Care Centers of Am., Inc. et al,* Case No. 02-CP-10-

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Similarly, the plain language of the SCUTPA statute does not allow for a representative of an estate, like Plaintiff, to maintain an action under the Act. SCUPTA clearly states:

> Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, *but not in a representative capacity*, to recover actual damages.

S.C. Code Ann. § 39-5-140 (emphasis added). It is clear that "an unfair trade practices claim may not be brought in a representative capacity." *Wogan v. Kunze,* 366 S.C. 583, 609, 623 S.E.2d 107, 121 (S.C. Ct. App. 2005), *aff'd as modified*, 379 S.C. 581, 666 S.E.2d 901 (S.C. 2008). Accordingly, all of Plaintiff's claims based on fraud and deceit – fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, and violation of the SCUTPA did not survive the death of Plaintiff's parents and may not be brought on behalf of Mrs. Hughes' estate.

C. PLAINTIFF'S CLAIMS ARE ALL TIME BARRED.

Statutory law and common law set a three-year statute of limitations period for each of Plaintiff's claims: 1) fraud (*see* S.C. Code § 15-3-530(7)); (2) fraudulent concealment (*id.*); (3) breach of contract accompanied by a fraudulent act (*see* S.C. Code § 15-3-530(1)); (4) violation of the SCUTPA) (*see* S.C. Code Ann. § 39-5-150); (5) breach of a fiduciary duty (*see Mazloom v. Mazloom*, 382 S.C. 307, 323, 675 S.E.2d 746, 755 (S.C. Ct. App. 2009) ("Generally, the statute of limitations is three years for actions for a breach of a fiduciary duty.")); and (6) conversion (*see* S.C. Code Ann. §§ 15-3-530(4) and 15-3-530(5)).

The relevant statutes of limitation began to run on Plaintiff's claims when Mrs. Hughes could or should have known, using reasonable diligence, that a cause of action might exist. "The

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3566, 2003 WL 25460625 (S.C. Ct. Comm. Pleas Mar. 28, 2003) ("SCUTPA does not survive the death of an alleged injured party.").

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exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed." *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (S.C. 1981). Because Plaintiff alleged that his parents started receiving payment deductions from their account, and notice of said deductions on each monthly statement, beginning in June 2006, the statute of limitations on their potential claims ran in June 2009.

This Court agrees with the findings by the District Court and the Court of Appeals in the 2015 Federal Action that equitable tolling does not apply in this case. Mrs. Hughes was given actual notice of the alleged improper charges by both monthly charges being deducted from her account and the monthly bank and/or home equity loan statements identifying those charges. Plaintiff specifically alleges that "BANA withdrew a monthly charge of $28.40 from the Hughes' BANA joint checking account beginning on or about June 2006" for his father's LPP coverage. (TAC ¶ 25.) Plaintiff also states that the LPP fee appeared on his parents' checking account statements. (Compl. ¶ 23.) The South Carolina Supreme Court has maintained that "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 117, 687 S.E.2d 29, 32 (S.C. 2009). "It has been observed that equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Id.* at 116. Here, because Plaintiff's parents received actual monthly notice of the charges being deducted from their account from 2006 to 2015, Plaintiff's allegations on the face

of the complaint make clear that nothing was hidden from him. Plaintiff also does not plead that BANA engaged in conduct that prevented his parents from filing suit during the appropriate time-period. Accordingly, the scarcely used doctrine of equitable tolling is not appropriate for this case.

CONCLUSION

For all of the above-stated reasons, this Court hereby GRANTS Bank of America, N.A.'s Motion to Dismiss the Plaintiff's Complaint with prejudice.

AND IT IS SO ORDERED.

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Spartanburg Common Pleas

Case Caption: Phillip Francis Luke Hughes , plaintiff, et al VS Bank Of America National Association

Case Number: 2017CP4202834

Type: Order/Dismissal

It is so Ordered.

s/ R. Keith Kelly - 2165

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No.: 2017-CP-42-02834

Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes .....Appellant,

v.

Bank of America National Association .....Respondent.

CERTIFICATION OF COUNSEL

Pursuant to Rule 210(g), SCACR, the undersigned, an attorney in this matter for the Appellant, certifies that this Record on Appeal includes all matters proposed to be included by the parties and not any other material.

September 10
~~August 20~~, 2018

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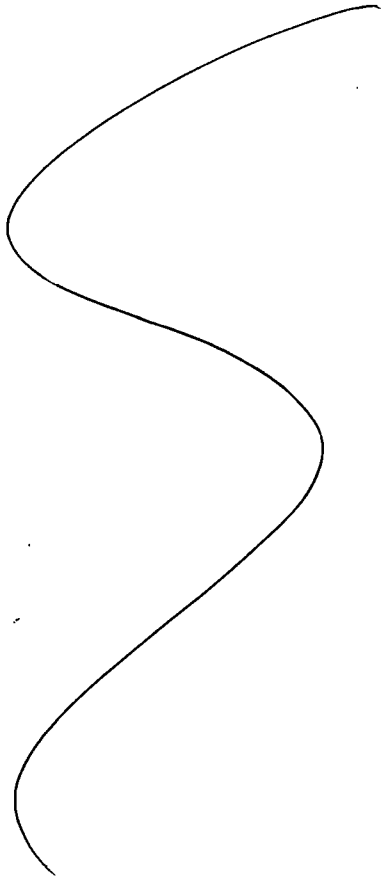


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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THIS COURT SHOULD ABOLISH THE COMMON LAW RULE EXCEPTING FRAUD-BASED ACTIONS FROM SOUTH CAROLINA'S SURVIVAL STATUTE.

II. WHETHER THE DOCTRINE OF RES JUDICATA BARS A STATE COURT ACTION CHALLENGING EXISTING PRECEDENT WHEN CLAIMS RELATED TO THAT ACTION WERE ADJUDICATED IN A FEDERAL COURT WHICH LACKED THE JURISDICTION TO CERTIFY ISSUES OF STATE PRECEDENT OR CHANGE CONTROLLING STATE LAW.

III. WHETHER THE LOWER COURT ERRED IN CONCLUDING THAT APPELLANT'S CLAIMS ARE TIME-BARRED.

STATEMENT OF THE CASE

This case arose from fraudulent charges made by of Bank of America National Association ("BANA") against the account of John and Jane Hughes. Appellant Phillip Francis Luke Hughes filed the current survival action on behalf of the Estate of Jane K. Hughes on August 15, 2017, alleging fraud and other fraud-based causes of action. On December 21, 2017, BANA filed a Motion to Dismiss pursuant to SCRCP Rule 12(b)(6).

Prior to initiating the present action, Appellant filed an action in the Spartanburg County Court of Common Pleas in 2015 based upon the same transactions and occurrences that establish his claim for relief in the current action. Appellant's 2015 Complaint was filed as a putative class action law suit against BANA for violation of the Truth in Lending Act, fraud, fraudulent concealment, breach of contract, and breach of contract accompanied by fraudulent acts. BANA removed the 2015 action to federal court, and filed a motion to dismiss in lieu of an answer. Before the District Court decided BANA's motion, Hughes stipulated to the dismissal, without prejudice,

of all claims against BANA *except* breach of contract and violation of TILA. The District Court ultimately dismissed the breach of contract and TILA claims as untimely, and the Fourth Circuit Court of Appeals upheld that decision.

Appellant dismissed the fraud-based claims pending in the 2015 federal action and re-filed those claims in his 2017 Complaint because the District Court lacked jurisdiction to decide a key issue related to those claims: whether existing precedent excluding fraud from the South Carolina survival statute should be overturned. The question is one left to the State to decide but, because case law provides controlling precedent on the issue, the question could not be certified back to the South Carolina Supreme Court under Rule 244(a), SCACR. (R. p. 44, lines 1-25).

Respondent moved to dismiss Appellant's 2017 Complaint under the doctrines of *res judicata* and collateral estoppel, and the common law exception of fraud from S.C. Code Ann. § 15-5-90 (1976), South Carolina's survival statute. The Honorable R. Keith Kelly heard arguments by Appellant and Respondent on February 22, 2018 and subsequently granted Respondent's motion, finding the actions barred by res judicata, the statute of limitations, and S.C. Code Ann. § 15-5-90. (R. pp. 1-11). Appellant filed a timely Notice of Appeal on March 27, 2018 pursuant to Rule 201, SCACR, challenging the lower court's dismissal of the fraud-based claims alleged in Appellant's 2017 Complaint. (R. pp. 281-282). On March 29, 2018, Respondent filed a Motion for Sanctions against counsel for Appellant, seeking more than $70,000.00 in attorneys' fees for the filing of the 2017 Complaint, which resulted in a dismissal prior to any discovery and after a single hearing.

STATEMENT OF THE FACTS

On June 13, 2006, Mr. and Mrs. Hughes opened a line of credit from BANA in the amount of $120,000.00, secured by a mortgage ("Mortgage") on their Spartanburg County homestead. The line of credit is governed by a document entitled "Bank of America Maximizer Agreement and Disclosure Statement" ("Agreement") signed by both borrowers on June 13, 2006. (R. p. 18, ¶ 7). At the same time, Mr. and Mrs. Hughes signed an acknowledgement and authorization ("Authorization") which allowed BANA to automatically draft loan payments from the Hughes's BANA bank account. (R. p. 18, ¶ 8).

During the meeting to complete the Mortgage transaction, BANA presented Mr. and Mrs. Hughes with a document entitled "Optional Line Protection Plan Addendum ("Addendum")." As stated on the form, the "Line Protection Plan only provides protection on the variable portion of your credit line" and "This Product is Optional." If elected, the Line Protection Plan allowed the cancellation of all or some monthly loan payments in the event of disability, accidental death, or involuntary unemployment. The Agreement explicitly stated that the borrowers "must specifically request" the Line Protection Plan. (R. p. 19, ¶ 10). Mr. and Mrs. Hughes both signed a two-page document captioned "OPTIONAL LINE PROTECTION PLAN ADDENDUM ("ADDENDUM")" which stated that BANA provided them with information on the Line Protection Plan. Jane and John Hughes designated their election to decline the purportedly optional Line Protection Plain by clearly and conspicuously checking a box next to the "DECLINE to purchase any Protection on this Credit Line" option. (R. p. 19, ¶ 11).

In June 2006, John Hughes was age 86. (R. p. 19, ¶ 12). He died on October 22, 2008, and left his estate to his wife, Jane K. Hughes. (R. p. 20, ¶ 13). Mrs. Hughes was age 85 in June 2006 and underwent major heart surgery, suffered from dementia, and experienced vision

impairments, including cataracts and eye surgery, from June 2006 until her death. Mrs. Hughes also suffered a broken hip after June 2006 that required hospitalization and extensive rehabilitation at White Oak Manor Nursing Home in Spartanburg, South Carolina. Mrs. Hughes was diagnosed with impaired cognition and mobility, atypical psychosis, confusion, blindness, renal insufficiency, heart failure, and was noted to lack decisional capacity in the years subsequent to June 2006. (R. pp. 19-20, ¶ 12).

Over six years after Mr. Hughes's death, on or around March 17, 2015, BANA sent a boilerplate form cancellation notice addressed to Mr. and Mrs. Hughes, informing them that "The Line Protection Plan would be cancelled on September 30, 2015," and that "You're no longer being charged for the Protection Plan as of April 1, 2015." The notice also indicated that John P. Hughes was a "protected" borrower. (R. p. 20, ¶ 15). Although Mr. and Mrs. Hughes never elected to purchase any "Protection Plan," BANA sent a second letter dated March 25, 2015, stating that John Hughes had selected "6 month, Involuntary Unemployment, Disability, Accidental Death and Hospitalization" protection at a monthly rate of 9.5% of the Hughes' Minimum Monthly Payment. (R. p. 20, ¶ 17).

In response to inquiry from a family member of Mrs. Hughes, BANA stated in a May 6, 2015 letter that "The Line Protection Plan (Plan) addendum for your Bank of America loan ending in 4699 is enclosed, per your request, and enclosed an eight-page document entitled "OPTIONAL LINE PROTECTION PLAN ADDENDUM ("ADDENDUM")." (R. pp. 20, ¶ 17). The eight-page "ADDENDUM" provided by BANA in May 2015 is not the two page "ADDENDUM" signed by Mr. and Mrs. Hughes in 2006, and does not contain or provide for signatures or a place for election or rejection of the "protection." (R. pp. 20-21, ¶ 18). In any event, BANA did not provide the eight-page addendum to Mr. or Mrs. Hughes before May 2015, nor did the Line

Protection Plan premium appear on the mortgage finance charge disclosed to Mr. and Mrs. Hughes in 2006. (R. p. 21, ¶¶ 19, 20).

