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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Master in Equity

Cynthia Graham Howe Master in Equity

Case No 09 CP 26 3470

Robert W Oskin Glenn Small
and Freddie Kanos — Appellants

v

Stephen Mark Johnson Michael Brown
Joan Conner Brown and J Conner LLC — Respondents

And which State of South Carolina ex rel
Allan Wilson Attorney General is — Intervening Party

SUPPLEMENTAL RECORD ON APPEAL

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SUPPLEMENTAL RECORD ON APPEAL
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	**CIVIL ACTION NO 2009-CP-26-3470**
Robert W Oskin Glenn Small, and Freddie Kanos	)	
Plaintiffs	)	**COMPLAINT (DECLARATORY JUDGMENT) (NON-JURY)**
vs	)	
Stephen Mark Johnson Michael Brown Joan Conner Brown, and J Conner LLC,	)	
Defendants	)	

The Plaintiffs, complaining of the Defendants herein would respectfully show unto this Honorable Court as follows

1 Plaintiff Robert W Oskin is a citizen and resident of Horry County South Carolina

2 Plaintiff Glenn Small is a citizen and resident of Lancaster County, South Carolina

3 Plaintiff Freddie Kanos is a citizen and resident of Mecklenburg County South Carolina

4 Defendant Stephen Mark Johnson ("Johnson) is a citizen and resident of Horry County South Carolina

5 Upon information and belief Defendant Michael D Brown ("Brown') is a citizen and resident of North Carolina, who owns property in Horry County, South Carolina

6 Upon information and belief Defendant Joan Conner Brown (Wife) is a citizen and resident of North Carolina Upon information and belief Brown and Wife are husband and wife

7 Upon information and belief Defendant J Conner LLC is a company organized and existing pursuant to the laws of the State of North Carolina

8 This is an action to set aside the fraudulent conveyance of a note and mortgage by and among the Defendants to declare the validity of that mortgage to declare the rights of certain parties to a parcel of land in Horry County South Carolina and for punishment under the South Carolina Statute of Elizabeth

9 This Honorable Court has jurisdiction over the parties hereto and the subject matter herein

FACTUAL SUMMARY

10 Oskin, Small and Kanos are creditors of Johnson as follows

a Oskin is a judgment creditor by virtue of a judgment obtained on December 11 2008 Oskin's judgment totals $1,262 499 99,

b Small and Kanos are the holders of a promissory note given by Johnson to Small The amount due on this Note as of April 1 2009 was $611 000 00 and

c Oskin is also the holder and owner, by assignment of a judgment granted on January 11, 2008, to David O Connell (the O Connell judgment') against Mark Johnson in the amount of $36 000 00 (A copy of the Assignment is attached hereto as Exhibit T)

11 Plaintiffs are owed with interest on the two judgments, over $2 26 million Oskin, as assignee of the O'Connell judgment is seeking recovery for both judgments

12 At all times relevant hereto Defendants Brown and Johnson were aware of Plaintiffs' status as creditors of Johnson

13 In May of 2006 Oskin filed suit against Johnson seeking money owed pursuant to a contract between Oskin and Johnson Johnson did not file an Answer

14 On or about November 30 2006 Defendants Brown and Johnson were deeded certain property, with improvements, described and known as Lot 13, Dunes Ocean Front Development Phase II (the ' Property) Upon information and belief Johnson uses the Property as his primary residence (See Deed attached as Exhibit A)

15 In order to obtain the loan from SCB&T, Defendants Brown and Johnson submitted a loan application showing their assets and net worth (A copy of the loan application is attached as Exhibit B) Defendant Brown indicated on his application that Wachovia Bank, N A managed $40 million of his assets

16 As a perquisite to making the loan, SCB&T required Brown to deposit $300 000 00 into an SCB&T account to develop a depository relationship (See page 6 of Exhibit B) Upon information and belief, Brown transferred some or all of these funds at the time of the closing of the loan (See HUD-1 Settlement Statement attached as Exhibit C)

17 In order to secure the loan from SCB&T, Brown and Johnson executed and delivered to SCB&T a $3 5 million promissory note (the Note') secured by a mortgage (the "Mortgage') on the Property (A copy of the Note and Mortgage are attached as Exhibits D and E)

18 The Note's terms required interest only payments at a rate of 7%, until November 30 2008 at which time the Note was due in full The due date was later change to December 10, 2009

19 Defendants Brown and Johnson were co-makers and co-obligors on the Note Pursuant to the terms of the Note SCB&T had the right to demand payment from either or both makers In the event of default SCB&T had the right to foreclose on the Mortgage

20 On October 17, 2007, Johnson signed a Confession of Judgment in favor of O'Connell in the amount of $36 000 00 On January 11 2008, O Connell filed the judgment with the Clerk of Court for Horry County (See Judgment attached as Exhibit U)

21 On November 3, 2008, a hearing was held in the Horry County Courthouse for Oskin's summary judgment motion against Johnson for the contract action The Honorable Diane Goodstein ruled in favor of Oskin granting his judgment in the amount of $1 million (this Order and judgment were amended by Order of Judge Goodstein on March 4, 2009) Johnson was in attendance at this hearing and was aware of the ruling (See Order for Summary Judgment and Order Amending that Order attached as Exhibits F and G)

22 On information and belief Defendants Brown and Johnson were informed and did believe that the value of the Property as of November 2008 was $2 5 million

23 On or about November 4, 2008, four days after the ruling against Johnson, Defendant Brown his agent, or someone acting on Brown's behalf, contacted SCB&T to inquire about the willingness of SCB&T to sell the Note and Mortgage to Brown for less than the full amount owed specifically $2 5 million (See screen print from SCB&T attached as Exhibit H and email between SCB&T and Scott Masel attached as Exhibit I)

24 Again on November 7 2008 SCB&T informed Brown, or his agent that Brown was a co maker on the Note and that SCB&T would foreclose on the Note and Mortgage and seek deficiency judgment against Brown if the Note was not paid in full (See Exhibit H)

25 Upon information and belief, Brown and Johnson considered refinancing the obligation with Wachovia (See Exhibit H) In September of 2008 Johnson s attorneys conducted a title search on the Property The title search revealed the existence of the O'Connell judgment, which is now held by Oskin Upon receipt of the title search results in September of 2008, by their agents the Browns and J Conner were aware of the O'Connell judgment

26 Defendant Brown did not want to be named in a foreclosure action and did not want Johnson to lose the house through foreclosure Furthermore, Brown did not want to lose the value of the investment he already made in the Property, in particular, the initial deposit of $300,000 00 into the SCB&T account

27 As sometime between November 7, 2008 and November 21, 2008, Brown met with representatives of SCB&T in person to discuss how each would proceed (See email from SCB&T attached as Exhibit I) The email correspondence in Exhibit I refers to Brown s purchase' of the Note and Mortgage SCB&T was fully informed of Brown s intent Following this meeting SCB&T decided not to demand payment of the full amount due on the due date of the Note Rather SCB&T delayed action so that Brown could obtain the funds to pay off the Note

28 In a separate email dated November 6 2008 Jim Boyd, an employee of SCB&T informed Brown's agent that Brown's purchase of the Note and Mortgage would be for the "Payoff" amount (See email attached as Exhibit J)

29 Upon information and belief Brown and Johnson sought counsel on how to keep the Mortgage filed and of record upon payment to SCB&T of the full amount due under the Note This was vital to Brown because the judgments would take priority over any other mortgage

