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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

_____

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein
Circuit Court Judge

_____

Case No. 2012-CP-10-02758
Appellate Case No. 2020-000162

_____

Pinnacle Bank, as successor in interest to Bank of North Carolina, previous successor in interest to Harbor National Bank, Plaintiff

RECEIVED
Nov 25 2020
SC Court of Appeals

v.

Anthony Whitfield and Cindy Whitfield, Defendants

Anthony Whitfield,
Counterclaimant

v.

David Swanson, Counterclaim Defendant

of whom

Anthony Whitfield is the Appellant and David Swanson is the Respondent.

_____

RECORD ON APPEAL – VOLUME I

_____

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2012-CP-10-5887
	)	
Bank of North Carolina,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**ORDER**
	)	
Anthony Whitfield and Cindy Whitfield,	)	
	)	
Defendants.	)	
	)	
Anthony Whitfield, Counterclaimant	)	
	)	
	)	
	)	
vs.	)	
	)	
David Swanson, Counterclaim Defendant	)	
	)	

FILED
2017 NOV -8 AM 9:58
JULIE J. ARMSTRONG
CLERK OF COURT

THIS MATTER came before the Court on August 28, 2017, for Counterclaim Defendant David Swanson's Motion for Summary Judgment filed on July 28, 2017. For the reasons set forth herein, Defendant Swanson's motion is granted in part and denied in part.

Standard

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24, 25 (1988).

Findings and Conclusions

This lawsuit began as a foreclosure action that Harbor National Bank ("Bank") filed against Anthony Whitfield ("Whitfield"). Whitfield subsequently asserted various counterclaims against the Bank. In January 2016, Whitfield amended his pleadings for a fifth time to assert claims against David Swanson ("Swanson") as an additional counterclaim defendant.

Whitfield's claims against Swanson are based on deposition testimony that Swanson gave in this lawsuit. Swanson is an attorney at Haynsworth Sinkler Boyd, P.A. He was questioned in his deposition about advice he gave the Bank in connection with a prior attempt to renew the subject loan. Swanson's testimony corroborated the earlier deposition testimony of Scott Warren ("Warren"), a Bank employee who was involved in the attempted renewal.

Specifically, Swanson testified about a conversation he had with Warren in which Swanson recommended that the Bank obtain a title endorsement before renewing the loan. Whitfield alleges that the conversation never happened and that Swanson gave false testimony to support an "advice of counsel" defense to Whitfield's counterclaims against the Bank. These allegations form the basis of Whitfield's claims against Swanson for abuse of process and civil conspiracy. *See* Whitfield's Fifth Am. Answer filed January 8, 2016, ¶¶ 65-71 (abuse of process); ¶¶ 73-82 (civil conspiracy).

Whitfield has asserted these claims against an attorney who never represented him. Whitfield does not dispute that he is a third-party to the attorney-client relationship between Swanson and the Bank. *See* Gaar v. N. Myrtle Beach Realty Co., 287 S.C. 525, 529, 339 S.E.2d 887, 889 (Ct. App. 1986) ("In his professional capacity the attorney is not liable, except to his client and those in privity with his client, for injury allegedly arising out of the performance of his professional activities."). However, the absence of privity does not provide "absolute immunity to

an attorney under any and all circumstances." Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995) (recognizing that "an attorney may be held liable for conspiracy where, in addition to representing his client, he breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client.").

Here, viewing the evidence in the light most favorable to the non-moving party this Court finds that scintilla of evidence exist giving rise to genuine issue of material fact as to Whitfield's claim for civil conspiracy. Accordingly, Swanson motion is denied as to that claim.

The same cannot be said for Whitfield's abuse of process claim. "[A]n abuse of process is the employment of legal process for some purpose other than that which it was intended by the law to effect—the improper use of a regularly issued process." Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 210, 153 S.E.2d 693, 695 (1967). "The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions, 388 S.C. 394, 403, 697 S.E.2d 551, 556 (2010). "[T]he essence of the tort of abuse of process centers on events occurring *outside* the process[.]" Swicegood v. Lott, 379 S.C. 346, 353, 665 S.E.2d 211, 214 (Ct. App. 2008) (emphasis in original). "The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club." Id. (*quoting* Huggins, 153 S.E.2d at 694).

Here, the process that forms the basis of Whitfield's abuse of process claim is Swanson's deposition testimony. Swanson was subpoenaed to appear for the deposition by Whitfield's counsel. Swanson did not employ the process. *See* D.R. Horton, Inc. v. Wescott Land Company, LLC, 398 S.C. 528, 554, 730 S.E.2d 340 (Ct. App. 2012)("[B]ecause Horton did not employ any

legal procedure or process against Hawkins, Hawkins cannot maintain an action against Horton for abuse of process."), *aff'd as modified on other grounds*, 410 S.C. 319, 764 S.E.2d 701 (2014).

Moreover, the process was employed for the purpose for which it was intended—obtaining Swanson's sworn deposition testimony. Whitfield alleges that the testimony was false, but abuse of process was not intended to provide a civil remedy for damages allegedly caused by disputed deposition testimony. Accordingly, the Court finds that Swanson is entitled to judgment as a matter of law as to Whitfield's abuse of process claim.

Based on the foregoing, Defendant Swanson's motion for summary judgment is GRANTED as to Whitfield's claim for abuse of process and DENIED as to Whitfield's claim for civil conspiracy.

AND IT IS SO ORDERED.

The Honorable J.C. Nicholson, Jr.
Ninth Judicial Circuit

November 6, 2017
Charleston, South Carolina

STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	) CASE NO.: 2012-CP-10-5887
	)
Pinnacle Bank, as successor in interest to Bank of North Carolina, previous successor in interest to Harbor National Bank	)
Plaintiff,	)
vs.	)
Anthony Whitfield and Cindy Whitfield,	)
Defendants.	)
Anthony Whitfield, Counterclaimant	)
vs.	)
David Swanson, Counterclaim Defendant	)

ORDER

FILED
2019 OCT 16 PM 12: 23
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Before the Court is Counterclaim Defendant David Swanson's motion requesting Defendant Anthony Whitfield's counterclaim for civil conspiracy against Swanson and Pinnacle Bank be bifurcated, that the jury demand be struck as to the civil conspiracy counterclaim, and that the bifurcated civil conspiracy counterclaim be referred to the master in equity. A hearing was held on October 7, 2019 where the Court heard arguments of counsel for all parties. After careful consideration of the submissions, arguments of counsel and the relevant legal authority, the Court grants Mr. Swanson's motion.

I

The current matter is a foreclosure lawsuit by Pinnacle Bank, as successor in interest to Bank of North Carolina, previous successor in interest to Harbor National Bank. Defendant Whitfield has asserted multiple counterclaims in this foreclosure action. In Defendant Whitfield's Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Whitfield asserts

counterclaims for (1) Breach of Contract, (2) Negligent Misrepresentation, (3) Fraud in the Inducement, (4) Violation of Federal Trade Commission Act Section 5(a) 15 U.S.C. §45 as made applicable through S.C. Code §39-5-10 et seq, (5) Promissory Estoppel/Detrimental Reliance, (6) Breach of Contract Accompanied by a Fraudulent Act, and (7) Tortious Interference with Prospective contractual Relations, all against Pinnacle Bank only, and (9) Civil Conspiracy against Pinnacle Bank and David Swanson (as an additional counterclaim defendant)[1] and (10) a cross-claim against Cindy Whitfield for Equitable Indemnity.

The current motion relates solely to the ninth counterclaim for civil conspiracy, which is the only cause of action including Swanson as a party. The issue currently before the Court is whether Defendant Whitfield is entitled to a jury trial as a matter of right on his civil conspiracy counterclaim to the foreclosure complaint, and if the civil conspiracy claim should be bifurcated and tried in a separate non-jury proceeding. To aid in the disposition of this motion, a brief factual background of Mr. Swanson's connection to the litigation is as follows.

In 2007, Whitfield entered into several loan agreement secured by real property with Harbor National Bank. One of the subject loans was secured by the real property located at 1055 Black Rush Circle, Mount Pleasant, SC 29466 ("Black Rush Property")[2]. (Pl. Compl. ¶16; Ex. C to Pl. Compl.). The maturity date on the subject promissory note was May 3, 2012. (Pl. Compl. Ex. A.).

---

[1] Whitfield's eighth counterclaim also asserted against additional counterclaim defendant Swanson for Abuse of Process was dismissed by an order entered November 8, 2017 granting in part Swanson's motion for summary judgment.

[2]Loans secured by other real property in Dorchester and Berkeley Counties are the subject of separate foreclosure actions between Plaintiff and Defendants in those respective counties. Mr. Swanson is not a party to the Dorchester or Berkeley foreclosure actions.

In or about January 2012, Mr. Whitfield alleges that he and Harbor National representatives discussed renewing his loans. (Defs. 5th Am. Ans., Aff. Def., Crossclaim and Counterclaims ¶¶28-29). Mr. Whitfield alleges that on June 26, 2012, Harbor National Bank's vice president signed a loan commitment letter to Mr. Whitfield outlining the terms and conditions of his loan renewals. (Id. ¶31).

Mr. Whitfield further alleges that the parties attended an anticipated closing of the loan renewals on June 28, 2012 wherein the Harbor National Bank representative "informed Mr. Whitfield that a signed endorsement from a title company was needed so that Mr. Whitfield's ex-spouse Cindy Whitfield would not be required to sign the loan documents for the Black Rush Property." (Id. ¶¶32, 37). According to Whitfield, the closing attorney advised him the endorsement could not be procured, that his ex-wife would not sign the mortgage to the Black Rush Property, and that ultimately all of his properties secured by loans from Harbor National Bank then became the subject of foreclosure proceedings. (Id. ¶¶32-33). Whitfield contends that he subsequently learned that a title endorsement was not required to close the loan renewals and asserts that Plaintiff breached an alleged agreement to renew the loans. (Id. ¶33).

After the loan renewals did not close, Plaintiff initiated the current foreclosure action. During the course of this foreclosure action, Mr. Whitfield conducted depositions of Harbor National Bank representative Scott Warren and Mr. Swanson. Mr. Swanson is an attorney who advised Harbor National Bank on certain matters. Both Warren and Swanson testified in their depositions that in a phone call on or prior to June 28, 2018, Swanson recommended that Harbor National Bank get a title endorsement for the Black Rush Property. (See, Id. at ¶¶74-79).

In his civil conspiracy counterclaim, Whitfield alleges that the alleged phone call between Warren and Swanson wherein Swanson recommended Harbor National Bank obtain a title endorsement *did not* occur before the anticipated closing of the loan renewals. Whitfield instead alleges that Harbor National Bank and Swanson conspired to give false deposition testimony for the purpose of justifying Harbor National Bank's request for a title endorsement.

In the operative pleading, Mr. Whitfield's civil conspiracy counterclaim alleges:

> 74. Mr. Scott Warren claims he called Mr. David Swanson for the advice to procure a title endorsement to renew the loan for the Black Rush Property.
>
> 75. Mr. Swanson claims that Mr. Scott Warren called him regarding the anticipated closing between Mr. Whitfield and Harbor National Bank, said closing to occur on June 28, 2012.
>
> 76. Despite providing such **sworn testimony** by each Mr. Scott Warren and Mr. David Swanson that this advice was given and received before the June 28, 2012 closing, there is **no evidence of any such phone call** as the phone records from Mr. David Swanson's cell phone and his office line show no records of a phone call from Mr. Scott Warren cell phone or office line in June of 2012.
>
> 77. Because the telephone records show the phone call never occurred, the sworn testimony that the call was made, when in fact evidence shows it was not made at the time, was given with the ulterior purpose of fabricating a legal defense for the bank's failure to renew its contractual obligations to renew Mr. Whitfield's loans.
>
> 78. Mr. David Swanson has represented that Scott Warren called him regarding an anticipated closing, in which he gave advice to Mr. Warren to procure a title endorsement. As alleged previously, Mr. Swanson and his law firm have no proof the advice was ever given as there is no engagement letter, fee agreement, correspondence, records of any kind, opinion letters, or billing entries at the firm to corroborate the legal defenses that Mr. Swanson provided the information at the time he claims the advice was made. Additionally, there is no evidence of the communication itself from Mr. Warren's cell phone or office line to Mr. Swanson's cell phone or office line, further evidence that the communication was never made, when Mr. Swanson and Mr. Warren claim it was.

> 79. The sworn testimony that the call was placed before closing, when in fact it was not, was a willful or overt act, done with the intent and collateral objective of furnishing a legal defense (advice of counsel) for the bank and injuring Mr. Whitfield.

(Def's 5th Am Ans, Aff. Def., Crossclaim and Counterclaims ¶¶74-79)(emphasis in original pleading).

As is clear from the factual allegations supporting the civil conspiracy counterclaim, the civil conspiracy claim does not arise out of the underlying loans or prospective loan renewals, but rather, out of activity that took place after the alleged loan renewals did not close.

II

Mr. Swanson argues that the civil conspiracy counterclaim is a permissive counterclaim under Rule 13, SCRCP and therefore, Mr. Whitfield is not entitled to a jury trial as of right on the civil conspiracy counterclaim. Whitfield, on the other hand, argues that the civil conspiracy counterclaim arises out of the same transactions and occurrences as the underlying loan and alleged renewal transactions. The Court finds that the civil conspiracy counterclaim is permissive, and therefore, Whitfield is not entitled to a jury trial as of right on the civil conspiracy counterclaim.

"Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable...." *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). Because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial. *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014). A party is entitled to a jury trial in an equitable action "only if the counterclaims are legal and compulsory." *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 295, 778 S.E.2d 106, 109 (2015). "By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." *Blackburn*, 407 S.C. at 330-331, 755 S.E.2d at 442. When a defendant asserts permissive counterclaims which are legal in nature, he waives the

right to a jury trial on these issues. *C&S Real Estate Services, Inc., v. Massengale*, 290 S.C. 299, 301, 350 S.E.2d 191, 193 (1986).

Under South Carolina law, whether a counterclaim is compulsory or permissive is viewed through the logical relationship test. "Under this test, the logical relationship determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage. If the defendant's prevailing on his counterclaim would affect the bank's right to enforce the note and foreclose the mortgage, there is a logical relationship between the counterclaim and the underlying suit, and the counterclaim is therefore compulsory." *Blackburn.* A407 S.C. at fn7, 755 S.E.2d at fn7 (internal citations omitted).

Here, the civil conspiracy counterclaim has no logical relationship to Pinnacle Bank's right to enforce the note and foreclose the mortgage. The alleged facts supporting the civil conspiracy counterclaim--that Swanson and Harbor National Bank conspired to give false testimony for the purpose of providing an *after-the-fact* justification for Harbor National Bank's request for a title endorsement--relate to activity that occurred after Mr. Whitfield's loans were not renewed. Accordingly, the outcome of the civil conspiracy counterclaim will not affect the enforceability of the note and mortgage, will not affect whether Harbor National Bank had an obligation to renew Mr. Whitfield's the loans, and will not affect Whitfield's other counterclaims alleging improper acts against the bank with respect to the original loans and the failed alleged loan renewals.

The Court finds that Mr. Whitfield's civil conspiracy counterclaim is a permissive counterclaim asserted in an equitable foreclosure action, and therefore, Mr. Whitfield is not entitled to a jury trial as of right on his civil conspiracy counterclaim. Accordingly, upon motion of counterclaim defendant Swanson pursuant to Rule 39(a)(2), SCRCP, the civil conspiracy counterclaim shall be tried by non-jury trial.

III

Mr. Swanson also moves for an order bifurcating the civil conspiracy claim from the other claims and counterclaims asserted in the litigation.

Rule 42(b), SCRCP provides that "the court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claims, counterclaims, or third-party claims, or issues, always preserving inviolate the right to trial by jury as declared by the Constitution or as given by statute of the State." Bifurcation is proper where the issues in the case are complex, and bifurcation helps to clarify or simplify the issues. *Durham v. Vinson*, 360 S.C. 639, 602 S.E.2d 760 (2004).

Here, counterclaim defendant Swanson is only a party to one cause of action asserted in the complex litigation between Pinnacle Bank and Mr. Whitfield. Pursuant to this order, the Court has determined that Whitfield's civil conspiracy counterclaim is not entitled to a jury trial as of right. Likewise, as discussed herein, the outcome of the civil conspiracy cause of action will not affect the remainder of the claims asserted between the parties.

As the Court has determined that no logical relationship exists between Mr. Whitfield's civil conspiracy counterclaim and the foreclosure action or Mr. Whitfield's other counterclaims to which Mr. Swanson is not a party, the Court finds that bifurcation of the civil conspiracy counterclaim is prudent. Bifurcation of the civil conspiracy counterclaim will simplify the evidence and issues presented before the jury, will avoid the inconvenience of forcing those witnesses and parties only material to the civil conspiracy claim to attend a lengthy trial regarding the other counterclaims asserted by Whitfield, and will aid in avoiding jury confusion over which facts are relevant to the claims that are to be decided by the jury rather than by the Court.

Accordingly, the Court finds that the civil conspiracy claim should be bifurcated and tried in a separate trial conducted non-jury.

IV

For the reasons stated herein, the Court grants the motion of counterclaim defendant David Swanson. Therefore, it is hereby

ORDERED, that the Defendant Whitfield's civil conspiracy counterclaim shall be bifurcated from the trial of all other claims in the subject litigation and shall proceed in a non-jury trial; and it is further

ORDERED, that this Order shall apply only to the civil conspiracy counterclaim asserted by Defendant Anthony Whitfield and shall not affect any of the remaining claims, counterclaims, or crossclaims asserted between the parties to this litigation, the trial of which is set to begin October 21, 2019 and shall proceed.

IT IS SO ORDERED!

Diane S. Goodstein
Circuit Court Judge

St George, South Carolina

ELECTRONICALLY FILED - 2020 Jan 06 3:18 PM - CHARLESTON - COMMON PLEAS - CASE#2012CP1005887

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIRST JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	Case No.: 2012-CP-10-5887
Pinnacle Bank,	)	
	)	
Plaintiff,	)	**ORDER DENYING DEFENDANT'S MOTION TO ALTER OR AMEND THE COURT'S ORDER ENTERED**
	)	
vs.	)	
	)	
Anthony M. Whitfield et al,	)	
	)	
Defendants.	)	
	)	

This matter came before this Court by way of Defendant's Motion to Alter or Amend Judgment brought forth pursuant to South Carolina Rules of Civil Procedure 52(b) and 59(e). Because the Defendant's Motion does not raise any novel issues for the Court's consideration, the Defendant's Motion to Alter or Amend Judgment is denied**.**

AND IT IS SO ORDERED!

_____
Judge Diane S. Goodstein
First Judicial Circuit

January _____, 2020

ELECTRONICALLY FILED - 2020 Jan 06 3:18 PM - CHARLESTON - COMMON PLEAS - CASE#2012CP1005887

Charleston Common Pleas

Case Caption:	Harbor National Bank , plaintiff, et al VS Anthony M Whitfield , defendant, et al
Case Number:	2012CP1005887
Type:	Order/Other

This Order is Hereby GRANTED!

S/ Diane S. Goodstein (2112)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CASE NUMBER: 2012-CP-10- 5887
Harbor National Bank,	)	
Plaintiff,	)	**COMPLAINT**
v.	)	(Foreclosure of Real Estate)
	)	(Action On Note)
Anthony M. Whitfield and Cindy Whitfield,	)	*(Non-Jury)*
Defendants.	)	

FILED
2012 SEP -7 PM 4:15
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The Plaintiff, complaining of the Defendant above-named, would respectfully show unto this Court:

1. The Plaintiff is a national banking organization organized and existing pursuant to the laws of the United States of America, with its principal place of business located in South Carolina.

2. Defendant Anthony M. Whitfield is a citizen and resident of the County of Charleston, State of South Carolina.

3. Defendant Cindy Whitfield is a citizen and resident of the County of Charleston, State of South Carolina.

DAB #1

4. The real property hereinafter described, which is the subject of this action, is situated and located in Charleston County, South Carolina.

5. All parties hereto and all matters herein are within the jurisdiction of this Court.

FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANT ANTHONY M. WHITFIELD
(Action on Note)

6. Heretofore, on or about April 23, 2007, for value received the Defendant Anthony M. Whitfield executed and delivered to Harbor National Bank, a certain Promissory Note, Loan No. 400032000, a copy of which is attached hereto as Exhibit "A" and made a part hereof by reference, by which, according to the terms and conditions set out therein, Anthony M. Whitfield promised to pay to Harbor National Bank the sum of Three Hundred Twenty-Five Thousand and no/100 ($325,000.00) Dollars, together with interest thereon at the rate of 7.5 % per annum on the unpaid balance, with a maturity date of May 3, 2012.

7. On September 20, 2007, the parties entered into a Commercial Debt Modification Agreement, wherein the date of monthly payments was changed, but the maturity date of the said Note remained the same; a true and correct copy of the said Commercial Debt Modification Agreement is attached hereto as Exhibit "B" to the Complaint.

8. The payment due under the Note referred to in the preceding paragraph is in default, and the conditions of said Note have been broken.

9. Defendant Anthony M. Whitfield has committed an act of default under the aforesaid Note.

10. The Plaintiff has made demand upon Defendant Anthony M. Whitfield to pay the entire amount due under the Note, but the said Defendant has failed and refused to make such payment.

AA9 #2

11. The failure of Defendant Anthony M. Whitfield to make payment of the balance due constitutes a breach of the Note.

12. Plaintiff elects to, and does declare the entire balance of said indebtedness due and payable, and that there is due on said note as August 17, 2012, the principal sum of Three Hundred

Fourteen Thousand, Eight Hundred Sixty-Six and 30/100 ($314,866.30) Dollars, accumulated interest of Seven Thousand, Two Hundred Seventy-Four and 21/100 ($7,274.21) Dollars, and interest continuing to accumulate at the current rate of $122.45 per diem from August 17, 2012 until paid in full, together with late charges, the costs and disbursements of this action, and attorney's fees.

13. Plaintiff has retained and employed Bernstein & Bernstein, P.A. for the purpose of instituting and prosecuting this action, and is entitled to recover all costs, expenses and reasonable attorneys' fees incurred with respect to this action.

14. By reason of the aforesaid breach of contract, the Plaintiff has suffered damages in the amount of Three Hundred Fourteen Thousand, Eight Hundred Sixty-Six and 30/100 ($314,866.30) Dollars, accumulated interest of Seven Thousand, Two Hundred Seventy-Four and 21/100 ($7,274.21) Dollars, and interest continuing to accumulate at the current rate of $122.45 per diem from August 17, 2012 until paid in full, together with late charges, the costs and disbursements of this action, and attorney's fees.

FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANTS ANTHONY M. WHITFIELD AND CINDY WHITFIELD
(Mortgage Foreclosure)

AAB #3

15. The allegations of paragraphs One (1) through Fourteen (14) of this Complaint are realleged as if repeated herein verbatim.

16. To further secure his obligation under the aforesaid Promissory Note, on April 23, 2007, Anthony M. Whitfield executed a Real Estate Mortgage, whereby to secure the liability under the Promissory Note and any further advances thereof, a mortgage was granted to and upon the following described property, to wit:

All that certain piece, parcel or tract of land situate, lying, and being in the Town of

Mt. Pleasant, Charleston County, South Carolina, shown and designated as Lot 78, on that certain plat prepared by Mark S. Busey, S.C.R.L.S., entitled "A FINAL SUBDIVISION PLAT OF PHASE 2 WHISPERING MARSH, DUNES WEST, OWNED BY JOHN WIELAND HOMES OF SOUTH CAROLINA, LOCATED IN THE TOWN OF MT. PLEASANT, CHARLESTON COUNTY, SOUTH CAROLINA", said plat being dated January 13, 2000 and duly recorded in the Charleston County RMC Office in Plat Book ED, Page 822. reference to said plat is hereby made for a more complete description as to distances, courses, metes and bounds.

BEING the same premises as conveyed to Anthony M. Whitfield by deed of Dennis E. Harris and Robin Harris dated April 23, 2007, and recorded in the Office of the R.M.C. for Charleston County on April 24, 2007 in Deed Book C623, Page 352.

TMS #594-10-00-507

Address: 1055 Black Rush Circle, Mt. Pleasant, SC 29466

(hereinafter referred to as the PROPERTY); a true and correct copy of the said Mortgage is attached hereto as Exhibit "C" to this Complaint.

17. On April 24, 2007, the said Mortgage was recorded in the Office of the Register of Mesne Conveyances for Charleston County in Book E623, at page 742.

18. According to the terms and conditions of the aforesaid Real Estate Mortgage, it is provided that in the event of default in the payment of any installment when due, the entire principal and accrued interest shall at once become due and payable without notice, at the option of the holder, and if the same should be placed in the hands of an attorney for collection, all cost of collection, including a reasonable attorney's fees, shall become an obligation of the Defendant Anthony M. Whitfield, to be secured by the said mortgage as part of the debt secured thereby.

AAB #4

19. Further, under the terms and conditions of the said Mortgages, it was agreed that the mortgagor would pay all taxes, assessments, water rates, other governmental or municipal charges, fines or impositions for which provisions were not otherwise made, and if the mortgagor failed to

do so, the mortgagee might pay same, which amount, together with interest thereon, would be secured by said mortgage.

20. According to the terms of the said Mortgages, and as additional security, the mortgagor assigned all rents, issues and profits of the mortgaged premises from and after any default thereunder, and should legal proceedings be instituted pursuant to said mortgage, the mortgagee, its successors or assigns, were given the right to have a Receiver appointed of the rents, issues and profits, who, after deducting all charges and expenses attending such proceedings, and the execution of his trust as Receiver, shall apply the residue of the rents, issues and profits toward the debt secured by said mortgage.

21. On or about July 24, 2007, without the knowledge or consent of the Plaintiff, the Defendant Anthony M. Whitfield transferred a one-half undivided interest in the said property to Defendant Cindy Whitfield.

22. Defendant Cindy Whitfield acquired her one-half undivided interest in the property subject to the mortgage of the Plaintiff herein, and her claim to the said property is subordinate to the claim of the Plaintiff herein.

RAB #5

23. The payments due under said Note is due and has been in default since May 3, 2012, and the conditions of said mortgage have been broken.

24. The entire balance of said indebtedness due and payable, and that there is due on said note as of August 17, 2012, the sum of Three Hundred Fourteen Thousand, Eight Hundred Sixty-Six and 30/100 ($314,866.30) Dollars, accumulated interest of Seven Thousand, Two Hundred Seventy-Four and 21/100 ($7,274.21) Dollars, and interest continuing to accumulate at the current rate of $122.45 per diem from August 17, 2012 until paid in full, together with late charges, the costs and

disbursements of this action, and attorney's fees.

25. Plaintiff has retained and employed Bernstein & Bernstein, P.A. for the purpose of instituting and prosecuting this action, and is entitled to recover all costs, expenses and reasonable attorneys' fees incurred with respect to this action.

26. The Plaintiff is entitled to an Order foreclosing the mortgage upon the PROPERTY, and the proceeds of the said foreclosure to be distributed first to the costs and expenses of the sale thereof, second to be applied against accrued principal and interest under the Note and mortgage, third to payment of the costs, expenses and reasonable attorneys fees incurred by the Plaintiff in prosecuting this foreclosure action, and the Court should thereafter pay any excess proceeds of sale to such claimants in such priorities as their interests may appear.

FOR A THIRD CAUSE OF ACTION
(Appointment of Receiver)

27. The allegations of paragraphs One (1) through Twenty-Six (26) of this Complaint are realleged as if repeat ed herein verbatim.

28. To further secure his obligation under the aforesaid Promissory Note, on April 23, 2007, Anthony M. Whitfield executed an Assignment of Leases and Rents, whereby to secure the liability under the Promissory Note and any further advances thereof, the Defendant assigned all leases and rents from the subject PROPERTY to the Plaintiff; a true and correct copy of the said Assignment of Leases and Rents is attached hereto as Exhibit "D."

25. On April, 2007, the said Assignment of Leases and Rents was recorded in the Office of the Register of Mesne Conveyances for Charleston County in Book F623, at Page 152.