Before March 2015, BANA did not provide any statement, notice, or communication of any sort to Mrs. Hughes revealing that BANA believed that the Hughes's had elected any "Protection Plan" or that an amount was being charged to them for such a plan. (R. p. 21, ¶ 21). To date, BANA has been unable to provide any documentation that Mr. or Mrs. Hughes ever elected or agreed to pay for any "Protective Plan" coverage of any sort. (R. p. 21, ¶ 22).

However, despite having declined to purchase the Line Protection Plan, BANA withdrew a monthly charge of $28.40 from the Hughes's BANA joint checking account for several years. This charge was ambiguously listed as "Ad Insurance Des:XXXXXX4374 ID: 6 R# XXXXXXX1070 Indn:Hughes Sr, John P Co ID:XXXXXX4660 Ppd" and appeared amid numerous other monthly charges. (R. p. 21, ¶ 23). Notably, all other charges from BANA or its subsidiaries appearing on the Hughes's bank statements during the relevant period were clearly designated as transactions with "Bank of America" or "BkofAmerica" and other insurance transactions were clearly identified with the name of the charging company (i.e., "Patrons Mutual," "Travelers Insur"). (R. p. 21, ¶ 24). None of the numbers in the Line Protection Plan transaction description were related to the Hughes's BANA mortgage or line of credit. (R. p. 21, ¶ 25).

As neither Mr. nor Mrs. Hughes had elected Line Protection Plan coverage or had received any notice that BANA had issued such a plan to them, they were not expecting to be charged for any such service and they did not have any reason to expect that "Ad Insurance Des:XXXXXX4374 ID: R# XXXXXXX1070 Indn:Hughes Sr, John P Co ID:XXXXXX4660 Ppd" was a BANA charge generally or a "Line Protection Plan" charge specifically until receiving the March 2015 BANA notices. (R. p. 22, ¶ 26). Upon receiving notice of Mr. Hughes's death,

on May 6, 2015, BANA declined coverage under the Line Protection Plan on the grounds that "[t]he death was the result of disease or treatment of disease or any medical treatment (and/or was not for the treatment of an accidental injury)." (R. p. 22, ¶ 27). BANA refused to refund the payments drawn during Mr. Hughes's lifetime and has been unable to produce any documentation supporting that Mr. Hughes elected to enroll in the Line Protection Plan. (R. p. 22, ¶ 28).

On June 3, 2015, Jane K. Hughes passed away, and Appellant was subsequently named as personal representative of her estate. (R. p. 22, ¶ 29). Appellant filed a prior action in this Court in 2015 based upon the facts and transaction set forth above. The 2015 Complaint was filed as a putative class action law suit against BANA for violation of the Truth in Lending Act, fraud, fraudulent concealment, breach of contract, and breach of contract accompanied by fraudulent acts. BANA removed the action to federal court under federal question and diversity jurisdiction, and filed a motion to dismiss in lieu of an answer. Prior to the District Court's decision on the motion, Appellant stipulated to the dismissal, without prejudice, of all claims against BANA *except* breach of contract and violation of TILA. Appellant refiled his fraud-based claims in state court due to the District Court's lack of jurisdiction to hear a key issue essential to those claims, and to allow this Court to revisit the survivability of fraud claims in South Carolina.

STANDARD OF REVIEW

This is an appeal, made pursuant to Rule 201, SCACR, from an Order of Dismissal issued by the lower court based on the trial judge's grant of Respondent BANA's Rule 12(b)(6) Motion to Dismiss.

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." Brouwer v. Sisters of Charity Providence Hosps., 409 S.C. 514, 519, 763 S.E.2d 200, 202 (2014) (citing Rydde v. Morris, 381 S.C. 643,

646, 675 S.E.2d 431, 433 (2009)). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." Id. Furthermore, the court should not dismiss a complaint merely because the court doubts that the plaintiff will prevail in the action. Spence v. Spence, 368 S.C. 106, 116-117, 628 S.E.2d 869, 874 (2006).

ARGUMENT

I. THIS COURT SHOULD ABOLISH THE COMMON LAW RULE EXCEPTING FRAUD-BASED ACTIONS FROM SOUTH CAROLINA'S SURVIVAL STATUTE.

The South Carolina survival statute allows for the survival of ***any and all*** injuries to the person or personal property. The trial court dismissed Appellant's fraud-based claims, in part, based upon a court-created exception to the South Carolina survival statute which excludes fraud as a surviving cause of action. Appellant challenges this antiquated and arbitrary exception to the survival statute and, for the reasons set forth below, asks this court to reconsider precedent to better reflect the rights of persons in a modern society.

A. Scope of the South Carolina Survival Statute

i. Mattison v. Palmetto State Life Ins. Co.

South Carolina's survival statute provides that "[c]auses of action for and in respect to any and all injuries and trespasses to and upon real estate and ***any and all*** injuries to the person or to personal property" shall survive the death of a party, whether the claim is on behalf of or against the deceased, ". . . any law or rule to the contrary notwithstanding." S.C. Code Ann. § 15-5-90 (1976) (emphasis supplied). The statute, enacted in 1905, allows for the survival of certain claims that were historically barred by a claimant's death. Bennett v. Spartanburg Ry., Gas & Elec. Co., 97 S.C. 27, 81 S.E. 189, 189 (1914). South Carolina's survival statute has remained intact, and

the language essentially unchanged, from 1905 to present. The courts have relied and still rely upon early judicial interpretations of the statutory language and legislative intent in answering contemporary questions regarding the survivability of actions under the act.

South Carolina first addressed the question of whether fraud survives the death of a party under the survivability statute in Mattison v. Palmetto State Life Ins. Co., 197 S.C. 256, 15 S.E.2d 117 (1941). In Mattison, the estate brought an action against Palmetto State Life Insurance Company for perpetrating a fraudulent scheme intended to cheat the deceased of his rights under an insurance contract. Id. The South Carolina Supreme Court granted certiorari to hear the case on several questions, the relevant question being whether the cause of action of fraud survived. Id.

In determining whether the fraud claim survived, the Mattison Court reviewed the survival statute to assess whether fraud fell within the scope of the statutory language. At that time, the applicable statute read:[1]

> Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to *personal property*, shall survive both to and against the personal or real representative (as the case may be) of the deceased persons, and the legal representatives of insolvent persons, and defunct or insolvent corporations, any law or rule to the contrary notwithstanding.

1932 Code § 419 (emphasis added).

The Mattison Court succinctly opined that fraud did not fall within the scope of the statutory language, and therefore the Legislature did not intend that claims of fraud survive death. The Mattison Court further provided that:

> It is readily seen that under the above quoted Section, there are but two instances wherein a cause of action survives: (1) For and in respect to any and all injuries and trespasses to and upon real estate, and (2) any and all injuries to the person or to *personal property*.

[1] The current survival statute is codified at S.C. Code Ann § 15-5-90, and the language is nearly identical to the 1932 Code with only some minor changes in punctuation.

> And it is just as readily seen that respondent's second cause of action does not come within either of the instances where a cause of action survives.

Mattison at 256, 15 S.E.2d at 119 (original emphasis replaced).

While the Mattison court asserted that the survival statute must be liberally interpreted, the court failed to do exactly that. Instead, the court narrowly interpreted the statute and, in doing so, failed to explain why fraud does not constitute injury to personal property. In fact, there is no discussion in Mattison regarding the elements of fraud or why pecuniary loss caused by fraud is not an injury to personal property. This omission is relevant because the money taken by BANA from Jane Hughes was personal property.[2] Once Jane Hughes died, interest in her personal property, including her financial holdings, transferred to her Estate. Thus, Mattison's principle that fraud does not survive the death of a party in South Carolina is internally inconsistent.

ii. Fraud as an "exception" to the South Carolina Survival Statute

Since Mattison, and contrary to its narrow view of survivability, the South Carolina Supreme Court has consistently *broadly* interpreted the survival statute. See, e.g., Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 564, 564 S.E.2d 94, 97 (2002) ("[T]he statute's language is broad and ostensibly appears to include almost every conceivable cause of action."); Layne v. Int'l Bhd. of Elec. Workers, (AFL-CIO), Local No. 382, 271 S.C. 346, 352, 247 S.E.2d 346, 349 (1978) ("[I]t is the general rule that any cause of action which could have been brought by the deceased in his lifetime survives to his representative under the Survival Act."); Brewer v. Graydon, 233 S.C. 124, 128, 103 S.E.2d 767, 769 (1958) ("the Survival Statute must be liberally construed"). These later South Carolina opinions create a tension with Mattison's holding—that fraud falls outside the scope of the statute—by implying that fraud ostensibly falls within the

[2] S.C. Code Ann. § 15-1-40 (1976) provides that "[t]he words 'personal property,' as used in this Title, include *money*, goods, chattels, things in action and evidences of debt." (emphasis added).

purview of the survival statute, and would survive but for the *exception* created by Mattison. See, Ferguson at 564, 564 S.E.2d at 96 ("The general survivability statute has a wide ambit that includes all causes of action not covered by specific exceptions."); Brailsford v. Brailsford, 380 S.C. 443, 449, 669 S.E.2d 342, 345 (S.C. App., 2008) (Upholding a dismissal of a fraud-based action upon "[a]pplying this State's longstanding exception to the survivability statute for fraud."); Layne Workers at 352, 247 S.E.2d at 349 (Identifying fraud as an "exception" to the general rule of survivability).

A review of the interpretation of the survival statute by South Carolina courts, as it pertains to fraud, reveals decades of precedent founded in error. The most recent South Carolina Supreme Court opinion relying upon the Mattison-created exception, Ferguson, strongly implies that fraud falls within the scope of the survival statute, but is excluded as a result of the Mattison opinion. See, Ferguson at 564, 564 S.E.2d at 96. The Mattison opinion, however, states in no uncertain terms that fraud "does not come within either of the instances where a cause of action survives" under the statute. Mattison at 256, 15 S.E.2d at 119. Bizarrely, Mattison serves as the foundation upon which the Ferguson opinion rests, yet the language of the Ferguson opinion directly contradicts that of Mattison.

Whether a cause of action for fraud is a common law exception to the survivability statute or whether it falls outside the scope of the statute's language is an important distinction. The survival statute, currently and when Mattison was decided, expressly provides that causes of action that fall within the scope of the statute survive, "any law or rule to the contrary notwithstanding." Id.; S.C. Code Ann § 15-5-90 (1976). Over the years, the Mattison court's interpretation of the survival statute as not extending to actions of fraud has evolved into a common law rule excepting

fraud. The result of that evolution is a "law or rule to the contrary" that is untenable under the plain language of the survival statute.

Despite this irreconcilable disconnect, the South Carolina Supreme Court has yet to revisit the Mattison rationale for the fraud "exception." Indeed, there has been no discussion by South Carolina courts since 1941 on *why* fraud should be excepted from the survival statute; rather, opinions simply offer that fraud *is* excepted based upon the Mattison opinion. Appellant, therefore, invites this Court to reexamine this question of survivability and to determine viability of the 1941 Mattison analysis in 2018.

B. Public Policy

i. Clear evidence of mindset defeats policy reasons for exception.

Perhaps the only attempt at explanation for South Carolina's fraud exception comes from the Fourth Circuit opinion in Faircloth v. Finesod, 938 F.2d 513, 517 (4th Cir. 1991). The plaintiff in Faircloth challenged the fraud exception to the South Carolina survival statute as violating the Equal Protection Clause, and the South Carolina District Court agreed. On appeal, the Fourth Circuit, applying a minimum scrutiny standard, supplied its "feasible attempt for [the] legislative distinction":

> [F]raud is a tort that requires a special quality of proof, and the states of mind of the victim (e.g., whether he knew the statement was false, relied upon it, and was justified in so relying) and the perpetrator are especially vital. . . . [A] legislature could rationally conclude that the difficulty and potential unfairness of proving the state of mind of a dead party to a fraudulent transaction justified excepting fraud from the survival statute.