30 Upon information and belief, Brown and Johnson were informed or were aware that they would not be able to obtain conventional financing to refinance the Note because of the decrease in value of the Property and because the judgments would be a lien that would have to be paid prior to or simultaneous with the refinance

31 Upon information and belief, Brown, Johnson, and their agent or agents decided upon the following course of action

a Brown would pay the full amount of the Note to SCB&T

b Brown and Wife and Brown's agent or agents, or anyone or several of them, would organize a company to act as the ' purchaser" or holder of the Note and Mortgage,

c The name of the company would combine the first initial of wife's first name Joan with her maiden name Conner to make it appear as if it were an unrelated company, (See people Search report for Joan Conner Brown attached as Exhibit K) and

d Rather than marking the Note ' Paid' and satisfying the Mortgage, SCB&T would assign the Note and Mortgage, through allonge and assignment respectively, to the newly formed company

32 Brown's and Johnson's, and their agent or agents , intent was to make it appear to creditors including Plaintiffs and others, that there was a legitimate purchase of the Note and Mortgage In fact, the formation of the new company and

assignment of the Note and Mortgage was a sham was fraudulent, and was done as part of a scheme and conspiracy to avoid creditors of Johnson, including Plaintiffs

33 Defendants set out to put their scheme into action

34 On or about November 19 2008, Sherri L McGirt as organizer, organized Defendant J Conner LLC (See copy of the Articles of Organization attached as Exhibit L)

35 Upon information and belief Sherri L McGirt is an attorney for McNair Law Firm in Charlotte, North Carolina Upon information and belief, Sherri L McGirt and McNair Law Firm provided legal advice and services to Brown

36 Upon information and belief, Defendant Wife is the sole owner and sole member of J Conner LLC and had knowledge of the entire transaction herein

37 On or about December 2, 2008 Brown or his agents informed SCB&T that Brown s funds would be available to pay SCB&T (See email from Scott Masel to SCB&T attached as Exhibit M)

38 Upon information and belief on December 2 2008 Brown or Johnson and their agents informed SCB&T of Brown and Johnson's desire to have SCB&T transfer the Note and Mortgage to J Conner (See Exhibit M)

39 On or about December 11 2008, Oskin's judgment against Johnson was entered on the Horry County judgment roll (See copy of Judgment form attached as Exhibit N)

40 Upon information and belief Defendants Brown and Johnson, either personally or through the knowledge of their agents were aware of the entry of Oskin's judgment on or about December 11 2008

41 Johnson and Brown ignored the judgments and proceeded with the scheme sham, and fraudulent transaction they had conjured up with some or all of the Defendants

42 On or about December 16, 2008, Brown requested that Wachovia wire $3 5 million of Brown s funds to SCB&T for payment on the Note Wachovia noted this transaction was a 'Customer transfer' and that Brown was the Caller" (See wire information attached as Exhibit O) SCB&T received this wire information

43 It is unclear to Plaintiffs how Brown and Wachovia funded the wire On information and belief, Brown had adequate funds invested in Wachovia to pay the full amount due under the Note

44 On information and belief, Brown either transferred his own funds to SCB&T or transferred the proceeds of a loan that Wachovia made to Brown Information received from Wachovia regarding the wiring of $3 5 million to SCB&T reference both a 'Customer Transfer" as well as the Wachovia Commercial Loans Department (See Exhibit O) Wachovia in furtherance of the fraudulent conveyance, has refused to provide information to Plaintiffs about this wire

45 According to SCB&T's records the amount due on the Note, on or around December 10, 2008 was $3 549,591 11 (See detailed printout of SCB&T attached as Exhibit P)

46 On or about December 16, 2008 Wachovia, at Brown s request wired $3 5 million to SCB&T pay off the Note (See Exhibit O)

47 The payment by Wachovia to SCB&T was made by or on behalf of Brown or Brown and Johnson and in fact, the wire transaction references Brown and Johnson as the beneficiaries of the wire SCB&T was aware that the funds paying

off the Note were Brown s and were for the benefit of Brown and Johnson (See Exhibits I and O)

48 On or about December 23, 2008, Brown executed and delivered a check in the amount of $44 303 31 drawn on Brown's Wachovia account, for full and final payment of the Note (See copy of check attached as Exhibit Q)

49 Rather than marking the Note "Paid ' and satisfying the Mortgage as required by law, SCB&T waited for direction from Brown and Johnson, or their agents

50 On or about December 30 2008, 14 days after receiving the wire of $3 5 million for the benefit of Brown and Johnson and 7 days after receiving Brown's check for the final payoff, SCB&T on the direction and request of Brown, Johnson or their agent or agents, assigned the Note and Mortgage to J Conner LLC (See Assignment of Mortgage and details of the same from Horry County's website attached as Exhibit R)

51 Throughout the Transaction Brown and his agents only provided Masel with enough information to benefit Brown On or about January 7, 2009, Scott Masel emailed SCB&T to inform them that he had just learned about the wire and check from Brown to SCB&T Masel at the direction of Brown and his agents, informed SCB&T that he was not filing a satisfaction of the Mortgage SCB&T was complicit with this part of the scheme and had a pecuniary interest in following Brown's direction To that end, SCB&T executed the assignment of the Note and Mortgage in January, but dated them December 30, 2008 (See email attached as Exhibit S)

52 Because the full amount due under the Note was paid by or on behalf of Brown or Brown and Johnson, the Note should have been marked Paid ' and the Mortgage satisfied as required by S C Code Ann § 36-3 602 (Supp 2008)

53 Because the Note was paid by or on behalf of Brown or Brown and Johnson, the Note should have been marked 'Paid" the Mortgage should have been extinguished, and Brown and Johnson should have held the property free and clear of any encumbrances other than Plaintiffs judgments and claims

54 On or about January 14, 2009, the assignment of the Mortgage was recorded in the office of the Register of Deeds for Horry County

55 All of the acts of Brown, Johnson Wife SCB&T and J Conner with respect to the Note and Mortgage, and the payment and assignment of both (the "Transaction) were done with the full knowledge and consent of each other and were done with the intent to avoid creditors of Johnson

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment under S C Code Ann §15-53-10)

56 Plaintiffs reallege each and every allegation above as if repeated verbatim herein

57 This action is brought pursuant to S C Code Ann §15-53-10 et seq , which is known as the Uniform Declaratory Judgment Act

58 Plaintiffs request that this Court declare that Plaintiffs are creditors of Johnson

59 Plaintiffs request that this Court declare the rights of the parties in the Property, to include the rights of Oskin as a judgment creditor of Defendant Johnson, under both the O'Connell judgment and his own, and the priority of the two judgments with respect to the Mortgage in Defendant J Conner s possession

60 Plaintiffs request that this Court declare that the assignment of the Mortgage to J Conner was a fraudulent transfer under South Carolina's statute of Elizabeth, which is codified at S C Code Ann §27-23 10, et seq

61 Plaintiffs request that this Court declare that the Mortgage should have been satisfied or extinguished when payment was made by or on behalf of Brown or Brown and Johnson

62 Plaintiffs request that the Court declare that the assignment of the Note and Mortgage was fraudulent when made because some or all of the Defendants were aware that the Note was paid in full, by or on behalf of the obligor or obligors, and that the Mortgage as the security for the underlying debt should have been satisfied or extinguished when such debt was extinguished