26. According to the terms of the said Assignment of Leases and Rents, and as additional

security, the Defendant assigned all rents, issues and profits of the PROPERTY from and after any default thereunder, and should legal proceedings be instituted pursuant to said Assignment of Leases and Rents, the Plaintiff were given the right to have a Receiver appointed of the rents, issues and profits, who, after deducting all charges and expenses attending such proceedings, and the execution of his trust as Receiver, shall apply the residue of the rents, issues and profits toward the secured debt.

27. The payments due under said Note is due and has been in default since May 3, 2012, and the conditions of said Assignment of Leases and Rents have been broken.

28. The entire balance of said indebtedness due and payable, and that there is due on said note of August 17, 2012, the sum of Three Hundred Fourteen Thousand, Eight Hundred Sixty-Six and 30/100 ($314,866.30) Dollars, accumulated interest of Seven Thousand, Two Hundred Seventy-Four and 21/100 ($7,274.21) Dollars, and interest continuing to accumulate at the current rate of $122.45 per diem from August 17, 2012 until paid in full, together with late charges, the costs and disbursements of this action, and attorney's fees.

29. The Plaintiff is entitled to have a Receiver appointed for the PROPERTY to collect all income from the said PROPERTY, to pay expenses associated therewith, including the fees of the Receiver, and to remit the balance of such collections to the Plaintiff to apply toward the secured debt hereunder.

WHEREFORE, the Plaintiff prays for judgment as follows:

(1) Under the First Cause of Action, for judgment against Defendant Anthony M. Whitfield the amount of Three Hundred Fourteen Thousand, Eight Hundred Sixty-Six and 30/100 ($314,866.30) Dollars, accumulated interest of Seven Thousand, Two Hundred Seventy-Four and 21/100 ($7,274.21) Dollars, and interest continuing to accumulate at the current rate of $122.45 per diem from August 17, 2012 until paid in full, together with late charges, the costs and disbursements of this action, and attorney's fees;

(2) Under the Second Cause of Action, that

(a) That the amount due upon the said Note and Mortgage held by the Plaintiff be ascertained and determined under the direction of this Court, together with attorneys fees and the costs of this action.

(b) That the Plaintiff's Mortgage be declared a first lien and that Plaintiff has judgment of foreclosure for the amount found to be due and owing under the promissory note, together with any taxes or insurance premiums which may be due, with a reasonable sum as attorney's fees, and the costs of this action.

(c) That the PROPERTY be sold under the direction of this Court, the equities of redemption are barred, and that the proceeds of sale are applied as follows:

First, to the costs and expenses of the within action and sale,

Second, to the payment and discharge of the amount due on the Plaintiff's Note and Mortgage, with the costs and disbursements of this action together with attorneys' fees, and

Third, the surplus, if any, be distributed according to law; and

#8

3) Under the Third Cause of Action, for the Appointment of a Receiver to collect all income from the said PROPERTY, to pay expenses associated therewith, including the fees of the Receiver, and to remit the balance of such collections to the Plaintiff to apply toward the secured debt

4) For such other and further relief as may be just and proper.

BERNSTEIN & BERNSTEIN, P.A.

Robert A. Bernstein

Robert A. Bernstein
Post Office Box 20519
Charleston, SC 29413-0519
(843) 529-1111
(843) 529-0035 (*fax*)
ATTORNEYS FOR THE PLAINTIFF

September 5, 2012
Charleston, South Carolina

ANTHONY M WHITFIELD 2141 DORCHESTER ROAD NORTH CHARLESTON, SC 29405 **BORROWER'S NAME AND ADDRESS** "I" includes each borrower above, jointly and severally.	Harbor National Bank 1503 Old Towne Road Charleston, SC 29407 **LENDER'S NAME AND ADDRESS** "You" means the lender, its successors and assigns.	247-86-7213 Loan Number [redacted]2000 Date 04/23/2007 Maturity Date 05/03/2012 Loan Amount $ 325,000.00 Renewal Of

For value received, I promise to pay to you, or your order, at your address listed above the **PRINCIPAL** sum of Three Hundred Twenty-Five Thousand Dollars Dollars $ 325,000.00

☒ **Single Advance:** I will receive all of this principal sum on 04/23/2007. No additional advances are contemplated under this note.

☐ **Multiple Advance:** The principal sum shown above is the maximum amount of principal I can borrow under this note. On _____ I will receive the amount of $ _____ and future principal advances are contemplated.

Conditions: The conditions for future advances are _____

☐ **Open End Credit:** You and I agree that I may borrow up to the maximum amount of principal more than one time. This feature is subject to all other conditions and expires on _____.

☐ **Closed End Credit:** You and I agree that I may borrow up to the maximum only one time (and subject to all other conditions).

INTEREST: I agree to pay interest on the outstanding principal balance from 04/23/2007 at the rate of 7.500 % per year until Maturity.

☐ **Variable Rate:** This rate may then change as stated below.

☐ **Index Rate:** The future rate will be _____ the following index rate: _____

☐ **No Index:** The future rate will not be subject to any internal or external index. It will be entirely in your control.

☐ **Frequency and Timing:** The rate on this note may change as often as _____.
A change in the interest rate will take effect _____.

☐ **Limitations:** During the term of this loan, the applicable annual interest rate will not be more than _____ % or less than _____ %. The rate may not change more than _____ % each _____.

Effect of Variable Rate: A change in the interest rate will have the following effect on the payments:

☐ The amount of each scheduled payment will change. ☐ The amount of the final payment will change.

☐ _____.

ACCRUAL METHOD: Interest will be calculated on a Actual/360 basis.

POST MATURITY RATE: I agree to pay interest on the unpaid balance of this note owing after maturity, and until paid in full, as stated below:

☐ on the same fixed or variable rate basis in effect before maturity (as indicated above).

☒ at a rate equal to 14.000%.

☒ **LATE CHARGE:** If a payment is not made within 10 days after it is due, I agree to pay a late charge of 5.000% of the payment amount with a minimum of $20.00.

☒ **ADDITIONAL CHARGES:** In addition to interest, I agree to pay the following charges which ☐ are ☒ are not included in the principal amount above: APPRAISAL FEE $325.00, FLOOD SEARCH FEE $15, ORIGINATION FEE $1625.00.

PAYMENTS: I agree to pay this note as follows:

☒ **Interest:** I agree to pay accrued interest See Additional Terms

☒ **Principal:** I agree to pay the principal See Additional Terms

☐ **Installments:** I agree to pay this note in _____ payments. The first payment will be in the amount of $ _____ and will be due _____. A payment of $ _____ will be due _____ thereafter. The final payment of the entire unpaid balance of principal and interest will be due _____.

ADDITIONAL TERMS: I AGREE TO PAY 24 MONTHLY INTEREST ONLY PAYMENTS BEGINNING 06/03/2007, FOLLOWED BY 35 MONTHLY PRINCIPAL AND INTEREST PAYMENTS OF $2,297.15 BEGINNING 06/03/2009 WITH 1 (ONE) FINAL PAYMENT OF THE OUTSTANDING PRINCIPAL AND ACCRUED INTEREST ON 05/03/2012.

☒ **SECURITY:** This note is separately secured by (describe separate document by type and date):
MORTGAGE AND ASSIGNMENT OF LEASES & RENTS OF EVEN DATE ON 1055 BLACK RUSH CIRCLE, MT. PLEASANT, SC

(This section is for your internal use. Failure to list a separate security document does not mean the agreement will not secure this note.)

PURPOSE: The purpose of this loan is TO PURCHASE 1055 BLACK RUSH CIRCLE, MT PLEASANT, SC.

SIGNATURES: I AGREE TO THE TERMS OF THIS NOTE (INCLUDING THOSE ON PAGE 2). I have received a copy on today's date.

Signature for Lender

Angela Bell
Commercial Lender

ANTHONY M WHITFIELD

SOUTH CAROLINA - UNIVERSAL NOTE

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EXHIBIT A
Page 1 of 2

DEFINITIONS: As used on page 1, "☒" means the terms that apply to this loan. "I," "me" or "my" means each Borrower who signs this note and each other person or legal entity (including guarantors, endorsers, and sureties) who agrees to pay this note (together referred to as "us"). "You" or "your" means the Lender and its successors and assigns.

APPLICABLE LAW: The law of the state of South Carolina will govern this note. Any term of this note which is contrary to applicable law will not be effective, unless the law permits you and me to agree to such a variation. If any provision of this agreement cannot be enforced according to its terms, this fact will not affect the enforceability of the remainder of this agreement. No modification of this agreement may be made without your express written consent. Time is of the essence in this agreement.

COMMISSIONS OR OTHER REMUNERATION: I understand and agree that any insurance premiums paid to insurance companies as part of this note will involve money retained by you or paid back to you as commissions or other remuneration.

In addition, I understand and agree that some other payments to third parties as part of this note may also involve money retained by you or paid back to you as commissions or other remuneration.

PAYMENTS: Each payment I make on this note will first reduce the amount I owe you for charges which are neither interest nor principal. The remainder of each payment will then reduce accrued unpaid interest, and then unpaid principal. If you and I agree to a different application of payments, we will describe our agreement on this note. I may prepay a part of, or the entire balance of this loan without penalty, unless we specify to the contrary on this note. Any partial prepayment will not excuse or reduce any later scheduled payment until this note is paid in full (unless, when I make the prepayment, you and I agree in writing to the contrary).

INTEREST: Interest accrues on the principal remaining unpaid from time to time, until paid in full. If I receive the principal in more than one advance, each advance will start to earn interest only when I receive the advance. The interest rate in effect on this note at any given time will apply to the entire principal advanced at that time. Notwithstanding anything to the contrary, I do not agree to pay and you do not intend to charge any rate of interest that is higher than the maximum rate of interest you could charge under applicable law for the extension of credit that is agreed to here (either before or after maturity). If any notice of interest accrual is sent and is in error, we mutually agree to correct it, and if you actually collect more interest than allowed by law and this agreement, you agree to refund it to me.

INDEX RATE: The index will serve only as a device for setting the rate on this note. You do not guarantee by selecting this index, or the margin, that the rate on this note will be the same rate you charge on any other loans or class of loans to me or other borrowers.

ACCRUAL METHOD: The amount of interest that I will pay on this loan will be calculated using the interest rate and accrual method stated on page 1 of this note. For the purpose of interest calculation, the accrual method will determine the number of days in a "year." If no accrual method is stated, then you may use any reasonable accrual method for calculating interest.

POST MATURITY RATE: For purposes of deciding when the "Post Maturity Rate" (shown on page 1) applies, the term "maturity" means the date of the last scheduled payment indicated on page 1 of this note or the date you accelerate payment on the note, whichever is earlier.

SINGLE ADVANCE LOANS: If this is a single advance loan, you and I expect that you will make only one advance of principal. However, you may add other amounts to the principal if you make any payments described in the "PAYMENTS BY LENDER" paragraph below.

MULTIPLE ADVANCE LOANS: If this is a multiple advance loan, you and I expect that you will make more than one advance of principal. If this is closed end credit, repaying a part of the principal will not entitle me to additional credit.

PAYMENTS BY LENDER: If you are authorized to pay, on my behalf, charges I am obligated to pay (such as property insurance premiums), then you may treat those payments made by you as advances and add them to the unpaid principal under this note, or you may demand immediate payment of the charges.

SET-OFF: I agree that you may set off any amount due and payable under this note against any right I have to receive money from you.

"Right to receive money from you" means:

(1) any deposit account balance I have with you;

(2) any money owed to me on an item presented to you or in your possession for collection or exchange; and

(3) any repurchase agreement or other nondeposit obligation.

"Any amount due and payable under this note" means the total amount of which you are entitled to demand payment under the terms of this note at the time you set off. This total includes any balance the due date for which you properly accelerate under this note.

If my right to receive money from you is also owned by someone who has not agreed to pay this note, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement. Your right of set-off does not apply to an account or other obligation where my rights are only as a representative. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set off this debt against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

REAL ESTATE OR RESIDENCE SECURITY: If this note is secured by real estate or a residence that is personal property, the existence of a default and your remedies for such a default will be determined by applicable law, by the terms of any separate instrument creating the security interest and, to the extent not prohibited by law and not contrary to the terms of the separate security instrument, by the "Default" and "Remedies" paragraphs herein.

DEFAULT: I will be in default if any one or more of the following occur: (1) I fail to make a payment on time or in the amount due; (2) I fail to keep the property insured, if required; (3) I fail to pay, or keep any promise, on any debt or agreement I have with you; (4) any other creditor of mine attempts to collect any debt I owe him through court proceedings; (5) I die, am declared incompetent, make an assignment for the benefit of creditors, or become insolvent (either because my liabilities exceed my assets or I am unable to pay my debts as they become due); (6) I make any written statement or provide any financial information that is untrue or inaccurate at the time it was provided; (7) I do or fail to do something which causes you to believe that you will have difficulty collecting the amount I owe you; (8) any collateral securing this note is used in a manner or for a purpose which threatens confiscation by a legal authority; (9) I change my name or assume an additional name without first notifying you before making such a change; (10) I fail to plant, cultivate and harvest crops in due season if I am a producer of crops; (11) any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in 7 C.F.R. Part 1940, Subpart G, Exhibit M.

REMEDIES: If I am in default on this note you have, but are not limited to, the following remedies:

(1) You may demand immediate payment of all I owe you under this note (principal, accrued unpaid interest and other accrued charges).

(2) You may set off this debt against any right I have to the payment of money from you, subject to the terms of the "SET-OFF" paragraph herein.

(3) You may demand security, additional security, or additional parties to be obligated to pay this note as a condition for not using any other remedy.

(4) You may refuse to make advances to me or allow purchases on credit by me.

(5) You may use any remedy you have under state or federal law.

By selecting any one or more of these remedies you do not give up your right to later use any other remedy. By waiving your right to declare an event to be a default, you do not waive your right to later consider the event as a default if it continues or happens again.

COLLECTION COSTS AND ATTORNEY'S FEES: I agree to pay all costs of collection, replevin or any other or similar type of cost if I am in default. In addition, if you hire an attorney to collect this note, I also agree to pay any fee you incur with such attorney plus court costs (except where prohibited by law). To the extent permitted by the United States Bankruptcy Code, I also agree to pay the reasonable attorney's fees and costs you incur to collect this debt as awarded by any court exercising jurisdiction under the Bankruptcy Code.

WAIVER: I give up my rights to require you to do certain things. I will not require you to:

(1) demand payment of amounts due (presentment);

(2) obtain official certification of nonpayment (protest); or

(3) give notice that amounts due have not been paid (notice of dishonor).

I waive any defenses I have based on suretyship or impairment of collateral.

OBLIGATIONS INDEPENDENT: I understand that I must pay this note even if someone else has also agreed to pay it (by, for example, signing this form or a separate guarantee or endorsement). You may sue me alone, or anyone else who is obligated on this note, or any number of us together, to collect this note. You may without notice release any party to this agreement without releasing any other party. If you give up any of your rights, with or without notice, it will not affect my duty to pay this note. Any extension of new credit to any of us, or renewal of this note by all or less than all of us will not release me from my duty to pay it. (Of course, you are entitled to only one payment in full.) I agree that you may at your option extend this note or the debt represented by this note, or any portion of the note or debt, from time to time without limit or notice and for any term without affecting my liability for payment of the note. I will not assign my obligation under this agreement without your prior written approval. You may, without notice, fail to perfect your security interest in, impair, or release any security and I will still be obligated to pay this loan.

FINANCIAL INFORMATION: I agree to provide you, upon request, any financial statement or information you may deem necessary. I warrant that the financial statements and information I provide to you are or will be accurate, correct and complete.

NOTICE: Unless otherwise required by law, any notice to me shall be given by delivering it or by mailing it by first class mail addressed to me at my last known address. My current address is on page 1. I agree to inform you in writing of any change in my address. I will give any notice to you by mailing it first class to your address stated on page 1 of this agreement, or to any other address that you have designated.

WAIVER OF HEARING PRIOR TO IMMEDIATE POSSESSION: If this loan is for a business purpose I agree to waive the right to five days' notice and a preseizure hearing prior to seizure of any personal property which may secure this loan.

DATE OF TRANSACTION	PRINCIPAL ADVANCE	BORROWER'S INITIALS (not required)	PRINCIPAL PAYMENTS	PRINCIPAL BALANCE	INTEREST RATE	INTEREST PAYMENTS	INTEREST PAID THROUGH:
	$		$	$	%	$	
	$		$	$	%	$	
	$		$	$	%	$	
	$		$	$	%	$	
	$		$	$	%	$	
	$		$	$	%	$	
	$		$	$	%	$	
	$		$	$	%	$	
	$		$	$	%	$	
	$		$	$	%	$	
	$		$	$	%	$	

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EXHIBIT A
2 of 2

Angie,
Do I need a modification for the other two loans to pay payments due some time?
Thanks Tw

BORROWER NAME AND ADDRESS	LENDER NAME AND ADDRESS	LOAN DESCRIPTION
ANTHONY M WHITFIELD 2141 DORCHESTER ROAD NORTH CHARLESTON, SC 29406	Harbor National Bank 1503 Old Towne Road Charleston, SC 29407	Number 400033000 Amount $325,000.00 Date 04/23/2007

☐ Refer to the attached Signature Addendum, incorporated herein, for additional Borrowers and their signatures.

COMMERCIAL DEBT MODIFICATION AGREEMENT

DATE AND PARTIES. The date of this Debt Modification Agreement (Modification) is 09/13/2007
DEFINITIONS. As used in this Modification, the terms have the following meanings:
Pronouns. The pronouns "I," "me," and "my" refer to each Borrower signing this Modification, individually and together with their heirs, executors, administrators, successors, and assigns. "You" and "your" refer to the Lender, with its participants or syndication, successors and assigns, or any person or entity that acquires an interest in this Modification or Prior Obligation.
Prior Obligation. "Prior Obligation" refers to my previous agreement governing my promise to pay you money, including any loan agreement, note, or document that evidences my indebtedness, and any extensions, renewals, modifications, and substitutions.
BACKGROUND. You and I have entered into a Prior Obligation which is evidenced by MORTGAGE & ASSIGNMENT OF LEASES & RENTS
dated 04/23/2007 ☒ in the original principal amount of / ☐ with a maximum possible principal amount of $ 325,000.00 .
☐ payable on demand. / ☐ payable on demand but if no demand is made, by the maturity date of _____ . / ☒ with a maturity date of 05/03/2012 .
As of the date of this Modification, the ☐ amount remaining due is / ☒ current amount outstanding on the Prior Obligation is $ 325,000.00
principal (Principal) plus $ 677.08 accrued interest, for a total of $ 325,677.08 .
MODIFICATION. For value received, you and I agree to modify the Prior Obligation as follows.
☐ **INTEREST RATE MODIFICATION.**
☐ **INTEREST RATE.**

Maximum Interest Amount. Any amount assessed or collected as interest will be limited to the maximum lawful amount of interest allowed by state or federal law. Amounts collected in excess of the maximum lawful amount will be applied first to the unpaid principal balance. Any remainder will be refunded to me.
☐ Post-Maturity/Default Interest Rate.

☐ Compounding. This Modification provides for the compounding of interest.

☒ **PAYMENT MODIFICATION.**
THE MONTHLY PAYMENT IS HEREBY CHANGED FROM THE 3RD DAY OF EACH MONTH TO THE 13TH DAY OF EACH MONTH BEGINNING ON OCTOBER 13, 2007 UNTIL APRIL 13, 2012. THE FINAL PAYMENT OF THE OUTSTANDING PRINCIPAL AND ACCRUED INTEREST WILL REMAIN ON 05/03/2012. ALL OTHER TERMS AND CONDITIONS REMAIN THE SAME.

☐ **DRAW PERIOD MODIFICATION.**

☐ **FEES AND CHARGES MODIFICATION.**

ADDITIONAL TERMS.

CONTINUATION OF TERMS. Except as specifically amended in this Modification, all terms of the Prior Obligation remain in effect.
INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Modification.
VT only ☐ NOTICE TO BORROWER: THIS IS A DEMAND NOTE AND SO MAY BE COLLECTED BY THE LENDER AT ANY TIME. A NEW NOTE MUTUALLY AGREED UPON AND SUBSEQUENTLY ISSUED MAY CARRY A HIGHER OR LOWER RATE OF INTEREST.

☐ ORAL AGREEMENTS OR COMMITMENTS TO LOAN MONEY, EXTEND CREDIT OR TO FORBEAR FROM ENFORCING REPAYMENT OF A DEBT INCLUDING PROMISES TO EXTEND OR RENEW SUCH DEBT ARE NOT ENFORCEABLE, REGARDLESS OF THE LEGAL THEORY UPON WHICH IT IS BASED THAT IS IN ANY WAY RELATED TO THE CREDIT AGREEMENT. TO PROTECT YOU (BORROWER/DEBTOR) AND US (LENDER/SECURED PARTY) FROM MISUNDERSTANDING OR DISAPPOINTMENT, ANY AGREEMENTS WE REACH COVERING SUCH MATTERS ARE CONTAINED IN THIS WRITING, WHICH IS THE COMPLETE AND EXCLUSIVE STATEMENT OF THE AGREEMENT BETWEEN US, EXCEPT AS WE MAY LATER AGREE IN WRITING TO MODIFY IT. BY SIGNING THIS MODIFICATION, THE PARTIES AFFIRM THAT NO UNWRITTEN ORAL AGREEMENT EXISTS BETWEEN THEM.

SIGNATURES. By signing under seal, Borrower agrees to the terms contained in this Note. Borrower also acknowledges receipt of a copy of this Note.
BORROWER:

Entity Name ANTHONY M. WHITFIELD	Entity Name
Signature ANTHONY M WHITFIELD Date 9/20/07 (Seal)	Signature Date (Seal)
Signature Date (Seal)	Signature Date (Seal)

LENDER:

Harbor National Bank Entity Name	
Signature Angela Bell Commercial Lendee (Seal)	Signature Date (Seal)

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EXHIBIT B
Page 1 of 1

J. STANLEY CLAYPOOLE, PA
2155 NORTHPARK LANE
NORTH CHARLESTON, S.C. 29406
Whitfield OT-0513

BK E 623PG742

This document was prepared by (name, address, phone):
Harbor National Bank
1503 Old Towne Road
Charleston, SC 29407

State of South Carolina — Space Above This Line For Recording Data

REAL ESTATE MORTGAGE
(With Future Advance Clause)

1. **DATE AND PARTIES.** The date of this Mortgage is 04/23/2007 and the parties and their addresses are as follows:

MORTGAGOR: ANTHONY M WHITFIELD
2141 DORCHESTER ROAD
NORTH CHARLESTON, SC 29405

☐ Refer to the Addendum which is attached and incorporated herein for additional Mortgagors.

LENDER: Harbor National Bank
1503 Old Towne Road
Charleston, SC 29407

2. **MORTGAGE.** For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debt (hereafter defined), Mortgagor grants, bargains, conveys and mortgages to Lender the following described property:
SEE ATTACHED EXHIBIT 'A'

The property is located in CHARLESTON (County) at 1055 BLACK RUSH
CIRCLE (Address), MOUNT PLEASANT (City), South Carolina 29466 (Zip Code)

Together with all rights, easements, appurtenances, royalties, mineral rights, oil and gas rights, crops, timber, all diversion payments or third party payments made to crop producers, and all existing and future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate described above (all referred to as "Property"). The term Property also includes, but is not limited to, any and all water wells, water, ditches, reservoirs, reservoir sites and dams located on the real estate and all riparian and water rights associated with the Property, however established.

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3. **MAXIMUM OBLIGATION LIMIT.** The total principal amount of the Secured Debt (hereafter defined) secured by this Mortgage at any one time shall not exceed $ 325,000.00 . This limitation of amount does not include interest, loan charges, commitment fees, brokerage commissions, attorneys' fees and other charges validly made pursuant to this Mortgage and does not apply to advances (or interest accrued on such advances) made under the terms of this Mortgage to protect Lender's security and to perform any of the covenants contained in this Mortgage. Interest under the Note will be deferred, accrued or capitalized; however, Mortgagee shall not be required to defer, accrue or capitalize any interest except as provided in the Note. Future advances are contemplated and, along with other future obligations, are secured by this Mortgage even though all or part may not yet be advanced. Nothing in this Mortgage, however, shall constitute a commitment to make additional or future loans or advances in any amount. Any such commitment would need to be agreed to in a separate writing.

4. **SECURED DEBT DEFINED.** The term "Secured Debt" includes, but is not limited to, the following:
   A. The promissory note(s), contract(s), guaranty(ies) or other evidence of debt described below and all extensions, renewals, modifications or substitutions (Evidence of Debt) *(e.g., borrower's name, note amount, interest rate, maturity date)*:

   One note of even date in the principal amount of 325,000.00 with final payment due 05/03/2012

   B. All future advances from Lender to Mortgagor or other future obligations of Mortgagor to Lender under any promissory note, contract, guaranty, or other evidence of debt existing now or executed after this Mortgage whether or not this Mortgage is specifically referred to in the evidence of debt.
   C. All obligations Mortgagor owes to Lender, which now exist or may later arise, to the extent not prohibited by law, including, but not limited to, liabilities for overdrafts relating to any deposit account agreement between Mortgagor and Lender.
   D. All additional sums advanced and expenses incurred by Lender for insuring, preserving or otherwise protecting the Property and its value and any other sums advanced and expenses incurred by Lender under the terms of this Mortgage, plus interest at the highest rate in effect, from time to time, as provided in the Evidence of Debt.
   E. Mortgagor's performance under the terms of any instrument evidencing a debt by Mortgagor to Lender and any Mortgage securing, guarantying, or otherwise relating to the debt.

   If more than one person signs this Mortgage as Mortgagor, each Mortgagor agrees that this Mortgage will secure all future advances and future obligations described above that are given to or incurred by any one or more Mortgagor, or any one or more Mortgagor and others. This Mortgage will not secure any other debt if Lender fails, with respect to such other debt, to make any required disclosure about this Mortgage or if Lender fails to give any required notice of the right of rescission.

5. **PAYMENTS.** Mortgagor agrees to make all payments on the Secured Debt when due and in accordance with the terms of the Evidence of Debt or this Mortgage.

6. **WARRANTY OF TITLE.** Mortgagor covenants that Mortgagor is lawfully seized of the estate conveyed by this Mortgage and has the right to grant, bargain, convey, sell, and mortgage the Property and warrants that the Property is unencumbered, except for encumbrances of record.

7. **CLAIMS AGAINST TITLE.** Mortgagor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities, and other charges relating to the Property when due. Lender may require Mortgagor to provide to Lender copies of all notices that such amounts are due and the receipts evidencing Mortgagor's payment. Mortgagor will defend title to the Property against any claims that would impair the lien of this Mortgage. Mortgagor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses which Mortgagor may have against parties who supply labor or materials to improve or maintain the Property.

8. **PRIOR SECURITY INTERESTS.** With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Property and that may have priority over this Mortgage, Mortgagor agrees:
   A. To make all payments when due and to perform or comply with all covenants.
   B. To promptly deliver to Lender any notices that Mortgagor receives from the holder.
   C. Not to make or permit any modification or extension of, and not to request or accept any future advances under any note or agreement secured by, the other mortgage, deed of trust or security agreement unless Lender consents in writing.

9. **DUE ON SALE OR ENCUMBRANCE.** Lender may, at its option, declare the entire balance of the Secured Debt to be immediately due and payable upon the creation of any lien, encumbrance, transfer, or sale, or contract for any of these on the Property. However, if the Property includes Mortgagor's residence, this section shall be subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable. For the purposes of this section, the term "Property" also includes any interest to all or any part of the Property. This covenant shall run with the Property and shall remain in effect until the Secured Debt is paid in full and this Mortgage is released.

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10. **TRANSFER OF AN INTEREST IN THE MORTGAGOR.** If Mortgagor is an entity other than a natural person (such as a corporation or other organization), Lender may demand immediate payment if (1) a beneficial interest in Mortgagor is sold or transferred; (2) there is a change in either the identity or number of members of a partnership or similar entity; or (3) there is a change in ownership of more than 25 percent of the voting stock of a corporation or similar entity. However, Lender may not demand payment in the above situations if it is prohibited by law as of the date of this Mortgage.