Faircloth at 517.

Assuming that the rationale proffered by the Fourth Circuit in Faircloth is, in fact, the underlying basis for the common law fraud exclusion, as a matter of public policy, the common law exclusion should be overturned or, at the very least, excepted in those circumstances where

the state of mind of the deceased party is readily identifiable, as in the current case, where Jane and John Hughes expressly declined, through an executed document, to enroll in a program offered by BANA. The instant case, where the policy supporting the exclusion is defeated, in consideration with the additional policy reasons set forth below, cries for a reevaluation of the fraud exclusion to the survival statute.

ii. Elderly fraud victims and public policy.

Public policy should not enable the abuse of elderly and otherwise vulnerable citizens of South Carolina. Jane Hughes was 85 years old when Defendant began withdrawing the fraudulent, unauthorized charges from her account and suffered from dementia and vision impairments in the following years until her death. Studies show that elderly persons, like Jane Hughes, are highly susceptible to being defrauded.

According to a 2015 study by True Link Financial, approximately 36.9% of American seniors are victims of financial abuse in any five-year span. *The True Link Report on Elder Financial Abuse 2015*, TRUE LINK, January 2015 at 11 (https://truelink-wordpress-assets.s3.amazonaws.com/wp-content/uploads/True-Link-Report-On-Elder-Financial-Abuse-012815.pdf). Fraud and financial abuse costs our seniors an estimated total of $36.48 billion annually. *Id.* Of this, approximately $16.99 billion is lost to financial exploitation, which is defined as "when misleading or confusing language is used – *often combined with social pressure and tactics that take advantage of cognitive decline and memory loss* – to obtain a senior's consent to take his or her money." *Id.* at 1. Not surprisingly, the vulnerability of seniors to fraud is in part due to the loss of cognitive functions of these individuals. *Id.* at 19. True Link's research shows that conditions such as dementia and Alzheimer's disease increase vulnerability to fraud, and an individual with a below-average memory is 78% more likely to be a victim of fraud. *Id.*

Notably, as much financial exploitation is accomplished through deception that does not quite rise to a criminal level, only a civil remedy is available. *Id.* at 5. The reality is that the time to identify, investigate, report, and prosecute civil offenses now, unlike in 1941, often takes many years and exceeds the lifetime of the victims. The speed and complexity of today's financial transactions, exacerbated by sophisticated technology, furthers fraud in ways not conceivable in 1941. Thus, the impact of the Mattison holding is now much more adverse to those most likely to fall victim to fraud than in 1941.

In sum, the public policy impact of South Carolina's survivability statute is long overdue for review in light of electronic phishing, data mining, electronic databases, and targeted advertising, and Appellant asks this Court to initiate that reevaluation.

iii. Survivability of fraud in other jurisdictions.

Further supporting the issue at hand is that the majority of states allow the survival of fraud claims. Indeed, South Carolina is one of only seven (7) states that do not allow a fraud action to survive; the others being Alabama, Arkansas, Massachusetts, Texas, Vermont, and Wisconsin.

The general consensus among states that have offered policy considerations for the survival of fraud actions is that any action which lessens the value of an estate should survive, as the modern trend is to remove obstructions to the free transfer of property and rights and interests therein. See, e.g., Jandera v. Lakefield Farmers' Union, 150 Minn. 476, 479, 185 N.W. 656, 658 (1921); Micheletti v. Moidel, 94 Colo. 587, 591, 32 P.2d 266, 267 (1934); St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani, 154 Idaho 37, 41, 293 P.3d 661, 665 (2013).

In light of the policy considerations put forth by South Carolina's sister states regarding the impact of survivability on property rights, Appellant would urge this court to examine the question of whether excepting fraud from the South Carolina survival statute violates public policy.

II. THE DOCTRINE OF RES JUDICATA DOES NOT BAR A STATE COURT ACTION CHALLENGING EXISTING PRECEDENT WHEN CLAIMS RELATED TO THAT ACTION WERE ADJUDICATED IN A FEDERAL COURT LACKING THE JURISDICTION TO CERTIFY ISSUES OF STATE PRECEDENT OR CHANGE CONTROLLING STATE LAW.

Appellant does not dispute the lower court's determination that the present action is based upon the same transaction and occurrence as matters previously adjudicated by the District Court. However, because the District Court lacked jurisdiction to either overturn Mattison or certify the question of whether fraud survives to the South Carolina Supreme Court, the fraud-based claims presented in the current action are not barred under the doctrine of *res judicata.*

Res judicata prohibits a party from bringing a claim against a second party when that claim has already been, or could have been, litigated. In order to establish that a claim should be barred by *res judicata*, Respondent must show that the current claim involves 1) the same parties; 2) the same subject matter; and 3) an issue previously adjudicated in another suit. Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986). Because Appellant's fraud-based claims (fraud, breach of contract accompanied by a fraudulent act, and fraudulent concealment) were voluntarily dismissed without prejudice in the District Court proceeding, these claims were not previously adjudicated and thus do not meet the third element of *res judicata.*

Appellant acknowledges that *res judicata* can also serve to bar "any issues which might have been raised in the former suit." Judy v. Judy, 393 S.C. 160, 712 S.E.2d 408, 414 (2011) (citing Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)). However, the issue of whether fraud should continue to be exempted from the survival statue could *not* be adjudicated in the prior lawsuit. Respondent removed the action to federal court based on federal question jurisdiction over the TILA claim, and diversity jurisdiction over Appellant's state law remaining claims. Under the Erie doctrine, the District Court must apply South Carolina

substantive law in deciding state law issues. See, Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). Due to the existing South Carolina precedent surrounding the issue of the survivability of fraud, the federal court would be required to apply that precedent and dismiss Appellant's claims of fraud. Likewise, under Rule 244(a), SCACR, the District Court could not certify the question of survivability back to the South Carolina Supreme Court, as the scope of certification extends only to questions of law for which there is no controlling precedent. See, Rule 244(a), SCACR.

Consequently, the District Court lacked any jurisdictional mechanism under which it might decide Appellant's challenge to the fraud exception to survivability. Requiring Appellant to pursue his fraud-based claims in the federal court, therefore, would inevitably lead to dismissal of the claims pursuant to S.C. Code Ann § 15-5-90, and the state court's interpretation thereof, to exclude fraud without the opportunity to have a central issue decided in this case. Appellant seeks reexamination of this interpretation for reasons set forth in Section I, *infra,* which can only be accomplished by pursuing the fraud-based claims in state court. Because the issue of survivability could not have been raised in the prior proceeding in any meaningful capacity, Appellant's fraud-based claims are not barred by the doctrine of *res judicata.*

South Carolina takes the position that "*res judicata* is not "an 'ironclad' bar to a later lawsuit." Judy at 167, 712 S.E.2d at 412. Likewise, South Carolina has adopted the Restatement (Second) of Judgments Section 28, which provides exceptions to circumstances in which *res judicata* typically would apply. Specifically, Section 28 outlines factors under which a new determination of an issue is warranted, including differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or there is a clear and convincing need for a new determination of the issue because of the adverse impact of the determination on the public interest or interests of persons not themselves

party in the initial action; or because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. Pye v. Aycock, 325 S.C. 426, 437-38, 480 S.E.2d 455, 460-61 (S.C. App.1997).

The circumstances of the current action, even if barred by traditional principles of *res judicata*, survive under Section 28 of the Restatement (Second) of Judgments. As set forth in the survivability argument, *infra*, the issue of the survivability of fraud is one that directly impacts public interest as well as persons not party to the initial action. Appellant, in fact, originally sought to pursue the initial lawsuit as a class action so as to protect the interests of similarly situated parties. Appellant additionally did not have adequate opportunity to fully adjudicate the issue of the survivability of fraud in the initial action, because the District Court was not the proper forum for deciding that issue. Notably, Section 28 specifically addresses the fact that state and federal courts may retain exclusive jurisdiction over particular issues and provides direction in instances where an initial case is heard in federal court, and a subsequent action is heard in state court. See, Restatement (Second) of Judgments § 28 (1982), cmt. e.

Accordingly, the doctrine of *res judicata* does not bar the lower court from hearing Appellant's fraud-based claims, as the issues brought before the court through those claims were neither ruled upon by the District Court, nor could they have been. As such, Appellant respectfully asks this Court to reverse the lower court's finding that *res judicata* acts to bar the fraud-based claims set forth in Appellant's 2017 complaint.

III. THE LOWER COURT ERRED IN CONCLUDING THAT APPELLANT'S CLAIMS ARE TIME-BARRED.

Finally, the lower court, in error, opined that Appellant's fraud-based claims are barred by the statute of limitations and that equitable tolling did not apply to Jane Hughes. A review of the Order on Motion to Dismiss demonstrates the lower court's failure to view the facts as set forth in the complaint, or derive inferences therefrom, in the light most favorable to the non-moving party. Accordingly, Appellant asks this court to review the matter, *de novo*, and apply the appropriate standard of review in finding that Appellant's claims are not time-barred.

A. Statute of Limitations

In its discussion of the issue of whether Appellant's claims are barred by frauds three-year statute of limitations, the lower court relied upon a single fact within the complaint—that the alleged deductions from the bank account of Jane and John Hughes began in June 2006. (R. p. 9). In essence, the trial court determined that a single deduction from a bank account, without considering any additional facts alleged in the complaint, constitutes sufficient notice to put Mr. and Mrs. Hughes on notice of an invasion of their rights. Id. The court did *not* consider—in rendering a decision regarding the statute of limitations, in its statement of facts alleged, or at any point in its written opinion—facts alleged in the complaint which tend to negate the lower court's finding of fact, including:

- As of June 2006, Jane Hughes was 85 years old and John Hughes was 86 years old. (R. p. 19, ¶ 12).
- Mrs. Hughes, from June 2006 until her death, underwent major heart surgery, suffered from dementia, and experienced vision impairments and cataracts, which ultimately required surgery. Mrs. Hughes additionally suffered a broken hip that required hospitalization and extensive rehabilitation, and was diagnosed with impaired cognition and mobility, atypical psychosis, confusion, blindness, renal insufficiency, and heart failure, and she was noted to lack decisional capacity in the years leading up to her death. (R. pp. 19-20, ¶ 12).

- The Line Protection Plan premium did not appear on the mortgage finance charge disclosed to Mr. and Mrs. Hughes in 2006. (R. p. 21, ¶ 20). In fact, before March 2015, BANA did not provide any statement, notice, or communication of any sort to Mrs. Hughes revealing that BANA believed that the Hughes's had elected any "Protection Plan" or that an amount was to or was being charged to them for such a plan. (R. p. 21, ¶ 21).

- The charges surreptitiously made to the Hughes account by Respondent were ambiguously listed and appeared amid numerous other monthly charges. (R. p. 21, ¶ 23). All other charges from BANA or its subsidiaries appearing on the Hughes's bank statements during the relevant period were clearly designated as transactions with "Bank of America" or "BkofAmerica" and other insurance transactions were clearly identified with the name of the charging company. (R. p. 21, ¶ 24).

The statute of limitation for claims of fraud does not accrue until the complaining party has knowledge of fraud itself or knowledge of sufficient facts to put a party on inquiry. See, Burgess v. American Cancer Soc., South Carolina Div., Inc., 300 S.C. 182, 386 S.E.2d 798, 789 (S.C. App., 1989). The discovery rule requires this Court to examine when Appellant's cause of action accrued; this issue of fact was improperly examined by the lower court and decided at the pleadings stage. Appellant asserts that, viewing the facts as alleged in the pleadings in the light most favorable to the non-moving party, the statute of limitations began to run in March 2015 upon receiving a notice from BANA of charges to Jane Hughes' account for an unselected, optional mortgage service. Accordingly, the trial court erred in determining that Appellant's fraud-based causes of action began to accrue in June 2006.

B. Equitable Tolling

Even if the lower court properly determined that Appellant's claims are barred by the statute of limitations, it erred in finding that equitable tolling does not apply in this case. Viewing the facts and drawing all inferences in the light most favorable to the Appellant, the statute of limitations should be equitably tolled until March 2015 when Mrs. Hughes received a notice from BANA regarding the cancellation of a service that she expressly declined.