63 Plaintiffs request that the Court declare that the assignment of the Note and Mortgage by SBC&T was a fraudulent conveyance and was had or made with the intent or purpose to delay, hinder, or defraud Plaintiffs, as creditors, of their just and lawful actions suits debts, accounts damages penalties and forfeitures

64 Plaintiffs request that the assignment of the Note and Mortgage be deemed and taken to be clearly and utterly void, frustrate and of no effect, and that J Conner's interest in the Mortgage be declared void

65 Plaintiffs request that the Court declare that because the Property was free and clear from any encumbrances due to payment of the Note, any mortgage assigned to J Conner was a mortgage given at the direction of Defendants Brown and Johnson as owners of the property, and that such grant of a mortgage was a violation of S C Code Ann § 27 23-10, as it was made without consideration,

made to a related company and was made to avoid delay Plaintiffs as creditors of Johnson

66 Plaintiffs request that the Court declare that the two payments to SCB&T made the property free and clear of encumbrances other than Plaintiffs' claims and judgments

67 Plaintiffs request that the court declare that the Transaction is controlled by S C Code Ann §36-3-602 (Supp 2008)

68 Plaintiffs request that the court declare that the payments made to SCB&T were made by or on behalf of Defendant Brown or Defendants Brown and Johnson, as contemplated by S C Code Ann §36-3-602 (Supp 2008) such that the Note was paid, and as a result, that the Mortgage must be extinguished

69 Plaintiffs request that the Court declare that one year s value of the Mortgage is $245 000 which amount is based on the amount of interest on the Note which the Mortgage secures

70 Plaintiffs request that the Court declare that each Defendant was a party to, was privy to had knowledge of or wittingly or willingly put in use avowed maintained justified or defended, or any of them, the feigned, covinous and fraudulent transfer of the Note and Mortgage as true, simple and done had or made bona fide or upon good consideration, all of which was done of or to the disturbance or hindrance of the Plaintiffs

71 Plaintiffs request that the Court declare that each Defendant incur the penalty and forfeiture of one year's value of the mortgage, one moiety whereof shall be for the use of the State and the other moiety to the Plaintiffs who were grieved by such

feigned and fraudulent conveyance, encumbrance or limitation of use of the property

72 Plaintiffs request that the court declare that judgments have priority over any other liens on the Property

FOR A SECOND CAUSE OF ACTION
(Punishment under South Carolina Fraudulent Conveyance statute)

73 Plaintiffs reallege each and every allegation above as if repeated verbatim herein

74 Defendants Johnson Brown, Wife, and J Conner were all aware of the payment of the Note and assignment of the Mortgage and were aware of the judgments

75 Because all Defendants were parties to avowed, had knowledge of, and wittingly or willingly put in use, maintained justified or defended the Transaction, as true simple and done each Defendant is responsible if the assignment of the Mortgage is set aside as a fraudulent conveyance, for one year's value of the Mortgage a moiety of which is payable to the State, and the remaining moiety of which is payable to Plaintiffs as required by S C Code Ann §27-23-30

76 One year s value of the Mortgage, as evidenced by the Note, is 7% of $3 5 million or $245,000 00

77 Plaintiffs are informed and do believe they are entitled to an order of this Court granting judgment against each Defendant and any other person or entity that had knowledge of the Transaction, in the amount of $245,000 for each such party person or entity

Wherefore having alleged the above, Plaintiffs pray for the following

a The Court to declare the rights of all parties in the Property

b The Court to declare the priority of the judgments held by Oskin

c The Court to declare the status of the Mortgage in J Conner's possession

d The Court to declare that the transfer of the Mortgage was a fraudulent conveyance made in attempt to avoid Plaintiffs as creditors of Defendant Johnson

e That the Court punish each defendant as required by S C Code Ann §27-23-30 and that the Court grant judgment against each Defendant for one year's value of the Mortgage's moiety to the State and the remaining moiety to the Plaintiffs

f That an expedited hearing and speedy trail be granted pursuant to Rule 57 SCRCP

g That the Court award costs and fees related to the prosecution of this action and

h Any other damages awards or relief this Court deems appropriate

MULLEN WYLIE, LLC

By _____

Mark A Brunty Esquire
4710 Oleander Drive
P O Box 1980
Myrtle Beach SC 29578
(843) 449-4800
Attorney for Plaintiffs

November 20 2009

Myrtle Beach South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C/A 2007-CP-26-2702
DAVID B O'CONNELL	)	
	)	
Plaintiff,	)	
v	)	CONFESSION OF JUDGMENT
	)	
MARK JOHNSON	)	
	)	
Defendant.	)	

In the consideration of an agreement reached between the parties named above, the receipt of which is hereby acknowledged, the undersigned Mark Johnson, in the presence of one (1) witness, hereby confesses judgment as follows

1 Mark Johnson, hereinafter referred to and collectively referenced above as the Defendant, hereby acknowledges and confesses that he is liable to David O'Connell, hereinafter referred to and referenced above as the Plaintiff, for a debt for services provided by the Plaintiff to the Defendant

2 The said Defendant hereby acknowledges and confesses that the foregoing described indebtedness is in the amount of **$36,000 00**, actual charges Said Defendant further acknowledges and confesses that he is liable to the Plaintiff for said indebtedness, all of which is now due and owing.

3 In settlement of the foregoing described indebtedness, the said Defendant has agreed to pay, and the Plaintiff has agreed to accept, the sum of **$31,000 00** to be paid in full on or before Monday January 9, 2008

4 The Defendant hereby acknowledges and agrees that all payments described above will be forwarded to the law office of F Miles Adler, P O Box 50460, Myrtle Beach, SC 29579, and that all payments made by the Defendant in the form of a check, money order, or other negotiable instrument, shall be made payable to David O'Connell

5 The Defendant hereby acknowledges and agrees that, in the event that (s)he is ever more than one day late in making any of the foregoing described payments, and/or, in the event that any check, money order or other negotiable instrument (used by Defendant in making the payments described above) is not honored, or is dishonored, at any time, for any reason whatsoever, by the institution or other entity that issued the same, then in either one and/or both of said events,

6. The Defendant hereby acknowledges and confesses that the foregoing described indebtedness is now justly due and owing to the Plaintiff and he/she hereby authorizes the Horry County Clerk of Court to file this Confession of Judgment at any time it is presented for filing by the Plaintiff or its attorneys. The Defendant understands, however, that this Confession of Judgment will be held by the Plaintiff's attorney and not filed with the Horry County Clerk of Court so long as Defendant continues to make the payments as outlined in Paragraphs 3, 4, and 5 above In addition, the Defendant understands that when it makes the final payment described above, Plaintiff's attorney agrees to mark this Confession of Judgment "PAID AND EXTINGUISHED "

DATED AND WITNESSED this 17th day of October, 2007

Witness

Defendant

THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE
THIS COMMUNICATION IS FROM A DEBT COLLECTOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

VERIFICATION

PERSONALLY APPEARED before me the undersigned witness, who being duly sworn, deposes and says that (s)he witnessed the execution and delivery of the foregoing Confession of Judgment, by Mark Johnson