11. **ENTITY WARRANTIES AND REPRESENTATIONS.** If Mortgagor is an entity other than a natural person (such as a corporation or other organization), Mortgagor makes to Lender the following warranties and representations which shall be continuing as long as the Secured Debt remains outstanding:
    A. Mortgagor is an entity which is duly organized and validly existing in the Mortgagor's state of incorporation (or organization). Mortgagor is in good standing in all states in which Mortgagor transacts business. Mortgagor has the power and authority to own the Property and to carry on its business as now being conducted and, as applicable, is qualified to do so in each state in which Mortgagor operates.
    B The execution, delivery and performance of this Mortgage by Mortgagor and the obligation evidenced by the Evidence of Debt are within the power of Mortgagor, have been duly authorized, have received all necessary governmental approval, and will not violate any provision of law, or order of court or governmental agency.
    C. Other than disclosed in writing Mortgagor has not changed its name within the last ten years and has not used any other trade or fictitious name. Without Lender's prior written consent, Mortgagor does not and will not use any other name and will preserve its existing name, trade names and franchises until the Secured Debt is satisfied.

12. **PROPERTY CONDITION, ALTERATIONS AND INSPECTION.** Mortgagor will keep the Property in good condition and make all repairs that are reasonably necessary. Mortgagor will give Lender prompt notice of any loss or damage to the Property. Mortgagor will keep the Property free of noxious weeds and grasses. Mortgagor will not initiate, join in or consent to any change in any private restrictive covenant, zoning ordinance or other public or private restriction limiting or defining the uses which may be made of the Property or any part of the Property, without Lender's prior written consent. Mortgagor will notify Lender of all demands, proceedings, claims, and actions against Mortgagor or any other owner made under law or regulation regarding use, ownership and occupancy of the Property. Mortgagor will comply with all legal requirements and restrictions, whether public or private, with respect to the use of the Property. Mortgagor also agrees that the nature of the occupancy and use will not change without Lender's prior written consent.

    No portion of the Property will be removed, demolished or materially altered without Lender's prior written consent except that Mortgagor has the right to remove items of personal property comprising a part of the Property that become worn or obsolete, provided that such personal property is replaced with other personal property at least equal in value to the replaced personal property, free from any title retention device, security agreement or other encumbrance. Such replacement of personal property will be deemed subject to the security interest created by this Mortgage. Mortgagor shall not partition or subdivide the Property without Lender's prior written consent. Lender or Lender's agents may, at Lender's option, enter the Property at any reasonable time for the purpose of inspecting the Property. Any inspection of the Property shall be entirely for Lender's benefit and Mortgagor will in no way rely on Lender's inspection.

13. **AUTHORITY TO PERFORM.** If Mortgagor fails to perform any of Mortgagor's duties under this Mortgage, or any other mortgage, deed of trust, security agreement or other lien document that has priority over this Mortgage, Lender may, without notice, perform the duties or cause them to be performed. Mortgagor appoints Lender as attorney in fact to sign Mortgagor's name or pay any amount necessary for performance. If any construction on the Property is discontinued or not carried on in a reasonable manner, Lender may do whatever is necessary to protect Lender's security interest in the Property. This may include completing the construction.

    Lender's right to perform for Mortgagor shall not create an obligation to perform, and Lender's failure to perform will not preclude Lender from exercising any of Lender's other rights under the law or this Mortgage. Any amounts paid by Lender for insuring, preserving or otherwise protecting the Property and Lender's security interest will be due on demand and will bear interest from the date of the payment until paid in full at the interest rate in effect from time to time according to the terms of the Evidence of Debt.

14. **ASSIGNMENT OF LEASES AND RENTS.** Mortgagor assigns, grants, bargains, conveys and mortgages to Lender as additional security all the right, title and interest in the following (Property).
    A. Existing or future leases, subleases, licenses, guaranties and any other written or verbal agreements for the use and occupancy of the Property, including but not limited to, any extensions, renewals, modifications or replacements (Leases).
    B. Rents, issues and profits, including but not limited to, security deposits, minimum rents, percentage rents, additional rents, common area maintenance charges, parking charges, real estate taxes, other applicable taxes, insurance premium contributions, liquidated damages following default, cancellation premiums, "loss of rents" insurance, guest receipts, revenues, royalties, proceeds, bonuses, accounts, contract rights, general intangibles, and all rights and claims which Mortgagor may have that in any way pertain to or are on account of the use or occupancy of the whole or any part of the Property (Rents).

    In the event any item listed as Leases or Rents is determined to be personal property, this Assignment will also be regarded as a security agreement.

    Mortgagor will promptly provide Lender with copies of the Leases and will certify these Leases are true and correct copies. The existing Leases will be provided on execution of the Assignment, and all future Leases and any other information with respect to these Leases will be provided immediately after they are executed. Mortgagor may collect, receive, enjoy and use the Rents so long as Mortgagor is not in default. Mortgagor will not collect in advance any Rents due in future lease periods, unless Mortgagor first obtains Lender's written consent. Upon default, Mortgagor will receive

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any Rents in trust for Lender and Mortgagor will not commingle the Rents with any other funds. When Lender so directs, Mortgagor will endorse and deliver any payments of Rents from the Property to Lender. Amounts collected will be applied at Lender's discretion to the Secured Debts, the costs of managing, protecting and preserving the Property, and other necessary expenses. Mortgagor agrees that this Security Instrument is immediately effective between Mortgagor and Lender and effective as to third parties on the recording of this Assignment.

As long as this Assignment is in effect, Mortgagor warrants and represents that no default exists under the Leases, and the parties subject to the Leases have not violated any applicable law on leases, licenses and landlords and tenants. Mortgagor, at its sole cost and expense, will keep, observe and perform, and require all other parties to the Leases to comply with the Leases and any applicable law. If Mortgagor or any party to the Lease defaults or fails to observe any applicable law, Mortgagor will promptly notify Lender. If Mortgagor neglects or refuses to enforce compliance with the terms of the Leases, then Lender may, at Lender's option, enforce compliance.

Mortgagor will not sublet, modify, extend, cancel, or otherwise alter the Leases, or accept the surrender of the Property covered by the Leases (unless the Leases so require) without Lender's consent. Mortgagor will not assign, compromise, subordinate or encumber the Leases and Rents without Lender's prior written consent. Lender does not assume or become liable for the Property's maintenance, depreciation, or other losses or damages when Lender acts to manage, protect or preserve the Property, except for losses and damages due to Lender's gross negligence or intentional torts. Otherwise, Mortgagor will indemnify Lender and hold Lender harmless for all liability, loss or damage that Lender may incur when Lender opts to exercise any of its remedies against any party obligated under the Leases.

15. CONDOMINIUMS; PLANNED UNIT DEVELOPMENTS. If the Property includes a unit in a condominium or a planned unit development, Mortgagor will perform all of Mortgagor's duties under the covenants, by-laws, or regulations of the condominium or planned unit development.

16. DEFAULT. Mortgagor will be in default if any of the following occur:

A. Any party obligated on the Secured Debt fails to make payment when due;
B. A breach of any term or covenant in this Mortgage, any prior mortgage or any construction loan agreement, security agreement or any other document evidencing, guarantying, securing or otherwise relating to the Secured Debt;
C. The making or furnishing of any verbal or written representation, statement or warranty to Lender that is false or incorrect in any material respect by Mortgagor or any person or entity obligated on the Secured Debt;
D. The death, dissolution, or insolvency of, appointment of a receiver for, or application of any debtor relief law to, Mortgagor or any person or entity obligated on the Secured Debt;
E. A good faith belief by Lender at any time that Lender is insecure with respect to any person or entity obligated on the Secured Debt or that the prospect of any payment is impaired or the value of the Property is impaired;
F. A material adverse change in Mortgagor's business including ownership, management, and financial conditions, which Lender in its opinion believes impairs the value of the Property or repayment of the Secured Debt; or
G. Any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in 7 C.F.R. Part 1940, Subpart G, Exhibit M.

17. REMEDIES ON DEFAULT. In some instances, federal and state law will require Lender to provide Mortgagor with notice of the right to cure, mediation notices or other notices and may establish time schedules for foreclosure actions. Subject to these limitations, if any, Lender may accelerate the Secured Debt and foreclose this Mortgage in a manner provided by law if this Mortgagor is in default.

At the option of Lender, all or any part of the agreed fees and charges, accrued interest and principal shall become immediately due and payable, after giving notice if required by law, upon the occurrence of a default or anytime thereafter. In addition, Lender shall be entitled to all the remedies provided by law, the Evidence of Debt, other evidences of debt, this Mortgage and any related documents. All remedies are distinct, cumulative and not exclusive, and the Lender is entitled to all remedies provided at law or equity, whether expressly set forth or not. The acceptance by Lender of any sum in payment or partial payment on the Secured Debt after the balance is due or is accelerated or after foreclosure proceedings are filed shall not constitute a waiver of Lender's right to require full and complete cure of any existing default. By not exercising any remedy on Mortgagor's default, Lender does not waive Lender's right to later consider the event a default if it continues or happens again.

18. EXPENSES; ADVANCES ON COVENANTS; ATTORNEYS' FEES; COLLECTION COSTS. Except when prohibited by law, Mortgagor agrees to pay all of Lender's expenses if Mortgagor breaches any covenant in this Mortgage. Mortgagor will also pay on demand all of Lender's expenses incurred in collecting, insuring, preserving or protecting the Property or in any inventories, audits, inspections or other examination by Lender in respect to the Property. Mortgagor agrees to pay all costs and expenses incurred by Lender in enforcing or protecting Lender's rights and remedies under this Mortgage, including, but not limited to, attorneys' fees, court costs, and other legal expenses. Once the Secured Debt is fully and finally paid, Lender agrees to release this Mortgage and Mortgagor agrees to pay for any recordation costs. All such amounts are due on demand and will bear interest from the time of the advance at the highest rate in effect, from time to time, as provided in the Evidence of Debt and as permitted by law.

19. ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES. As used in this section, (1) "Environmental Law" means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.), all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) "Hazardous Substance" means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has

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characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substances," "hazardous waste" or "hazardous substance" under any Environmental Law. Mortgagor represents, warrants and agrees that, except as previously disclosed and acknowledged in writing:

A. No Hazardous Substance has been, is, or will be located, transported, manufactured, treated, refined, or handled by any person on, under or about the Property, except in the ordinary course of business and in strict compliance with all applicable Environmental Law.
B. Mortgagor has not and will not cause, contribute to, or permit the release of any Hazardous Substance on the Property.
C. Mortgagor will immediately notify Lender if (1) a release or threatened release of Hazardous Substance occurs on, under or about the Property or migrates or threatens to migrate from nearby property; or (2) there is a violation of any Environmental Law concerning the Property. In such an event, Mortgagor will take all necessary remedial action in accordance with Environmental Law.
D. Mortgagor has no knowledge of or reason to believe there is any pending or threatened investigation, claim, or proceeding of any kind relating to (1) any Hazardous Substance located on, under or about the Property; or (2) any violation by Mortgagor or any tenant of any Environmental Law. Mortgagor will immediately notify Lender in writing as soon as Mortgagor has reason to believe there is any such pending or threatened investigation, claim, or proceeding. In such an event, Lender has the right, but not the obligation, to participate in any such proceeding including the right to receive copies of any documents relating to such proceedings.
E. Mortgagor and every tenant have been, are and shall remain in full compliance with any applicable Environmental Law.
F. There are no underground storage tanks, private dumps or open wells located on or under the Property and no such tank, dump or well will be added unless Lender first consents in writing.
G. Mortgagor will regularly inspect the Property, monitor the activities and operations on the Property, and confirm that all permits, licenses or approvals required by any applicable Environmental Law are obtained and complied with.
H. Mortgagor will permit, or cause any tenant to permit, Lender or Lender's agent to enter and inspect the Property and review all records at any reasonable time to determine (1) the existence, location and nature of any Hazardous Substance on, under or about the Property; (2) the existence, location, nature, and magnitude of any Hazardous Substance that has been released on, under or about the Property; or (3) whether or not Mortgagor and any tenant are in compliance with applicable Environmental Law.
I. Upon Lender's request and at any time, Mortgagor agrees, at Mortgagor's expense, to engage a qualified environmental engineer to prepare an environmental audit of the Property and to submit the results of such audit to Lender. The choice of the environmental engineer who will perform such audit is subject to Lender's approval.
J. Lender has the right, but not the obligation, to perform any of Mortgagor's obligations under this section at Mortgagor's expense.
K. As a consequence of any breach of any representation, warranty or promise made in this section, (1) Mortgagor will indemnify and hold Lender and Lender's successors or assigns harmless from and against all losses, claims, demands, liabilities, damages, cleanup, response and remediation costs, penalties and expenses, including without limitation all costs of litigation and attorneys' fees, which Lender and Lender's successors or assigns may sustain; and (2) at Lender's discretion, Lender may release this Mortgage and in return Mortgagor will provide Lender with collateral of at least equal value to the Property secured by this Mortgage without prejudice to any of Lender's rights under this Mortgage.
L. Notwithstanding any of the language contained in this Mortgage to the contrary, the terms of this section shall survive any foreclosure or satisfaction of this Mortgage regardless of any passage of title to Lender or any disposition by Lender of any or all of the Property. Any claims and defenses to the contrary are hereby waived.

20. CONDEMNATION. Mortgagor will give Lender prompt notice of any action, real or threatened, by private or public entities to purchase or take any or all of the Property, including any easements, through condemnation, eminent domain, or any other means. Mortgagor further agrees to notify Lender of any proceedings instituted for the establishment of any sewer, water, conservation, ditch, drainage, or other district relating to or binding upon the Property or any part of it. Mortgagor authorizes Lender to intervene in Mortgagor's name in any of the above described actions or claims and to collect and receive all sums resulting from the action or claim. Mortgagor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property. Such proceeds shall be considered payments and will be applied as provided in this Mortgage. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.

21. INSURANCE. Mortgagor agrees to maintain insurance as follows:

A. Mortgagor shall keep the Property insured against loss by fire, theft and other hazards and risks reasonably associated with the Property due to its type and location. Other hazards and risks may include, for example, coverage against loss due to floods or flooding. This insurance shall be maintained in the amounts and for the periods that Lender requires. What Lender requires pursuant to the preceding three sentences can change during the term of the Secured Debt. The insurance carrier providing the insurance shall be chosen by Mortgagor subject to Lender's approval, which shall not be unreasonably withheld. If Mortgagor fails to maintain the coverage described above, Lender may, at Lender's option, obtain coverage to protect Lender's rights in the Property according to the terms of this Mortgage.

All insurance policies and renewals shall be acceptable to Lender and shall include a standard "mortgage clause" and, where applicable, "lender loss payee clause." Mortgagor shall immediately notify Lender of cancellation or termination of the insurance. Lender shall have the right to hold the policies and renewals. If Lender requires, Mortgagor shall immediately give to Lender all receipts of paid premiums and renewal notices. Upon loss, Mortgagor shall give immediate notice to the Insurance carrier and Lender. Lender may make proof of loss if not made immediately by Mortgagor.

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Unless Lender and Mortgagor otherwise agree in writing, insurance proceeds shall be applied to restoration or repair of the Property damaged if the restoration or repair is economically feasible and Lender's security is not lessened. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the Secured Debt, whether or not then due, with any excess paid to Mortgagor. If Mortgagor abandons the Property, or does not answer within 30 days a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may collect the insurance proceeds. Lender may use the proceeds to repair or restore the Property or to pay the Secured Debt whether or not then due. The 30-day period will begin when the notice is given.

Unless Lender and Mortgagor otherwise agree in writing, any application of proceeds to principal shall not extend or postpone the due date of scheduled payments or change the amount of the payments. If the Property is acquired by Lender, Mortgagor's right to any insurance policies and proceeds resulting from damage to the Property before the acquisition shall pass to Lender to the extent of the Secured Debt immediately before the acquisition.

B. Mortgagor agrees to maintain comprehensive general liability insurance naming Lender as an additional insured in an amount acceptable to Lender, insuring against claims arising from any accident or occurrence in or on the Property.

C. Mortgagor agrees to maintain rental loss or business interruption insurance, as required by Lender, in an amount equal to at least coverage of one year's debt service, and required escrow account deposits (if agreed to separately in writing), under a form of policy acceptable to Lender.

22. **NO ESCROW FOR TAXES AND INSURANCE.** Unless otherwise provided in a separate agreement, Mortgagor will not be required to pay to Lender funds for taxes and insurance in escrow.

23. **FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Mortgagor will provide to Lender upon request, any financial statement or information Lender may deem necessary. Mortgagor warrants that all financial statements and information Mortgagor provides to Lender are, or will be, accurate, correct, and complete. Mortgagor agrees to sign, deliver, and file as Lender may reasonably request any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Mortgagor's obligations under this Mortgage and Lender's lien status on the Property. If Mortgagor fails to do so, Lender may sign, deliver, and file such documents or certificates in Mortgagor's name and Mortgagor hereby irrevocably appoints Lender or Lender's agent as attorney in fact to do the things necessary to comply with this section.

24. **JOINT AND INDIVIDUAL LIABILITY; CO-SIGNERS; SUCCESSORS AND ASSIGNS BOUND.** All duties under this Mortgage are joint and individual. If Mortgagor signs this Mortgage but does not sign the Evidence of Debt, Mortgagor does so only to mortgage Mortgagor's interest in the Property to secure payment of the Secured Debt and Mortgagor does not agree to be personally liable on the Secured Debt. Mortgagor agrees that Lender and any party to this Mortgage may extend, modify or make any change in the terms of this Mortgage or the Evidence of Debt without Mortgagor's consent. Such a change will not release Mortgagor from the terms of this Mortgage. The duties and benefits of this Mortgage shall bind and benefit the successors and assigns of Mortgagor and Lender.

If this Mortgage secures a guaranty between Lender and Mortgagor and does not directly secure the obligation which is guarantied, Mortgagor agrees to waive any rights that may prevent Lender from bringing any action or claim against Mortgagor or any party indebted under the obligation including, but not limited to, anti-deficiency or one-action laws.

25. **APPLICABLE LAW; SEVERABILITY; INTERPRETATION.** This Mortgage is governed by the laws of the jurisdiction in which Lender is located, except to the extent otherwise required by the laws of the jurisdiction where the Property is located. This Mortgage is complete and fully integrated. This Mortgage may not be amended or modified by oral agreement. Any section or clause in this Mortgage, attachments, or any agreement related to the Secured Debt that conflicts with applicable law will not be effective, unless that law expressly or impliedly permits the variations by written agreement. If any section or clause of this Mortgage cannot be enforced according to its terms, that section or clause will be severed and will not affect the enforceability of the remainder of this Mortgage. Whenever used, the singular shall include the plural and the plural the singular. The captions and headings of the sections of this Mortgage are for convenience only and are not to be used to interpret or define the terms of this Mortgage. Time is of the essence in this Mortgage.

26. **NOTICE.** Unless otherwise required by law, any notice shall be given by delivering it or by mailing it by first class mail to the appropriate party's address on page 1 of this Mortgage, or to any other address designated in writing. Notice to one mortgagor will be deemed to be notice to all mortgagors.

27. **WAIVER OF HOMESTEAD.** Except to the extent prohibited by law, Mortgagor waives all homestead exemption rights relating to the Property.

28. **U.C.C. PROVISIONS.** If checked, the following are applicable to, but do not limit, this Mortgage:

☐ **Construction Loan.** This Mortgage secures an obligation incurred for the construction of an improvement on the Property.

☐ **Fixture Filing.** Mortgagor grants to Lender a security interest in all goods that Mortgagor owns now or in the future and that are or will become fixtures related to the Property.

☐ **Crops; Timber; Minerals; Rents, Issues and Profits.** Mortgagor grants to Lender a security interest in all crops, timber, and minerals located on the Property as well as all rents, issues, and profits of them including, but not limited to, all Conservation Reserve Program (CRP) and Payment in Kind (PIK) payments and similar governmental programs (all of which shall also be included in the term "Property").

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☐ **Personal Property.** Mortgagor grants to Lender a security interest in all personal property located on or connected with the Property. This security interest includes all farm products, inventory, equipment, accounts, documents, instruments, chattel paper, general intangibles, and all other items of personal property Mortgagor owns now or in the future and that are used or useful in the construction, ownership, operation, management, or maintenance of the Property. The term "personal property" specifically excludes that property described as "household goods" secured in connection with a "consumer" loan as those terms are defined in applicable federal regulations governing unfair and deceptive credit practices.

☐ **Filing As Financing Statement.** Mortgagor agrees and acknowledges that this Mortgage also suffices as a financing statement and as such, may be filed of record as a financing statement for purposes of Article 9 of the Uniform Commercial Code. A carbon, photographic, image or other reproduction of this Mortgage is sufficient as a financing statement.

29. OTHER TERMS. If checked, the following are applicable to this Mortgage:

☐ **Line of Credit.** The Secured Debt includes a revolving line of credit provision. Although the Secured Debt may be reduced to a zero balance, this Mortgage will remain in effect until released.

☒ **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 thirty 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. 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.

☒ **Separate Assignment.** The Mortgagor has executed or will execute a separate assignment of leases and rents. If the separate assignment of leases and rents is properly executed and recorded, then the separate assignment will supersede this Security Instrument's "Assignment of Leases and Rents" section.

☐ **Additional Terms.**

SIGNATURES: By signing below, Mortgagor agrees to the terms and covenants contained in this Mortgage and in any attachments. Mortgagor also acknowledges receipt of a copy of this Mortgage on the date stated above on Page 1.

☐ Actual authority was granted to the parties signing below by resolution signed and dated _____ .

Entity Name: _____

(Signature) ANTHONY M WHITFIELD 04/23/2007 (Date) (Seal)

Entity Name: _____

_____ (Signature) _____ (Date) (Seal)

Signed, Sealed and delivered in the presence of:

_____ (Witness)

_____ (Witness)

☐ Refer to the Addendum which is attached and incorporated herein for additional Mortgagors, signatures and acknowledgments.

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Page 7 of 10

BKE 623PG749

PROBATE:

STATE OF South Carolina, COUNTY OF Charleston } ss.

Personally appeared before me the undersigned witness who, being duly sworn, deposed and said that (s)he saw the Mortgagor (and each Mortgagor if more than one) sign, seal and deliver the foregoing Mortgage and that (s)he, together with the other witness whose name appears as a witness, witnessed the execution thereof.

Sworn to and subscribed before me this 23rd day

of April, 2007.

Notary Public for South Carolina

x

My commission expires: 1-28-2014

SARAH B PFLUG NOTARY PUBLIC STATE OF SOUTH CAROLINA

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EXHIBIT C

Exhibit "A"

ALL that certain piece, parcel or tract of land, situate, lying and being in the Town of Mt. Pleasant, Charleston County, South Carolina, shown and designated as Lot 78, on that certain plat prepared by Mark S. Busey, S.C.R.L.S., entitled "A FINAL SUBDIVISION PLAT OF PHASE 2 WHISPERING MARSH, DUNES WEST, OWNED BY JOHN WIELAND HOMES OF SOUTH CAROLINA, LOCATED IN THE TOWN OF MT. PLEASANT, CHARLESTON COUNTY, SOUTH CAROLINA" said plat being dated January 13, 2000 and duly recorded in the Charleston County RMC Office in Plat Book ED, Page 822. Reference to said plat is hereby made for a more complete description as to distances, courses, metes and bounds.

BEING the same premises as conveyed to the Mortgagor herein by deed of Dennis E. Harris and Robin J. Harris dated this date and recorded simultaneously herewith.

BKE 623PG751

RECORDER'S PAGE

***NOTE*: This page MUST remain with the original document**

FILED

April 24, 2007

3:54:11 PM

BKE 623PG742

Charlie Lybrand, Register
Charleston County, SC

Filed By:

J. Stanley Claypoole, P.A.
Attorney at Law
2155 Northpark Lane
North Charleston SC 29406

Number of Pages: 10

DESCRIPTION	AMOUNT
	$ 15.00
Postage	
TOTAL	$ 15.00

DRAWER: A - bmm

DWJ

DO NOT STAMP BELOW THIS LINE

EXHIBIT C
Page 10 of 10

J. STANLEY CLAYPOOLE, PA
2155 NORTHPARK LANE
NORTH CHARLESTON, S.C. 29406
whitfield 07-0513

BKF 623PG152

State of South Carolina — Space Above This Line For Recording Data

This document was prepared by (name, address, phone number): Harbor National Bank
1503 Old Towne Road
Charleston, SC 29407

(843) 852-6400

ASSIGNMENT OF LEASES AND RENTS

1. **DATE AND PARTIES.** The date of this Assignment of Leases and Rents (Assignment) is 04/23/2007. The parties and their addresses are:

ASSIGNOR: ANTHONY M WHITFIELD
2141 DORCHESTER ROAD
NORTH CHARLESTON, SC 29405

☐ Refer to the Addendum that is attached and incorporated herein for additional Assignors.

LENDER: Harbor National Bank
1503 Old Towne Road
Charleston, SC 29407

2. **ASSIGNMENT OF LEASES AND RENTS.** For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debts and Assignor's performance under this Assignment, Assignor irrevocably assigns, grants, bargains, conveys and mortgages to Lender as additional security all the right, title and interest in the following (all referred to as Property).

A. Existing or future leases, subleases, licenses, guaranties and any other written or verbal agreements for the use and occupancy of the Property, including any extensions, renewals, modifications or replacements (all referred to as Leases).

B. Rents, issues and profits (all referred to as Rents), including but not limited to security deposits, minimum rent, percentage rent, additional rent, common area maintenance charges, parking charges, real estate taxes, other applicable taxes, insurance premium contributions, liquidated damages following default, cancellation premiums, "loss of rents" insurance, guest receipts, revenues, royalties, proceeds, bonuses, accounts, contract rights, general intangibles, and all rights and claims which Assignor may have that in any way pertain to or are on account of the use or occupancy of the whole or any part of the Property.

C. The term Property as used in this Assignment shall include the following described real property:

SEE ATTACHED EXHIBIT 'A'

EXHIBIT D
Page 1 of 9

The Property is located in CHARLESTON County at 1055 BLACK RUSH CIRCLE MOUNT PLEASANT , SC 29466 (Address, City, State, ZIP Code).

In the event any item listed as Leases or Rents is determined to be personal property, this Assignment will also be regarded as a security agreement.

3. **MAXIMUM OBLIGATION LIMIT.** The total principal amount secured by this Assignment at any one time will not exceed $325,000.00 . This limitation of amount does not include interest and other fees and charges validly made pursuant to this Assignment. Also, this limitation does not apply to advances made under the terms of this Assignment to protect Lender's security and to perform any of the covenants contained in this Assignment. Interest under the Note will be deferred, accrued or capitalized; however, Lender will not be required to defer, accrue or capitalize any interest except as provided in the Note.

4. **SECURED DEBTS.** This Assignment will secure the following Secured Debts:

A. ☐ **Specific Debts.** The following debts and all extensions, renewals, refinancings, modifications and replacements. (Include items such as borrowers' names, note amounts, interest rates, maturity dates, etc.)

☐ One or more of the debts secured by this Assignment contains a future advance provision.

B. ☒ **All Debts.** All present and future debts from Assignor and _____

to Lender, even if this Assignment is not specifically referenced or if the future debt is unrelated to or of a different type than this debt. If more than one person signs this Assignment, each agrees that it will secure debts incurred either individually or with others who may not sign this Assignment. Nothing in this Assignment constitutes a commitment to make additional or future loans or advances. Any such commitment must be in writing. In the event that Lender fails to provide notice of the right of rescission, Lender waives any subsequent security interest in the Assignor's principal dwelling that is created by this Assignment. This Assignment will not secure any debt for which a non-possessory, non-purchase money security interest is created in "household goods" in connection with a "consumer loan," as those terms are defined by federal law governing unfair and deceptive credit practices. This Assignment will not secure any debt for which a security interest is created in "margin stock" and Lender does not obtain a "statement of purpose," as defined and required by federal law governing securities.

C. **Sums Advanced.** All sums advanced and expenses incurred by Lender under the terms of this Assignment.

5. **PAYMENTS.** Assignor agrees that all payments under the Secured Debts will be paid when due and in accordance with the terms of the Secured Debts and this Assignment.