First, the lower court's Order suggests that, under the doctrine of *res judicata,* Appellant is barred from asserting the doctrine of equitable tolling in relation to its fraud-based claims brought in state court, because the District Court determined that other claims raised by Appellant in a prior suit were not tolled under the federal application of the doctrine. (R. p. 5). As set forth in Section II, *infra*, *res judicata* does not bar Appellant from bringing his fraud-based claims in state court. Likewise, *res judicata* does not prevent Appellant from asserting that, based on South Carolina's standard of application of the doctrine of equitable tolling, Appellant's claims should be equitably tolled. The District Court never ruled on any issue pertaining to Appellant's fraud-based claims; it certainly did not determine whether, under state law, equitable tolling would serve to toll the statute of limitations on those fraud-based claims.

Nor does the issue of whether Appellant's fraud-based claims should be equitably tolled constitute an action that could have been litigated before the District Court. Because those claims, under existing precedent, do not survive death, Appellant lacked standing to raise an equitable tolling argument before the District Court as it might pertain to the claims of fraud. In order for Appellant to seek a determination on the issue of equitable tolling, the Court must first revisit the issue of the survivability of fraud, and find in Appellant's favor. Because the District Court could not make a determination on the survivability issue, the lower court erred in finding that District Court's Order nonetheless serves as an adjudication of the issue of whether Appellant's fraud-based claims are time-barred.

Moreover, the federal standard applied by the District Court in determining whether Appellant's breach of contract and TILA causes of action should be equitably tolled is not the standard applied by South Carolina Courts. The District Court applied a single federal test that allows for the application of equitable tolling where "(1) the party pleading the statute of

limitations fraudulently concealed the facts that are the basis of the plaintiff's claims; (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." (R. p. 15). South Carolina's stance on equitable tolling, however, is more lenient than that of the federal courts and, in order to determine whether Appellant's fraud-based state law claims are tolled, the lower court should have—but did not—review the facts of this case under that more lenient standard.

In South Carolina, the parameters used by sister states and federal courts to decide on the doctrine's application "do not constitute an exclusive list of circumstances that justify the application of equitable tolling." Hooper v. Ebenezer Sr. Services and Rehabilitation Center, 386 S.C. 108, 113, 687 S.E.2d 29, 32 (S.C. 2009). Instead, equitable tolling may be applied where it is justified under all circumstances of a case, typically when a plaintiff does not file within the statute of limitations due to "an extraordinary event beyond his or her control." Id. Rather than applying the tests for the application of equitable tolling adopted in other jurisdictions, our state holds that "'[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations.'" Id., quoting 54 C.J.S. Limitations of Actions § 115 (2005). "Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." Id., quoting Rodriguez v. Superior Court, 176 Cal. App. 4th 1461 (2009). "The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." Id., quoting Hausman v. Hausman, 199 S.W.3d 38, 42 (Tex. App. 2006).

Although the lower court cited to the "extraordinary circumstances" language in the

Hooper opinion, it went on to summarily find that "because Plaintiff's parents received actual monthly notice of the charges being deducted from their account from 2006 to 2015, Plaintiff's allegations on the face of the complaint make clear that nothing was hidden from him. Plaintiff also does not plead that BANA engaged in conduct that prevented his parents from filing suit during the appropriate time period. Accordingly, the scarcely used doctrine of equitable tolling is not appropriate for this case." (R. pp. 9-10).

The assertions in the order below that "nothing was hidden" from John and Jane Hughes, that Appellant did not plead that BANA engaged in any conduct that prohibited John or Jane Hughes from filing suit, and that the charges were not hidden, demonstrate the lower court's failure to view all of the facts alleged in the complaint. The allegations in the case at hand are that BANA—an international financial institution—deceived and defrauded a frail, elderly couple by surreptitiously charging them for a product they expressly declined. The charges against their account for these services continued after the death of John Hughes and while Jane Hughes suffered debilitating ailments, including dementia, vision impairments resulting in surgery, heart problems resulting in surgery, and a broken hip that required hospitalization and extensive rehabilitative care. BANA withdrew these charges even though the couple expressly denied the Line Protection Plan service, failed to report the charges on the couple's finance statement (as required under the Truth in Lending Act), and withdrew the monthly fee "under the confusing and non-descript transaction . . . with the intention that the Hughes' not identify the true nature of the transaction." (R. pp. 23-24, ¶ 38). Surely, death and dementia, constitute "extraordinary circumstances beyond [one's] control" so as to justify equitable tolling under Hooper; this is especially so when viewed in combination with Respondent's surreptitious, illegal activities and position as a fiduciary.

The trial court, by failing to take into account any of the facts favorable to Appellant in its determination of the equitable tolling issue, concluded that, as a matter-of-fact, Jane Hughes was put on notice of the charges against her account by Respondent. (R. p. 9). Not only does the lower court's order fail to apply the appropriate standard of review and improperly determine an issue of fact for the jury, it furthers the agenda of those seeking to perpetrate fraud against the elderly. As discussed in Section I(B), *infra*, elderly individuals are highly susceptible to fraud, in part due to their inevitable cognitive decline. The lower court's finding that equitable tolling is not warranted where an elderly victim, suffering from dementia and impaired vision, fails to notice a nominal and non-descript monthly draft on her bank statement, essentially offers potential fraudsters not only another reason to target those most in need of the state's protection, but also a viable method of doing so without penalty.

CONCLUSION

In sum, Appellant has raised timely claims for fraud in a forum appropriate to address the issue of whether fraud-based claims should survive under South Carolina's survival statute, codified at S.C. Code Ann § 15-5-90. The lower court erred by finding that Appellant's claims are barred by the statute of limitations and the doctrine of *res judicata*; and further erred by failing to apply the appropriate standard of review and consequently refusing to apply equitable tolling in extraordinary circumstances. Finally, though the lower court's determination that fraud does not survive death follows South Carolina's existing precedent, Appellant urges this Court to reconsider the exception in light of public policy concerns arising since the 1941 Mattison opinion.

Respectfully Submitted,

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September 10, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

RECEIVED
SEP 10 2018
SC Court of Appeals

Case No.: 2017-CP-42-02834
(Appeal Tracking No.: 2018-001443)

Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes.....Appellant,

v.

Bank of America National Association.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Appellant and Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant and Final Reply Brief of Appellant upon counsel of record for the Respondent by causing it to be deposited in the United States Mail, postage prepaid, on September 10, 2018, addressed to Robert A. Muckenfuss, 201 N. Tryon Street, Suite 3000, Charlotte, NC 28202 and Elizabeth M.Z. Timmermans, 434 Fayetteville St. Suite 2600, Raleigh, NC 27601.

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INTRODUCTION

For nine years, from 2006 into 2015, Bank of America, N.A. ("BANA") charged the Hughes family $28.40 per month for an optional insurance product. Each charge appeared on the Hughes' monthly bank statements, listed as "Ad Insurance" and under the name of John P. Hughes. Mr. Hughes died in 2008, and his wife Jane Hughes passed away in 2015. After learning of their passing, BANA refunded all of the charges made after Mr. Hughes' death.

In 2015, the Hughes' son, Phillip Hughes ("Plaintiff"), sued BANA on behalf of his mother's estate. Plaintiff alleged that his parents had declined the insurance product in 2006 but were charged anyway and brought claims under the Truth in Lending Act ("TILA") and for fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, and breach of duty of good faith and fair dealing. Plaintiff eventually voluntarily dismissed the fraud claims, acknowledging that such claims were barred in South Carolina because they did not survive the death of his parents. The United States District Court for the District of South Carolina granted BANA's motion to dismiss on February 13, 2017. The court ruled that all of Plaintiff's claims were barred by the applicable three-year statutes of limitations. Noting that the insurance charges appeared on Ms. Hughes' monthly statements from 2006 to 2015, the court held that equitable tolling did not apply because "any argument they failed to discover the purported wrongdoing by Defendant...is bereft of any merit." The Fourth Circuit Court affirmed. The Supreme Court of the United States denied Plaintiff's petition for *writ of certiorari*.

Not happy with the first result, Plaintiff again sued BANA in 2017 in South Carolina Circuit Court. His factual allegations were nearly identical to the federal lawsuit that had been previously dismissed, but this time he brought the fraud-based claims that he had previously voluntarily dismissed out of the federal case: fraud, fraudulent concealment, breach of contract

accompanied by fraudulent acts, and violation of the South Carolina Unfair Trade Practices Act (SCUTPA).

At the hearing on BANA's motion to dismiss, Plaintiff's counsel admitted that his claims should be dismissed and confessed that his only reason for bringing the identical lawsuit in state court was to seek reversal of South Carolina's well established survivorship law. Judge R. Keith Kelly dismissed Plaintiff's action on multiple grounds, holding that: (1) Plaintiff's fraud-related claims did not survive the death of Plaintiff's parents; (2) Plaintiff's SCUTPA claim was not allowed in a representative capacity; (3) the doctrine of *res judicata* barred all of Plaintiff's claims; and (4) all of Plaintiff's claims were barred by the applicable statute of limitations and were not subject to equitable tolling.

On appeal, Plaintiff focuses his brief on the non-survivability of fraud and on *res judicata*. He first asks this Court to reverse 80 years of precedent from the South Carolina Supreme Court, which held in 1941 that fraud claims do not survive the death of the allegedly defrauded person. (Hughes Br. 12–19.) He then asks this Court to craft a brand-new exception to *res judicata* so that he can litigate now, in state court, claims he dismissed from federal court three years ago. (Hughes Br. 19–22.)

Plaintiff is incorrect on both points. First, Plaintiff conceded in the 2015 federal lawsuit and then again in the lower court that "controlling binding precedent" precluded him from bringing fraud claims on behalf of his deceased mother. In fact, he voluntarily dismissed his fraud claims from the federal suit because he knew that they were prohibited by South Carolina's survivability statute. And, even if this Court were inclined to overrule almost 80 years of well-established law, this Court cannot overrule South Carolina Supreme Court precedent. The Constitution leaves that prerogative exclusively to the South Carolina Supreme Court.

Second, the Court of Common Pleas correctly ruled that *res judicata*, or claim preclusion, bars Plaintiff's claims. After all, Plaintiff "does not dispute the lower court's determination that the present action is based upon the same transaction and occurrence as matters previously adjudicated" in federal court.

And, to the extent that South Carolina recognizes limited exceptions to *res judicata*, Plaintiff does not even argue that any of these exceptions apply here. Instead, he asks this Court to create a new exception: that *res judicata* does not apply where a plaintiff voluntarily dismissed claims from the first action in anticipation of defeat. This is not a sufficient basis for ignoring a doctrine that serves vital public interests beyond any "individual judge's ad hoc determination of the equities" in a particular case. Having strategically set aside certain state claims to pursue federal claims in federal court, Plaintiff cannot now invoke the interest of justice in trying to get a second chance at the claims he abandoned years ago.

Moreover, even if Plaintiff's claims were not excluded by South Carolina's survivability statute and *res judicata*, they would fail for the additional reason that they are just as untimely as the 2015 lawsuit was. The new claims here are subject to a three-year statute of limitations. Because Plaintiff's 2017 complaint is at least eight years too late—the charges began in 2006—he seeks the benefit of equitable tolling.

Plaintiff's argument fails. Equitable tolling is foreclosed by issue preclusion. In the 2015 action, the District Court decided that the "rarely" used doctrine did not apply. Because the charges appeared on the Hughes' monthly statements, the District Court found the idea of equitable tolling "bereft of any merit," and the Fourth Circuit agreed. Plaintiff cannot retread the same equitable tolling argument that has been rejected in his prior litigation.

And, even apart from issue preclusion, equitable tolling does not apply. The Court of Common Pleas simply agreed with the federal courts that the facts as alleged here do not support equitable tolling.

The Court of Common Pleas should be affirmed.

STATEMENT OF THE ISSUES ON APPEAL

I. Did the Court of Common Pleas correctly rule that it lacks authority to overturn South Carolina Supreme Court precedent on the survivability of fraud? (Yes.)

II. Did the Court of Common Pleas correctly rule that South Carolina's unfair and deceptive practices statute bars suits in a representative capacity? (Yes.)

III. Did the Court of Common Pleas correctly rule that *res judicata* bars Plaintiff from litigating claims he concedes arise out of the same transaction and occurrence as his prior federal action? (Yes.)