Witness

SWORN TO and subscribed before me
this 17th day of October 2007

Notary Public for South Carolina
My Commission Expires 5/14/17

STATE OF SOUTH CAROLINA C/A 2007-CP-26-2702

COUNTY OF HORRY

ASSIGNMENT OF JUDGMENT

For Five Hundred and No/100s ($500 00) Dollars and other good and valuable consideration, receipt whereof is hereby acknowledged, the undersigned David B O Connell ("Assignor") hereby sells transfers sets over and assigns unto Robert W Oskin ("Assignee") all of his interest in that certain Confession of Judgment and Judgment against Mark Johnson which Confession was filed in the Clerk of Court for Horry County on January 11 2008 The Assignor represents that prior to signing this Assignment Assignor has not assigned this Judgment to any other party and has not waived any rights, nor released any party from liability for the design construction or repair of Assignee s residence

Effective as of this 4th day of November 2009

Witness

Thomas P. Jenkins

Margaret E. Blanchard

David B O Connell

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

PROBATE

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named David O'Connell Assignor sign, seal and as his/her act and deed deliver the within written Assignment of Membership Interest and that s/he with the other witness whose signature appears above witnessed the execution thereof

Thomas R. Johnson

SWORN to before me this 4th day of November, 2009

Margaret R Stancil (L S)
Notary Public for South Carolina

My Commission Expires Feb 12, 2014

MARGARET R. STANCIL NOTARY PUBLIC SOUTH CAROLINA

FILED
HORRY COUNTY
2009 NOV -6 AM 8 30
CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

PROMISSORY NOTE

For Value Received, the undersigned **Mark Johnson and Johnson Coastal Consulting, LLC**, (hereinafter, collectively, "Maker") promises to pay to the order of **Glen Small and Freddie Kanos** (hereinafter, collectively, "Lender") in lawful money of the United States of America, the principal sum of **Two Hundred Thousand and 00/100 ($200,000 00) Dollars.** The loan shall be repaid as follows:

a. The amount of **$20,000.00 per month**, paid on the 4th day of each month beginning August, 2007, said amount to include all interest, fees and costs related to the loan, and said payment to continue monthly, for a period of no longer than four months, until paid in full as set forth below,

b A balloon payment in the amount of $200,000.00 on or before November 4 2007, said amount to include all interest, fees, penalties, late fees and costs thereon.

If any payment described above is not made by the due date, Maker shall pay a late fee of **$1,000.00 per day** will be imposed and shall continue to accrue in that amount until paid in full. Should the Maker fail to pay any payment within 10 days of the payment date set forth above, the Lender may, at his, her or its option, declare the entire outstanding indebtedness, principal interest and late charges due, payable and in default. In like manner breach of any terms of any instruments given to secure this note shall accelerate the same at holder's option. In the event the interest on the loan exceeds legal limits, then this note shall automatically revise to the highest interest rate allowed by law

Should this note be place in the hands of an attorney for collection after the same shall for any reason become due, or if same shall become involved in any legal proceedings necessary to protect or collect same, or to protect its interest in the collateral, the Maker shall pay all costs of collection including reasonable attorney fees.

Demand, presentment, protest or other requirements of notice or acts of diligence are waived by all signers hereof, either as makers or endorsers.

July 3rd 2007

Mark Johnson
Individually, and on behalf of and as owner of
Johnson Coastal Consulting, LLC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	**CIVIL ACTION NO 2009-CP-26-3470**
Robert W Oskin Glenn Small and Freddie Kanos,	)	
Plaintiffs	)	**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO ALTER OR AMEND OR FOR A NEW TRIAL**
vs	)	
Stephen Mark Johnson Michael Brown Joan Conner Brown, J Conner LLC and South Carolina Bank and Trust N A	)	
Defendants	)	

Plaintiffs respectfully submit the following Memorandum in support of their Motion to Alter or Amend or for a New Trial

The Order of this Court contains several errors of law and ignores salient facts that are crucial to the outcome of this case For the reasons stated herein the Order must be amended to accurately reflect the well-settled law of this State, or a new trial must be granted

I This Court found that Michael Brown paid the SCB&T Note with his funds, but improperly applied the law related to the payment of instruments to this transaction

Was a payment made? The relevant South Carolina statutory and case law says yes What happens after such payment is made and hypothetical scenarios about what would happen if no payment were made are completely irrelevant to the analysis and answer of this question This Court seems to have stumbled over this mental hurdle

This Court ignored the equitable maxim Equity follows the law Michael Brown had a Note coming due and needed to take care of his obligation Hypothetically if he paid it transparently and legitimately with his funds, or through a conventional refinance, his co-

owner s judgment creditors would have subjected Brown s interest in the Property to seizure and sale and he would have lost a portion or all[1] of his investment and interest in the Property Similarly, if he allowed it to be foreclosed he would have lost his interest and investment in the Property [2]

Cases do not turn on hypothetical scenarios or "if this, then that' analysis Instead, this Court must look at what actually happened and apply precedent to those facts Because neither option mentioned above was acceptable to Michael Brown, a man of significant wealth who did not want to lose any more money on this investment he negotiated for and obtained a loan to pay his obligation on the Note By doing this through a shell company Brown kept the Note and Mortgage alive as a shield against judgment holders

This Court found that SCB&T assigned the Note & Mortgage to J Conner LLC upon payment of $3,544,303 31 in funds supplied by Michael Brown, a co-obligor on the SCB&T Note (See Letter of the Honorable Cynthia Graham Howe, dated February 19, 2010, attached as Exhibit A) Despite these facts the Court held that the Note was not paid This ruling is in direct conflict with both the statutory and common law of South Carolina Because an obligor made payment to the full extent of the Note the obligation of all parties to the instrument was discharged by operation of law

A The South Carolina UCC requires a finding that a payment was made and the accompanying instrument was discharged

South Carolina s version of the revised Article 3 of the UCC controls this issue S C Code Ann §36-3-602 (Supp 2008), titled 'Payment", provides an instrument is paid to the

[1] Due to Brown s and Johnson s ownership interest as Tenants in Common an action by Johnson s judgment holders to partition the Property would have placed choices on Brown to either buy Johnson s interest to satisfy the judgment or lose it through a judicial sale

[2] In the Court s letter ruling Her Honor assumes that the judgments would have been distinguished There is no evidence in the record about what a foreclosure sale would have brought so the Court s conclusion is particularly confusing

extent payment is made by or on behalf of a party obliged to pay the instrument ' In this case Brown a party obliged[3] to pay the Note either made payment or had payment made for him to the full extent of the amount due At the exact moment[4] that payment was made the obligation under the instrument was discharged *eo instante ipso jure*, as set out in §36-3-602(c) 'to the extent of a payment under Subsections (a) and (b), the obligation of the party obliged to pay the instrument is discharged '

Any dispute about the effect of payment by an obligor and co-maker is resolved by the South Carolina Reporter's comments on the statute

> The effect of payment by one party to a note upon the obligation of other parties to the note has generated several appellate opinions interpreting the former statute See Williams v Sandman, 187 F 3d 379 (4th Cir 1999) (South Carolina law) United Carolina Bank v Caroprop, Ltd 311 S C 376, 429 S E 2d 197 (S C App 1993) Jetfcoat v Morris, 300 S C 526, 389 S E 2d 159 (S C App 1989) The rules distilled from these cases are (1) if the party paying the note is an accommodation party, that party has a right of reimbursement against the maker, (2) if the party making payment is a co-maker of the note and not an accommodation party, the payment will discharge the obligation of all co makers of the note but (3) the co-maker who paid the note has a right to contribution from the other discharged co-makers The current statute confirms these results

(Emphasis added)