6. **COLLECTION OF RENTS.** Assignor may collect, receive, enjoy and use the Rents so long as Assignor is not in default. Assignor will not collect in advance any Rents due in future lease periods, unless Assignor first obtains Lender's written consent. Upon default, Assignor will receive any Rents in trust for Lender and Assignor will not commingle the Rents with any other funds. When Lender so directs, Assignor will endorse and deliver any payments of Rents from the Property to Lender. Amounts collected will be applied at Lender's discretion to the Secured Debts, the costs of managing, protecting and preserving the Property, and other necessary expenses. Assignor agrees that this Assignment is immediately effective between Assignor and Lender and effective as to third parties on the recording of this Assignment.

7. **WARRANTIES AND REPRESENTATIONS.** To induce Lender to enter into the Loan, Assignor makes these representations and warranties for as long as this Assignment is in effect.

A. **Power.** Assignor is duly organized, validly existing and in good standing under the laws in the jurisdiction where Assignor was organized and is duly qualified, validly existing and in good standing in all jurisdictions in which Assignor operates or Assignor owns or leases property. Assignor has the power and authority to enter into this transaction and to carry on Assignor's business or activity as now conducted.

B. **Authority.** The execution, delivery and performance of this Assignment and the obligation evidenced by this Assignment: are within Assignor's duly authorized powers; has received all necessary governmental approval; will not violate any provision of law or order of court or governmental agency; and will not violate any agreement to which Assignor is a party or to which Assignor is or any of Assignor's property is subject.

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_____

EXHIBIT D
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C. **Name and Place of Business.** Other than previously disclosed in writing to Lender, Assignor has not changed Assignor's name or principal place of business within the last ten years and has not used any other trade or fictitious name. Without Lender's prior written consent, Assignor does not and will not use any other name and will preserve Assignor's existing name, trade names and franchises.

D. **Ownership or Lease of Property.** Assignor owns or leases all property that Assignor needs to conduct Assignor's business and activities. All of Assignor's property is free and clear of all liens, security interests, encumbrances and other adverse claims and interests, except those Lender previously agreed to in writing.

E. **Compliance with Laws.** Assignor is not violating any laws, regulations, rules, orders, judgments or decrees applicable to Assignor or Assignor's property, except for those that Assignor is challenging in good faith through proper proceedings after providing adequate reserves to fully pay the claim and its challenge should Assignor lose.

F. **Title.** Assignor has good title to the Leases, Rents and Property and the right to assign, grant, bargain, convey and mortgage to Lender as additional security the Leases and Rents, and no other person has any right in the Leases and Rents.

G. **Recordation.** Assignor has recorded the Leases as required by law or as otherwise prudent for the type and use of the Property.

H. **Default.** No default exists under the Leases, and the parties subject to the Leases have not violated any applicable law on leases, licenses and landlords and tenants. Assignor, at its sole cost and expense, will keep, observe and perform, and require all other parties to the Leases to comply with the Leases and any applicable law. If Assignor or any party to the Lease defaults or fails to observe any applicable law, Assignor will promptly notify Lender.

I. **Lease Modification.** Assignor has not sublet, modified, extended, canceled, or otherwise altered the Leases, or accepted the surrender of the Property covered by the Leases (unless the Leases so required).

J. **Encumbrance.** Assignor has not assigned, compromised, subordinated or encumbered the Leases and Rents.

8. **COVENANTS.** Assignor agrees to the following covenants:

A. **Rent Abatement and Insurance.** When any Lease provides for an abatement of Rents due to fire, flood or other casualty, Assignor will insure against this risk of loss with a policy satisfactory to Lender. Assignor may choose the insurance company, subject to Lender's approval, which will not be unreasonably withheld.

B. **Copies of Leases.** Assignor will promptly provide Lender with copies of the Leases and will certify these Leases are true and correct copies. The existing Leases will be provided on execution of the Assignment, and all future Leases and any other information with respect to these Leases will be provided immediately after they are executed.

C. **Right to Rents.** Immediately after the execution of this Assignment, Assignor will notify all current and future tenants and others obligated under the Leases of Lender's right to the Leases and Rents, and will request that they immediately pay all future Rents directly to Lender when Assignor or Lender asks them to do so.

D. **Accounting.** When Lender requests, Assignor will provide to Lender an accounting of Rents, prepared in a form acceptable to Lender, subject to generally accepted accounting principles and certified by Assignor or Assignor's accountant to be current, accurate and complete as of the date requested by Lender.

E. **Lease Modification.** Assignor will not sublet, modify, extend, cancel, or otherwise alter the Leases, or accept the surrender of the Property covered by the Leases (unless the Leases so required) without Lender's written consent.

F. **Encumbrance.** Assignor will not assign, compromise, subordinate or encumber the Leases and Rents without Lender's prior written consent.

G. **Future Leases.** Assignor will not enter into any future Leases without prior written consent from Lender. Assignor will execute and deliver such further assurances and assignments as to these future Leases as Lender requires from time to time.

H. **Personal Property.** Assignor will not sell or remove any personal property on the Property, unless Assignor replaces this personal property with like kind for the same or better value.

I. **Prosecution and Defense of Claims.** Assignor will appear in and prosecute its claims or defend its title to the Leases and Rents against any claims that would impair Assignor's interest under this Assignment and, on Lender's request, Assignor will also appear in any action or proceeding on behalf of Lender. Assignor agrees to assign to Lender, as requested by Lender, any right, claims or defenses which Assignor may have against parties who supply labor or materials to improve or maintain the leaseholds subject to the Leases and/or the Property.

J. **Liability and Indemnification.** Lender does not assume or become liable for the Property's maintenance, depreciation, or other losses or damages when Lender acts to manage, protect or preserve the Property, except for losses or damages due to Lender's gross negligence or intentional torts to the extent permitted by law. Otherwise, Assignor will indemnify Lender and hold Lender harmless for all liability, loss or damage that Lender may incur when Lender opts to exercise any of its remedies against any party obligated under the Leases.

K. **Leasehold Estate.** Assignor will not cause or permit the leasehold estate under the Leases to merge with Assignor's reversionary interest, and agrees that the Leases shall remain in full force and effect regardless of any merger of the Assignor's interests and of any merger of the interests of Assignor and any party obligated under the Leases.

L. **Insolvency.** Lender will be the creditor of each tenant and of anyone else obligated under the Leases who is subject to an assignment for the benefit of creditors, an insolvency, a dissolution or a receivership proceeding, or a bankruptcy.

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9. **TRANSFER OF AN INTEREST IN THE ASSIGNOR.** If Assignor is an entity other than a natural person (such as a corporation or other organization), Lender may demand immediate payment if:
   A. A beneficial interest in Assignor is sold or transferred.
   B. There is a change in either the identity or number of members of a partnership or similar entity.
   C. There is a change in ownership of more than 25 percent of the voting stock of a corporation or similar entity.
   However, Lender may not demand payment in the above situations if it is prohibited by law as of the date of this Assignment.

10. **DEFAULT.** Assignor will be in default if any of the following occur with regard to the Secured Debts that are secured by this Assignment:
   A. **Payments.** Assignor fails to make a payment in full when due.
   B. **Insolvency or Bankruptcy.** Assignor makes an assignment for the benefit of creditors or becomes insolvent, either because Assignor's liabilities exceed Assignor's assets or Assignor is unable to pay Assignor's debts as they become due; or Assignor petitions for protection under federal, state or local bankruptcy, insolvency or debtor relief laws, or is the subject of a petition or action under such laws and fails to have the petition or action dismissed within a reasonable period of time not to exceed 60 days.
   C. **Death or Incompetency.** If Assignor is an individual, Assignor dies or is declared legally incompetent.
   D. **Business Termination.** If Assignor is not an individual, Assignor merges, dissolves, reorganizes or ends its business or existence, or a partner or majority owner dies or is declared legally incompetent.
   E. **Failure to Perform.** Assignor fails to perform any condition or to keep any promise or covenant of this Assignment, any other document evidencing or pertaining to the Loan, or any other debt or agreement Assignor has with Lender.
   F. **Misrepresentation.** Assignor makes any verbal or written statement or provides any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.
   G. **Property Transfer.** Assignor transfers all or a substantial part of Assignor's money or property.
   H. **Property Value.** The value of the Property declines or is impaired.
   I. **Name Change.** Assignor changes Assignor's name or assumes an additional name without notifying Lender before making such a change.
   J. **Material Change.** Without first notifying Lender, there is a material change in Assignor's business, including ownership, management, and financial conditions.
   K. **Insecurity.** Lender reasonably believes that Lender is insecure.

11. **REMEDIES.** After Assignor defaults, and after Lender gives any legally required notice and opportunity to cure the default, Lender may at Lender's option do any one or more of the following:
   A. **Acceleration.** Lender may make all or any part of the amount owing by the terms of the Secured Debts immediately due.
   B. **Additional Security.** Lender may demand additional security or additional parties to be obligated to pay the Secured Debts.
   C. **Sources.** Lender may use any and all remedies Lender has under the state law where the Property is located or federal law or in any instrument evidencing or pertaining to the Secured Debts.
   D. **Insurance Benefits.** Lender may make a claim for any and all insurance benefits or refunds that may be available on Assignor's default.
   E. **Payments Made On Assignor's Behalf.** Amounts advanced on Assignor's behalf will be immediately due and may be added to the Secured Debts.
   F. **Rents.** Lender may terminate Assignor's right to collect Rents and directly collect and retain Rents in Lender's name without taking possession of the Property and to demand, collect, receive, and sue for the Rents, giving proper receipts and releases. In addition, after deducting all reasonable expenses of collection from any collected and retained Rents, Lender may apply the balance as provided for by the Secured Debts.
   G. **Entry.** Lender may enter, take possession, manage and operate all or any part of the Property; make, modify, enforce or cancel or accept the surrender of any Leases; obtain or evict any tenants and licensees; increase or reduce Rents; decorate, clean and make repairs or do any other act or incur any other cost Lender deems proper to protect the Property as fully as Assignor could do. Any funds collected from the operation of the Property may be applied in such order as Lender may deem proper, including, but not limited to, payment of the following: operating expenses, management, brokerage, attorneys' and accountants' fees, the Secured Debts, and toward the maintenance of reserves for repair or replacement. Lender may take such action without regard to the adequacy of the security, with or without any action or proceeding, through any person or agent, or receiver to be appointed by a court, and irrespective of Assignor's possession. The collection and application of the Rents or the entry upon and taking possession of the Property as set out in this section shall not cure or waive any notice of default under the Secured Debts, this Assignment, or invalidate any act pursuant to such notice. The enforcement of such remedy by Lender, once exercised, shall continue for so long as Lender shall elect, notwithstanding that such collection and application of Rents may have cured the original default.

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H. **Waiver.** Except as otherwise required by law, by choosing any one or more of these remedies you do not give up any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

12. **APPOINTMENT OF A RECEIVER.** On or after an Assignor's default, Assignor agrees to Lender making an application to the court for an appointment of a receiver for the benefit of Lender to take possession of the Property and the Leases, with the power to receive, collect and apply the Rents. Any Rents collected will be applied as the court authorizes to pay taxes, to provide insurance, to make repairs and to pay costs or any other expenses relating to the Property, the Leases and Rents, and any remaining sums shall be applied to the Secured Debts. Assignor agrees that this appointment of a receiver may be without giving bond, without reference to the then-existing value of the Property, and without regard to the insolvency of any person liable for any of the Secured Debts.

13. **COLLECTION EXPENSES AND ATTORNEYS' FEES.** To the extent permitted by law, Assignor agrees to pay all expenses of collection, enforcement or protection of Lender's rights and remedies under this Assignment. Unless the applicable law that governs this Assignment is North Dakota, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. These expenses are due and payable immediately. These expenses will bear interest from the date of payment until paid in full at the contract interest rate then in effect for the Loan. To the extent permitted by the United States Bankruptcy Code, Assignor agrees to pay the reasonable attorneys' fees Lender incurs to collect this Assignment as awarded by any court exercising jurisdiction under the Bankruptcy Code.

14. **ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES.** As used in this section, (1) Environmental Law means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.), all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) Hazardous Substance means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substances," "hazardous waste," "hazardous substance," or "regulated substances" under any Environmental Law.

Assignor represents, warrants and agrees that:

A. Except as previously disclosed and acknowledged in writing to Lender, no Hazardous Substance has been, is, or will be located, transported, manufactured, treated, refined, or handled by any person on, under or about the Property, except in the ordinary course of business and in strict compliance with all applicable Environmental Law.
B. Except as previously disclosed and acknowledged in writing to Lender, Assignor has not and will not cause, contribute to, or permit the release of any Hazardous Substance on the Property.
C. Assignor will immediately notify Lender if (1) a release or threatened release of Hazardous Substance occurs on, under or about the Property or migrates or threatens to migrate from nearby property; or (2) there is a violation of any Environmental Law concerning the Property. In such an event, Assignor will take all necessary remedial action in accordance with Environmental Law.
D. Except as previously disclosed and acknowledged in writing to Lender, Assignor has no knowledge of or reason to believe there is any pending or threatened investigation, claim, or proceeding of any kind relating to (1) any Hazardous Substance located on, under or about the Property; or (2) any violation by Assignor or any tenant of any Environmental Law. Assignor will immediately notify Lender in writing as soon as Assignor has reason to believe there is any such pending or threatened investigation, claim, or proceeding. In such an event, Lender has the right, but not the obligation, to participate in any such proceeding including the right to receive copies of any documents relating to such proceedings.
E. Except as previously disclosed and acknowledged in writing to Lender, Assignor and every tenant have been, are and will remain in full compliance with any applicable Environmental Law.
F. Except as previously disclosed and acknowledged in writing to Lender, there are no underground storage tanks, private dumps or open wells located on or under the Property and no such tank, dump or well will be added unless Lender first consents in writing.
G. Assignor will regularly inspect the Property, monitor the activities and operations on the Property, and confirm that all permits, licenses or approvals required by any applicable Environmental Law are obtained and complied with.
H. Assignor will permit, or cause any tenant to permit, Lender or Lender's agent to enter and inspect the Property and review all records at any reasonable time to determine (1) the existence, location and nature of any Hazardous Substance on, under or about the Property; (2) the existence, location, nature, and magnitude of any Hazardous Substance that has been released on, under or about the Property; or (3) whether or not Assignor and any tenant are in compliance with applicable Environmental Law.

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I. Upon Lender's request and at any time, Assignor agrees, at Assignor's expense, to engage a qualified environmental engineer to prepare an environmental audit of the Property and to submit the results of such audit to Lender. The choice of the environmental engineer who will perform such audit is subject to Lender's approval.
J. Lender has the right, but not the obligation, to perform any of Assignor's obligations under this section at Assignor's expense.
K. As a consequence of any breach of any representation, warranty or promise made in this section, (1) Assignor will indemnify and hold Lender and Lender's successors or assigns harmless from and against all losses, claims, demands, liabilities, damages, cleanup, response and remediation costs, penalties and expenses to the extent permitted by law, including without limitation all costs of litigation and attorneys' fees, which Lender and Lender's successors or assigns may sustain; and (2) at Lender's discretion, Lender may release this Assignment and in return Assignor will provide Lender with collateral of at least equal value to the Property secured by this Assignment without prejudice to any of Lender's rights under this Assignment.
L. Notwithstanding any of the language contained in this Assignment to the contrary, the terms of this section will survive any foreclosure or satisfaction of this Assignment regardless of any passage of title to Lender or any disposition by Lender of any or all of the Property. Any claims and defenses to the contrary are hereby waived.

15. TERM. This Assignment will remain in full force and effect until the Secured Debts are paid or otherwise discharged and Lender is no longer obligated to advance funds under any loan or credit agreement which is a part of the Secured Debts. If any or all payments of the Secured Debts are subsequently invalidated, declared void or voidable, or set aside and are required to be repaid to a trustee, custodian, receiver or any other party under any bankruptcy act or other state or federal law, then the Secured Debts will be revived and will continue in full force and effect as if this payment had not been made.

16. CO-SIGNERS. If Assignor signs this Assignment but does not sign the Secured Debts, Assignor does so only to assign Assignor's interest in the Property to secure payment of the Secured Debts and Assignor does not agree to be personally liable on the Secured Debts. If this Assignment secures a guaranty between Lender and Assignor, Assignor agrees to waive any rights that may prevent Lender from bringing any action or claim against Assignor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or one-action laws.

17. WAIVERS. Except to the extent prohibited by law, Assignor waives all homestead exemption rights relating to the Property.

18. U.C.C. PROVISIONS.

☐ **Construction Loan.** This Assignment secures an obligation incurred for the construction of an improvement on the Property.

19. OTHER TERMS. If checked, the following are applicable to this Assignment:

☐ **Line of Credit.** The Secured Debts include a revolving line of credit provision. Although the Secured Debts may be reduced to a zero balance, this Assignment will remain in effect until the Secured Debts and all underlying agreements have been terminated in writing by Lender.

☐ **Additional Terms.**

20. APPLICABLE LAW. This Assignment is governed by the laws of South Carolina, except to the extent otherwise required by the laws of the jurisdiction where the Property is located, and the United States of America.

21. JOINT AND INDIVIDUAL LIABILITY AND SUCCESSORS. Each Assignor's obligations under this Assignment are independent of the obligations of any other Assignor. Lender may sue each Assignor individually or together with any other Assignor. Lender may release any part of the Property and Assignor will still be obligated under this Assignment for the remaining Property. The duties and benefits of this Assignment will bind and benefit the successors and assigns of Lender and Assignor.

22. AMENDMENT, INTEGRATION AND SEVERABILITY. This Assignment may not be amended or modified by oral agreement. No amendment or modification of this Assignment is effective unless made in writing and executed by Assignor and Lender. This Assignment is the complete and final expression of the agreement. If any provision of this

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Assignment is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

23. **INTERPRETATION.** Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Assignment.

24. **NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail and by registered or certified mail, return receipt requested, to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one party will be deemed to be notice to all parties. Assignor will inform Lender in writing of any change in Assignor's name, address or other application information. Assignor will provide Lender any financial statements or information Lender requests. All financial statements and information Assignor gives Lender will be correct and complete. Assignor agrees to sign, deliver, and file any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Assignor's obligations under this Assignment and to confirm Lender's lien status on any Property. Time is of the essence.

25. **SIGNATURES.** By signing under seal, Assignor agrees to the terms and covenants contained in this Assignment. Assignor also acknowledges receipt of a copy of this Assignment.

_____
(Entity Name)

_____ (Seal)
(Signature) ANTHONY M WHITFIELD

_____ (Seal)
(Signature)

Signed, sealed and delivered in the presence of:

X _____
(Witness)

_____
(Witness)

PROBATE:

STATE OF South Carolina, COUNTY OF Charleston } ss.

Personally appeared before me the undersigned witness who, being duly sworn, deposed and said that (s)he saw the Assignor (and each Assignor if more than one) sign, seal and deliver the foregoing Assignment and that (s)he, together with the other witness whose name appears as a witness, witnessed the execution thereof.

Sworn to and subscribed before me this 23rd day of April, 2007

SHARON A. DOUG NOTARY PUBLIC STATE OF SOUTH CAROLINA (Seal)

_____
Notary Public for South Carolina

X _____

My commission expires: 1-28-2014

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Page 7 of 9

Exhibit "A"

ALL that certain piece, parcel or tract of land, situate, lying and being in the Town of Mt. Pleasant, Charleston County, South Carolina, shown and designated as Lot 78, on that certain plat prepared by Mark S. Busey, S.C.R.L.S., entitled "A FINAL SUBDIVISION PLAT OF PHASE 2 WHISPERING MARSH, DUNES WEST, OWNED BY JOHN WIELAND HOMES OF SOUTH CAROLINA, LOCATED IN THE TOWN OF MT. PLEASANT, CHARLESTON COUNTY, SOUTH CAROLINA" said plat being dated January 13, 2000 and duly recorded in the Charleston County RMC Office in Plat Book ED, Page 822. Reference to said plat is hereby made for a more complete description as to distances, courses, metes and bounds.

BEING the same premises as conveyed to the Mortgagor herein by deed of Dennis E. Harris and Robin J. Harris dated this date and recorded simultaneously herewith.

EXHIBIT D
Page 8 of 9

BKF 623PG160

RECORDER'S PAGE

***NOTE*: This page MUST remain with the original document**

FILED

April 24, 2007

3:54:44 PM

BKF 623PG152

Charlie Lybrand, Register
Charleston County, SC

Filed By:

J. Stanley Claypoole, P.A.
Attorney at Law
2155 Northpark Lane
North Charleston SC 29406

Number of Pages: 9

DESCRIPTION	AMOUNT
MISC/ASGT	$ 14.00
Postage	
TOTAL	$ 14.00

DRAWER: A - bmm

DO NOT STAMP BELOW THIS LINE

EXHIBIT D
Page 9 of 9

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS CASE NO. 2012-CP-10-5887
HARBOR NATIONAL BANK, Plaintiff, vs. ANTHONY WHITFIELD Defendant.	)	**DEFENDANT'S ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS** (Breach of Contract, Negligent Misrepresentation, Fraud in the Inducement, Unfair Trade Practices) **(Jury Trial Demanded)**

FILED
2013 APR -1 A 11:54
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: ROBERT A. BERNSTEIN, ATTORNEY FOR PLAINTIFF

Comes now Defendant, Anthony Whitfield (hereinafter, "Mr. Whitfield") and responds to the allegations of Plaintiff's Complaint as follows:

1. Mr. Whitfield admits the allegations of Paragraphs 2, 3, 4, 10 and 19.

2. Mr. Whitfield denies, the allegations of Paragraphs 15 and 27 to the extent such Paragraphs reference previous allegations which are herein denied.

3. Mr. Whitfield admits an assignment was made but denies the event of default as alleged in Paragraph 20, 28, 25, 26 and 27.

4. Mr. Whitfield denies Paragraphs 1, 5, 6, 7, 8, 9, 11, 12, 13, 14, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 28 and 29.

5. Mr. Whitfield denies each and every allegation not specifically enumerated herein.

FIRST AFFIRMATIVE DEFENSE

6. Plaintiff's claims to foreclose on the 2007 Mortgage should be waived, estopped, barred, and/or dismissed as Defendant made all payments as was required under the Note and was told by Plaintiff numerous times that the October 13, 2012 maturity date as referenced in the Note would be automatically extended.

SECOND AFFIRMATIVE DEFENSE

7. Plaintiff's claims in equity are barred by the doctrine of unclean hands.

THIRD AFFIRMATIVE DEFENSE

8. Plaintiff's action should be barred by the doctrines of unconscionability, waiver, estoppel and duress.

FOURTH AFFIRMATIVE DEFENSE

9. Plaintiff has failed to comply with the mandatory provisions of the South Carolina Supreme Court Administrative Order 2011-05-02-01. As such, this matter should be stayed or dismissed.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's Failure to Provide Required Truth in Lending Disclosures; Set-Off

10. Defendants, whose ownership interest in the residential property being foreclosed upon with address of 1055 Black Rush Circle, Mount Pleasant, SC 29466 (the "Subject Property") is subject to the security interest created by the Plaintiff's 2007 mortgage, elect to rescind the mortgage and note being foreclosed upon (the " 2007 Loan").

Plaintiff violated TILA and Regulation Z by, inter alia:

a. failing to provide interest rate disclosures at the 2007 closing;

b. failing to provide material disclosures in a form Defendants could keep prior to consummation of the 2007 closing;

c. failing to provide Notices of Right to Cancel;

d. failing to provide disclosures as part of the 2007 Loan.

11. Plaintiff was obligated to provide the information set forth in the preceding Paragraph as Plaintiff knew, at all material times, that the subject property was residential and was Defendant Cindy Whitfield's primary residence.

12. Plaintiff's violations of the Truth-in-Lending Act give rise to a three year continuing right of rescission on the part of Defendants.

13. Defendants hereby elect to rescind the 2007 loan transaction with Plaintiff, pursuant to the continuing right of rescission.

14. When a consumer elects to rescind pursuant to the Truth-in-Lending Act, any security interest taken in connection with the transaction becomes void. 15 U.S.C. § 1635(b).

15. When a consumer elects to rescind pursuant to the Truth-in-Lending Act, the consumer is not liable for any finance or other charge. 15 U.S.C. § 1635(b).

16. The 2007 mortgage that is the subject of this foreclosure action was taken in connection with the transaction that Defendant has elected to rescind.

17. Defendant has the ability to tender repayment of their rescission obligations through procurement of a buyer of the home.

18. Since the mortgage is void, the foreclosure action must be dismissed.

COUNTERCLAIMS

Factual Allegations

19. In 2006, Mr. Whitfield approached Charlie Rivers (hereinafter, "Mr. Rivers") of Harbor National Bank to purchase and refinance certain real estate in the lowcountry counties of Berkeley, Dorchester and Charleston. Mr. Rivers previously helped Mr. Whitfield refinance over 25 loans when Mr. Rivers was a loan officer with Southtrust Bank. These loans always had 30 year terms and never had balloon payments or required refinancing or re-approval.

20. Mr. Rivers promised Mr. Whitfield the same loans as he was previously given by Mr. Rivers, to-wit, 30 year loans with the best rate possible, with a ½ point origination fee. There was no mention of balloon payments or re-qualification anytime during the 30 year loans. After a review of Mr. Whitfield's financial condition, Mr. Rivers approved $1.5 million in loans to refinance rental properties. At the time, Mr. Whitfield made clear to Mr. Rivers that the loans could not have demand features or have a balloon payment. Mr. Rivers agreed.

21. In reliance on Mr. Rivers' representations, Mr. Whitfield purchased the property at 1055 Black Rush Circle, Mount Pleasant, SC 29466 (hereinafter, "the Subject Property").

22. On or about March 27, 2007 Mr. Whitfield was provided documentation from Plaintiff stating that Mr. Whitfield would have the choice of a 7.5% interest rate or a floating rate of prime minus ¼ % (See Exhibit "A" attached hereto).

23. Plaintiff was aware at all material times, that the home was being purchased as a primary residence for Mr. Whitfield's ex-wife, Cindy Whitfield.

24. Despite being provided documentation by Plaintiff that Mr. Whitfield would have the choice of a 7.5% interest rate or a floating rate of prime minus ¼ %, Mr. Whitfield was provided the higher 7.5% rate as opposed to the lower floating rate of prime minus ¼ %.

25. Despite being provided documents at the closing with the May 3, 2012 maturity date, Mr. Whitfield was assured numerous times by Plaintiff that the maturity date was just a formality and in fact was just a renewal date and would be extended automatically with only adjustments of interest without any re-qualifying or costs to extend.

26. After these assurances and representations, Mr. Whitfield made payments the loan on the subject property from the origination of the loan every month until the renewal date.

27. In January, 2012, Plaintiff asked Mr. Whitfield for a copy of his recent tax returns so that the loan could be automatically extended. As late as February, 2012, Plaintiff sent an email to Mr. Whitfield asking him for tax information to work on the "renewals." Ultimately, Plaintiff refused to renew the loan, despite making payments on time, every month. Had Mr. Whitfield known Plaintiff never intended to renew the loan, Mr. Whitfield would have previously refinanced the loan with another lender at a time when it was possible. Although Plaintiff promised in writing to renew the loan on June 26, 2012, Plaintiff refused to close the loan on June 28, 2012. (See Exhibit "B" attached hereto).

28. Additionally, Plaintiff never lowered the interest rate, as promised to Mr. Whitfield, to the floating prime rate minus ¼%.

FOR A FOR FIRST COUNTERCLAIM
(Breach of Contract)

29. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

30. As described above, Plaintiff indicated before and after the origination of the loan, verbally and in writing, that the loan to the Subject Property would be automatically renewed.

31. Despite repeatedly making these representations and reassurances, Plaintiff failed to renew the loan and instead declared Mr. Whitfield to be in default despite being paid all monthly installments on time, as and when due, breaching their agreement with Mr. Whitfield.

32. Additionally, despite offering the payment terms in Exhibit "A", Plaintiff over charged Mr. Whitfield interest in an amount to be determined by the trier of fact. Although Plaintiff promised in writing to renew the loan on June 26, 2012, Plaintiff refused to close the loan on June 28, 2012.