IV. Did the Court of Common Pleas correctly rule that Plaintiff's claims, filed in 2017 but based on conduct that began in 2006, were untimely? (Yes.)

a. Are Plaintiff's claims untimely because issue preclusion bars reconsideration of equitable tolling? (Yes.)

b. Are Plaintiff's claims untimely regardless of the earlier litigation because equitable tolling does not apply when the charges made against the Plaintiff account were announced on monthly statements for years on end? (Yes.)

STATEMENT OF THE CASE

Plaintiff, as personal representative of the estate of his mother, Jane Hughes ("Ms. Hughes"), alleges that his late parents opened a $120,000 line of credit from BANA on June 13, 2006. (R. p. 18, ¶ 7.) The line of credit was secured by a mortgage on their Spartanburg, South Carolina home. (*Id.*) In conjunction with the transaction, his parents signed a mortgage; an agreement and disclosure statement governing the line of credit; and an acknowledgement and authorization permitting BANA to automatically draft payments from their account. (R. pp. 18–19, ¶¶ 7–8.)

Plaintiff claims that on June 13, 2006, BANA also presented his parents with policy documentation concerning optional line protection insurance coverage ("LPP"). (R p. 19, ¶ 11.) The optional LPP is a type of insurance that enables borrowers to cancel some or all of the monthly payments on the variable portion of a credit line due to events like disability, accidental death, or involuntary unemployment. (*Id.*) Plaintiff claims that his parents declined to purchase LPP coverage when they received the $120,000 line of credit. (*Id.*)

Plaintiff claims that "for several years," BANA drafted a monthly charge of $28.40 from his parents' account for LPP coverage, and that only his father (John Hughes, Sr.) received LPP coverage. (R. p. 21, ¶ 23.) The $28.40 fee was listed on his parents' monthly account statements. (*Id.*)

In 2015, John Hughes' estate notified BANA that Mr. Hughes had passed away seven years earlier. (R. p. 22, ¶ 27.) BANA refunded all LPP premium payments drawn on the Hughes' account after the death of John Hughes. (R. p. 95, ¶ 30.) In June 2015, Ms. Hughes passed away, and Hughes was named personal representative of her estate. (R. p. 22, ¶ 29.)

Following the death of Ms. Hughes, Plaintiff filed a class action Complaint in state court in South Carolina in November 2015 (the "2015 Lawsuit"). (R. pp. 74–75.) BANA timely removed the action to the United States District Court for the District of South Carolina under federal question jurisdiction. Plaintiff amended his complaint in the 2015 Lawsuit three times. (R. p. 90.)

In his Third Amended Complaint, Plaintiff alleged that BANA's charging for the LPP, when the Plaintiff allegedly declined coverage, amounted to fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent acts, breach of the duty of good faith and fair dealing, and a violation of the TILA. (R. pp. 99–105.) Plaintiff also sought to represent

a class of "BANA customers who, without the customer's express and informed written consent, were enrolled in and charged for a protection plan insurance products referred variously as 'Borrower's Protection Plan,' 'Line Protection Plan,' or other similar monikers." (R. p. 97–98, ¶ 43.)

BANA filed a motion to dismiss all of the claims for failure to state a claim. After the motion to dismiss was fully briefed, but prior to the District Court's ruling on the motion, Plaintiff voluntarily dismissed his fraud-based claims (fraud, fraudulent concealment, and breach of contract accompanied by fraudulent acts), admitting that "there is controlling precedent that may bar recovery for these particular claims by virtue of Jane Hughes' death." (R. p. 120.)

In February 2017, the District Court granted BANA's motion to dismiss the remaining claims. It held that Plaintiff's remaining breach of contract and TILA claims were time-barred and that Plaintiff could not rely on the doctrine of equitable tolling to save the untimely claims. (R. p. 126.) The court further stated that "[t]he charge for the mortgage insurance appeared on the Hughes' monthly checking account statements from 2006 to 2015, thus any argument they failed to discover the purported wrongdoing by Defendant during this period of time, although they exercised due diligence, is bereft of any merit." (*Id.*)

The Fourth Circuit affirmed the District Court's ruling "for the reasons stated by the district court." (R. p. 129.) Three months later, Plaintiff filed a Petition for Writ of Certiorari in the Supreme Court of the United States. The Supreme Court denied certiorari. *See Estate of Hughes v. Bank of Am. Nat. Assn.*, 138 S. Ct. 935 (U.S. Jan. 22, 2018).

Meanwhile, Plaintiff sued BANA again. Asserting almost identical factual allegations as in the 2015 Lawsuit, Plaintiff again claimed that although his parents paid for the LPP coverage offered by BANA, and for nearly a decade received monthly statements reflecting these payments,

his parents were unaware of the LPP charge and had actually declined the loan protection coverage at the time they obtained the line of credit in 2006. (R. p. 19, ¶¶ 9–11.) Based on these allegations, Plaintiff asserted claims for fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, violation of the SCUTPA, breach of fiduciary duty, and conversion. (R. pp. 22–29, ¶¶ 30–70.) He also asserted a statutory survival cause of action in an effort to enforce the six substantive causes of actions. (R. p. 29, ¶¶ 71–74.)

BANA filed a motion to dismiss for failure to state a claim, and the Court of Common Pleas granted BANA's motion on "several grounds." (R. p. 4.) In particular, the court held that (1) Plaintiff's fraud-related claims did not survive the death of Plaintiff's parents; (2) Plaintiff's claim based on South Carolina's unfair trade practices act was not allowed in a representative capacity; (3) all of Plaintiff's claims were barred by the doctrine of *res judicata*; and (4) all of Plaintiff's claims were barred by the applicable statute of limitations and not subject to equitable tolling. (R. pp. 4–10.) This appeal followed.

STANDARD OF REVIEW

On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court. *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009) (citing *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001)). That standard requires the court to construe the complaint in a light most favorable to the non-movant and determine if the "facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Id.* To survive a 12(b)(6) motion, the plaintiff must set forth "ultimate facts"– i.e., facts that state more than a mere legal conclusion – "showing he is entitled to relief." *Watts v. Metro Sec. Agency*, 346 S.C. 235, 238, 550 S.E.2d 869, 870 (Ct. App. 2001).

In addition, when analyzing a Rule 12(b)(6) motion to dismiss, the court may consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *see Doe v. Bishop of Charleston*, 407 S.C. 128, 134 n.2, 754 S.E.2d 494, 497 n.2 (2014) (recognizing a court may take judicial notice of publicly filed court documents and consider them when ruling on a Rule 12(b)(6) motion to dismiss).

ARGUMENT

I. PLAINTIFF'S FRAUD-BASED CLAIMS FAIL BECAUSE THEY DO NOT SURVIVE THE DEATH OF THE ALLEGEDLY DEFRAUDED PERSON[1]

A. The law in South Carolina has been clear on this point for almost 80 years.

Plaintiff concedes that "there is controlling binding precedent on the primary issues in this case, which are the fraud based claims." (R. p. 43, lines 14–17.) Indeed, the law in South Carolina has been clear on this point for almost 80 years: fraud-related claims *do not* survive the person's death. *Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 15 S.E.2d 117, 119 (1941) (holding that a cause of action for fraud did not survive the death of a person who was allegedly defrauded by an apparent cancellation of an insurance policy).

Accordingly, in bringing fraud-related claims on behalf of his deceased mother, Plaintiff runs afoul of South Carolina's survivability statute. Although the survivability statute generally allows causes of action for personal injuries to survive the death of the person, the South Carolina

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[1] The only claims at issue on appeal are Hughes' fraud-based claims. Although Hughes' Complaint also includes a breach of fiduciary duty and a conversion claim (R. pp. 28–29, ¶¶ 62–70), counsel for Hughes conceded these claims at the hearing below, and he does not raise them again on appeal. (R. p. 45, lines 1–6, p. 47, lines 12–16 ("So I think I would tend to agree that the conversion claim, the breach of fiduciary duty claims are probably foreclosed and that we would forego those claims"); R. p. 45, lines 1–6 (admitting that these claims "may be barred by [issue preclusion] and res judicata").

Supreme Court has expressly ruled that fraud-related claims *do not* survive the person's death. *Mattison*, 197 S.C. 256, 15 S.E.2d at 119 ("[It] is just as readily seen that respondent's second cause of action [for fraud] does not come within either of the instances where a cause of action survives."); *see also Brailsford v. Brailsford*, 380 S.C. 443, 449, 669 S.E.2d 342, 345 (Ct. App. 2008) ("South Carolina . . . has long recognized several exceptions to the survivability of a claim, including an exception for fraud.").

The South Carolina Supreme Court decision in *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563–64, 564 S.E.2d 94, 97 (2002) is instructive. In *Ferguson*, the court analyzed the survivability of fraud and fraudulent concealment-based allegations brought by an estate against a car dealership. The court held:

> The essence of Mr. Ferguson's allegation was that [the defendant] CLM included an improper fee in the purchase price and concealed the fee through fraudulent and deceptive actions. Whether Mr. Ferguson labeled CLM's actions as unfair, misleading, or deceptive is irrelevant. At the core of Mr. Ferguson's complaint was the allegation that CLM misled him into paying more for the car than he should have paid, and concealed the overcharge either through intentionally deceptive actions or through grossly negligent disclosure practices. Allegations of such fraud and deceit are exempted from the general survival statute and do not survive the Plaintiff's death. Accordingly, we hold that Mr. Ferguson's cause of action did not survive his death.

Id., 349 S.C. at 563–64, 564 S.E.2d at 97–98 (finding that claims brought under the Regulation of Manufacturers, Distributors, and Dealers Act were exempted because they were based on fraud and deceit).

Here, much like in *Ferguson*, Plaintiff alleges that BANA "made false and material representations" relating to the LPP coverage or "in the alternative, Defendant BANA intentionally concealed the material facts that it enrolled Plaintiffs in [the LPP]." (R. pp. 22–23, ¶¶ 31, 37.) Plaintiff asserts that "[d]ue to the fraudulent nature of BANA's actions," he is entitled to damages, including punitive damages. (R. pp. 23–25, 27–28, ¶¶ 35, 42, 51, 60, 61.) Plaintiff's allegations

relating to fraud and deceit, including his action under SCUTPA, are "exempted from the general survival statute and do not survive the Plaintiff's death." *Ferguson*, 349 S.C. at 563–64, 564 S.E.2d at 97–98. Accordingly, the Court of Common Pleas' finding that all of Plaintiff's claims based on fraud and deceit—fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, and violation of SCUTPA claims—did not survive the death of Ms. Hughes should be affirmed.

B. This Court cannot overrule the South Carolina Supreme Court.

The "decisions of the Supreme Court shall bind the Court of Appeals as precedents." S.C. CONST. art. V, § 9. Therefore, the Courts of Appeals "may not overrule supreme court precedent." *Campbell v. Robinson*, 398 S.C. 12, 18, 726 S.E.2d 221, 225 (Ct. App. 2012); *see also Caldwell v. Wiquist*, 402 S.C. 565, 570, 741 S.E.2d 583, 586 (Ct. App. 2013) ("Initially, we note that Wiquist asserts that the *Yates* line of cases should be overruled. This court has no authority to overrule Supreme Court precedent."). Therefore, even if this Court were inclined to overrule almost 80 years of precedent from the state Supreme Court, the Constitution leaves that prerogative to the South Carolina Supreme Court.

C. It is perfectly proper that fraud claims do not survive.

There are good reasons why fraud claims do not survive the death of the allegedly defrauded person. In particular, "fraud is a tort that requires a special quality of proof, and the states of mind of the victim (e.g., whether he knew the statement was false, relied upon it, and was justified in so relying) and the perpetrator are especially vital." *Faircloth v. Finesod*, 938 F.2d 513, 517 (4th Cir. 1991). Thus, "the difficulty and potential unfairness of proving the state of mind of a dead party to a fraudulent transaction justifie[s] excepting fraud from the survival statute." *Id.*

The South Carolina legislature codifies these principles in other contexts: Rule 9(b) of the South Carolina Rules of Civil Procedure requires fraud to be pled more particularly than other claims, and the SCUTPA prohibits claims under the Act from being brought in a representative capacity.