The only case found to have interpreted this section of the UCC involves facts that are eerily similar to the instant action In Metro Engineering v Metro-Erickson Ventures, No 0 178 (Ct App Iowa 2000) (attached) a co-obligor on a note, who did not want to be named in a foreclosure action, caused a company he owned to ' purchase a note and mortgage by paying the lender the balance due ' [The obligor] or some individual or entity acting at his direction and on his behalf paid off the note ' Id The Iowa court ruled that this purchase was a payment ' by or on behalf of' an obligor and, because of the UCC, the debt for all obligors was satisfied and the

[3] See discussion regarding Brown s status as a borrower and maker in the equitable subrogation discussion
[4] When Brown s check was received by SCB&T for the balance due

underlying mortgage was extinguished

No one disputes that Brown was a co-maker of the Note This Court found that Brown supplied the funds due for the Note and guaranteed the J Conner loan Even if they were not Brown's funds, either Brown s wife, or a company he directed and controlled, made the payment for his benefit and to satisfy his obligation As a result the law requires the discharge of the obligation under the Note

B This Court's ruling conflicts with South Carolina case law

South Carolina law requires a finding that a payment was made and that the Note and Mortgage was discharged The Plaintiffs relied upon Jeffcoat for its holding[5] that when an obligor makes payment on an instrument, the obligations of all obligors are discharged This Court erroneously believes that Jeffcoat applies only to situations where a receiver makes the payment and attempts to foreclose on other obligors This Court ignored the more broad rule adopted in that case Thus, we hold that payment of a note by a maker or an appointed receiver of the maker operates to extinguish the note, discharging the liability of any co-makers on the note Jeffcoat at 529, 161

The question before the Jeffcoat Court was whether a payment made by a receiver was analogous to payment made by an obligor The Court went into a laborious analysis of receivers and held that the receiver stood in the shoes of the party in receivership and that the receiver s payment was the same as a payment by the obligor The Jeffcoat Court at once adopted and applied the general rule – payment made by an obligor extinguishes the debt – to a more narrow circumstance – where a receiver makes the payment

South Carolina courts consistently cite Jeffcoat for the general rule 'The Jeffcoat court held that a maker's payment of a note extinguishes the note and discharges any co-makers'

[5] S C Code Ann §36 3 602(a) (Supp 2008) is nearly a word for word codification of the Jeffcoat holding

liability on the note Williams v Sandman, 187 F 3d 379 (4th Cir 1999) Another such case, and one with a factual scenario similar to the instant one, is Hobbithouser v Crosby 2008-UP 339 (Ct App 2008) (attached) In Hobbithouser an obligor paid off two notes and then obtained an assignment of the notes and mortgage to a company he controlled The Court of Appeals, relying heavily on Jeffcoat, ruled that the payment made by the maker extinguished the note and mortgage ' In accordance with South Carolina jurisprudence Crosby s two notes and mortgage were extinguished when he, as the sole debtor on the notes and mortgage paid the debts in full Hobbithouser

Jeffcoat and its progeny requires a finding that the obligation of both makers of this Note was extinguished when Brown, a co-maker and co-obligor, made the payment

C Because of the payment, the Mortgage should have been discharged

Because Brown, an obligor, made payment, the Mortgage should have been discharged immediately The law of this State on this subject has been settled for over a hundred years It is actually based, in part, on the doctrine of merger It is also based on logic Brown himself expressed the logical reasoning when he testified that he could not loan money to himself, as that would be absurd Through his testimony we know that Brown was aware that he could not own both the Property and the Mortgage This was the impetus for the entire scheme – Brown could not buy his own Mortgage and keep it from merging into his fee simple interest

As early as 1889 our Supreme Court recognized the same absurdity Brown recognized

> The owner of the fee subject to a charge who is himself the principal and primary debtor, and is liable personally and primarily for the debt secured cannot pay off the charge, and in any manner or by any form of transfer keep it alive Payment by such a person and under such circumstances necessarily amount to a discharge The encumbrance cannot be prevented from merging by an assignment taken directly to the owner himself, or to a third person as trustee This rule applies especially to a mortgagor who continues to be the primary and principal debtor

Fowler v Wood 31 S C 398 10 S E 93 (1889) Brown unknowingly echoed the Fowler Court s language about assigning his own mortgage to himself "The assignment to one of his own debt is an absurdity Fowler citing Sherwood v Collier 29 Am Dec , 264

A mortgage is analogous to a judgment because both act as a lien on real property Therefore the payment of a note secured by a mortgage should be treated like the payment of a judgment Its very purpose is to enforce payment from the defendant in execution and when he pays the money that is the end of the law the transaction is payment *eo instanti*, and not merely purchase for future use against himself Agnew v Charlotte, Columbia & Augusta R R Co , 24 S C 18 (1885) (finding that payment of a judgment ends the judgment instantly)

In Hobbithouser, supra the court held that the transfer of a satisfied mortgage to the maker s company was a nullity as the mortgage was dead paper because [o]nce the debts were paid, the mortgage was satisfied and there were no rights to assign due to the satisfaction of the underlying debt Hobbithouser, citing Ives v Rutland, 135 S C 173, 133 S E 539 (1926) (mortgages become dead paper' when underlying obligation is paid off)

Another case similar to the instant one is Langehans v Smith, 347 S C 348, 554 S E 2d 681 (Ct App 2001) There, three obligors were in default of their obligation on a Note, which was secured by a Mortgage As part of a contrived 'purchase of the Note and Mortgage the wife of one of the obligors paid the holder for half of the Note and another obligor, coincidentally name Michael Brown, and his wife paid the other half of the Note The wives then obtained an assignment of the note and mortgage The lender then purported to assign the note to the wives Langehans at 351 682 The Court found that the 'purchase was a gratuitous payment by one spouse and a payment by Michael Brown, which discharged the husbands' obligations under the note

II This Court erred in finding that Brown was equitably subrogated to Johnson

The ruling of this Court states that Michael Brown would be equitably subrogated to Stephen Mark Johnson's interest in the Property for amounts paid on behalf of Johnson [6] A finding that Brown is equitably subrogated to anyone's interest is erroneous because Brown does not meet three of the five elements required for equitable subrogation This question is not close

The elements of equitable subrogation are

1 The party claiming subrogation has paid the debt,
2 The party was not a volunteer but had a direct interest in the discharge of the debt or lien
3 The party was secondarily liable for the debt or for the discharge of the lien,
4 No injustice will be done to another party by the allowance of the equity and
5 The party claiming subrogation must not have knowledge of any intervening lien holder

United Carolina Bank v Caroprop, Ltd , 316 S C 1, 446 S E 2d 415 (1994), Dedes v Strickland, 307 S C 155 414 S E 2d 134 (1992), Pee Dee State Bank v Prosser 295 S C 229, 367 S E 2d 708 (Ct App 1988), Dodge City v Jones 317 S C 491 454 S E 2d 918 (Ct App 1995)

The first step of analyzing equitable subrogation is to determine which party is seeking it The fact that Brown is seeking subrogation is proof enough that he is not entitled to any equitable relief because he has maintained throughout this matter that J Conner paid the debt For the sake of argument we press on and analyze subrogation from Brown s point of view [7]

Brown only fails to satisfy three of the five elements Despite the farce perpetrated by the Defendants Plaintiffs will not dispute what is obvious Brown paid the debt and, as an obligor and co-maker, had a direct interest in the discharge of the debt (in reality he had a larger