FOR A SECOND CAUSE OF ACTION
(Negligent Misrepresentation)

33. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

34. As described above, Harbor National Bank made affirmative representations to Mr. Whitfield that: (1) the loan would be a 30 year loan; (2) the maturity date referenced in the Note was simply a renewal date; (3) the interest rate to be charged would be Mr. Whitfield's choice of 7.5% or prime minus ¼ %; and (4) the

loan would be renewed at 4.75% with a new maturity date of July 10, 2017.

35. Plaintiff knew these representations were false, misleading, and incomplete when they were made. Such representations were (1) false, misleading and incomplete when made; (2) were made for a pecuniary interest of the Plaintiff; (3) the Plaintiff owed a duty of care to convey truthful information to Mr. Whitfield; (4) the Plaintiff breached that duty by failing to exercise due care; (5) Mr. Whitfield was unaware that the representations were false - and had no reason to suspect they were false as he placed his trust and confidence in Plaintiff. As such, Mr. Whitfield had a right to rely on such information, and did so rely on said information to his financial detriment as outlined above.

FOR A THIRD CAUSE OF ACTION
(Fraud in the Inducement)

36. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

37. At or about the time of the loan origination, Plaintiff made affirmative representations to Mr. Whitfield that: (1) the loan would be a 30 year loan; (2) that the maturity date referenced in the Note was simply a renewal date; (3) that the interest rate to be charged would be Mr. Whitfield's choice of 7.5% or prime minus ¼ %; and (4) the loan would be renewed at 4.75% with a new maturity date of July 10, 2017. Such representations were false, incomplete and misleading when made, were material, were known by the Plaintiff to be false, misleading and incomplete, and were intended to be relied upon.

38. Mr. Whitfield was unaware that the representations were false and had no

reason to suspect they were false, as he placed his trust and confidence in Plaintiff. As such, Mr. Whitfield had a right to rely on such information, and did so rely on said information to his detriment financial as outlined above.

39. These false representations were made to induce the Mr. Whitfield to enter a high cost loan, and were made by the Plaintiff with the knowledge of their falsity.

40. Mr. Whitfield reasonably relied on the material representations of Plaintiff and had no knowledge the representations made by the Plaintiff were false and the Mr. Whitfield was, therefore, fraudulently induced by the Plaintiff to enter into the high cost loan.

41. Mr. Whitfield made a mistake in entering into the loan, which mistake was unilateral. Mr. Whitfield was fraudulently induced by the Plaintiff to make the unilateral mistake as a direct, proximate and foreseeable result of the fraud, deceit, misrepresentation, and active concealment perpetrated upon Mr. Whitfield by the Plaintiff.

42. Subsequent to the origination of the loan, Mr. Whitfield has been informed and now believes that the Plaintiff misrepresented the terms of the loan, verbally and in writing by (1) not receiving a 30 year loan, (2) representing that the maturity date was simply a renewal date; (3) charging, and refusing to change, the interest rate of 7.5%; and (4) not renewing the loan at 4.75% with a new maturity date of July 10, 2017 as agreed. As such, Mr. Whitfield is entitled to avoid or rescind the loan and to be returned to the status quo ante whereby the Plaintiff returns to Mr. Whitfield all monies paid by Mr. Whitfield in exchange for Mr. Whitfield returning the amount of the loan proceeds to the Plaintiff. In addition thereto, Mr. Whitfield is entitled to all incidental, consequential,

direct and indirect damages proximately caused by Plaintiff when they fraudulently induced Mr. Whitfield to enter into the loan transaction. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A FOURTH CAUSE OF ACTION

(Violation of Federal Trade Commission Act Section 5(a) 15 U.S.C. §45)
(As made applicable through SC Code §39-5-10 et.seq.)

43. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

44. As stated above, Plaintiff made affirmative representations to Mr. Whitfield that: (1) the loan would be a 30 year loan; (2) that the maturity date referenced in the Note was simply a renewal date; (3) that the interest rate to be charged would be Mr. Whitfield's choice of 7.5% or prime minus ¼ %; and (4) the loan would be renewed at 4.75% with a new maturity date of July 10, 2017.

45. Plaintiff's acts enumerated above constitute "unfair or deceptive acts or practices in or affecting commerce," as those terms are defined in the Act. This prohibition applies to all persons engaged in commerce, including banks. An act or practice is unfair where it: (1) causes or is likely to cause substantial injury to consumers; (2) cannot be reasonably avoided by consumers and; (3) is not outweighed by countervailing benefits to consumers or to competition. In this case, Plaintiff's actions have caused substantial injury to Mr. Whitfield as described above.

46. An act or practice is deceptive where: (1) a representation, omission, or practice misleads or is likely to mislead the consumer; (2) a consumer's interpretation of the representation, omission, or practice is considered reasonable under the

circumstances and; (3) the misleading representation, omission, or practice is material. In this case, Plaintiff's actions were deceptive because Plaintiff clearly misrepresented the terms of the transaction from the time of origination throughout service of the loan, and have damaged Mr. Whitfield as described above and as will shown to the trier of fact.

FOR A FIFTH CAUSE OF ACTION
(Violation of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* and Federal Reserve Regulation Z, 12 C.F.R. § 226.1 *et seq.*)

47. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

48. Defendant, whose ownership interest in the residential property being foreclosed upon is subject to the security interest created by the Plaintiff's 2007 mortgage, elects to rescind the mortgage and note being foreclosed upon.

49. Plaintiff violated TILA and Regulation Z by, inter alia:

a. failing to provide interest rate and cancellation disclosures at the 2007 closing;

b. failing to provide material disclosures in a form Defendants could keep prior to consummation of the 2007 closing;

c. failing to provide Notices of Right to Cancel;

d. failing to provide disclosures as part of the 2007 closing.

50. Plaintiff was obligated to provide the information set forth in the preceding Paragraph as Plaintiff knew, at all material times, that the subject property was residential and was Defendant Cindy Whitfield's primary residence.

51. Plaintiff's violations of the Truth-in-Lending Act give rise to a three year continuing right of rescission on the part of Defendants.

52. Defendant elects to rescind the 2007 loan transaction with Plaintiff, pursuant to the continuing right of rescission, which was not discovered until recently.

53. When a consumer elects to rescind pursuant to the Truth-in-Lending Act, any security interest taken in connection with the transaction becomes void. 15 U.S.C. § 1635(b).

54. Mr. Whitfield has the ability to tender repayment of their rescission obligations through procurement of a buyer of the home.

55. Since the mortgage is void, the second cause of action must be dismissed.

WHEREFORE, Defendants prays for relief as set forth below together with such further relief as this court deems just:

a. Actual damages;

b. Statutory damages;

c. Treble Damages

d. Disgorgement of profits;

e. Restitution;

f. Rescission;

g. Injunctive relief; and

h. Attorneys' fees and costs

DEMAND FOR JURY TRIAL

Mr. Whitfield demands a jury trial on all counts stated above. These causes of action must be tried before any equitable causes of action asserted by either party can be disposed of. *See* Gardner v. Travis, 316 S.C. 315, 450 S.E.2d 54 (Ct. App. 1994)

Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

By: _____

Brent S. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F:864-326-4844
Email: brent@halversenlaw.com

Attorneys for the Defendants

March 28, 2013.

Charleston, South Carolina

12-CP-10-5887

CERTIFICATE OF SERVICE

I certify that I served the foregoing Answer, Affirmative Defenses and Counterclaims upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to the parties and counsel's last known address on this 28th day of March, 2013.

HALVERSEN & ASSOCIATES, LLC

By: _____

Brent S. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com

Charleston, SC
March 28, 2013

FILED
2013 APR -1 AM 11:55
JULIE J. ARMSTRONG
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	
		CASE NO. 2012-CP-10-5887
HARBOR NATIONAL BANK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**DEFENDANT'S THIRD AMENDED ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS**
	)	
ANTHONY WHITFIELD	)	
	)	
Defendant.	)	(Breach of Contract, Breach of Contract Accompanied by Fraudulent Act, Negligent Misrepresentation, Fraud in the Inducement, Unfair Trade Practices, Promissory Estoppel, Tortious Interference with Prospective Contractual Relations)
	)	
		(Jury Trial Demanded)

FILED
2014 AUG 27 PM 2:53
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: ROBERT A. BERNSTEIN, ATTORNEY FOR PLAINTIFF

Comes now Defendant, Anthony Whitfield (hereinafter, "Mr. Whitfield") and responds to the allegations of Plaintiff's Complaint as follows:

1. Mr. Whitfield admits the allegations of Paragraphs 2, 3, 4, 10 and 19.

2. Mr. Whitfield denies, the allegations of Paragraphs 15 and 27 to the extent such Paragraphs reference previous allegations which are herein denied.

3. Mr. Whitfield admits an assignment was made but denies the event of default as alleged in Paragraph 20, 28, 25, 26 and 27.

4. Mr. Whitfield denies Paragraphs 1, 5, 6, 7, 8, 9, 11, 12, 13, 14, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 28 and 29.

5. Mr. Whitfield denies each and every allegation not specifically enumerated herein.

FIRST AFFIRMATIVE DEFENSE

6. Plaintiff's claims to foreclose on the 2007 Mortgage should be waived, estopped, barred, and/or dismissed as Defendant made all payments as was required under the Note and was told by Plaintiff numerous times that the maturity date as referenced in the Note would be automatically extended.

SECOND AFFIRMATIVE DEFENSE

7. Plaintiff's claims in equity are barred by the doctrine of unclean hands and equitable estoppel.

THIRD AFFIRMATIVE DEFENSE

8. Plaintiff's action should be barred by the doctrines of unconscionability, waiver, fraud and duress.

FOURTH AFFIRMATIVE DEFENSE

9. Plaintiff has failed to comply with the mandatory provisions of the South Carolina Supreme Court Administrative Order 2011-05-02-01. As such, this matter should be stayed or dismissed.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's Failure to Provide Required Truth in Lending Disclosures; Set-Off

10. Defendants, whose ownership interest in the residential property being foreclosed upon with address of 1055 Black Rush Circle, Mount Pleasant, SC 29466 (the "Subject Property") is subject to the security interest created by the Plaintiff's 2007

mortgage, elect to rescind the mortgage and note being foreclosed upon (the " 2007 Loan").

Plaintiff violated TILA and Regulation Z by, inter alia:

a. failing to provide interest rate disclosures at the 2007 closing;

b. failing to provide material disclosures in a form Defendants could keep prior to consummation of the 2007 closing;

c. failing to provide Notices of Right to Cancel;

d. failing to provide disclosures as part of the 2007 Loan.

11. Plaintiff was obligated to provide the information set forth in the preceding Paragraph as Plaintiff knew, at all material times, that the subject property was residential and was Defendant Cindy Whitfield's primary residence.

12. Plaintiff's violations of the Truth-in-Lending Act give rise to a three year continuing right of rescission on the part of Defendants.

13. Defendants hereby elect to rescind the 2007 loan transaction with Plaintiff, pursuant to the continuing right of rescission.

14. When a consumer elects to rescind pursuant to the Truth-in-Lending Act, any security interest taken in connection with the transaction becomes void. 15 U.S.C. § 1635(b).

15. When a consumer elects to rescind pursuant to the Truth-in-Lending Act, the consumer is not liable for any finance or other charge. 15 U.S.C. § 1635(b).

16. The 2007 mortgage that is the subject of this foreclosure action was taken in connection with the transaction that Defendant has elected to rescind.

17. Defendant has the ability to tender repayment of their rescission

obligations through procurement of a buyer of the home.

18. Since the mortgage is void, the foreclosure action must be dismissed.

SIXTH AFFIRMATIVE DEFENSE

19. Upon information and belief, the subject note attempted to be foreclosed upon is not the original note and therefore Plaintiff does not have standing pursue this foreclosure action.

COUNTERCLAIMS

Factual Allegations

20. In 2006, Mr. Whitfield approached Charlie Rivers (hereinafter, "Mr. Rivers") of Harbor National Bank to purchase and refinance certain real estate in the lowcountry counties of Berkeley, Dorchester and Charleston. Mr. Rivers previously helped Mr. Whitfield refinance over 25 loans when Mr. Rivers was a loan officer with Southtrust Bank. These loans always had 30 year terms and never had balloon payments or required refinancing or re-approval.

21. Mr. Rivers promised Mr. Whitfield the same loans as he was previously given by Mr. Rivers, to-wit, 30 year loans with the best rate possible, with a ½ point origination fee. There was no mention of balloon payments or re-qualification anytime during the 30 year loans. After a review of Mr. Whitfield's financial condition, Mr. Rivers approved $1.5 million in loans to refinance rental properties. At the time, Mr. Whitfield made clear to Mr. Rivers that the loans could not have demand features or have a balloon payment. Mr. Rivers agreed.

22. In reliance on Mr. Rivers' representations, Mr. Whitfield purchased the property at 1055 Black Rush Circle, Mount Pleasant, SC 29466 (hereinafter, "the Subject Property" or "Black Rush Property").

23. On or about March 27, 2007 Mr. Whitfield was provided documentation from Plaintiff stating that Mr. Whitfield would have the choice of a 7.5% interest rate or a floating rate of prime minus ¼ % (See Exhibit "A" attached hereto).

24. Plaintiff was aware at all material times, before and after the loan was closed, that the home was being purchased as a primary residence for Mr. Whitfield's ex-wife, Cindy Whitfield.

25. Despite being provided documentation by Plaintiff that Mr. Whitfield would have the choice of a 7.5% interest rate or a floating rate of prime minus ¼ %, Mr. Whitfield was provided the higher 7.5% rate as opposed to the lower floating rate of prime minus ¼ %.

26. Despite being provided documents at the closing with a April 13, 2012 maturity date on some of the loans, Mr. Whitfield was assured numerous times by loan officer Angela Bell that the maturity date was just a formality and in fact was just a renewal date and would be extended automatically with only adjustments of interest without any re-qualifying or costs to extend. Despite making such assurances to Mr. Whitfield, loan officer Angela Bell determined as early as 2010 that the loans would not be renewed as she felt Mr. Whitfield was not providing financial information to her. At the time she indicated she needed to "grease the wheel" with Mr. Whitfield's accountant so the accountant would tell her more information about Mr. Whitfield's financial status.

27. Because of Ms. Bell's assurances and representations, Mr. Whitfield made

payments on the loan for the subject properties from the origination of the loan every month until the renewal date.

28. In January, 2012, Plaintiff asked Mr. Whitfield for a copy of his recent tax returns so that the loan could be automatically extended. As late as February 6, 2012, loan officer Angela Bell sent an email to Mr. Whitfield asking him for tax information to work on the "renewals." On February 21, 2012, Mr. Whitfield informed loan officer Angela Bell that he was under some financial pressure, that his health was suffering, and that he wanted interest rates on par with the other mortgages he held with other banks. The following day, Ms. Bell informed Harbor National Bank personnel (but not Mr. Whitfield) that she was going to let Mr. Whitfield know that she would be asking him to move the loans. Although she informed others of her intention not to renew the loans, Ms. Bell never told Mr. Whitfield that he needed to move the loans- at any point in time. Had Mr. Whitfield known Plaintiff never intended to renew the loan, Mr. Whitfield would have previously refinanced the loan with another lender at a time when it was possible.

29. One week later, on February 28, 2012 loan officer Angela Bell wrote Mr. Whitfield to let him know that she would have to have his 2010 tax returns in order to request approval for renewal of his upcoming maturing loans. On April 2, 2012, Mr. Whitfield informed loan officer Angela Bell that his 2010 tax returns were complete and that he urgently wanted his loans modified since the rates were extremely high, and that his health had been an issue. After receiving the information about receiving the tax returns, the following day loan officer Angela Bell told a senior credit analyst at Harbor National Bank, "I'm just glad the threats of no renewals finally worked." Five days later, on April 8, 2012, Mr. Whitfield suffered a heart attack.

30. Despite making assurances the loans would renew, two notes (732 Gahagan and 110 Mepkin) matured on April 13, 2012 without having been renewed by the Plaintiff. The note for the Black Rush Property came due on May 3, 2012, again without renewal. On June 21, 2012 Charlie Rivers orally agreed to modify the notes and specifically agreed to: (a) extend the notes for a 25 year amortization with another 5 year maturity; (b) eliminate the need for any principal pay downs; (c) eliminate the need for additional collateral to secure the notes; (d) eliminate the need to cross collateralize the loans; (e) waive the default interest rate of 14%; (f) back date the rate of 4.75% to the maturity the May 3, 2012 maturity date; and (g) credit Mr. Whitfield's overpayment of interest.

31. On June 26, 2012, Harbor National Bank vice president Scott Warren signed a loan commitment letter to Mr. Whitfield outlining the terms and conditions of the renewals of all Mr. Whitfield's loans held by Harbor National Bank. The proposed new loans dropped the interest rate to 4.75% and extended the maturities another 5 years. (See loan commitment, attached hereto as Exhibit "B"). On the same day, Mr. Whitfield was given drafts of new notes to sign for the closing which was to be held on June 28, 2012. The new documents contained clauses that all of Mr. Whitfield's properties would be cross collateralized, despite Mr. River's agreement and assurances not to cross collateralize the properties (See Paragraph 30 (d) herein).

32. In reliance upon Mr. Warren's June 26, 2012 commitment letter, Mr. Whitfield attended a scheduled closing at attorney Mark Weeks' law office. At the closing, Mr. Warren informed Mr. Whitfield that a signed endorsement from a title company was needed so that Mr. Whitfield's ex-spouse Cindy Whitfield would not be

required to sign the loan documents for the Black Rush Property, the home that Cindy Whitfield resided in.[1] At a certain point, Mr. Whitfield was informed by the closing attorney that the endorsement could not be procured, that Mrs. Whitfield was refusing to sign the mortgage to the Black Rush Property, and Mr. Warren proposed that it would only be possible to close two of the subject properties -Mepkin and Gahagan, but that if the Black Rush Property ultimately couldn't be closed, all properties including Mepkin and Gahagan would have to be foreclosed upon.

33. Despite Harbor National Bank's representations that a title endorsement was required to renew the Black Rush Property, Mr. Whitfield has subsequently learned that no such endorsement was required from the title company. Moreover, Harbor National Bank failed to renew any of the loans listed in the June 26, 2012 commitment letter despite agreeing to do so, willfully breaching their agreements, and causing Mr. Whitfield damages as to be determined by the trier of fact.

FOR A FOR FIRST COUNTERCLAIM
(Breach of Contract)

34. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

35. As described above, Plaintiff indicated before and after the origination of the loan, verbally and in writing, that the loan to the Subject Property would be automatically renewed.

[1] Plaintiff also attempted to procure a "Business Purpose Statement" from Mr. Whitfield indicating that the property was to be used in Mr. Whitfield's business despite having previous knowledge that the Black Rush Property was in a fact residential property for Mr. Whitfield's ex-wife Cindy Whitfield.

36. Despite repeatedly making these representations and reassurances, Plaintiff failed to renew the loan and instead declared Mr. Whitfield to be in default despite being paid all monthly installments on time, as and when due, breaching their agreement with Mr. Whitfield.

37. Although Plaintiff ultimately promised in writing to renew the loan on June 26, 2012, Plaintiff refused to close the loan on June 28, 2012, as described above, breaching the terms of the offer contained in the writing. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A SECOND CAUSE OF ACTION
(Negligent Misrepresentation)

38. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

39. As described above, Harbor National Bank made affirmative representations to Mr. Whitfield that: (1) the initial loans would be 30 year loans; (2) the maturity date referenced in the Note was simply a renewal date; and (3) the interest rate to be charged would be Mr. Whitfield's choice of 7.5% or prime minus ¼ %. The Plaintiff also made representations, and an offer, that the loans would be renewed at 4.75% with a new maturity date of July 10, 2017.

40. Plaintiff knew these representations were false, misleading, and incomplete when they were made. Such representations were (1) false, misleading and

incomplete when made; (2) were made for a pecuniary interest of the Plaintiff; (3) the Plaintiff owed a duty of care to convey truthful information to Mr. Whitfield; (4) the Plaintiff breached that duty by failing to exercise due care; (5) Mr. Whitfield was unaware that the representations were false - and had no reason to suspect they were false as he placed his trust and confidence in Plaintiff. As such, Mr. Whitfield had a right to rely on such information, and did so rely on said information to his financial detriment as outlined above. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A THIRD CAUSE OF ACTION
(Fraud in the Inducement)

41. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

42. At or about the time of the initial loan originations, Plaintiff made affirmative representations to Mr. Whitfield that: (1) the loans would be 30 year loans; (2) that the maturity date referenced in the Notes were simply renewal dates; and (3) that the interest rate to be charged would be Mr. Whitfield's choice of 7.5% or prime minus ¼ %. The Plaintiff also made representations, and an offer, that the loans would be renewed at 4.75% with new maturity dates of July 10, 2017. Such representations were false, incomplete and misleading when made, were material, were known by the Plaintiff to be false, misleading and incomplete, and were intended to be relied upon.

43. Mr. Whitfield was unaware that the representations were false and had no

reason to suspect they were false, as he placed his trust and confidence in Plaintiff. As such, Mr. Whitfield had a right to rely on such information, and did so rely on said information to his detriment financial as outlined above. Had Mr. Whitfield known Plaintiff never intended to renew the loan, Mr. Whitfield would have previously refinanced the loan with another lender at a time when it was possible. At a minimum, the Plaintiff should have relayed their concerns about renewals as early as documentary evidence suggest Harbor National Bank had a concern, to-wit, the year 2010.

44. These false representations were made to induce the Mr. Whitfield to enter a high cost loan, and were made by the Plaintiff with the knowledge of their falsity.

45. Mr. Whitfield reasonably relied on the material representations of Plaintiff and had no knowledge the representations made by the Plaintiff were false and the Mr. Whitfield was, therefore, fraudulently induced by the Plaintiff to enter into the high cost loan.

46. Mr. Whitfield made a mistake in entering into the loan, which mistake was unilateral. Mr. Whitfield was fraudulently induced by the Plaintiff to make the unilateral mistake as a direct, proximate and foreseeable result of the fraud, deceit, misrepresentation, and active concealment perpetrated upon Mr. Whitfield by the Plaintiff.

47. Subsequent to the origination of the loan, Mr. Whitfield has been informed and now believes that the Plaintiff misrepresented the terms of the loan, verbally and in writing by (1) not receiving 30 year loans, (2) representing that the maturity date was simply a renewal date; and (3) charging, and refusing to change, the interest rate of 7.5%. The Plaintiff also made representations, and an offer, to renew the loans at

4.75% with a new maturity date of July 10, 2017 as agreed. As such, Mr. Whitfield is entitled to avoid or rescind the loan and to be returned to the status quo ante whereby the Plaintiff returns to Mr. Whitfield all monies paid by Mr. Whitfield in exchange for Mr. Whitfield returning the amount of the loan proceeds to the Plaintiff. In addition thereto, Mr. Whitfield is entitled to all incidental, consequential, direct and indirect damages proximately caused by Plaintiff when they fraudulently induced Mr. Whitfield to enter into the loan transaction. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A FOURTH CAUSE OF ACTION
(Violation of Federal Trade Commission Act Section 5(a) 15 U.S.C. §45)
(As made applicable through SC Code §39-5-10 et.seq.)

48. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

49. As stated above, Plaintiff made affirmative representations to Mr. Whitfield that: (1) the loans would be 30 year loans; (2) that the maturity dates referenced in the Notes were simply renewal dates; and (3) that the interest rate to be charged would be Mr. Whitfield's choice of 7.5% or prime minus ¼ %. The Plaintiff also represented, and made an offer, that the loans would be renewed at 4.75% with new maturity dates of July 10, 2017.

50. Plaintiff's acts enumerated above constitute "unfair or deceptive acts or practices in or affecting commerce," as those terms are defined in the Act. This prohibition applies to all persons engaged in commerce, including banks. An act or

practice is unfair where it: (1) causes or is likely to cause substantial injury to consumers; (2) cannot be reasonably avoided by consumers and; (3) is not outweighed by countervailing benefits to consumers or to competition. In this case, Plaintiff's actions discussed above have caused substantial injury to Mr. Whitfield.

51. An act or practice is deceptive where: (1) a representation, omission, or practice misleads or is likely to mislead the consumer; (2) a consumer's interpretation of the representation, omission, or practice is considered reasonable under the circumstances and; (3) the misleading representation, omission, or practice is material. In this case, Plaintiff's actions were deceptive because Plaintiff clearly misrepresented that the loans would be renewed. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A FIFTH CAUSE OF ACTION
(Promissory Estoppel / Detrimental Reliance)

52. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

53. Mr. Whitfield relied on the promises of Angela Bell, Charlie Rivers, and Scott Warren to renew and modify the loans.

54. These promises were unambiguous in their terms and were relied upon by Mr. Whitfield. In particular, there were no contingencies placed upon the June 26, 2012 written offer to renew any of the loans as title insured first mortgages were already in place on the subject properties.

55. The reliance by Mr. Whitfield regarding renewing the loans was more than

expected and more than foreseeable by Harbor National Bank.

56. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

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

57. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

58. As stated above, Mr. Rivers made an agreement to renew the loans at the June 21, 2012 meeting with Mr. Whitfield.

59. Plaintiff breached the agreement with Mr. Whitfield by failing to close the renewal of the loan which is the subject of this lawsuit. Such breach was made with the fraudulent intent of never actually intending to close the renewal when that representation was made, and such fraudulent intent was manifested by the fraudulent act of claiming a title endorsement was required to renew the loan when in fact one was never needed.

60. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A SEVENTH CAUSE OF ACTION
(Tortious Interference with Prospective Contractual Relations)

61. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

62. The acts of Plaintiff described herein constituted an interference with Mr. Whitfield's business, were without justification, were done with improper purpose and motive, knowing it would place Mr. Whitfield under duress when filing these unfounded legal proceedings and knowing that it would interfere with Mr. Whitfield's ability to sell and/or rent his properties.

63. As a result of Plaintiff's actions Mr. Whitfield has lost the ability to enter into contracts with identifiable prospective buyers and/or renters of his properties. As a direct and proximate result of the Plaintiff's actions, Mr. Whitfield has suffered special damages including but not limited to a diminished value of their property in the eyes of third parties, loss of income and loss of profits.

64. Plaintiff's actions proximately caused actual, consequential, and special damages, including but not limited to: a) inability to sell and/or rent his properties to third parties who meet requirements for sale and/or rental of his properties; b) foreclosure proceedings having been instituted on his properties; c) a diminished value of his properties in the eyes of third parties; d) damage to Mr. Whitfield's reputation and business standing in the real estate profession; e) financial damage to Mr. Whitfield's business because of time spent away to defend these charges; f) financial damage for his inability to sell his properties following filing of the lis pendens and lawsuit; g) attorneys' fees and costs incurred; h) time spent away from work as a result of the lis pendens and lawsuit; i) emotional distress to Mr. Whitfield; j) injury to his health and

mental pain and suffering; and k) adverse tax consequences.

WHEREFORE, Defendants prays for relief as set forth below together with such further relief as this court deems just:

a. Actual damages

b. Consequential and Special damages;

c. Statutory damages;

d. Treble Damages

e. Disgorgement of profits;

f. Restitution;

g. Rescission;

h. Injunctive relief; and

i. Attorneys' fees and costs

DEMAND FOR JURY TRIAL

Mr. Whitfield demands a jury trial on all counts stated above. These causes of action must be tried before any equitable causes of action asserted by either party can be disposed of. *See* Gardner v. Travis, 316 S.C. 315, 450 S.E.2d 54 (Ct. App. 1994).

Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

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Charleston, SC
August 26, 2014

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

FILED
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JULIE J. ARMSTRONG
CLERK OF COURT

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2012-CP-10-5887

HARBOR NATIONAL BANK,

Plaintiff,

v.

ANTHONY M. WHITFIELD AND CINDY WHITFIELD,

Defendants.

REPLY TO THIRD AMENDED ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS

The Plaintiff, replying to the allegations of the Third Amended Answer, Affirmative Defenses, and Counterclaims, would show unto this Court:

1. Each and every allegation contained in said Third Amended Answer, Affirmative Defenses and Counterclaims not hereinafter specifically admitted is denied.

2. The allegations of Paragraphs One (1) through Nineteen (19) of the Answer, Affirmative Defenses and Counterclaims fail to make allegations against the Plaintiff requiring a response; to the extent they make such allegations, the same are hereby denied.