These justifications are in force here. Contrary to Plaintiff's argument that "the state of mind of [Mr. and Ms. Hughes] is readily identifiable," it would in fact be difficult and potentially unfair to prove the Hughes' state of mind regarding the LPP charges without the benefit of their deposition testimony and other personal discovery. Mr. and Mrs. Hughes—not the current plaintiff—were the ones who attended the June 2006 transaction, signed various paperwork, and spoke to BANA employees. Even after the transaction, Mr. Hughes lived for more than two years, during which time he received statements listing the $28.40 charge by his name. Later, Ms. Hughes received the statements reflecting the insurance charge for many years. Because both are gone, no one knows whether they saw or understood those charges, or what they thought. There is no inherent injustice in South Carolina's position that a person suing for fraud needs to be alive in order to provide a fair opportunity to investigate that person's mental state. Crucial evidence in a fraud case is lost when an alleged victim passes away.

Further, Plaintiff's argument that civil remedies are necessary to curb financial exploitation of the elderly is likewise inapt here. (Hughes Br. 18.) As Plaintiff well knows, openly charging someone for a product they have allegedly declined to buy could yield a variety of causes of action apart from fraud and its special rules. Indeed, Plaintiff sued BANA for a handful of those other causes of action in 2015. On the facts alleged in this case, South Carolina law on survivability simply did not put the plaintiffs out of court. Bringing their claims years beyond the statute of limitations did.

II. PLAINTIFF'S SCUTPA CLAIM FAILS FOR THE ADDITIONAL REASON THAT IT CANNOT BE BROUGHT IN A REPRESENTATIVE CAPACITY

Plaintiff conceded at the hearing on BANA's Motion to Dismiss that "[i]f there's a case on point where once you die, your unfair trade claim dies with you, I would again concede the point that there's controlling precedent." (R. p. 47, lines 12–21.) In fact, the plain language of the SCUTPA statute itself does not allow for a representative of an estate to maintain an action under the Act, as Plaintiff attempts to do here.

SCUTPA clearly states:"[a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, *but not in a representative capacity*, to recover actual damages." S.C. Code Ann. § 39-5-140 (emphasis added).

Applying this statutory language, courts analyzing South Carolina law have therefore precluded estate representatives from maintaining claims under SCUTPA. *See Faircloth v. Jackie Fine Arts, Inc.*, 682 F. Supp. 837, 845 (D.S.C. 1988), *aff'd in part, rev'd in part on other grounds*, *Faircloth v. Finesod*, 938 F.2d 513 (4th Cir. 1991) ("[T]he language of the statute precludes the bringing of a SCUTPA action by an appellant who acts in a representative capacity."). It is clear that "an unfair trade practices claim may not be brought in a representative capacity." *Wogan v. Kunze*, 366 S.C. 583, 609, 623 S.E.2d 107, 121 (Ct. App. 2005), *aff'd as modified*, 379 S.C. 581, 666 S.E.2d 901 (2008). Because Plaintiff affirmatively alleges that he is bringing this action as the "Personal Representative of the Estate of Jane K. Hughes" (R. p. 17, ¶ 1), his claim under the SCUTPA fails, and the lower court's ruling on this point should be affirmed.

III. *RES JUDICATA* BARS ALL OF PLAINTIFF'S CLAIMS

A. Every element of *res judicata* exists here.

The Court of Common Pleas also correctly ruled that *res judicata*, or claim preclusion, bars each of Plaintiff's claims. (R. p. 5.) After all, Plaintiff "does not dispute the lower court's determination that the present action is based upon the same transaction and occurrence as matters previously adjudicated" in federal court. (Hughes Br. 19.)

"*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). *Res judicata* has three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." *Plum Creek Dev. Co.*, 334 S.C. at 34, 512 S.E.2d at 109. The third element, requiring adjudication, includes "any issues which might have been raised in the former suit." *Id.*

The matter at hand is exactly what the doctrine of *res judicata* exists to prevent.

First, there is no dispute that the identity of the parties is identical. In both actions, Plaintiff sued BANA in a representative capacity on behalf of his mother's estate. (*See* R. pp. 17, 89.)

Second, as Plaintiff concedes, the subject matter of the two lawsuits is also identical. (*See* Hughes Br. 19 ("Appellant does not dispute the lower court's determination that the present action is based upon the same transaction and occurrence as matters previously adjudicated by the District Court.")) In fact, the 2015 Lawsuit and this case overlap so much that the majority of the factual allegations are identical. *Compare* R. pp. 17–34 *with* R. pp. 89–106. Both cases allege that in a June 2006 transaction, Mr. and Mrs. Hughes declined to buy an insurance product,

yet were charged for it anyway, monthly, for the next nine years. All of the claims made, in 2015 and now, are offshoots of this same subject matter.

Third, that subject matter was adjudicated in the 2015 Lawsuit. The District Court dismissed all of Plaintiff's claims with prejudice following full briefing on BANA's Motion to Dismiss. (R. p. 123.) Plaintiff appealed and lost. *See Hughes, on behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n*, 697 F. App'x 191, 193 (4th Cir. 2017); *see also* R. pp. 129–30. Then he filed a certiorari petition and it was denied. *See In re Estate of Hughes v. Bank of Am. Nat'l Ass'n*, No. 17-884, 2018 WL 491558, at *1 (U.S. Jan. 22, 2018).

Every cause of action in this case "might have been raised in the former suit." *Plum Creek Dev. Co.*, 334 S.C. at 34, 512 S.E.2d at 109. The factual allegations are the same. And Plaintiff *did* bring several fraud claims in 2015, but voluntarily dismissed them after acknowledging that those claims did not survive under South Carolina law. (R. pp. 120–21.) The claims here were perfectly available to Plaintiff in 2015, and he should not be able to split them simply because he believes this forum will be a better one on the merits than the federal court was. *E.g.*, *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 192, 417 S.E.2d 569, 571 (1992) ("All of Clarkson's claims arise out of the distributorship or the settlement agreement. The claims were either litigated in the prior actions or could have been so litigated. Thus, the trial court properly held that Clarkson's claims were barred by *res judicata* and entered judgment in favor of Sub-Zero.").

B. Plaintiff's voluntary dismissal of claims in the first suit because he expected to lose them should not provide him a second try.

Plaintiff voluntarily dismissed his fraud claims in the 2015 Lawsuit because he expected to lose. This does not justify departing from *res judicata*, which exists because "public interest

requires an end to litigation and no one should be sued twice for the same cause of action." *S.C. Pub. Interest Found. v. Greenville Cty.*, 401 S.C. 377, 391, 737 S.E.2d 502, 509 (Ct. App. 2013).

South Carolina recognizes limited exceptions to circumstances in which *res judicata* typically would govern, none of which apply here. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1982) (enumerating six different "exceptions" to *res judicata*); *S.C. Pub. Interest Found.*, 401 S.C. at 390, 737 S.E.2d at 509 (finding that none of the enumerated exceptions from the Restatement (Second) § 26 were applicable to the plaintiff's claim, and therefore, the claims were barred by *res judicata*).

The law has enumerated exceptions to *res judicata.* They occur when either: (a–b) the parties or the court in the first suit agreed that the plaintiff could bring a second suit; (c) the first court had limited subject matter jurisdiction to entertain a particular theory or certain remedy; (d) the first judgment was plainly inconsistent with a statutory or constitutional scheme; (e) continuing or recurrent wrong cases where the plaintiff may sue from time to time for damages to-date; and (f) clear and convincing showings of an "extraordinary reason" such as related to "personal liberty" or the failure of the first case to produce a coherent disposition. RESTATEMENT (SECOND) OF JUDGMENTS § 26.

Plaintiff does not even argue that any of these exceptions apply here. (*See* Hughes Br. 20.) Instead, he asks this Court to create a new exception: that *res judicata* does not apply where a plaintiff voluntarily dismissed claims from the first action in anticipation of defeat.

The closest existing exception to Plaintiff's argument occurs when the first court lacks subject matter jurisdiction over the issue. But federal courts can and do hear state fraud claims all the time, and indeed, the District Court could have heard the Plaintiff's fraud-based claims in the 2015 Lawsuit. In fact, Plaintiff decided to bring a TILA claim in the 2015 Lawsuit, providing the

federal court with subject matter jurisdiction over his claims. (R. pp. 99–101; 28 U.S.C. §1367(a) (district courts have supplemental jurisdiction over claims arising out of the same case or controversy as the federal claim)). That Plaintiff later decided on his own to dismiss his claims because he thought he would lose and would not be able to obtain a certified question does not bring him within this exception.

Similarly, Plaintiff's reliance on Section 28, Comment (e) of the Restatement, which addresses exceptions to issue preclusion, is misguided. The example illustrated by Comment (e) is telling—the Restatement explains that a determination in a state court on a patent license agreement may not be held binding in a subsequent federal court action for patent infringement if the grant of exclusive jurisdiction in patent infringement cases to the federal district courts is construed to require otherwise. Again, that is not the case here. Undisputedly, both the District Court and the Court of Common Pleas have equal subject matter jurisdiction to hear Plaintiff's fraud claims. Instead, Plaintiff preemptively dismissed them, expecting defeat.

The cases cited by Plaintiff in support of his position—*Judy v. Judy* and *Pye v. Aycock*—only underscore BANA's position. In both *Judy* and *Pye*, the court ultimately found that the doctrine of *res judicata* barred the plaintiff from re-litigating his claims in the subsequent action. *See Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009), *aff'd*, 393 S.C. 160, 712 S.E.2d 408 (2011) (rejecting the plaintiff's argument that *res judicata* did not apply, where the probate court in the first action did have jurisdiction to decide the cause of action for waste); *Pye v. Aycock*, 325 S.C. 426, 433, 480 S.E.2d 455, 458 (Ct. App. 1997) (affirming the trial court's decision finding that the plaintiff was barred by the doctrine of *res judicata* and rejecting the plaintiff's argument that any of the Restatement's enumerated exceptions applied).

Plaintiff's vague policy justification—that the District Court's decision has an adverse impact on the public interest and therefore does not have binding effect—likewise does not hold water. "[T]he doctrine of *res judicata* serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply no principle of law or equity which sanctions the rejection... of the salutary principle of *res judicata*." *Griswold v. Cty. of Hillsborough*, 598 F.3d 1289, 1294 (11th Cir. 2010) (internal quotations omitted).

In any case, applying *res judicata* would not be unjust here. Plaintiff had an opportunity to litigate his fraud claims and simply failed to do so. Moreover, if Plaintiff's fraud allegations were the "primary issue" and "the crux of this case," as he now alleges, he could have structured this litigation to avoid removal to federal court in the first case. (R. p. 45, lines 5-6.) That is, Plaintiff prioritized his federal TILA claim in the 2015 Lawsuit. Therefore, he faced removal and adjudication in federal court (all the way to the Supreme Court of the United States). Had Plaintiff not pleaded a federal claim, he could have litigated the fraud exception in state court the first time around.

But having strategically set aside certain state claims to pursue federal claims in federal court, Plaintiff cannot now invoke the interest of justice in trying to get a second bite at the claims he abandoned years ago. This litigation is an afterthought, pursued only after it became apparent that the District Court and Fourth Circuit had not gone Plaintiff's way in the first case.

IV. PLAINTIFF'S CLAIMS ARE ALL UNTIMELY

Even if Plaintiff's claims were not excluded by South Carolina's survivability statute and *res judicata*, they would be barred by the applicable statute of limitations. A three-year statute of limitations governs all of Plaintiff's claims here. Yet Plaintiff filed his *first* complaint more than nine years after the charges he challenges began, and the current Complaint two years after that.

Because the statutes of limitation have long expired, Plaintiff's claims can only be timely if the doctrine of equitable tolling saves them. But there are two independent reasons why equitable tolling cannot apply here: first, Plaintiff litigated that issue and lost in the 2015 Federal Lawsuit; and second, regardless, equitable tolling cannot apply on the undisputed facts and pleadings in this case.

A. All of Plaintiff's claims are beyond their limitations period.

The Court of Common Pleas correctly found that Plaintiff's 2017 claims—all arising from a transaction that occurred in 2006—are time-barred by many years. (R. pp. 8–10.)

Each cause of action remaining here has a three-year statute of limitations: (1) fraud (S.C. Code Ann. § 15-3-530(7); (2) fraudulent concealment (*id.*); (3) breach of contract accompanied by a fraudulent act (§ 15-3-530(1)); and (4) violation of the SCUTPA (§ 39-5-150). Plaintiff has never disputed this.