[6] This Court s Order erroneously states that Brown would be equitably subrogated to Stephen Mark Johnson s interest in the Property (See Paragraph 35) For the purposes of this Motion Plaintiffs assume that the Court meant that Brown was subrogated to SCB&T s interest in the Property which interest might actually cut short the rights of Oskin as a judgment/lien holder on the Property and not Johnson who was not a creditor

[7] Because the Court did not address J Conner s right to equitable subrogation Plaintiffs will not address it here Regardless J Conner is not entitled to equitable subrogation and cannot satisfy the five elements

interest in not discharging the debt) However, Brown does not satisfy the remaining three elements In addition because equitable subrogation seeks equity, the party requesting it must do equity and must come with clean hands See Prudential Investment Co v Connor, 120 S C 42, 112 S E 539 (1921) (party seeking equity must be acting with clean hands) On this, Brown again falls flat

A Brown was not secondarily liable for the debt

[E]quity will deny the right of subrogation to one who pays or has paid a debt for which he was at the time primarily liable' Dunn v Chapman, 149 S C 163, 146 S E 818 (1929) (emphasis added) Brown, as a Borrower and maker of the Note was primarily liable for the entire debt

Brown is primarily liable for the Note under both the UCC and the Note itself S C Code Ann §36-3-412 (Supp 2008) states that the 'issuer of a note is obliged to pay the instrument (1) according to its terms at the time it was issued The term 'issuer' "means a maker or drawer of an instrument ' See S C Code Ann §36-3-105 (Supp 2008) The terms of the Note itself sets out each Borrower s liability in paragraph 8

> If more than one person signs this Note each person is fully and personally obligated The Note Holder may enforce its rights under this Note against each person individually or against all of us together This means that any one of us may be required to pay all of the amounts owed under this Note

This case and these facts do not fit into the scenario before the Court in Caroprop, where one of two obligors transferred his interest in the property to a third party that took over debt payments Caroprop held that, upon transfer of one obligor s interest in the property, the property became primarily liable for the debt and the remaining obligor was secondarily liable for the other s debt Neither Brown nor Johnson transferred their interest in the Property therefore each remained primary obligors under the express terms of the Note

B Allowing subrogation causes injustice to the Plaintiffs

Allowing Brown to be subrogated to the interests of SCB&T will unequivocally cause an injustice to Plaintiffs, especially Oskin who would have been able to sell the Property to pay his judgment when the Property was worth enough to pay both his lien and that of Ameris [8]

Brown had to fulfill his obligation to SCB&T but knew that if he obtained a conventional refinance, or made the payment himself, the Mortgage would be extinguished and Oskin s judgments – both his and O'Connell s, which was assigned to Oskin – would take priority Brown used J Conner as a straw company and conduit for his funds He then obtained an assignment of the Note and Mortgage to J Conner, his alter ego, so that he could control the Property and prevent Johnson s creditors from affecting his interest in it and keep the Mortgage in place as a shield against the judgments Upon payment of the Note and discharge of the Mortgage, Oskin's judgments would take priority over the extinguished Mortgage When the payment was made the Property had enough equity to sell to satisfy the judgments and the Ameris mortgage Allowing equitable subrogation in this case would allow Brown to leapfrog Oskin s judgments and would promote the result Brown sought to accomplish when he conspired with his wife J Conner his nephew, and others

This scenario was similar to the one facing the lower court in Langehans Several judgment creditors of one of the obligors in that case challenged the superiority of the wives mortgage against their judgments While not at issue in the Court of Appeals decision that is reported[9], the court did note the referee s findings 'The special referee further found that it would be extremely inequitable to Flint Smith's judgment creditors to allow Wives to achieve

[8] Of course this assumes that the Court properly analyzes the effect of the payment by Brown which would extinguish the first mortgage and leave only the Ameris $500 000 mortgage and Oskin s $1 000 00 00 judgment as liens on the Property

[9] A previous opinion discussed this and other issues however that opinion was withdrawn and substituted with the current opinion which dispensed with the appeal by noting the issues were not raised to the trial court

priority status through their collusion with Husbands The same conclusion should be reached here, where Brown is attempting to achieve priority status through collusion with his wife J Conner and Johnson

C Michael Brown had actual knowledge of at least one lien holder

Brown is not entitled to equitable subrogation if he had knowledge of lien holders This Court ignored the fact that Brown had actual notice of an intervening lien creditor, specifically David O'Connell The evidence on this issue is clear Brown testified about a report' prepared by his attorneys which listed amounts owed by Mark Johnson The report was a title search and included a copy of the judgment given by Johnson to David O Connell Brown testified that Johnson informed him that Johnson did indeed owe money to David O Connell In addition, Brown was aware of Johnson's debt to Oskin and the impending judgment against Johnson in Oskin s action As a result, Brown fails this element

III This Court erred by not finding that J Conner was the alter ego of Michael Brown

This Court should have found that J Conner was merely the alter ego of Michael Brown[10] because J Conner existed only to accomplish the goals of Michael Brown and Michael Brown completely dominated and controlled J Conner s activities Moreover Brown testified that if he did not owe a debt to SCB&T J Conner, LLC would have never existed In addition, allowing the entity to stand on its own would promote the fraudulent enterprise entered into by the Defendants

The alter ego theory is a procedural remedy and one that the Court can employ to disregard the actions of an entity if that entity is considered to be acting at the behest of a dominant entity or person See Colleton County v School District 371 S C 224 638 S E 2d

[10] Again the Order of this Court erroneously states the Michael Brown is not the alter ego of J Conner LLC Presumably this Court meant to find that J Conner is not Michael Brown s alter ego Plaintiffs argument is and the fact of this case show that J Conner is the alter ego of Michael Brown

685 (2006), Drury Development Corp v Foundation Insurance Co , 668 S E 2d 798 (2008) (fn 2 "alter ego describes a theory of procedural relief")

A court will disregard an entity as an alter ego where (1) the subservient entity functions solely to achieve the goals of the dominant entity, (2) the subservient entity manifests no separate interest from the dominant entity, and (3) fraud or misuse of control by dominant entity results in injustice Colleton County

A Goal of Dominant Entity – Michael Brown

Michael Brown s goal in late 2008 was to satisfy his obligation to SCB&T while keeping the Mortgage in place as a shield against creditors and judgment holders He was aware that he could not do this alone J Conner shared the exact same goals and no other – it did not even try to collect on the amount owed on its Note Brown merely used J Conner to accomplish indirectly what he could not do directly In fact he testified that if he did not owe money to SCB&T there never would have been a J Conner LLC Clearly, J Conner was merely a vehicle to achieve Brown s goals

B J Conner manifests no interests separate from Michael Brown

J Conner has no interests separate from Michael Brown s interest The only reason J Conner was formed was to satisfy Michael Brown s obligation and to keep the Mortgage in place as a shield to protect Michael Brown s interest in the Property For proof this Court needs to look no further than J Conner s Operating Agreement In addition, J Conner has required no payment from Brown or Johnson on the Note Any legitimate company that purchased a Note would require payment from the obligors under the Note J Conner is not seeking to protect its interests because it has none separate from Michael Brown

C Fraud or misuse of entity results in injustice

The third element is clearly met as Michael Brown's use of J Conner was for the sole

purpose of defrauding and hindering and delaying Plaintiffs, all of which resulted in injustice Again, this could not have been accomplished without the J Conner J Conner was organized to satisfy Brown s obligations and to keep the Mortgage in place as a shield on the Property If Brown paid the debt in a straightforward way – either by refinance or payment – the Mortgage would have been extinguished and Oskin could have seized and sold the Property to satisfy both the Ameris lien and his own judgments The only reason to create this company and conduct the transaction in this manner was to harm the Plaintiffs