3. Responding to the allegations of Paragraph Twenty (20) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff admits that the Defendant applied to the Plaintiff for a credit commitment to purchase and refinance commercial real estate in the furtherance of his business in the Berkeley, Dorchester and Charleston County areas, and that the Defendant had financed other transactions with Southtrust Bank; the remaining allegations of Paragraph Twenty (20) of the Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

4. The allegations of Paragraphs Twenty-One (21) and Twenty-Two (22) of the

Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

5. Responding to the allegations of Paragraph Twenty-Three (23) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff admits that it provided the attached Exhibit "A" to the Defendant setting forth the terms and conditions upon which it would agree to extend credit to the Defendant, the terms and conditions of which are explicitly set forth in the said correspondence, and the Plaintiff craves reference to the said correspondence to determine the terms and conditions of such commitment; any allegations contained in Paragraph Twenty-Three (23) of the Third Amended Answer, Affirmative Defenses and Counterclaims not hereinafter specifically admitted are denied.

6. The allegations of Paragraph Twenty-Four (24) of the Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

7. Responding to the allegations of Paragraph Twenty-Five (25) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff admits that the Defendant chose a fixed interest rate as set forth in the applicable Note; any allegations contained in Paragraph Twenty-Five (25) of the Third Amended Answer, Affirmative Defenses and Counterclaims in addition to or other than this specific admission are denied.

8. The allegations of Paragraph Twenty-Six (26) of the Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

9. Responding to the allegations of Paragraph Twenty-Seven (27) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff admits that the Defendant made payments under the terms of and pursuant to the Promissory Note; any allegations contained in Paragraph Twenty-Seven (27) of the Third Amended Answer,

Affirmative Defenses and Counterclaims in addition to or other than this specific admission are denied.

10. Responding to the allegations of Paragraph Twenty-Eight (28) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff admits that it requested copies of the Defendant's tax returns pursuant to the terms of line of credit and the note and mortgage, that Defendant requested to be provided with a lower interest rate, and that the Plaintiff was considering terminating the loans due to the Defendant's failure to provide necessary documentation; any allegations contained in Paragraph Twenty-Eight (28) of the Third Amended Answer, Affirmative Defenses and Counterclaims in addition to or other than this specific admission are denied.

11. Responding to the allegations of Paragraph Twenty-Nine (29) of the Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff admits that it wrote to the Defendant again advising of the need for sufficient financial information, including tax returns, to evaluate the proposal to renew loans with the Defendant, that the Defendant thereafter advised of the completion of the tax returns, that the Defendant requested modified terms for the loans, and that Angela Bell communicated with a senior credit analyst regarding the successful receipt of required documentation from the Defendant; any allegations contained in Paragraph Twenty-Nine (29) of the Amended Answer, Affirmative Defenses and Counterclaims in addition to or other than this specific admission are denied.

12. Responding to the allegations of Paragraph Thirty (30) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff admits the Notes secured by mortgages on 732 Gahagan and 110 Mepkin matured by their terms, that in a meeting with the

Defendant that an agreement was reached upon the terms and conditions upon which certain loans could be renewed, that renewal terms included the terms contained in a June 26, 2012 letter to Mr. Whitfield; any allegations contained in Paragraph Thirty (30) of the Third Amended Answer, Affirmative Defenses and Counterclaims in addition to or other than this specific admission are denied.

13. Responding to the allegations of Paragraph Thirty-One (31) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff admits the Scott Warren issued a terms letter to Mr. Whitfield setting forth the terms and conditions under which it would agree to renew the loans in existence, and that the letter is attached to the Third Amended Answer, Affirmative Defenses and Counterclaims as Exhibit "B"; any allegations contained in Paragraph Thirty-One (31) of the Third Amended Answer, Affirmative Defenses and Counterclaims in addition to or other than this specific admission are denied.

14. Responding to the allegations of Paragraph Thirty-Two (32) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff admits the Plaintiff attended a scheduled closing at the office of attorney Mark Weeks, that it was discovered that Defendant had transferred an interest in the Black Rush property to his ex-wife, Cindy Whitfield, and that it was required as a condition of the closing either that Mrs. Whitfield sign the new mortgage or that a title endorsement be obtained; any allegations contained in Paragraph Thirty-Two (32) of the Third Amended Answer, Affirmative Defenses and Counterclaims in addition to or other than this specific admission are denied.

15. Responding to the allegations of Paragraph Thirty-Three (33) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff admits the closing of

the new loans never took place; any allegations contained in Paragraph Thirty-Three (33) of the Third Amended Answer, Affirmative Defenses and Counterclaims in addition to or other than this specific admission are denied.

FOR A FIRST DEFENSE TO THE FIRST COUNTERCLAIM
(DENIAL)

16. Responding to the allegations of Paragraph Thirty-Four (34) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Fifteen (15) of this Reply as if repeated herein verbatim.

17. The allegations of Paragraphs Thirty-Five (35), Thirty-Six (36), and Thirty-Seven (37) of the Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

FOR A FIRST DEFENSE TO THE SECOND COUNTERCLAIM
(DENIAL)

18. Responding to the allegations of Paragraph Thirty-Eight (38) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Seventeen (17) of this Reply as if repeated herein verbatim.

19. Responding to the allegations of Paragraph Thirty-Nine (39), the Plaintiff admits that it proposed to finance the line of credit through either a fixed rate or floating rate to be chosen by the Defendant, and that it stated its intention to agree to refinance the book of loans the Defendant had with the Plaintiff provided that the Defendant met the terms and conditions imposed upon the proposed transaction; the remaining allegations of Paragraph Thirty-Nine (39) of the Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

20. The allegations of Paragraph Forty (40) of the Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

FOR A FIRST DEFENSE TO THE THIRD COUNTERCLAIM
(DENIAL)

21. Responding to the allegations of Paragraph Forty-One (41) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Twenty (20) of this Reply as if repeated herein verbatim.

22. The allegations of Paragraphs Forty-Two (42), Forty-Three (43), Forty-Four (44), Forty-Five (45), Forty-Six (46) and Forty-Seven (47) of the Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

FOR A FIRST DEFENSE TO THE FOURTH COUNTERCLAIM
(DENIAL)

23. Responding to the allegations of Paragraph Forty-Eight (48) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Twenty-Two (22) of this Reply as if repeated herein verbatim.

24. Responding to the allegations of Paragraphs Forty-Nine (49) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff admits that it proposed to finance the line of credit through either a fixed rate or floating rate to be chosen by the Defendant, and that it stated its intention to agree to refinance the book of loans the Defendant had with the Plaintiff provided that the Defendant met the terms and conditions imposed upon the proposed transaction; the remaining allegations of Paragraph Forty-Nine (49) of the Third

Amended Answer, Affirmative Defenses and Counterclaims are denied.

25. The allegations of Paragraphs Fifty (50) and Fifty-One (51) of the Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

FOR A FIRST DEFENSE TO THE FIFTH COUNTERCLAIM
(DENIAL)

26. Responding to the allegations of Paragraph Fifty-Two (52) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Twenty-Five (25) of this Reply as if repeated herein verbatim.

27. The allegations of Paragraphs Fifty-Three (53), Fifty-Four (54), Fifty-Five (55) and Fifty-Six (56) of the Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

FOR A FIRST DEFENSE TO THE SIXTH COUNTERCLAIM
(DENIAL)

28. Responding to the allegations of Paragraph 57 (57) of the Third Amended Answer, Affirmative Defenses, and Counterclaims, the Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Twenty-Seven (27) of this Reply as if repeated herein verbatim.

29. The allegations of Paragraphs Fifty-Eight (58), Fifty-Nine (59) and Sixty (60) of the Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

FOR A FIRST DEFENSE TO THE SEVENTH COUNTERCLAIM
(DENIAL)

30. Responding to the allegations of Paragraph Sixty-One (61) of the Third Amended

Answer, Affirmative Defenses, and Counterclaims, the Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Twenty-Nine (29) of this Reply as if repeated herein verbatim.

31. The allegations of Paragraphs Sixty-Two (62), Sixty-Three (63), and Sixty-Four (64) of the Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

FOR A SECOND DEFENSE
(STATUTES OF LIMITATIONS)

32. Further responding to the allegations of all Counterclaims, the Plaintiff would show that such claims are barred by the applicable statutes of limitations, for which reason the Defendant cannot recover in any sum whatsoever.

FOR A THIRD DEFENSE
(FAILURE TO STATE A CLAIM)

33. Further responding to the allegations of all Counterclaims, the Plaintiff would show that such Counterclaims fail to state claims upon which relief can be granted, for which reason the Defendant cannot recover in any sum whatsoever.

FOR A FOURTH DEFENSE
(LACK OF RELIANCE)

34. Further responding to the allegations of the Second and Third Counterclaims, the Plaintiff would show that the Defendant failed to rely or have any right to rely upon the alleged representations other than as contained in the written contracts between the parties, for which reason the Defendant cannot recover in any sum whatsoever.

FOR A FIFTH DEFENSE
(REGULATED TRANSACTIONS)

35. Further responding to the allegations of the Fourth Counterclaim, the Plaintiff

would show that the actions and activities of the Plaintiff are regulated by the state and federal government, that the performance of said actions were in compliance with said state and federal regulations, and thus that the transactions are exempt from S.C. Code Ann. §39-5-10 et seq.

FOR A SIXTH DEFENSE
(OTHER CLAIM ALREADY PENDING)

36. Further responding to the allegations of the Counterclaims, the Plaintiff would show that another action is pending between the same parties for the same counterclaims, for which reason the said counterclaims are improper and should be dismissed pursuant to Rule 12(b)(8), SCRCP.

FOR A SEVENTH DEFENSE
(STATUTE OF FRAUDS)

37. Further responding to the allegations of the Counterclaims, the Plaintiff would show that Defendant's claim fails to comply with the statute of frauds, S.C. Code § 32-3-10, and the lender liability statute of frauds, S.C. Code § 37-10-107.

WHEREFORE, having fully responded to the allegations of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff rays that the same be dismissed, and that this Court enter judgment for the relief sought in the Complaint.

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Attorneys for the Plaintiff

September 10, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS CASE NO. 2012-CP-10-5887
HARBOR NATIONAL BANK, Plaintiff, vs. ANTHONY WHITFIELD and CINDY WHITFIELD Defendants.	)	**DEFENDANT'S FOURTH AMENDED ANSWER, AFFIRMATIVE DEFENSES, CROSSCLAIM, AND COUNTERCLAIMS** (Breach of Contract, Breach of Contract Accompanied by Fraudulent Act, Negligent Misrepresentation, Fraud, Unfair Trade Practices, Promissory Estoppel, Tortious Interference with Prospective Contractual Relations, and Equitable Indemnity) (**Jury Trial Demanded**)

FILED
2015 NOV 12 PM 12:58
JULIE J. ARMSTRONG
CLERK OF COURT

TO: ROBERT A. BERNSTEIN, BRIAN DUFFY, AND SETH WHITAKER, ATTORNEYS FOR PLAINTIFF

Comes now Defendant, Anthony Whitfield (hereinafter, "Mr. Whitfield") and responds to the allegations of Plaintiff's Complaint as follows:

1. Mr. Whitfield admits the allegations of Paragraphs 2, 3, 4, 10 and 19.

2. Mr. Whitfield denies, the allegations of Paragraphs 15 and 27 to the extent such Paragraphs reference previous allegations which are herein denied.

3. Mr. Whitfield admits an assignment was made but denies the event of default as alleged in Paragraph 20, 28, 25, 26 and 27.

4. Mr. Whitfield denies Paragraphs 1, 5, 6, 7, 8, 9, 11, 12, 13, 14, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 28 and 29.

5. Mr. Whitfield denies each and every allegation not specifically enumerated herein.

FIRST AFFIRMATIVE DEFENSE

6. Plaintiff's claims to foreclose on the 2007 Mortgage should be waived, estopped, barred, and/or dismissed as Defendant made all payments as was required under the Note and was told by Plaintiff numerous times that the maturity date as referenced in the Note would be automatically extended. Plaintiff ultimately agreed to renew the loans and then refused to close the renewals as previously agreed.

SECOND AFFIRMATIVE DEFENSE

7. Plaintiff's claims in equity are barred by the doctrine of unclean hands and equitable estoppel.

THIRD AFFIRMATIVE DEFENSE

8. Plaintiff's action should be barred by the doctrines of unconscionability, waiver, fraud and duress.

FOURTH AFFIRMATIVE DEFENSE

9. Plaintiff has failed to comply with the mandatory provisions of the South Carolina Supreme Court Administrative Order 2011-05-02-01. As such, this matter should be stayed or dismissed.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's Failure to Provide Required Truth in Lending Disclosures; Recoupment and Set-Off

10. Defendants, whose ownership interest in the residential property being foreclosed upon with address of 1055 Black Rush Circle, Mount Pleasant, SC 29466

(the "Subject Property") is subject to the security interest created by the Plaintiff's 2007 mortgage, elect to rescind the mortgage and note being foreclosed upon (the " 2007 Loan").

Plaintiff violated TILA and Regulation Z by, inter alia:

a. failing to provide interest rate disclosures at the 2007 and 2012 closings;

b. failing to provide material disclosures in a form Defendants could keep prior to consummation of the 2007 and 2012 closing;

c. failing to provide Notices of Right to Cancel;

d. failing to provide disclosures as part of the 2007 and 2012 transactions.

11. Plaintiff was obligated to provide the information set forth in the preceding Paragraph as Plaintiff knew, at all material times, that the subject property was residential and was Defendant Cindy Whitfield's primary residence.

12. Plaintiff's violations of the Truth-in-Lending Act give rise to a three year continuing right of rescission on the part of Defendants.

13. Defendants hereby elect to rescind the 2007 loan transaction with Plaintiff, pursuant to the continuing right of rescission.

14. When a consumer elects to rescind pursuant to the Truth-in-Lending Act, any security interest taken in connection with the transaction becomes void. 15 U.S.C. § 1635(b).

15. When a consumer elects to rescind pursuant to the Truth-in-Lending Act, the consumer is not liable for any finance or other charge. 15 U.S.C. § 1635(b).

16. The 2007 mortgage that is the subject of this foreclosure action was taken in connection with the transaction that Defendant has elected to rescind.

17. Defendant has the ability to tender repayment of their rescission obligations through procurement of a buyer of the home.

18. Since the mortgage is void, the foreclosure action must be dismissed.

SIXTH AFFIRMATIVE DEFENSE

19. Upon information and belief, the subject note attempted to be foreclosed upon is not the original note and therefore Plaintiff does not have standing pursue this foreclosure action.

COUNTERCLAIMS

Factual Allegations

20. In 2006, Mr. Whitfield approached Charlie Rivers (hereinafter, "Mr. Rivers") of Harbor National Bank to purchase and refinance certain real estate in the lowcountry counties of Berkeley, Dorchester and Charleston. Mr. Rivers previously helped Mr. Whitfield refinance over 30 loans when Mr. Rivers was a loan officer with Southtrust Bank. These loans always had 15 and 30 year terms and never had balloon payments or required refinancing or re-approval.

21. Mr. Rivers promised Mr. Whitfield the same loans as he was previously given by Mr. Rivers, to-wit, 30 year loans with the best rate possible, with a ½ point origination fee, on FNMA loan documents. There was no mention of balloon payments or re-qualification anytime during the 30 year loans. After a review of Mr. Whitfield's

financial condition, Mr. Rivers approved $1.5 million in loans to refinance rental properties, and shortly after extended the line to $2.0 million. At the time, Mr. Whitfield made clear to Mr. Rivers that the loans could not have demand features or have a balloon payment. Mr. Rivers agreed. Ms. Angie Bell, Plaintiff's loan officer, also represented to Mr. Whitfield that the loans would be automatically renewed in five years despite offering loans that had five year maturities.

22. In reliance on Mr. Rivers' and Ms. Bell's representations, Mr. Whitfield purchased the property at 1055 Black Rush Circle, Mount Pleasant, SC 29466 (hereinafter, "the Subject Property" or "Black Rush Property").

23. On or about March 27, 2007 Mr. Whitfield was provided documentation from Plaintiff stating that Mr. Whitfield would have the choice of a 7.5% fixed interest rate or a floating rate of prime minus ¼ % (See Exhibit "A" attached hereto). Ms. Bell advised that the fixed rate was the best option and that Mr. Whitfield could convert to a floating rate if the interest rates dropped. Upon information and belief, Ms. Bell knew or should have known in April of 2007 that the interest rates were going to fall.

24. Plaintiff was aware at all material times, before and after the loan was closed, that the home was being purchased as a primary residence for Mr. Whitfield's ex-wife, Cindy Whitfield. Mr. Whitfield provided all documents associated with the purchase of the home to Ms. Bell, including the real estate purchase contract to purchase Black Rush and the separation agreement which stated that Mr. Whitfield was to purchase the Black Rush property for Cindy Whitfield and deed a one half interest to her after the home was purchased, and deed the remaining one-half interest to Cindy Whitfield in 7 years, to-wit, June 13, 2015. Mr. Whitfield also provided Ms. Bell a copy of

the deed to Cindy Whitfield in July of 2007.

25. Despite being provided documentation by Plaintiff that Mr. Whitfield would have the choice of a 7.5% fixed interest rate or a floating rate of prime minus ¼ %, Mr. Whitfield was advised by Ms. Bell that the higher 7.5% fixed rate was the best option as opposed to the lower floating rate of prime minus ¼ %. Mr. Whitfield was told he could later change to the floating rate.

26. Despite being provided documents at the closing with a April 13, 2012 maturity date on some of the loans, Mr. Whitfield was assured numerous times by loan officer Angela Bell that the maturity date was just a formality and in fact was just a renewal date and would be extended automatically with only adjustments of interest without any re-qualifying or costs to extend. Despite making such assurances to Mr. Whitfield, loan officer Angela Bell determined as early as 2010 that the loans would not be renewed as she felt Mr. Whitfield was not providing financial information to her. At the time she indicated she needed to "grease the wheel" with Mr. Whitfield's accountant so the accountant would tell her more information about Mr. Whitfield's financial status.

27. Because of Ms. Bell's assurances and representations, Mr. Whitfield purchased the Black Rush property and made payments on the loan for the subject properties from the origination of the loan every month until the renewal date. Moreover, Mr. Whitfield repeatedly asked Ms. Bell to lower the rates on the subject property and all of Mr. Whitfield's other loans and was told by Ms. Bell each time that the bank could not lower the interest rates.

28. In January, 2012, Plaintiff asked Mr. Whitfield for a copy of his recent tax returns so that the loan could be automatically extended. As late as February 6, 2012,

loan officer Angela Bell sent an email to Mr. Whitfield asking him for tax information to work on the "renewals." On February 21, 2012, Mr. Whitfield informed loan officer Angela Bell that he was under some financial pressure, that his health was suffering, and that he wanted interest rates on par with the other mortgages he held with other banks. The following day, Ms. Bell informed Harbor National Bank personnel (but not Mr. Whitfield) that she was going to let Mr. Whitfield know that she would be asking him to move the loans. Although she informed others of her intention not to renew the loans, Ms. Bell never told Mr. Whitfield that he needed to move the loans- at any point in time. Had Mr. Whitfield known Plaintiff never intended to renew the loan, Mr. Whitfield would have previously refinanced the loan with another lender at a time when it was possible.

29. One week later, on February 28, 2012 loan officer Angela Bell wrote Mr. Whitfield to let him know that she would have to have his 2010 tax returns in order to request approval for renewal of his upcoming maturing loans. On April 2, 2012, Mr. Whitfield informed loan officer Angela Bell that his 2010 tax returns were complete and that he urgently wanted his loans modified since the rates were extremely high, and that his health had been an issue. After receiving the information about receiving the tax returns, the following day loan officer Angela Bell told a senior credit analyst at Harbor National Bank, "I'm just glad the threats of no renewals finally worked." Five days later, on April 8, 2012, Mr. Whitfield suffered a heart attack. Ms. Bell then began demanding appraisals on the properties and $2,700.00 worth of bank fees to perform the appraisals.

30. During a meeting with Ms. Bell and Mr. Willard Stout in May of 2012 (Ms. Bell's supervisor), Mr. Stout advised that appraisals were now required after the loans

began to mature and indicated that additional collateral requirements would be required to determine if the loans were "underwater," including a "blanket mortgage," for the properties. Mr. Stout made these demands despite the fact that Mr. Whitfield had paid down all of his principal balances since 2007 and never missed a regularly scheduled payment.

31. Despite making assurances the loans would be renewed, two notes (732 Gahagan and 110 Mepkin) matured on April 13, 2012 without having been renewed by the Plaintiff. Mr. Stout and/or Ms. Bell then demanded Mr. Whitfield sign 60-day renewal notes on the Gahagan and Mepkin properties on or about May 29, 2012, for him to be signed by May 31, 2012. On or about June 14, 2012 Mr. Stout threatened to hold Mr. Whitfield in default in three business days if he refused to sign the 60 day notes and agree to new collateral demands.

32. The note for the Black Rush Property came due on May 3, 2012, again without renewal. Finally, on June 21, 2012 Charlie Rivers met with Mr. Whitfield and orally agreed to modify the notes and specifically agreed to: (a) extend the notes for a 25 year amortization with another 5 year maturity; (b) eliminate the need for any principal pay downs; (c) eliminate the need for additional collateral to secure the notes; (d) eliminate the need to cross collateralize the loans; (e) waive the default interest rate of 14%; (f) back date the rate of 4.75% to the maturity the May 3, 2012 maturity date; and (g) credit Mr. Whitfield's overpayment of interest. Mr. Rivers agreed to renew all of Mr. Whitfield's other loans at this meeting as well. A copy of the notes Mr. River took at the meeting is attached hereto as Exhibit "B". The notes confirmed Mr. Rivers' agreement to renew the loans on the specified terms. After the meeting, the bank

contacted the closing attorney Mark Weeks and set up a closing for the following week, on June 28, 2012.

33. On June 27, 2012, only one day before the scheduled closing, Harbor National Bank vice president Scott Warren signed and provided a loan commitment letter dated June 26, 2012 to Mr. Whitfield stating the terms and conditions of the renewals of all Mr. Whitfield's loans held by Harbor National Bank. The proposed new loans dropped the interest rate to 4.75% and extended the maturities another 5 years. (See loan commitment[1], attached hereto as Exhibit "C"). The letter reflected Mr. Rivers' agreements from the June 21, 2012 meeting. Notably, the document contained no requirement that a title endorsement was required, or that Cindy Whitfield was required to give her permission or sign a mortgage to renew the loan for the Black Rush Property.

On the same day, Mr. Whitfield was given drafts of new notes and documents to sign for the closing which was to be held the following day, on June 28, 2012. The new note and documents for the Black Rush Property included: (a) a "Business Loan Agreement; (b) a "Business Purpose Statement; (c) a Commercial Promissory Note; (d) a Commercial Settlement Statement; and (e) a Waiver of Appraisal Rights.[2]

At the meeting on June 27, 2012, Mr. Warren mentioned the bank "may" need a title endorsement in order to close but never represented that one was required in order to close, or that it was a condition of closing - - nothing to that effect was stated in the June 26, 2012 letter that was given to Mr. Whitfield at the meeting with Mr. Warren,

[1] "Loan commitment" or "commitment" means a statement, written or electronic, by the mortgage lender setting forth the terms and conditions upon which the mortgage lender is willing to make a particular mortgage loan to a particular borrower. *See* SC Code § 37-22-110(24).
[2] A waiver of appraisal rights is exempted in a consumer credit transaction. *See* SC Code §29-3-680(b).

either. Similarly, Mr. Warren never expressed that Mrs. Cindy Whitfield was required to sign any documents in order to renew the loan for the subject properties.

34. In reliance upon Mr. Warren's June 26, 2012 commitment letter, Mr. Whitfield attended a scheduled closing at attorney Mark Weeks' law office. At the closing, Mr. Warren informed Mr. Whitfield that a signed endorsement from a title company was required so that Mr. Whitfield's ex-spouse Cindy Whitfield would not be required to sign the loan documents for the Black Rush Property, the home that Cindy Whitfield resided in.[3] At a certain point, Mr. Whitfield was informed by the closing attorney that the endorsement could not be procured, that Mrs. Whitfield was refusing to sign the mortgage to the Black Rush Property, and Mr. Warren proposed that it would only be possible to close two of the subject properties -Mepkin and Gahagan since they had matured, but that if the Black Rush Property ultimately couldn't be closed, all properties including Mepkin and Gahagan would have to be foreclosed upon. He then withdrew the offer to close Mepkin and Gahagan and stated that Black Rush must close or none of the nine loans could close. Outside Mr. Weeks law office, Mr. Warren imparted to Mr. Whitfield that the only option left was for Mr. Whitfield was to substitute collateral for Black Rush.

35. Despite Harbor National Bank's representations that a title endorsement was required to renew the Black Rush Property, Mr. Whitfield has subsequently learned that no such endorsement was required from the title company, or the closing attorney Mark Weeks. Moreover, Harbor National Bank failed to renew any of the loans listed in the June 26, 2012 commitment letter despite agreeing to do so, willfully breaching their

[3] Plaintiff also attempted to procure a "Business Purpose Statement" from Mr. Whitfield indicating that the property was to be used in Mr. Whitfield's business despite having previous knowledge that the Black Rush Property was in fact a residential property for Mr. Whitfield's ex-wife Cindy Whitfield.

agreements, and causing Mr. Whitfield damages as to be determined by the trier of fact.

36. Harbor National Bank claims to have relied upon the advice of their attorney, Mr. David Swanson, who indicated that a title endorsement was needed to renew the loan for the Black Rush Property. Mr. Warren never mentioned to Mr. Whitfield, at or after the closing, that the bank had procured Mr. Swanson's advice that a title endorsement be obtained in order to renew the Black Rush loan- and that he was relying on that advice in refusing to close the Black Rush loan. Recently, Mr. Swanson conceded that the Black Rush Property loan could have been renewed without such an endorsement. He also indicated that he was not told there were any other properties besides the Black Rush Property that were being renewed. Mark Weeks, the closing attorney at the June 28, 2012 closing, stated that no endorsement was necessary or required for the Black Rush Property and that he could have renewed any of the loans without an endorsement or Mr. Cindy Whitfield's permission and/or authorization to renew the loans. Mr. Swanson also conceded that his advice to procure a "title endorsement" was provided to Harbor National Bank without reviewing any documents, without performing any legal research, without providing any written opinion, and without charging the bank any money for the advice.

37. The attorney at the closing, Mr. Mark Weeks, has stated that there was absolutely no valid or legal reason that justified the bank's refusal to close any of Mr. Whitfield's loans. (See Affidavits of Mark Weeks, attached hereto as Exhibit "D").

38. Mr. Whitfield has also retained a banking expert, that has testified that the bank's actions were unreasonable as: (1) there was no risk to the bank in renewing the Black Rush Property without the title endorsement; (2) an endorsement was not

contractually called for in the bank's agreement to renew the Black Rush Property; and (3) the bank knew that Mrs. Whitfield was on title and received advice from Mr. Swanson on the subject prior to giving Mr. Whitfield the June 26, 2012 commitment letter that made no mention of a title endorsement. (See Affidavit of Peter Seitz, attached hereto as Exhibit "E").

39. Mr. Whitfield has also retained an experienced real estate attorney that has provided sworn testimony that the closing attorney had all the necessary paperwork in order to renew Mr. Whitfield's loans, and that no title endorsement or mortgage signature of Mrs. Cindy Whitfield was required. (See Affidavits of David Collins, attached hereto as Exhibit "F").

40. Adding insult to injury, after the bank failed to renew the loans at the June 28, 2012 closing, the bank continued to demand Mr. Whitfield's ex-wife sign the "necessary paperwork" when they had been advised four days after the closing by their own outside bank compliance expert Patti Blendon that the wife, "may not have to sign anything." The bank compliance expert Patti Blendon also told the bank the situation was, "a mess," and that the loan was a consumer – and not—a commercial loan, despite the bank treating the loan as commercial in 2007 when the loan was originated, and again treating the loan as commercial in 2012 when the bank made a condition of the renewal that Mr. Whitfield sign an affidavit that the loans (including the Black Rush Property) were, "owned and pledged for business purposes." Again, at all material times alleged herein, the bank knew the Black Rush Property was being purchased for Mrs. Whitfield to live in before origination in 2007, as well as at the time of the agreed-upon

renewal in 2012[4]—yet ignored following federal Truth-In-Lending laws to provide mandatory disclosures to Mr. Whitfield in 2007 and again in 2012, and otherwise not treating it as a consumer loan under RESPA and TILA.