Under the discovery rule, these statutes of limitation began to run when "the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. Code Ann. § 15-3-535; *Mitchell v. Holler*, 311 S.C. 406, 408–9, 429 S.E.2d 793, 795 (1993) (articulating the "discovery rule"). "The standard . . . is objective rather than subjective." *Gibson v. Bank of America, N.A.*, 383 S.C. 399, 405-06, 680 S.E.2d 778, 782 (Ct. App. 2009) (adding that the statute begins running when "the facts and circumstances . . . would have put a person of common knowledge and experience on notice that some claim against another party might exist.").

Here, these statutes of limitation began running in 2006. Plaintiff alleges that his parents declined to purchase the LPP when they opened their line of credit from BANA on June 13, 2006. Nonetheless, he alleges, BANA withdrew a monthly charge of $28.40 from their account "for several years," beginning "on or about June 2006." (R. p. 21, ¶ 23; R. pp. 94–95, ¶ 25.) Thus,

reasonable notice of the alleged wrongdoing occurred when the first charge appeared on her monthly statement in June 2006. (R. pp. 94–95, ¶ 25 (alleging that the monthly LPP charges were withdrawn from the Plaintiff's account beginning "on or about June 2006" as reflected in their monthly bank and/or home equity loan statements sent to their address.))

The Court of Appeals' 2009 decision in *Gibson* is instructive. 383 S.C. 399, 407–08, 680 S.E.2d 778, 783 (Ct. App. 2009). In *Gibson*, the estate of an elderly woman sued a bank, claiming that it had improperly allowed withdrawals from her bank account. However, at least some monthly statements sent to the decedent reflected the withdrawals. Thus, this Court held that she was, or objectively should have been, aware of the withdrawals. This Court found the lawsuit time barred.

As the *Gibson* Court observed, the purpose of bank statements is to assert the existing balance of an account, saying "in effect: 'this bank owes you this stated balance, and no more.'" *Id.* at 408. Therefore, even if a person does "not know the precise details behind the discrepancy," the statement provides notice and an opportunity for the account holder to inquire about any charge listed. "If this is not the legal effect of the bank's monthly statement to its depositor, it is not apparent what function the monthly statement performs." *Id.* at 408.

Like in *Gibson*, Hughes' parents received monthly statements listing the charges they now attempt to challenge. Those statements began in June 2006 and steadily continued, month after month, year after year, all showing a monthly withdrawal of $28.40. The statute of limitations for all of Plaintiff's claims expired three years later, in the summer of 2009—more than six years before Plaintiff filed his first complaint. (R. pp. 8–9.)

B. Equitable tolling is foreclosed by issue preclusion.

The parties here exhaustively litigated equitable tolling in the 2015 Lawsuit. Plaintiff lost. Issue preclusion, also known as collateral estoppel, bars his attempt to re-litigate that issue now.

Under the doctrine of issue preclusion, "when an issue has been actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action whether on the same or a different claim." *Zurcher v. Bilton*, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008). "[Issue preclusion] applies to specific issues, regardless of whether the claims in the first and subsequent suits are the same." *Judy*, 383 S.C. at 7, 677 S.E.2d at 217. Issue preclusion applies when "the issue in the present lawsuit was (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009).

Each element of issue preclusion is satisfied here. First, the issue was "actually litigated" in the 2015 Lawsuit. *Carolina Renewal*, 385 S.C. at 554, 684 S.E.2d at 782. The parties fully briefed the dispositive issues of timeliness and equitable tolling with regard to Plaintiff's LPP coverage allegations. (R. pp. 134–35, 208–09, 255–56.) In reviewing the parties' briefing on BANA's motion to dismiss, the District Court explicitly recognized that "Defendant argues all of Plaintiffs' claims are time barred and equitable tolling is inapplicable....Plaintiffs maintain their claims have been equitably tolled." (R. p. 125; R. p. 126 (adding that "Plaintiffs rely on the doctrine of equitable tolling to argue their claims are timely")). On appeal, both parties again briefed equitable tolling and its applicability. *See In re Estate of Hughes v. Bank of Am. Nat'l Ass'n*, 2017 WL 1739795, at *13–33 (4th Cir. 2017); *In re Estate of Hughes v. Bank of Am. Nat'l Ass'n*, 2017 WL 1206484, at *13–35 (4th Cir. 2017).

Second, the federal courts "directly determined" the issue "in the prior action." *Carolina*

Renewal, 385 S.C. at 554, 684 S.E.2d at 782. The District Court directly determined that the facts as alleged could not establish equitable tolling. (R. pp. 126–27; R. p. 46, lines 18–20 (Plaintiff's counsel conceding that the Federal Court "looked into" equitable tolling.)) The District Court reasoned that Plaintiff's allegations regarding Ms. Hughes' poor health, though unfortunate, were insufficient to show that the parties had exercised due diligence, noting that the LPP charges appeared on the Hughes' monthly checking statements sent to the Hughes' address for nine years. (*Id.*)

On appeal, the Fourth Circuit again ruled that equitable tolling could not apply here. After setting out the standard for equitable tolling, the Fourth Circuit opined that "with these standards in mind, we have reviewed the briefs and the record before us and conclude that the district court did not err in granting the motion to dismiss." *Hughes*, 697 F. App'x 191, 192-93 (4th Cir. 2017).

Third, the prior finding of no equitable tolling was "necessary to support the prior judgment." *Carolina Renewal*, 385 S.C. at 554, 684 S.E.2d at 782. In fact, the absence of equitable tolling is the express reason for the dismissal of Plaintiff's 2015 Lawsuit. (R. pp. 125–27 (granting BANA's motion to dismiss on the basis that the plaintiffs' claims were barred by the statute of limitations and were not entitled to equitable tolling, specifically observing that Plaintiff "rel[ied] on the doctrine of equitable tolling to argue [his] claims are timely" and rejecting that argument)).

Plaintiff cannot evade issue preclusion by arguing that the federal law of equitable tolling differs from that in South Carolina. (Hughes Br. 24–25.) Plaintiff theorizes that South Carolina offers a more "lenient" equitable tolling doctrine than the federal courts. (*Id.*) That is not correct. There is no meaningful difference between South Carolina and federal law on this issue, and indeed, the District Court of South Carolina cited to and considered both federal and state law in

ruling on equitable tolling. (R. p. 126.)

Both the federal courts and South Carolina recognize that equitable tolling is a matter of judicial discretion and that it is rarely proper. Both place the burden on the plaintiff. *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) (holding that the plaintiff "bears the burden of establishing sufficient facts to justify its use"); *CVLR Performance Horses, Inc. v. Wynne*, 792 F.3d 469, 476 (4th Cir. 2015) (noting that the plaintiff must carry "a considerable burden to demonstrate that it applies").

Both federal and South Carolina courts also require "a compelling basis for awarding such relief," such that the doctrine is used "sparingly" to avoid "a gross wrong." *Hooper*, 386 S.C. at 115, 687 S.E.2d at 32–33; *Kuusk v. Holder*, 732 F.3d 302, 306 (4th Cir. 2013) (doctrine applies "only sparingly"); *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) (requiring "gross injustice").

These cases show that equitable tolling is no different in federal court than in South Carolina. In fact, South Carolina cases have explicitly embraced the federal standard. *See, e.g.*, *Pelzer v. State*, 662 S.E.2d 618, 621 (S.C. Ct. App. 2008) (quoting and agreeing with the Fourth Circuit's equitable tolling description in *Harris*, 209 F.3d at 330, and calling it "particularly illuminating"). Both federal and state law recognize that the equitable tolling doctrine is sparingly applied, and only in extraordinary circumstances that overcome diligence by the plaintiff. *Id.*

Likewise, the fact that Plaintiff's causes of action in this suit are different from the 2015 Lawsuit does not change the outcome. "[Issue preclusion] applies to specific issues, regardless of whether the claims in the first and subsequent suits are the same." *Judy*, 383 S.C. at 7, 677 S.E.2d at 217. And, the statute of limitations period is the same for Plaintiff's existing claims as

his prior breach of contract claim in the 2015 Lawsuit: three years. As such, because the District Court determined that Plaintiff's claims were time-barred in 2015, his 2017 claims are likewise barred and should be dismissed.[2]

C. Even apart from issue preclusion, Plaintiff cannot meet the requirements of equitable tolling.

Even independently from the bar of issue preclusion, the court below correctly ruled that equitable tolling cannot apply here. (R. p. 9 ("The Court agrees with the findings of the District Court and the Court of Appeals in the 2015 Federal Action that equitable tolling does not apply in this case.")).

The South Carolina Supreme Court has maintained that "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." *Hooper*, 386 S.C. at 117, 687 S.E.2d at 32. "It has been observed that equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Id.* at 116. *See also Am. Legion Post 15 v. Horry Cty.*, 381 S.C. 576, 582, 674 S.E.2d 181, 184 (Ct. App. 2009) (emphasizing the need for due diligence before allowing for equitable tolling).

Plaintiff cannot satisfy the "sparingly" used equitable tolling doctrine. In particular, Plaintiff alleges that the charge for the insurance appeared on monthly checking account statements from 2006 to 2015. (R. pp. 94–95, ¶ 25.) The monthly charge was called "Ad

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[2] As discussed above, Plaintiff relies on 28 Comment e of the RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982) to argue that his fraud claims are not barred by *res judicata*. But Comment e—which applies to circumstances in which the first court lacks subject matter jurisdiction to decide a particular issue—does not help him here either. *See id.* There is no dispute that the District Court had subject matter jurisdiction to hear all of Hughes' claims and make a determination on the applicable statutes of limitations and equitable tolling issues, as it did.

Insurance." (R. p. 21, ¶ 23.) It recurred at $28.40 per month, and it was listed by the name of John P. Hughes, Sr. on the statement—a clear red flag to Mr. Hughes during his lifetime and to his decedents after 2008. Regardless of whether the typeface was small (the same size as all other charges on the bill), or the asserted ambiguity of some of its description, the charge was openly announced, steadily recurring, and appeared under a specific person's name on the bank statements. As the Court of Common Pleas found, there can be no "extraordinary event" stopping the Hugheses from bringing their claim when they "received actual monthly notice of the charges being deducted from their account from 2006 to 2015." (R. p. 9.) "Nothing was hidden." *Id.*

Nor can Ms. Hughes' health issues suffice to excuse many years of failing to investigate the charges. Although he has been litigating this issue for years now, through multiple complaints, Plaintiff has never claimed that his mother was incapacitated for the *entire* period between 2006 and her death in 2015. In federal court, Plaintiff could state only that "as of 2012" her condition was poor. *See In re Estate of Hughes v. Bank of Am. Nat'l Ass'n*, 2017 WL 1739795, at *22 (4th Cir. 2017).

Moreover, in view of the equitable nature of the tolling doctrine, it appears that Mrs. Hughes shared her bank account during the relevant time with her children, including the current plaintiff. Plaintiff makes no allegation that he or his sister were ever stopped from seeing the bank statements or inquiring about a recurring $28.40 charge for "Ad Insurance" listed as connected to their deceased father. It appears that Ms. Hughes was surrounded by family members whose capacity has never been questioned and who were named on the bank account from which the charges occurred. Particularly given that her claim now belongs to those same family members through her estate, there is no "gross wrong" in refusing to equitably toll the statute of limitations here. *Hooper*, 386 S.C. at 115, 687 S.E.2d at 32–33.

Thus, as the Court of Common Pleas observed, assertions that Ms. Hughes suffered health issues, although unfortunate, are simply insufficient to satisfy the due diligence requirement of the equitable tolling doctrine—which is to be employed only in "extraordinary" circumstances. (R. p. 5.) As the District Court explained, "[f]or the Court to adopt Plaintiffs' position [that] their claims are entitled to equitable tolling would mean statutes of limitations are inconsequential. And, of course, that is not so." (R. p. 127.)

Because all of Plaintiff's claims are untimely, and the equitable tolling doctrine does not apply, this Court can affirm on this ground alone.

CONCLUSION

For these reasons, this Court should affirm the Court of Common Pleas' dismissal of Plaintiff's Complaint with prejudice.

Respectfully submitted, September 11, 2018

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No.: 2017-CP-42-02834

Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes .....Appellant,

v.