D Control by dominant entity

The uncontroverted facts of this case reveal that Michael Brown exercised total domination and control over J Conner s business activities Brown had his attorney organize the LLC Brown alone negotiated the purchase' of the Note from SCB&T and Brown alone procured the J Conner loan from Wachovia The facts and evidence show that Joan Conner Brown served no role in the LLC and had no control over its activities

IV This Court erred when it found that Defendants did not violate the South Carolina Fraudulent Conveyance Act

The law of this State is clear A mortgage is only as good as the debt it secures, if there is no debt to secure, the mortgage is worthless Transferring the mortgage and keeping it in place after payment violated the Act because the Mortgage is no security and is only a ward to keep creditors at bay and shelter Brown and Johnson Cf Collins vs Myers 16 Ohio 547 (Ohio 1847) Because the Statute of Elizabeth was adopted to prevent and redress these types of transactions it must be applied in this instance

A Keeping the mortgage in place after payment to SCB&T and assigning it to J Conner violated the Act

By keeping the Mortgage in place and transferring it to a shell company Defendants kept alive and ongoing the alienation of the Property with the intent of hindering and delaying

creditors or others Transfers of mortgages and similar uses of liens and judgments to shield property from creditors have long been subject to laws prohibiting fraudulent conveyances See SCNB v Halter, 293 S C 121, 359 S E 2d 74 (Ct App 1987), Tuller v Nantahala Park Company, 276 S C 667 281 S E 2d 474 (1981)

Similarly, Defendants' attempt to set up their scheme as a purchase/sale is not novel and courts faced with similar schemes disregard them as fraudulent 'If a mortgage is in fact paid but instead of being discharged is fraudulently assigned with intent to defraud creditors, it is not a valid lien as to creditors ' McMaster v Campbell, 41 Mich 513 2 N W 836 (Mich 1879), cited in 37 C J S Fraudulent Conveyances § 54 The South Carolina Supreme Court applied the same rule and logic when the lien that was paid was a judgment ' A judgment will not avail against creditors where it is fraudulently kept open after it has in fact been paid nor will a sale by a sheriff under such a judgment give a good title to a purchaser who participated in, or knew of, the fraud 37 C J S Fraudulent Conveyances § 55 citing Booth v Moret 3 S C L 216 (S C Supreme Court date unknown)

The Defendants conspired to give a Mortgage, either the extinguished one or a new one, to J Conner Either action violates the Act The law of South Carolina with respect to mortgages under the statute was laid down in Magovern v Richard, 27 S C 272, 3 S E 340 (1887) To be void under said statute or at common law, it should be made to appear that it was either without consideration or that it was *mala fide* one or both See Lenhardt v Ponder, 64 S C 354 42 S E 169 (S C 1902) citing Magovern. Giving the Mortgage to J Conner was done to hinder or delay creditors or others and was *mala fide* Similarly, because of the reality of the situation, it was given without consideration

The Court erred when it applied the law regarding fraudulent conveyances of real property to these Defendants' acts of keeping a Mortgage in place and conveying it after

payment The Court here found that fraudulent conveyances will be set aside under two conditions First, when the transfer is made by a grantor with the intent of defrauding creditors and others, and Second where a transfer is made without consideration See Coleman v Daniel 261 S C 198, 199 S E 2d 74 (1973) This "general rule" does not cover the entirety of the statute s application and is not applicable to the facts of this case because no real property was conveyed

As stated in the first sentence of the Statute, its applicability extends to ' Every gift, grant, alienation, bargain transfer and conveyance The term conveyance, when adopted in the original Statute of Elizabeth in 1585 referred to the strict legal definition of conveyance meaning a transfer of legal title to land Cases like Coleman that cite the general rule only apply to transfers of legal title to land This case does not Rather this case involves the alienation of property and the transfer of a profit, charge, or chattel, which was made to delay, hinder, and defraud Plaintiffs

As succinctly put by Justice Pleicones in Carr v Guerard, 365 S C 151, 616 S E 2nd 429 (2005) a case where cash was secreted to keep it out of the reach of creditors ' The Statute of Elizabeth renders void any transfer of property made with intent or purpose to delay, hinder or defraud creditors or others " (Emphasis added) The Property of the debtor here was transferred charged, alienated, and encumbered in an effort to hinder or delay the Plaintiffs As a result the statute applies

B Brown was a debtor under the Act

The Court erroneously held that Michael Brown was not a debtor of Oskin Brown, as the co owner of the Property, whose interest was subject to partition by the judgment creditors of his co-owner, was a creditor under the liberal and broad definition of the word creditors and the term creditors and others" This ruling ignores the language and intent of the Statute

C. Intent to defraud is present.

Defendants' intent to defraud is clear from the facts and underlying circumstances regarding the organization of J Conner, the testimony of Michael Brown, and payment of the amount due to SCB&T. The sole reason to keep the Mortgage in place and hide the fact that a payment was made was to hinder and delay the Plaintiffs' efforts to collect, which is fraud under the Act

In cases under this statute Plaintiffs often must prove fraud through the use of circumstantial rather than direct evidence In Coleman, supra, the Court adopted the widely used "badges of fraud" analysis to determine if fraud existed in fraudulent transfer cases The badges of fraud include (1) insolvency or indebtedness of the transferor or debtor, (2) lack of consideration for the conveyance, (3) relationship between the transferor and the transferee, (4) the pendency or threat of litigation; (5) secrecy or concealment, (6) departure from the usual method of business, (7) transfer of debtor's entire estate, (8) reservation of benefit to the transferor, and (9) the retention by the debtor of possession of the property. Courts generally require several badges of fraud to infer that fraud took place See 37 Am Jur (2d), Fraudulent Conveyances, §10 (1968)

Most, if not all, of the badges of fraud are present in this case (1) Johnson is insolvent and indebted to Plaintiffs, (2) J Conner, LLC paid no consideration for the Mortgage, as the true payer was Michael Brown, (3) The sole member of the transferee is Brown's wife and Johnson's Aunt and the guarantors are Brown and his wife, (4) Oskin's suit had resulted in judgment, with supplemental proceedings threatened, (5) The use of the name J Conner, LLC" and loan to J Conner was an attempt to conceal the fact that the Aunt bought the Note and was a cloak to conceal the transaction and keep the true owner of the company and the Note and Mortgage a secret, (6) The usual business of Joan Conner Brown is not that of a lender or loan processor

Similarly J Conner was not in business at all prior to this transaction, (7) When the Note was paid Johnson owned a one half interest in a piece of property that had equity of at least $2 million With the mortgage in place the equity, and thus Johnson's estate, was vanquished (8) Johnson has the benefit of the use of the home (9) Johnson continues to possess and reside in the residence without making payments to J Conner

The facts and evidence presented to the Court reveal that all nine badges fraud are present Thus the attendant facts and circumstances here leave only one conclusion that the conveyance of the Mortgage to J Conner must be set aside

V This Court improperly gave effect to a future advance clause and disregarded a defeasance clause in the Mortgage