41. The bank compliance expert Patti Blendon also instructed the bank to get an attorney involved regarding these issues. The bank contacted Mr. Robert Bernstein on July 12, 2012, twelve days after giving their advice. Mr. Rivers, the bank president, stated that he felt comfortable in saying that all these issues were discussed with Mr. Bernstein. Mr. Bernstein, however, stated under oath that he was not asked nor provided legal advice as to technicalities, preparation or closing of the renewal of the Black Rush Property, during this exact same time period. Mr. Bernstein stated that he "wasn't clear why it didn't close," in June of 2012, but yet continued to demand that Mrs. Whitfield sign a mortgage in order to renew the loans after the failed closing, but before this foreclosure action was filed. He also has indicated that the reason the closing did not proceed was because of his conclusion that the existence of the transfer of the one-half interest "encumbered" the first mortgage.

42. Mr. Bernstein, at the time, made no efforts to contact Mr. Warren the loan officer, Mr. Weeks the closing attorney, or Mr. Swanson bank's counsel in order to determine if a title endorsement or Mrs. Whitfield's signature was truly necessary to renew the Black Rush Property (or any of the other properties)- but instead continued to demand that Mrs. Whitfield sign a mortgage in order to renew not just the Black Rush Property, but all eight others, or substitute collateral for the Black Rush Property to convert the loan from a consumer to business loan. The bank also retreated from its June 28, 2012 terms and conditions to renew the loans and went back to offering May,

[4] (See bank Credit Offering Reports from 2007 and 2012, attached hereto as Exhibit "G").

2012 demands for collateral changes to unnecessarily interfere with Mr. Whitfield's business.

43. Despite disputing the default, Plaintiff instituted receivership proceedings on seven of his properties, took possession of the properties, and selected a receiver whom Mr. Whitfield had a litigation history with, Ms. Candace Pratt. Ms. Pratt unilaterally leveraged the properties with loans from the plaintiff and squandered the properties' income for her own benefit with the bank's approval and acceptance.

44. As a direct consequence of the foreclosure actions and the bank's failure to renew the loans it agreed to, Mr. Whitfield has liquidated income producing assets in order to defend the foreclosures, pursue these counterclaims, and dispute Plaintiff's claimed default.

FOR A FOR FIRST COUNTERCLAIM
(Breach of Contract)

45. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

46. As described above, Plaintiff indicated before and after the origination of the loan, verbally and in writing, that the loan to the Subject Property (and Mr. Whitfield's eight other properties) with Harbor National Bank would be automatically renewed.

47. Despite repeatedly making these representations and reassurances, and making a specific agreement to renew the loans, Plaintiff failed to renew the loans and instead declared Mr. Whitfield to be in default despite being paid all monthly installments on time, as and when due, breaching their agreement with Mr. Whitfield.

48. Although Plaintiff ultimately confirmed in writing to renew the loans in the June 26, 2012 letter, Plaintiff refused to close the loan on June 28, 2012, as described above, breaching the terms of the offer contained in the writing. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A SECOND CAUSE OF ACTION
(Negligent Misrepresentation)

49. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

50. As described above, Harbor National Bank made affirmative representations to Mr. Whitfield that: (1) the initial loans would be 30 year loans; (2) the maturity date referenced in the Note was simply a renewal date; and (3) the interest rate to be charged would be Mr. Whitfield's choice of a 7.5% fixed rate or prime minus ¼ %. The Plaintiff also made representations, and an offer, that the loans would be renewed at 4.75% with a new maturity date of July 10, 2017.

51. Plaintiff knew these representations were false, misleading, and incomplete when they were made. Such representations were (1) false, misleading and incomplete when made; (2) were made for a pecuniary interest of the Plaintiff; (3) the Plaintiff owed a duty of care to convey truthful information to Mr. Whitfield; (4) the Plaintiff breached that duty by failing to exercise due care; (5) Mr. Whitfield was unaware that the representations were false - and had no reason to suspect they were

false as he placed his trust and confidence in Plaintiff. As such, Mr. Whitfield had a right to rely on such information, and did so rely on said information to his financial detriment as outlined above. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will be shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A THIRD CAUSE OF ACTION
(Fraud)

52. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

53. At or about the time of the initial loan originations, Plaintiff made affirmative representations to Mr. Whitfield that: (1) the loans would be 30 year loans; (2) that the maturity date referenced in the Notes were simply renewal dates; and (3) that the interest rate to be charged would be Mr. Whitfield's choice of a 7.5% fixed rate or prime minus ¼ %. The Plaintiff also made representations through Mr. Charlie Rivers, and an offer, that the loans would be renewed at 4.75% with new maturity dates of July 10, 2017. Such representations were false, incomplete and misleading when made, were material, were known by the Plaintiff to be false, misleading and incomplete, and were intended to be relied upon.

54. In addition to the aforementioned representations, Plaintiff made the representation and communicative action that it needed a "title endorsement" to the Black Rush Property in order to close not just the Black Rush loan, but all eight other loans as well.

55. The Plaintiff (as opposed to Mr. Whitfield) ought to have known the falsity of the representation of a need for a title endorsement as their own attorney that gave them the supposed advice for it stated the transaction could have been performed *without it and that the deed transfer to Cindy Whitfield was not a title defect.*

56. In addition to the aforementioned representations, Plaintiff made the representation and communicative action that it needed Cindy Whitfield to sign a mortgage to the Black Rush Property in order to close not just the Black Rush loan, but all eight other loans as well.

57. Mr. Whitfield was unaware that the representations were false and had no reason to suspect they were false, as he placed his trust and confidence in Plaintiff. As such, Mr. Whitfield had a right to rely on such information, and did so rely on said information to his detriment financial as outlined above. Had Mr. Whitfield known Plaintiff never intended to renew the loans, Mr. Whitfield would have previously refinanced the loans with another lender at a time when it was possible. In this regard, at a minimum, the Plaintiff should have relayed their concerns about the renewals as early as documentary evidence suggest Harbor National Bank had a concern, to-wit, the year 2010.

58. These false representations were made to induce the Mr. Whitfield to enter a high cost loan, and were made by the Plaintiff with the knowledge of their falsity.

59. Mr. Whitfield reasonably relied on the material representations of Plaintiff and had no knowledge the representations made by the Plaintiff were false and the Mr. Whitfield was, therefore, fraudulently induced by the Plaintiff to enter into multiple high cost loans with the Plaintiff.

60. Mr. Whitfield made a mistake in entering into this and the other loans, which mistake was unilateral. Mr. Whitfield was fraudulently induced by the Plaintiff to make the unilateral mistake as a direct, proximate and foreseeable result of the fraud, deceit, misrepresentation, and active concealment perpetrated upon Mr. Whitfield by the Plaintiff.

61. Subsequent to the origination of the loans, Mr. Whitfield has been informed and now believes that the Plaintiff misrepresented the terms of the loan, verbally and in writing by (1) not receiving 30 year loans, (2) representing that the maturity date was simply a renewal date; (3) charging, and stubbornly refusing to change and/or modify the interest rate of 7.5%; and (4) communicating to Mr. Whitfield orally and in writing that the loans would be renewed, as was agreed. The Plaintiff also made representations through Mr. Charlie Rivers, and an offer, to renew all nine loans at 4.75% with a new maturity date of July 10, 2017. As such, Mr. Whitfield is entitled to avoid or rescind the loans and to be returned to the status quo ante whereby the Plaintiff returns to Mr. Whitfield all monies paid by Mr. Whitfield in exchange for Mr. Whitfield returning the amount of the loan proceeds to the Plaintiff. In addition thereto, Mr. Whitfield is entitled to all incidental, consequential, direct and indirect damages proximately caused by Plaintiff when they fraudulently induced Mr. Whitfield to enter into this loan transaction and the other loans with Plaintiff. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the repeated acts of indifference, malice, trickery and deceit (rather than mere accident) of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A FOURTH CAUSE OF ACTION
(Violation of Federal Trade Commission Act Section 5(a) 15 U.S.C. §45)
(Unfair Trade Practices, as made applicable through SC Code §39-5-10 et.seq.)

62. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

63. As stated above, Plaintiff made affirmative representations to Mr. Whitfield that: (1) all loans would be 30 year loans; (2) that the maturity dates referenced in the Notes were simply renewal dates; and (3) that the interest rate to be charged would be Mr. Whitfield's choice of 7.5% fixed rate or prime minus ¼ %. The Plaintiff also represented, and made an offer, that the loans would be renewed at 4.75% with new maturity dates of July 10, 2017.

64. Plaintiff's acts enumerated above constitute "unfair or deceptive acts or practices in or affecting commerce," as those terms are defined in the Act. This prohibition applies to all persons engaged in commerce, including banks. An act or practice is unfair where it: (1) causes or is likely to cause substantial injury to consumers; (2) cannot be reasonably avoided by consumers and; (3) is not outweighed by countervailing benefits to consumers or to competition. In this case, Plaintiff's actions set forth above have caused substantial injury to Mr. Whitfield.

65. An act or practice is deceptive where: (1) a representation, omission, or practice misleads or is likely to mislead the consumer; (2) a consumer's interpretation of the representation, omission, or practice is considered reasonable under the circumstances and; (3) the misleading representation, omission, or practice is material. In this case, Plaintiff's actions were unethical and deceptive because Plaintiff clearly

misrepresented that the loans would be renewed and misrepresented the interest rate that Mr. Whitfield would be charged. The bank's own commercial loan policy mandates that the loans provided to Mr. Whitfield should have been, "tied to Harbor National Bank's Base Rate with the interest rate adjusted as the Base rate changes." It was the bank's own policy that these loans were to be made variable, not fixed, and the loan officer in 2007 Ms. Bell and the bank president Mr. Rivers in 2012 had no explanation as to what the circumstances were which demanded that Mr. Whitfield's loans were made fixed. Not only did Ms. Bell misrepresent the fact that the loan's interest rate feature could be switched from a fixed to a floating variable rate feature, but, it was never supposed to be fixed to begin with, per the bank's own loan policies. Mr. Rivers repeated this practice by not offering Mr. Whitfield a variable rate loan in accordance with their own loan policies in June of 2012.

66. The bank also committed unfair and deceptive acts by not complying with federal law and its own regulatory compliance program in failing to treat the Black Rush Property as a consumer loan, as defined in federal law. On June 21, 2012 Harbor National Bank made an offer to Mr. Whitfield to defer payment of debt on his loans until 2017, as confirmed in writing in the June 26, 2012 commitment letter. Such offer was accepted by Mr. Whitfield and was an extension of "credit" as defined in law.

67. The loan made by the Plaintiff to Mr. Whitfield for the Black Rush Property in 2007 and extension of credit offered in 2012 above was, at all material times, a consumer loan, as that term is defined in state and federal law. Specifically, the loan and the extension of credit was made for personal, family, or household purposes – and not a business use. The primary purpose of Mr. Whitfield procuring the loan for the

Black Rush Property (and the extension of credit in 2012) was for personal and family reasons as he was obligated to provide the Black Rush home to Cindy Whitfield pursuant to his family court obligations.

68. Plaintiff attempted to provide a notice of right to cure to Mr. Whitfield for the Black Rush loan, further evidencing Plaintiff's treatment of the loan as a consumer loan.

69. Plaintiff's own bank compliance expert, Ms. Patti Blendon acknowledged that the loan for the Black Rush Property was a consumer, and not a commercial loan. Mr. Rivers, the president of the bank, acknowledged that the Black Rush Property could be classified as a Residential 1-4 family dwelling secondary residence—which according to the bank's own regulatory compliance program mandates disclosures under TILA and RESPA.

70. The Plaintiff was required under state and federal law (and their own regulatory compliance program) to provide interest rate and material disclosures to Mr. Whitfield and Mrs. Whitfield in 2007 and 2012 after agreeing to extend credit on the Black Rush and never did.

71. Plaintiff was obligated to provide the information set forth in the preceding Paragraph as Plaintiff knew, at all material times, that the subject property was not a rental (or for business) and was Defendant Mrs. Cindy Whitfield's personal, primary residence. The disclosure violations were intentional and not bona fide errors as Plaintiff attempted to procure a "business purpose affidavit" from Mr. Whitfield at a time knowing full well the Black Rush Property was for personal, family or household use.

72. Mr. Whitfield has been injured in reliance upon Harbor National Bank's practices and omissions as cited above, as will shown to the trier of fact, including but not limited to, actual, consequential and special damages, physical and mental distress and financial loss. In addition thereto, the repeated acts of indifference, malice, trickery and deceit (rather than mere accident) of the Plaintiff entitle Mr. Whitfield to an award of treble damages, attorneys fees and costs and punitive damages.

FOR A FIFTH CAUSE OF ACTION
(Promissory Estoppel / Detrimental Reliance)

73. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

74. Mr. Whitfield relied on the promises of Angela Bell, Charlie Rivers, and Scott Warren to renew and modify the loans.

75. These promises were unambiguous in their terms and were relied upon by Mr. Whitfield. In particular, there were no contingencies placed upon Mr. Rivers June 21, 2012 offer and agreement to renew the nine loans on specified terms, as the June 26, 2012 written reflection of the agreement, nor Mr. Warren's representations to renew the loans on June 27, 2012, as title insured first mortgages were already in place on all of the subject properties.

76. The reliance by Mr. Whitfield regarding renewing the nine loans was more than expected and more than foreseeable by Harbor National Bank.

77. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, actual, consequential and special damages, physical and mental distress and financial loss. In addition thereto, the repeated acts of indifference, malice, trickery and deceit (rather

than mere accident) of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

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

78. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

79. As stated above, Mr. Rivers made an agreement to renew the loans at the June 21, 2012 meeting with Mr. Whitfield, as put in writing, as reflected in the June 26, 2012 commitment letter.

80. Plaintiff breached the agreement with Mr. Whitfield by failing to close the renewal of this loan and the 8 other loans. Such breach was made with the fraudulent intent of never actually intending to close the renewals when that representation was made, and such fraudulent intent was manifested by the fraudulent act of claiming a title endorsement was required to renew the loan on the Black Rush Property when in fact one was never needed, nor was any signature legally required of Mrs. Cindy Whitfield to effect the renewal of this loan.

81. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, actual, consequential and special damages, physical and mental distress and financial loss. In addition thereto, the repeated acts of indifference, malice, trickery and deceit (rather than mere accident) of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A SEVENTH CAUSE OF ACTION
(Tortious Interference with Prospective Contractual Relations)

82. Mr. Whitfield hereby incorporates the allegations of the foregoing

paragraphs as if fully restated herein.

83. The acts of Plaintiff described herein constituted an interference with Mr. Whitfield's business, were without justification, were done with improper purpose and motive, knowing it would place Mr. Whitfield under duress when filing these unfounded legal proceedings and knowing that it would interfere with Mr. Whitfield's ability to sell and/or rent his properties.

84. As a result of Plaintiff's actions Mr. Whitfield has lost the ability to enter into contracts with identifiable prospective buyers and/or renters of his properties. As a direct and proximate result of the Plaintiff's actions, Mr. Whitfield has suffered special damages including but not limited to a diminished value of all his properties in the eyes of third parties, loss of income and loss of profits.

85. Plaintiff's actions proximately caused actual, consequential, and special damages, including but not limited to: a) inability to sell and/or rent his properties to third parties who meet requirements for sale and/or rental of his properties; b) foreclosure proceedings having been instituted on his properties; c) a diminished value of all his properties in the eyes of third parties; d) damage to Mr. Whitfield's reputation and business standing in the real estate profession; e) financial damage to Mr. Whitfield's business because of pre-mature liquidations and time spent away to defend these charges and prosecute these claims; f) financial damage for his inability to sell his properties following filing of the lis pendens and lawsuit; g) attorneys' fees and costs incurred; h) time spent away from work as a result of the lis pendens and lawsuit; i) emotional distress to Mr. Whitfield; j) injury to his health and mental pain and suffering; and k) adverse tax consequences. In addition thereto, the repeated acts of indifference,

malice, trickery and deceit (rather than mere accident) of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR AN EIGHTH CAUSE OF ACTION
(Cross-Claim for Equitable Indemnity as to Co-Defendant Cindy Whitfield)

86. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

87. To the extent, if any, that Mr. Whitfield is held liable to the Plaintiff in this action, which such liability is expressly denied, such liability would be a proximate result of the wrongful acts, breach of duties, omissions, and/or negligence of Cindy Whitfield and/or her agents in failing to give her permission and/or authorization to renew the loan for the subject property located at 1055 Black Rush Circle, Mount Pleasant, South Carolina, said demand being made as a defense of Harbor National Bank to close all of the renewal loans set forth in Exhibit "C".

88. Specifically, the closing attorney Mark Weeks and Mr. Whitfield's previous counsel Lauren Felder have stated that Mrs. Cindy Whitfield's counsel Stanley Jaskiewicz was contacted regarding procuring her consent for the renewal of the Black Rush Property. Lauren Felder was advised by either Stanley Jaskiewicz or his paralegal Dena Hardison that Mrs. Cindy Whitfield, "would not sign off on the mortgage as Mr. Whitfield was solely responsible under the Final Family Court Order." Additionally, Mrs. Cindy Whitfield was told by Mr. Jaskiewicz' paralegal Dena Hardison that, "he [Mr. Whitfield] could not refinance my home or borrow the equity in it as he would be putting another nail in his coffin." According to Mrs. Whitfield, Ms. Dena Hardison gave her this

advice before the closing[5] and was also told by Ms. Hardison not to, "do anything until I talk to Stan," regarding gaining access to her home for an appraisal. According to Mrs. Whitfield, Mr. Jaskiewicz never called her back regarding any issues related to procuring her consent to renew her home.

89. To the extent, if any, that Mr. Whitfield is held liable to the Plaintiff in this action, which such liability is expressly denied, these wrongful acts, breach of duties, omissions, and/or negligence of Cindy Whitfield and/or her agents have damaged Mr. Whitfield, including but not limited to consequential and special damages, and the imposition of attorney's fees and costs in defending the foreclosure and prosecuting the Counterclaims as alleged herein. Mr. Whitfield and Mrs. Cindy Whitfield had a special relationship by virtue of their continuing family court obligations that would support a claim for indemnity against Mrs. Cindy Whitfield. Moreover, Mr. Whitfield is wholly without fault for Cindy Whitfield failing to provide her permission and/or authorization to renew the loan for the Black Rush Property.

90. To the extent, if any, that Mr. Whitfield is held liable to the Plaintiff in this action, which such liability is expressly denied, Mr. Whitfield would be entitled to be equitably indemnified for such liability from Cindy Whitfield for any liability that Mr. Whitfield is found to have incurred to the Plaintiff such that Mr. Whitfield would be entitled to recover his consequential and special damages, attorney's fees and costs, monies adjudged owed to the Plaintiff and/or monies expended by way of settlement of Plaintiff's claims as a result of Cindy Whitfield and/or her agents wrongful acts, breach of duties, omissions, and/or negligence as afore-described.

[5] Mrs. Whitfield indicated this statement was made by Ms. Hardison at the time the appraiser was attempting to gain access to Mrs. Whitfield's home-- in May and June of 2012. Correspondence was sent to Stanley Jaskiwicz advising him of appraisal access issue on June 11, 2012.

WHEREFORE, Defendants prays for relief as set forth below together with such further relief as this court deems just:

a. Actual damages
b. Consequential and Special damages;
c. Statutory damages;
d. Treble Damages
e. Disgorgement of profits;
f. Restitution;
g. Rescission;
h. Injunctive relief;
i. Attorneys' fees and costs;
j. Punitive Damages; and
k. Equitable Indemnification from co-defendant Cindy Whitfield in the alternative.

DEMAND FOR JURY TRIAL

Mr. Whitfield demands a jury trial on all counts so triable as stated above. These causes of action must be tried before any equitable causes of action asserted by either party can be disposed of. *See* Gardner v. Travis, 316 S.C. 315, 450 S.E.2d 54 (Ct. App. 1994).

Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

By: _____

Brent S. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com

Attorneys for Defendant

-and-

Andrew J. McCumber, Esquire

SLOTCHIVER & SLOTCHIVER, LLP
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andrew@slotchiverlaw.com
S.C. Bar No. 101559

&

Daniel S. Slotchiver, Esquire
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S.C. Bar No. 15129

Attorneys for Defendant

Charleston, SC
November 12, 2015

12-5887

CERTIFICATE OF SERVICE

I certify that I served the foregoing Fourth Amended Answer, Affirmative Defenses and Counterclaims upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to the parties and counsel's last known address on this 12 day of November, 2015.

HALVERSEN & ASSOCIATES, LLC

By: _____

Brent S. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com

FILED
2015 NOV 12 PM 12:58
JULIE J. ARMSTRONG
CLERK OF COURT

Charleston, SC
November 12, 2015

HARBOR NATIONAL BANK *yes!*

March 27, 2007

Mr. Anthony Whitfield
2141 Dorchester Road
N. Charleston, SC 29405

Re: Line of Credit

Dear Tony:

Harbor National Bank has approved an extension of credit to you subject to the specific terms and conditions outlined in the financing commitment below.

A. GENERAL TERMS.

1. BORROWER: Anthony M. Whitfield (hereinafter referred to as "Borrower")

2. AMOUNT OF LINE: Up to One Million Five Hundred Thousand and no/100 Dollars ($1,500,000.00). Each advance under this line to be approved individually by the Bank.

3. PURPOSE: Guidance Line of Credit to finance individual investment properties.

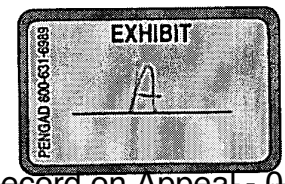
4. INTEREST RATE: Each individual credit facility shall bear and accrue interest at borrower's choice of 1) a fixed rate for each advance to be determined at time of advance (for example, loans approved today would be fixed at 7.50%) or 2) a floating rate of prime minus ¼ %.

5. ORIGINATION FEES: At Closing of each individual loan, Borrower will pay Bank origination fee of ½ %.

6. ~~GUARANTY: All loans and extensions of all credit shall be unconditionally guaranteed by Whitfield Realty.~~

7. MATURITY: Guidance Line to be approved and renewed on an annual basis. Each individual loan will mature 60-months from its closing date.

8. REPAYMENT: Monthly principal and interest payments based on a 30-year amortization with a 60 month maturity.



9. COVENANTS:

On new purchases:

- Loan to Value will not be greater than 75%,
- minimum cash equity/down payment of 15%,
- with minimum Debt Service Coverage ratio of 1.0 times.

On refinances:

- Loan to Value will be not greater than 75%,
- with minimum Debt Service Coverage ratio of 1.0 times.

B. **SECURITY.** Title Insured First Mortgage on each property. In addition, Bank requires an assignment of all leases, rents, and profits.

C. **APPRAISAL.** Prior to each loan closing, Bank shall order and receive an appraisal of the Property in form and substance satisfactory to Bank. Based on the appraisal, the loan will not exceed 75% of the value of the property.

D. **SURVEY.** Prior to closing, Bank shall receive and approve a survey, acceptable to the title company, showing the location of all physical matters affecting the Property, identified in Section B above. Such survey shall indicate the location of all boundary lines, means of ingress and egress, easements, rights of way and shall include a legal description of the Property.

Bank will waive such survey in the event that no exception would result with the title company.

E. **TITLE INSURANCE.** Receipt of an ALTA title insurance policy, and all title endorsements.

F. **INSURANCE.** Borrower will provide proof of insurance coverage with insurance companies satisfactory to Bank, on the Collateral, in such amounts and against such risks as typically required in this type of transaction.

G. **ENVIRONMENTAL.** Prior to loan closing, Bank shall be provided with proof of acceptable environmental conditions for the property through its environmental due diligence process. If Bank determines an environmental risk in this process, it reserves the right to require additional third party studies and/or insurance.

H. **FINANCIAL REPORTS AND OTHER DATA.**

1. Borrower will furnish Bank with annual personal financial statements and copies of tax returns within forty-five (45) days of filing with the Internal Revenue Service.

2. Within sixty (60) days after the close of each fiscal year, Borrower shall furnish Bank with annual financial statements, consisting of balance sheets, operating statements and such other statements as Bank may reasonably request. Copies of tax returns will be required on an annual basis within 45 days of filing.

I. **GENERAL CONDITIONS.**

1. Borrower shall be responsible for all reasonable and necessary expenses incidental to the transaction, including, but not limited to, all pre-closing, closing and post-closing expenses such as appraisal fees, legal fees, title insurance premiums, and architect's, surveyor's, engineer's expenses.

2. Unless otherwise provided in the Loan Documents, all terms, representations, warranties, covenants and agreements made herein and the terms and provisions thereof shall survive the making of the credit facilities described herein and the delivery of the Loan Documents, and shall continue in full force and effect, so long as the facilities remain outstanding and unpaid. These are not necessarily intended to represent all the conditions and requirements of our commitment that would be included in the subsequent loan documentation. In the event of irreconcilable inconsistency with any of the Loan Documents, the terms of the Loan Documents shall control. If the Loan Documents are silent to the issue, the terms of this Commitment Letter shall control.

If the aforementioned conditions are acceptable, please sign in the appropriate space and return to the undersigned. Unless accepted within ten (10) days, this commitment will be null and void. If this commitment is accepted, it will remain open for thirty (30) days after the acceptance date, at which time it will be null and void if the facility is not closed.

Sincerely,

Angela K. Bell
Vice President

Accepted this 28th day of March, 2007.

Anthony M. Whitfield

Signature

Guarantors

By:_____
Whitfield Realty

Have to get new Appraisals

Tony Whitfield

Mark Weeks extend Rate Back

1,266,000.00

9 individual Loans

orig 30 yr. Amm 5 yr Call
all Fixed Rates

3 currently due
and 6 more by Oct

25 years left
original advance Rate 75%

Issues

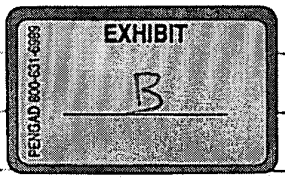
(1) Appraisals - 2500 fees he pays

(2) Rate

(3) Term

(4) LTV

(5) Proc fees 2,250 Waive



Options 80% LTV

① Pay down $137,600
or pledge $137,600 value
@ 4.85% 25 yrs 5 yr call
(4.25 - 4.50%)

② Attorney closed renewals @ 5.25% 4.75
No paydown No New Collateral
25 yr 5 yr call

Black Rush
① Need AV 350 M
② replace w/ other poop @ 350 value

Drive by App

HARBOR NATIONAL BANK

EXHIBIT C

June 26, 2012

Re: Renewal & Modification Existing Debt on 9 Residential Properties

Dear: Mr. Whitfield

Thank you very much for the opportunity to offer renewals and modifications on the 9 loans you presently have financed with Harbor National Bank. The following is not a commitment to lend, but is our proposal for the general terms and conditions of the subject loans if the transaction were to close on June 28, 2012.

A. GENERAL TERMS.

1. BORROWER: Anthony M. Whitfield (hereinafter referred to as "Borrower")

2. AMOUNT OF LOAN: Up to the current outstanding principal balances *(accrued interest must be paid prior to renewal & is subject to change based on per diem).*

Loan #	*Property Address	6/28 Principal Balance	Accrued Interest
0400076000	98 Willow	$ 97,627.80	$ 295.08
0400047100	131 Tryon	$114,010.17	$ 344.61
0400047000	109 Mallory	$130,164.03	$ 393.44
0400046900	118 Clay	$128,263.84	$ 387.70
0400046800	308 Shortleaf	$133,014.21	$ 402.06
0400046700	9708 Jamison	$130,163.98	$ 393.44
0400031600	732 Gahagan	$132,641.57	$ 121.23
0400031700	110 Mopkin	$ 85,269.58	$ 77.93
0400032000	1055 Black Rush Cir.	$314,866.30	$1,379.21
Total		$1,266,021.48	$3,795.30

3. MATURITY: The maturity dates of all loans will be changed to July 10, 2017

4. INTEREST RATE: Fixed Rate of 4.75% for the term of the loan.
This rate is not guaranteed beyond July 10, 2017 & is subject to the loan closing by June 28th & performing as required.

yes!