Bank of America National Association .....Respondent.

CERTIFICATE OF RESPONDENT

I certify that the Final Brief of Respondent complies with Rule 211(b) of the South Carolina Rules of Civil Procedure.

September 11, 2018

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ARGUMENT IN REPLY

Without restating the issues or arguments which have been thoroughly set forth in his initial brief, and incorporating that brief herein by reference, Appellant Hughes offers the following points of clarification and rebuttal to the arguments raised by Respondent Bank of America National Association ("BANA").

I. RESPONDENT'S ARGUMENT IN SUPPORT OF ITS POSITION AGAINST OVERTURNING THE COMMON-LAW FRAUD EXCEPTION TO THE SURVIVAL STATUTE IS UNAVAILING AND MISLEADING.

In its Order dismissing Appellant's underlying complaint, the Spartanburg County Court of Common Pleas held, in part, that "Plaintiff is barred from bringing fraud-related claims on behalf of his deceased mother under . . . South Carolina's survivability . . . statutes." (R. p. 6). Appellant challenges this point on appeal, on the ground that principles of statutory interpretation and public policy dictate a reversal of the common law exception to the survival statute that fraud does not survive death. In its responding brief, Respondent BANA argues, in relevant part, that this Court cannot overrule the South Carolina Supreme Court and the fraud exception stems from "South Carolina's position that a person suing for fraud needs to be alive in order to provide a fair opportunity to investigate that person's mental state." BANA Br. at 11. In support of its arguments, however, Respondent misrepresents to this Court both the rulings by the lower court and South Carolina law.

Respondent begins its argument with a misstatement of the lower court's Order on BANA's Motion to Dismiss. Specifically, Respondent states, as its first issue on appeal, "Did the Court of Common Pleas correctly rule that it lacks authority to overturn South Carolina Supreme Court precedent on the survivability of fraud. (Yes.)". BANA Br. at 4. The lower court, however, did not issue a ruling that it lacks authority to overturn Supreme Court precedent *at all.* Respondent

proceeded to set forth its argument regarding the survivability of fraud without reference to this alleged ruling by the Court of Common Pleas, instead simply citing to law in support of its newly raised position regarding the lower court's authority. BANA Br. at 10. BANA's misrepresentation of the lower court's ruling is indicative of Respondent's tendency throughout its brief to bolster its argument with misleading statements.

In a similar fashion, Respondent offers this Court what it purports to be justification by South Carolina's courts and legislature for the fraud-based exception to the survivability statute. Relying on a Fourth Circuit opinion, Respondent represents that the reason fraud does not survive death is due to the fact that the state of mind of a party is especially vital in cases of fraud. BANA Br. at 10-11 (citing Faircloth v. Finesod, 938 F.2d 513, 517 (4th Cir. 1991)). Respondent argues that, because the Hughes' are deceased, "it would in fact be difficult and potentially unfair to prove the Hughes' state of mind . . . without the benefit of their deposition testimony and other personal discovery." Id. at 11. This position is fundamentally flawed.

Respondent's reliance on Faircloth is misplaced. Relying on Faircloth, BANA represents to the Court that it is "South Carolina's position that a person suing for fraud needs to be alive in order to provide a fair opportunity to investigate that person's mental state." BANA Br. at 11. However, South Carolina does not actually take this position, as is evidenced by the language of Faircloth. The plaintiff in Faircloth challenged the fraud exception to the South Carolina survival statute as violating the Equal Protection Clause, and the district court determined that the lack of any explanation by the South Carolina courts of the exception's rationale was sufficient to overcome the presumption of constitutionality of the statute under the "rational basis" standard. Faircloth at 517. The district court stated that it "refuse[d] to speculate as to what considerations may underlie the distinction between fraud and other causes of action"; the Fourth Circuit Court

of Appeals reversed, finding that, on the contrary, a court must make every feasible attempt to discern the reasons for a legislative distinction before declaring that distinction unconstitutional. Id. In other words, the appellate court essentially determined that speculation as to the legislative intent supporting a statute is proper so long as it is reasonable, and subsequently found the fraud exception constitutional since a legislature "could" rationally conclude that the difficulty of proving state of mind of a deceased party justifies the fraud exception to the survival statute. Id.

Respondent extracts the court's musings in Faircloth as to a possible rationale for the fraud exception and presents them to this Court as "South Carolina's position" on the matter. BANA Br. at 11. Ironically, the Faircloth opinion actually highlights the fact that South Carolina courts have failed to provide any rationale for the fraud exception, which is precisely why Appellant seeks review of the exception now. And, BANA's further contention that it would be prejudiced in a suit for fraud because it would be "difficult and potentially unfair to prove the Hughes' state of mind," is equally contrived. BANA Br. at 11. As the party bringing suit, Appellant, not Respondent, carries the burden of proving the Hughes' state of mind. Appellant recognizes that cases may arise in which it is difficult to discern the state of mind of a deceased individual; however, this is not one of those cases. Jane Hughes submitted a signed and dated document to Respondent denying the optional insurance for which she was charged and which forms the basis of this suit; her state of mind and intentions are clear. (R. pp. 31-32). Whether this document sufficiently carries the burden of proof is for a jury—not Respondent—to decide.

Finally, Respondent challenges Appellant's position that public policy necessitates reconsideration of the fraud exception, so as to curb fraudulent exploitation of the elderly, by stating that parties may simply bring causes of action other than fraud to bring about the same result. However, not all instances of fraud are also breach of contract or violations of the Truth in

Lending Act, and the facts of those cases may not satisfy the elements of any action other than fraud. After all, it would stand to reason that fraud is the most appropriate cause of action available to those who are defrauded. Additionally, actions for fraud allow for the award of punitive damages—a mechanism designed to punish the defendant and deter future conduct. This distinction tends to suggest that a cause of action for fraud, as opposed to causes of action that do not allow for an award of punitive damages, would serve as a more effective deterrent against exploitation of the elderly.

Overall, Respondent's arguments against reconsideration of the fraud exception to the South Carolina survival statute constitute little more than an unconvincing attempt to create rationale for a rule where none exists. This matter is one that is deserving of clarification from this Court in the form of a reversal.

II. RESPONDENT'S ARGUMENT CONCERNING RES JUDICATA IS UNPERSUASIVE.

Respondent next refutes Appellant's argument, that his underlying complaint is not barred by *res judicata,* using similar tactics of manipulating words to better serve its agenda. Pertinently, Respondent takes the position that Appellant has failed to articulate any exception to *res judicata* that would allow his claim to survive, and instead asks the court to create a new exception where "a plaintiff voluntarily dismissed claims from the first action in anticipation of defeat." BANA Br. at 15. BANA's inaccurate summary of Respondent's position makes apparent the fact that either Respondent does not understand the argument set forth in Appellant's initial brief, or else would again present misrepresentations to this Court. Regardless, Appellant offers the following clarification on the matter.

It is Appellant's position that *res judicata* does not bar him from bringing the underlying complaint because the District Court lacked jurisdiction to decide the issue of whether fraud should

survive death, a theory essential to Appellant's fraud-based claims. Hughes Initial Br. at 19-21. Because the District Court could not hear or remand Appellant's argument against the fraud exception, he argues that the third element of *res judicata*—that a claim involves an issue was or could have been previously adjudicated in another suit—is not met. Id. 20. Alternatively, if *res judicata* did bar Appellant's claim, the exceptions provided for in Section 28 of the Restatement (Second) of Judgments would allow Plaintiff's claim to survive, specifically the exceptions providing for a subsequent suit where a new determination of an issue is warranted, including differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or where there is a clear and convincing need for a new determination of the issue because of the adverse impact of the determination on the public interest or interests of persons not themselves party in the initial action. Id. at 20-21. Support for the first exception is provided in Appellant's discussion of *res judicata* in Section II of his Initial Brief; the public policy exception ties directly to Appellant's public policy arguments in Section I(b)(ii) of Appellant's Initial Brief. See, Id. at 17-18; 19-21. Respondent's contention, then, that Appellant asked this Court to create a new exception, is clearly false.

Respondent further contends that Appellant failed to argue any of the exceptions to claim splitting provided for in the Restatement (Second) of Judgments § 26. BANA Br. at 15. On the contrary, although Appellant did not cite to Section 26 directly in support of his argument against *res judicata*, his argument mirrors one of the exceptions provided for in the Restatement. Specifically, Section 26 provides that a second action by a plaintiff against a defendant is available when "[t]he plaintiff was unable to rely on a certain theory of the case . . . because of the limitations on the subject matter jurisdiction of the courts . . . and the plaintiff desires in the second action to

rely on that theory." Restatement (Second) of Judgments § 26(1)(c) (1982). Likewise, Appellant argued that he was unable to have a theory of his case heard—that fraud should survive death—due to limitations on the District Court's ability to overturn state court precedent or remand the question back to state court. Hughes Initial Br. at 20 ("the District Court lacked any jurisdictional mechanism under which it might decide Appellant's challenge to the fraud exception to survivability"). Thus, Respondent's claim not only fails—it lends further support to Appellant's position that his claims are not barred by *res judicata*.

Respondent further insists that Appellant prioritized his federal court claim in the original lawsuit and, had he simply not proceeded with a cause of action under Truth in Lending Act, he could have avoided removal to federal court. BANA Br. at 17. This argument is no more than a smokescreen, and a party is not required to "prioritize" his theories of recovery. Restatement (Second) of Judgments § 26, relied upon by Respondent to support its argument, operates precisely so that a claimant may pursue all theories of recovery, and in separate jurisdictions if necessary. See, Restatement (Second) of Judgments § 26 (1982), cmt. c (stating that when formal barriers exist to prevent a litigant from presenting to a court in one action his entire claim, including any theories of recovery, it is unfair to prevent him from bringing a second action in which he can present the phases of his claim which he was unable to bring in the first.) Moreover, Appellant brought his original claims in the court of his choice: South Carolina state court. Respondent, not Appellant, removed the claims to federal court; Respondent has simply refiled the claims for fraud in the appropriate jurisdiction. Accordingly, Respondent's argument is inherently contradictive and must fail.

III. RESPONDENT IMPROPERLY RELIES ON UNSUBSTANTIATED AND NEWLY-RAISED FACTUAL ALLEGATIONS TO SUPPORT ITS ARGUMENT AGAINST EQUITABLE TOLLING.

Finally, although Appellant's Initial Brief thoroughly refutes Respondent's position on the timeliness of Appellant's claims, Appellant is compelled to respond to issues of fact improperly raised by Respondent for the first time on appeal.

In its responding brief, Respondent first suggests that the decedent's health-related issues do not warrant equitable tolling because Appellant did not plead that his deceased mother was incapacitated for the entire period during which BANA stole from her bank account, suggesting that at some unknown point in time she should have caught on to the theft. BANA Br. at 24. Respondent unabashedly victim-blames the deceased for not recognizing that the nondescript charges against her bank account were unauthorized, yet *never refutes that BANA fraudulently withdrew the charges.* Still, when Mrs. Hughes' infirmity began, its duration, and whether it prevented her from discovering the charges against her account, is a question of fact appropriately presented before a jury after engaging in discovery—not for the first time on appeal of a motion to dismiss on the pleadings.

Similarly, Respondent, for the first time, argues that Jane Hughes was "surrounded by family members" who should have inquired about the charges. BANA Br. at 24. Respondent's argument is not derived from the pleadings in this case, was not presented as a matter before the lower court, and constitutes an issue of fact that is not appropriately decided in the context of a 12(b)(6) motion to dismiss, nor as a novel issue raised on appeal. Moreover, this case is brought by the Estate of Jane K. Hughes based on fraud perpetrated against *her* by Respondent. The suggestion that Ms. Hughes' children should have inquired about charges to Mrs. Hughes' account, for a product which her children did not know had been expressly declined until 2015, is bizarre

and untimely. Rather than accepting responsibility for defrauding an elderly woman, BANA is pointing fingers at everyone but itself, including the deceased victim, in an attempt to escape being held accountable for engaging in reprehensible conduct that it does not deny occurred. Respondent cannot, however rely on newly-raised issues at this juncture in its effort to shirk responsibility.

CONCLUSION

For these reasons, as well as those addressed in Appellant's Initial Brief to this Court, the lower court's opinion should be reversed.

Respectfully Submitted,

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September 10, 2018