This Court found that the Mortgage would have remained in place even if payment were found to have occurred Despite Defendants' arguments and this Court s ruling, even if this ruling were correct it would not hinder Plaintiffs' attempt to sell the property to satisfy their judgments because there was no balance due under the Note This is an issue that should be ruled upon only in supplemental proceedings and not in this case Regardless of the ripeness of this ruling, the ruling was in error

The Court s holding that payment would not have extinguished this Mortgage due to the future advance clause is an egregious error There is, in fact, a future advance clause in the Mortgage and South Carolina recognizes the validity of such clauses These clauses protect lenders by allowing them to have a mortgage on amounts for interest, costs, or other necessary advances during the life of the loan and while a debt is still owed

South Carolina similarly recognizes release clauses and defeasance clauses in mortgages A defeasance clause is defined as 'a mortgage provision stating that the conveyance to the mortgagee will be ineffective if the mortgagor pays the debt on time Black's Law Dictionary,

8th Ed Release and Defeasance clauses protect borrowers by letting them have the security of knowing that when they make full payment the accompanying lien must be removed from their property Not all states recognize defeasance clauses as they are rooted in old common law, so drafters of mortgage forms like the one used by SCB&T call them release clauses This Court ignored the Release clause in this Mortgage

Paragraph 23 of the Mortgage titled 'Release , provides ' Upon payment of all sums secured by this Security Instrument this Security Instrument shall become null and void Lender shall release this Security Instrument ' Paragraph 26, titled 'Future Advances' provides The lien of the Security Instrument shall secure the existing indebtedness under the Note and any future advances made under this Security Instrument up to 150% of the original principal amount of the Note plus interest thereon, attorneys fees and court costs ' (emphasis added)

Assuming that payment was made in full, the Mortgage was null and void and must be released pursuant to paragraph 23 Paragraph 26 would not aid Defendants because upon payment there was no "existing indebtedness under the Note

VI This Court erred in not penalizing the Defendants under the South Carolina Fraudulent Conveyance Statute

When the South Carolina legislature adopted this statute in 1712 it sought to protect creditors from the fraudulent acts of debtors and others The punishment provision of the Statute of Elizabeth is in place to prevent mischievous actions and punish those involved

This section (§27-23-30) provides

> All parties to such feigned, covinous and fraudulent gifts, grants, leases, charges or conveyances, or being privy to and knowing of them, or any of them, who shall wittingly or willingly put in use, avow, maintain, justify or defend them, or any of them, as true, simple and done, had or made bona fide or upon good consideration shall incur the penalty and forfeiture of one year s value of such lands, tenements and hereditaments so purchased or charged

(emphasis added)

As the facts and evidence show, all Defendants were parties to the feigned covinous and fraudulent transaction were privy to and knew of it, or wittingly or willingly put in use avowed maintained, justified or defended the transaction as true simple and done, had or made bona fide or upon good consideration As such they are all subject to the punishment provision

The amount of the penalty is equal to one year s value of the lands, tenements and hereditaments ' involved in the fraud As noted above the Mortgage in this case is a part of the lands, tenements and hereditaments owned and transferred gifted purchased and charged by Johnson and Michael Brown This Court s determination of 'one year s value' of the Mortgage depends entirely on the valuation of the Mortgage The issue of mortgage valuation is rare, however a recent decision dealt with evaluating mortgages In re American Home Mortgage Holdings, Inc , 411 B R 181 (Bankr D Del 2009), determined that the proper method to evaluate a mortgage was to use a method similar to bond valuation The court noted

Mortgages are very similar to bonds in that both are debt instruments Valuing mortgages in this instance is just like valuing any asset that does not have a liquid market The [present] value of a mortgage is the present value of the promised cash flows on the [mortgage] ' Id The American Home Mortgage Holdings case and result rely upon Aswath Damodara, a professor at New York University s Stern Business School Damodara s writings have been cited in at least 16 different federal and state cases regarding the valuation of assets The court applies Damodara s explanation of bond valuation to the value of mortgages and holds that a mortgage is worth the total value of its future revenue stream

Using Damodara s valuation method, the Mortgage would be worth $3 99 million - $3 5 million mortgage plus two year's worth of payments equal to $245 000 per year Because the Note was a two year note, that term would be used to determine one year s value of the the

Mortgage In other words, one year s value of a Mortgage must be based on one fraction of the total term of the Note secured by the mortgage Mathematically stated, one year's value of the Mortgage in this case would be written as (1/n * 3,990 000) (where n is the term of the note, here 2 and $3 990,000 is the future stream of revenue from the Mortgage) or 1/2*3 990 000= $1 995,000 As a result, this amount is the penalty contemplated by the statute

VI This Court erred when it denied Plaintiffs' Motion to Compel McNair Law Firm to respond to Plaintiffs' subpoenas

This Court denied Plaintiffs' Motion to compel McNair Law Firm to provide responses to a subpoena The result of this failure to compel not only left the Plaintifts and the Court without the full information available but also allowed the Defendants to use their attorneys as a sword and a shield in furtherance of the scheme to defraud the Plaintiffs This Court's ruling was erroneous and prevented the Plaintiffs from presenting evidence that was vital to the trial of this case As a result, this Court should grant a new trial

Following the depositions ot Michael and Joan brown, wherein Michael and Joan explained that their attorney s advice was the reason for J Conner's existence and the purchase of the Note and Mortgage, Plaintiffs counsel served the McNair Law Firm with a subpoena requesting all information related to the advice given to the Browns and J Conner McNair responded by providing, among other things a title search conducted by McNair employees (these search results contained the information about the O Connell judgment) and a privilege log Plaintiffs moved to compel the responses because the privilege was waived by reliance on counsel's advice and the crime-fraud exception to the privilege This Court denied Plaintiffs' motion reasoning that Plaintiffs and the Court were aware that Michael Brown knew about the judgments " While true, this was not a proper reason for denying the motion Further by allowing the information to remain privileged the Court prevented the Plaintiffs from proving

their case and robbed itself of information necessary to determine the issues in the case

For these reasons, the Court should grant a new trial or in the alternative, reopen the testimony to allow for presentation of evidence related to the information for which the Browns waived their privilege or to which the privilege no longer applies

CONCLUSION

For the reasons stated above, Plaintiffs are entitled to a Revised or Amended Order of this Court, which follows South Carolina statute and precedent or a New Trial

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Master-in-Equity

Cynthia Graham Howe, Master-in-Equity

Case No 09-CP-26-3470

Robert W Oskin, Glenn Small,
and Freddie Kanos, Appellants,

v

Stephen Mark Johnson, Michael Brown,
Joan Conner Brown, and J Conner LLC Respondents

CERTIFICATE OF COUNSEL

The undersigned certifies that the Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material

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June 23, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Master-in-Equity

Cynthia Graham Howe, Master-in-Equity

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Robert W Oskin, Glenn Small,
and Freddie Kanos, Appellants,

v

Stephen Mark Johnson, Michael Brown,
Joan Conner Brown, and J Conner LLC Respondents,

And which State of South Carolina *ex rel*
Allan Wilson, Attorney General is, Intervening Party

Proof of Service

I, the undersigned of the law offices of Nelson Mullins Riley and Scarborough LLP, attorneys for Appellants, do hereby certify that I served all parties in this action with a copy of the pleading(s) listed below by mailing a copy of the same by United States Mail, postage prepaid, on June 23, 2011, to the following address(es)

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July 25, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Master-in-Equity

Cynthia Graham Howe, Master-in-Equity

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July 25, 2011