5. ORIGINATION FEE: None

6. COLLATERAL: *Title Insured 1st Real Estate Mortgage(s) plus an Assignment of all Leases, Rents, and Profits on real properties that were previously pledged as collateral to Harbor National Bank & identified under Section A (General Terms) part 2 of the subject term sheet. *The borrower's attorney will be responsible for conducting the closing and ensuring that the bank maintains its priority interest in the collateral. The Bank will require a minimum of title updates & new title opinion(s), but additional services and documentation may be required.*

7. REPAYMENT: Monthly payments of principal and interest to be based on a 25 year amortization with the balance due at maturity.

The due dates will all be changed to the 10th of the month with the first payment due on August 10th, 2012.

Taxes & Insurance are not escrowed & must be paid directly by the borrower

Estimated Initial Payments	
98 Willow	$ *561.40*
131 Tryon	$ *655.60*
109 Mallory	$ *748.49*
118 Clay	$ *737.57*
308 Shortleaf	$ *764.88*
9708 Jamison	$ *748.49*
732 Gahagan	$ *762.74*
110 Mepkin	$ *490.33*
1055 Black Rush Circle	*$1,810.60*
Total:	$7,275.02

8. PREPAYMENT PENALTY: None

B, GENERAL CONDITIONS:

1. The borrower will provide the bank updated financial statements to the bank on an annual basis. Tax Returns and an updated personal financial statement will be provided to the bank by April 15th of each year.
2. The proposed renewals/modifications will be closed under the supervision of the borrower's attorney. The borrower's attorney must ensure (a) the new closing documents are constructed & executed to be enforceable loan documents, and (b) ensure that parties signing the documents are educated about the content, their responsibilities, and the nature of their involvement. ***All attorney fees will be paid by the borrower at or prior to closing (cost TBD by borrower's attorney).***

3. Bank shall order or be provided an appraisal of the property in form and substance satisfactory to Bank. ***$2,700 is the cost of the appraisals*** (as invoiced by 3rd party vendors), and the borrower will pay the bank directly

WAIVER OF APPRAISAL RIGHTS. You are hereby notified pursuant to Section 29-3-680 of the 1976 Code of Laws for the State of South Carolina, prior to the transaction described above, that a Waiver of Appraisal Rights will be required as a condition of the Loan.

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 thirty (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. Pursuant to Section 29-3-680 of the Code of Laws of South Carolina, **THE UNDERSIGNED HEREBY WAIVE AND RELINQUISH 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.**

Upon reaching an agreement on these general terms, we can proceed to a formal commitment very quickly.

Sincerely,

Scott Warren
Vice President

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2012-CP-10-5887
HARBOR NATIONAL BANK,	)	
	)	
Plaintiff,	)	
	)	**AFFIDAVIT OF MARK WEEKS**
vs.	)	
	)	
ANTHONY M. WHITFIELD	)	
	)	
Defendant.	)	
	)	

Mark Weeks, personally appearing before me, who being duly sworn, states the following:

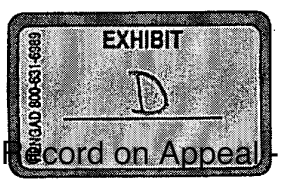
1. My name is Mark Weeks, I am over the age of eighteen, and have personal knowledge of the facts stated herein.

2. I was contacted on June 21, 2012 to close the renewal of nine loans made between Harbor National Bank and Anthony Whitfield.

3. The closing for the renewals of the loans was set for June 28, 2012.

4. My office performed a title examination on the nine properties and found they all had good and marketable title, and that each parcel was already subject to a valid first mortgage in favor of Harbor National Bank.

5. As part of closing the loans, Scott Warren instructed our office (through Teresa Farley via an email communication on June 27, 2012) that a title endorsement on the Black Rush property needed to be obtained as a condition to



close all of the renewals.

6. My office attempted to procure a title endorsement but one could not be made. Notwithstanding this attempt, I believe there was already a valid first mortgage in place on the Black Rush property and I could have closed the renewal of the Black Rush property without the endorsement if Harbor National Bank had agreed to do so.

7. Mr. Whitfield's ex-wife, Cindy Whitfield is a co-owner of the Black Rush property by virtue of a deed conveying a one-half interest to her, conveyed on July 24, 2007- after the Harbor National Bank mortgage was placed on the property. As such, Cindy Whitfield took title to the Black Rush property subject to Harbor National Bank's pre-existing first mortgage.

8. Although Cindy Whitfield is on title to the Black Rush property, I do not believe this is, or ever was, a title defect or in any away affected Harbor National Bank as an insured to the pre-existing First American Title Insurance issued to them when the lender's policy was issued in 2007. Accordingly, I do not believe a title endorsement was necessary in order to renew the Black Rush loan.

9. I did not require a title endorsement to close any of the nine renewal loans, including the Black Rush property. I was ready, willing, and able to close any or all of the nine renewal loans if Harbor National Bank had not insisted on procuring a title endorsement to the Black Rush property.

10. Additionally, I did not: (1) require that the Black Rush mortgage be modified in order to close the renewal of the loan for another five years, or (2)

require Cindy Whitfield to sign a mortgage in order to close the renewal of the Black Rush property.

FURTHER AFFIANT SAYETH NOT.

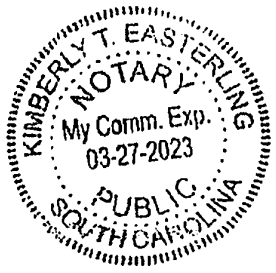
Mark Weeks

SWORN TO before me this

17th day of March, 2014.

Notary Public for South Carolina

My Commission Expires:_____



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2012-CP-10-5887
HARBOR NATIONAL BANK,	)	
Plaintiff,	)	
	)	**SUPPLEMENTAL AFFIDAVIT OF MARK WEEKS**
vs.	)	
ANTHONY M. WHITFIELD	)	
Defendant.	)	

Mark Weeks, personally appearing before me, who being duly sworn, states the following:

1. My name is Mark Weeks, I am over the age of eighteen, and have personal knowledge of the facts stated herein.

2. Since I gave my first affidavit in this matter and deposition last year, I have had occasion to review the deposition transcript of David Swanson, given in this matter. Notably, Mr. Swanson reviewed no relevant documents (the deed, mortgage, or my title opinion) in rendering his opinions to the bank.

3. First, having reviewed the transcript, I do not believe the bank had a valid or legal reason in relying upon Mr. Swanson's opinion in deciding not to close on Mr. Whitfield's loans. Mr. Swanson's opinions given to the bank were limited to advice rendered concerning the Black Rush property—which had nothing to do with the eight other loans the bank sent to my office to close. For

this reason, there was absolutely no valid or legal reason that these eight loans could not have been closed. It is my opinion that Harbor National Bank had absolutely no valid or legal reason to refuse to close the loan renewal of the Black Rush property, either. There was no new mortgage or no new modification of mortgage provided to my office for Mrs. Whitfield to sign. No one advised my office that a new mortgage or new modification of mortgage was required to be signed in order to renew these loans. Neither was not needed in fact or law to renew the loan, and I did not require either.

4. The Black Rush loan could have been renewed had it not been for the bank's unilateral decision to demand a title endorsement. One was not required, and I could have closed this loan and still ensured the bank maintained its priority interest in the collateral as I had conducted a title search on all of the properties and found there to be good and marketable title to all.

5. Second, it appears Mr. Swanson himself conceded in his deposition that the Black Rush loan could have been closed *without* the title endorsement. In light of this statement I especially believe the bank was not reasonable nor acted in good faith in relying on Mr. Swanson's advice in directing me not to close the Black Rush loan. In fact, I would say the opposite is true: I believe the bank foreclosed on Mr. Whitfield's loans without a valid or legal reason. If Mr. Swanson's opinions were so important to the bank, they should have brought them to my attention, which they never did.

6. I was never told by Mr. Scott Warren (or anyone at the bank) at the closing on June 28, 2012 (or at any point in time) that Mr. Swanson had given

any advice to the bank that it was relying upon in not deciding to close. Furthermore, Mr. Swanson never contacted me at any time to discuss his opinions.

7. Had I been so contacted by Mr. Swanson, or had Mr. Warren indicated his reasons (as supposedly indicated by Mr. Swanson) for not closing the loans on June 28, 2012, I would have advised all parties concerned that all of the loans could have, and should have been, closed that day.

8. If Mr. Swanson's testimony was the basis for the bank's refusal to close the loans, I believe the bank was without excuse in its decision not to close any of the loans. In particular, there was no risk whatsoever to the bank in closing the Black Rush loan based upon Mr. Swanson's hypothetical concern that Mrs. Whitfield would object to the transaction—since Mrs. Whitfield was the main beneficiary of the renewal, as it is my understanding she lives in the home.

9. Furthermore, Mr. Swanson based his recommendation upon a theory called "equitable subordination," indicating that Mrs. Whitfield's ½ ownership interest could jeopardize the bank's previous first secured mortgage interest if the loans were to renew without her consent. I have closed over 40,000 real estate loans in my career and have never seen a single instance in which a property owner defeated a bank's claim of lien by deeding a portion of its ownership interest to another person. I do not believe there is law in South Carolina or any State that stands for that proposition.

[SIGNATURE ON FOLLOWING PAGE]

FURTHER AFFIANT SAYETH NOT.

Mark Weeks

SWORN TO before me this
8th day of April, 2015.

Laura Lynn Parris
Notary Public for South Carolina

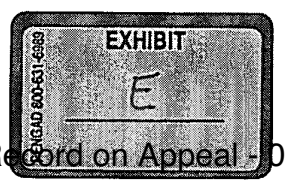
My Commission Expires: 09-13-15



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	CASE NO. CASE NO. 2012-CP-18-2119
HARBOR NATIONAL BANK,	)	
	)	
Plaintiff,	)	
	)	**AFFIDAVIT OF PETER SEITZ**
vs.	)	
	)	
ANTHONY M. WHITFIELD	)	
	)	
Defendant.	)	
	)	

Peter Seitz, personally appearing before me, who being duly sworn, states the following:

1. My name is Peter Seitz, I am over the age of eighteen, and have personal knowledge of the facts stated herein.
2. I am the Director of Enterprise Risk with First Bancorp. I hold a B.A. with Distinction from the University of Virginia and a J.D. *cum laude* from the Washington & Lee University School of Law. I have served over twenty years in bank management of four community banks, two of which regularly operated in South Carolina. In performing my responsibilities, I have had the opportunity assist the credit administrative and loan operation with issues similar to those which are the subject of this matter. Based on this banking experience, I prepared to offer several opinions in this matter. To that end, I have reviewed the pleadings, documents,



affidavits, met with Mr. Whitfield, and read certain deposition testimony in this matter.

3. Notwithstanding an attempted disclaimer to the contrary in a document dated June 26, 2012, Harbor National Bank, through its actions, demonstrated a commitment to close on the nine Whitfield loans (the "Whitfield Renewals") on June 28, 2012. Those actions include approving the selection of a closing attorney by Mr. Whitfield, preparing a loan package with specific terms, transmitting the closing package to the approved attorney, and sending a loan officer to the closing on behalf of the bank. Specifically, Harbor National Bank prepared and submitted to the closing attorney a closing package which included nine renewal notes for the borrower to execute secured by pre-existing mortgages covering nine distinct properties. Additionally, the bank coordinated with the closing attorney the preparation of a HUD-1 settlement statement containing the date, place of closing, property descriptions, identity of the borrower, identity of the lender, accrued interest, appraisal fees, closing fees, title search and opinion fees. As such, Harbor National Bank structured the Whitfield Renewals such that each of the Whitfield Renewals could close independently. Additionally, based on the closing documentation prepared, Harbor National Bank did not require any of the mortgages in the Whitfield Renewals to be modified.
4. Harbor National Bank further acknowledges the parties' respective desire to close on the Whitfield Renewals. The bank's own internal upcoming

maturities list documents that two of the loans on the list had been approved by the bank and documented Mr. Whitfield's acceptance of the terms. The second page of the list indicates a closing was scheduled.

5. The July 24, 2007 conveyance (the "Conveyance") of a partial interest in Lot 78, Phase 2, Whispering Marsh, Dunes West, Charleston County ("the Residence") by Mr. Whitfield did not impair the ability of the bank to close on the Whitfield Renewals and maintain the bank's primary lien position on the Residence. The deed into Cindy Whitfield expressly stated that she accepted her interest in the Residence subject to the terms and conditions of the 2007 Mortgage. The 2007 Mortgage defines "secured debt" as including: "The promissory note(s), contract(s), guaranty(ies) or other evidence of debt described below and all extensions, renewals, modifications or substitutions (Evidence of Debt) (e.g., borrower's name, note amount, interest rate, maturity date): One note of even date in the principal amount of $325,000.00 with final payment due 05/03/2012." Under these circumstances, I conclude that it is of no benefit to the bank to require a title endorsement in order to confirm the bank's first lien position post-renewal.
6. Harbor National Bank unreasonably relied on the opinion of its attorney, David Swanson, in reaching a conclusion not to close on the Whitfield Renewals. In particular, Harbor National did not supply its attorney any documentation for him to support his conclusion, including the 2007 loan

documentation financing the purchase of the Residence and the deed evidencing the Conveyance. Notably, Mr. Swanson subsequently conceded the 2007 loan that secured the Residence could have been renewed without the title endorsement despite the Conveyance. (Deposition of David Swanson, P. 28). Finally, Harbor National Bank never advised Mr. Swanson that the closing attorney concluded that the Conveyance had no impact on the bank's primary lien position. Under such circumstances, it would have been customary and reasonable to expect Harbor National Bank to contact bank counsel to seek further clarification of why bank counsel believed that the Conveyance posed a risk to its first lien position on the Residence, particularly given the fact that: 1) Mr. Swanson's opinion was obtained without any opportunity to review the documentation at issue and, 2) the bank had been advised by the title attorney that Cindy Whitfield took title subject to the Harbor National Bank mortgage.

7. Harbor National Bank was aware of the Conveyance prior to the preparation of its June 26 documentation outlining the terms of the deal. Given this timing, it is reasonable to conclude that the bank would have documented an express closing condition based on such a known fact following the advice of counsel recommending that the closing attorney obtain a "title endorsement". Instead, the bank expressly conditioned closing on the existence of a first lien on the Residence post-renewal, but not on the receipt of a title endorsement. The closing attorney confirmed

Harbor National Bank's first lien position. Under such circumstances and given the risk that the borrower would object to the bank's conclusion, it would be have been customary and reasonably expected for the bank to submit to the borrower and/or his closing attorney a written legal opinion supporting its conclusion that the borrower had not met its condition to close.

FURTHER AFFIANT SAYETH NOT.

Peter Seitz

SWORN TO before me this

18th day of June, 2014.

Melissa T. McRae

Notary Public for North Carolina

My Commission Expires: 10-12-18

MELISSA T. MCRAE NOTARY PUPLIC MONTGOMERY COUNTY, NC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2012-CP-10-5887
HARBOR NATIONAL BANK,	)	
	)	
Plaintiff,	)	
	)	**AFFIDAVIT OF DAVID COLLINS, ESQ.**
vs.	)	
	)	
ANTHONY M. WHITFIELD	)	
	)	
Defendant.	)	
	)	

David Collins, personally appearing before me, who being duly sworn, states the following:

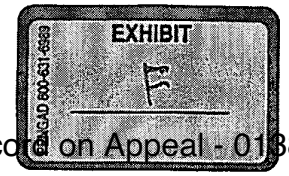
1. My name is David Collins, I am over the age of eighteen, and have personal knowledge of the facts stated herein.

2. I am licensed to practice law in the State of South Carolina and have been actively engaged in the private practice of law for over twenty-five years.

3. I have reviewed the pleadings, documents, affidavits, met with Mr. Whitfield, and read certain deposition testimony in this matter.

4. I am of the firm opinion that Harbor National Bank made a detailed offer to lend money to Mr. Whitfield in the June 26, 2012 letter to him. (See Exhibit 9 to the Deposition of Scott Warren).

5. The June 26, 2012 letter contained all of the material terms of the



transaction, including: a) the identity of the borrower, Mr. Whitfield, b) the property addresses covering the loans; c) the principal balance and accrued interest amounts as of the date of the scheduling closing; d) the extended maturity dates of the loans; e) a new interest rate; and f) a proposed amortization repayment schedule; and f) information as to the escrows for taxes and insurance.

6. Furthermore, I have reviewed communications from the bank to the closing agent Mark Weeks providing certain instructions regarding the attempted closing of the loans. Such communications and instructions included: a) new notes and related documents for the borrower to sign for each property that were drafted by the bank, b) amounts to be withheld for appraisal services and accrued interest; c) a proposed HUD-1 settlement statement containing the date, place of closing, property descriptions, identity of the borrower Mr. Whitfield, identity of the lender Harbor National Bank, accrued interest, appraisal fees, closing fees, title search and opinion fees; and d) payoff amounts.

6. I am of the firm opinion that Mr. Whitfield accepted the terms of the offer, as outlined in the letter, and proceeded to a closing at the office of attorney Mark Weeks on the date of June 28, 2012.

7. I have reviewed the Affidavit signed by Mark Weeks, and concur with the closing agent that there were no obstacles to closing the loans offered by Harbor National Bank to Mr. Whitfield had Harbor National Bank not insisted on receiving a title endorsement for the Black Rush property. I do not believe a title endorsement was required to close any of the loans offered to Mr. Whitfield

in the June 26, 2012 letter - either contractually or in law.

8. Accordingly, I believe Harbor National Bank is in breach of contract of its obligations to renew the loans that were offered in the June 26, 2012 letter to Mr. Whitfield, and the bank should have renewed the loans on June 28, 2012 as they agreed to do.

FURTHER AFFIANT SAYETH NOT.

David Collins

SWORN TO before me this
16 day of ~~March~~ April, 2014.

Notary Public for South Carolina
My Commission Expires: 5/16/22

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2012-CP-10-5887
HARBOR NATIONAL BANK,	)	
	)	
Plaintiff,	)	
	)	**AFFIDAVIT OF DAVID COLLINS, ESQ.**
vs.	)	
	)	
ANTHONY M. WHITFIELD	)	
	)	
Defendant.	)	
	)	

David Collins, personally appearing before me, who being duly sworn, states the following:

1. My name is David Collins, I am over the age of eighteen, and have personal knowledge of the facts stated herein.

2. I am licensed to practice law in the State of South Carolina and have been actively engaged in the private practice of law for over twenty-five years.

3. I have reviewed the pleadings, documents, affidavits, met with Mr. Whitfield, and read certain deposition testimony in this matter.

4. In addition to my previous affidavit in this matter, I am of the opinion that Plaintiff's excuse for failure to close the renewals of Mr. Whitfield's loans are not defendable on the basis of a hypothetical claim by Mr. Whitfield's ex-spouse.

5. I have reviewed South Carolina law and I can find no authority for

the proposition that the Plaintiff bank's lien of mortgage could have been equitably subordinated to Mr. Whitfield's ex-spouse's one-half undivided fee interest if the loan was renewed.

6. As such, I believe the bank received inadequate advice in failing to close Mr. Whitfield's loans and/or acted unreasonably in relying upon such advice. Furthermore, no equitable reasons for such a subordination claim have ever been presented by any party in this litigation, or could be presented.

6. A new mortgage or modified mortgage was not required in order to renew any of Mr. Whitfield's loans.

7. It is my opinion, to a reasonable degree of legal certainty, that the closing lawyer had all paperwork necessary to renew the loans.

FURTHER AFFIANT SAYETH NOT.

David Collins

SWORN TO before me this
1 day of ~~September~~ October, 2014.

Notary Public for South Carolina
My Commission Expires: 5/16/22

Harbor National Bank
Credit Offering

Borrower:	Anthony M. Whitfield	**NAICS Code:**	531110	**Date:**	4/8/2007
Address:	2141 Dorchester Road	**Tax ID:**	[redacted]	**Officer:**	Bell
City, State, Zip:	N. Charleston, SC 29405	**Loan #:**		**Prepared By:**	CF by Werking
Principals:		**Loan Ratings:**	3/4/5 FOV		
Nature of Business:	Real Estate	**Loss Prob.:**	5% ANN	**Bus Phone:**	843-324-2556

Facility		Commitments (000)			Outstandings (000)		
Commitments Under Consideration	**Loan Type**	**Harbor**	**Other**	**Total**	**Harbor**	**Other**	**Total**
Existing Officer's Guidance Line	LOC	1,500		1,500	0		0
1) TL Gahagan Dr	TL				140		
2) TL Mepkin Dr	TL				90		
3) TL Black Rush Circle	TL				325		
The three loans above will be advanced under the existing approved $1.5MM OGL leaving $945M availability on the LOC.							
Related Debt							
Grand Total		1,500	0	1,500	555	0	555

TERMS

Request:

1&2) Refinance existing mortgages on residential rental property. Both properties are currently listed for sale.
Gahagan Drive - Loan amount of $140M, expected a/v of $230M, monthly rental income of $1300.00
Monthly debt service of approximately $979.00. Expected LTV = 61%
Mepkin Drive - Loan amount of $90M, expected a/v of $140M, monthly rental income of $975.00.
Monthly debt service of approximately $630. Expected LTV = 64%

3) Purchase of residential property
Black Rush Circle, Mt. Pleasant, SC Purchase price $425M, loan amount of $325M, $100M cash equity.
LTC = 76%. Monthly payment of $2272.45 + Taxes & Insurance
This is the new purchase of a residence for ex-wife.

Repayment Plan:

1 & 2) Payments based on 30 year amortization, monthly payments of P&I, 5 year maturity.
7.50% Fixed, 1/2% Origination
3) 24 M I/O, to be followed by 36 M P&I, based on 30 year am, 7/5% fixed, 5 year maturity.
Include PSOR & SSOR - PSOR - Rental Income
SSOR - Borrower's income.

Collateral:

1st REM and Assignment of Leases, Rents and Profits on each property.

Approval	Req'd	Date	Approved	Declined	Comments:
Loan Officer	Bell	4-9-07	[signature]		
Senior Loan Officer	Stout	4-9-07	[signature]		
Chief Credit Officer	Ashburn	4/9/07	[signature]		
Bank President	Rivers				
Executive Loan Comm		OK	[signature]		

CRA?	Reg O Activity?
Yes ☐ No X	Yes ☐ No X

EXHIBIT G

PENGAD 800-631-6989

Pricing/Terms

No.	Credit Facility	Rate	Fee Amount / Type	Amortization	Term/Maturity
1	140000	7.5% fixed	1/2% TL	30 year am	60 month mat
2	90000	7.5% fixed	1/2% TL	30 year am	60 month mat
3	325000	7.5% fixed	1/2% TL	30 year am	24 M I/O followed by 36 M P&I, 60 month maturity

Deposit Relationship

	Current Balances	$ 5,000		
	Demand		**3 Months**	
	Money Market	$ 153,000	**6 Months**	
	Certificates		**12 Months**	
	Business X Personal		**Expected Deposits**	

Guarantor Financial Statements (000'S)

Name	**Anthony M. Whitfield**	2)	3)	4)	5)
Date	6/10/2006				
Joint w/Spouse (Y/N)	N				
Joint&Several or %? (JS or %)	100%				
Assets					
Cash	450				
Marketable Securities					
Retirement Accts					
Private Stock					
CVLI					
Personal Residence					
Other Real Estate	19,528				
Partnership Interests					
Business Assets	260				
Personal Property	915				
Total Assets	**21,153**	-	-	-	-
Liabilities					
Accounts Payable					
Notes Payable	217				
Mortgages - Residence(s)	266				
Other Mortgage Debt	7,927				
Loans to related Co.					
Deferred Taxes					
Other Liabilities					
Total Debt	**8,410**	-	-	-	-
Net Worth	**12,743**	-	-	-	-
Total Contingent Liability					

Life Insurance (Include amount, Insured, beneficiary, and assignment)

Owner	Beneficiary	Face	CSVLI	Comments:

Personal Cash Flow Analysis

Applicant(s): Anthony Whitfield

CBI Score/Date: 709-3/21/07

	Tax Return 2003	Tax Return 2004	Tax Return 2005	
Wages (1040)				
Interest / Dividends Income (1040)		4,970		
Add Recurring Capital Gains (1040)		-	-	
Business Income		(103,566)	(103,566)	Est
Business Depreciation (Schedule C)		6,199	6,199	Est
Business Interest (Schedule C)				
Recurring Proceeds from sale of Assets -3 Yr Avg (Sch D : Form 4797)		122,403	50,000	Est
Net Real Estate / Royalty Income (Schedule E; page 1)		82,074	1,174,980	Act
Real Estate Depreciation (Schedule E; page 1)		200,661		
Real Estate Interest (Schedule E; page 1)		253,557		
S Corp / Partnership / LLC - Withdrawals & Gtd. Payments (K-1)*				
Less: Contributions				
Retirement Distributions (1040)				
Other Income / Expense (1040)			(60,000)	Est
Total Recurring Income	**$ -**	**$ 566,298**	**$ 1,067,613**	
Less:				
State and Personal Taxes (Schedule A)		17,100	50,000	Est
Federal Taxes (1040; page 2)			100,000	Est
Other Itemized Deductions		54,950	50,000	Est
Total Taxes and Deductions	**$ -**	**$ 72,050**	**$ 200,000**	
Cash Flow Available to Service Debts	**$ -**	**$ 494,248**	**$ 867,613**	
Annual Fixed Payments / Debt Service (See Below)			**$ 778,169**	
Cash Flow Available for Living Expenses			**$ 89,444**	

* Credit for distributions received should not exceed S-Corp / Partnership / LLC pass-through income.

Fixed Payments / Debt Service Description	Balance	Monthly Payment
Mortgages on 36 Properties on CBI	2,537,838	23,586
Primary Residence Mortgage	1,300,000	7,715
Remaining Properties on 1/1/07 Rent Roll	4,089,212	31,940
Net New Properties (see income vs payment on page 1)	555,000	1,606
		x 12
Total Annual Fixed Payments and Debt Service		**$ 778,169**

Notes: 108 Properties reflected on 2005 tax return schedule E. Of these, 31 properties do not report mortgage interest to banks and 39 properties are not reflected on the CBI. Therefore, we chose to use the 1/1/07 rent roll to estimate current cash flow. We have utilized the total rental income less 8% vacancy to arrive at $1,174,980. DS includes Tax * Ins.

SECTION ON "PAYMENTS" ABOVE: USE MOST RECENT CREDIT REPORT AND PERSONAL FINANCIAL STATEMENT

COMMERCIAL & INDUSTRIAL
ACCOUNT MONITORING PLAN

The account officer will track the following documentation as prescribed below:

Document	Frequency	Type	Due Within
Fiscal Year End Financial Statements	Annual	TR and PFS	120 Days Y/E
Interim Financial Statements			
Personal Guarantor Statements			
Receivable Aging			
Borrowing Base Certificates			
Compliance Certificates			
Status Memo			
Other:			

The account officer will monitor and enforce the following loan covenants. Check if applicable. Any changes from the below covenants are authorized during the loan agreement negotiations if approved by the, department manager, bank president or the responsible credit officer.

FINANCIAL COVENANTS (Use standard definitions unless otherwise noted)

Tangible Net Worth - Total net worth minus intangibles and related party receivables (Subordinated debt is not included in net worth)
Liability - Total liabilities, including subordinated debt
Fixed Charge Coverage - (After tax income + depreciation + amortization + lease expense + interest expense) divided by (Lease expense + interest expense + current maturities of long term debt)
EBITDA - Earnings before interest, taxes, depreciation and amortization
Funded Debt - All interest bearing debt, including subordinated debt

		Proposed	Actual	When Tested
____	Minimum Adjusted Tangible Net Worth of:			
____	Maximum Liability to Tangible Net Worth of:			
____	Minimum Fixed Charge Coverage of:			
____	Funded Debt to EBITDA:			
____	Funded Debt to Capitalization:			
____	Minimum Consolidated Net Worth			
____	Maximum Capital Expenditures			
____	Minimum Consolidated EBITDA			
____	Other:			

AFFIRMATIVE COVENANTS

__X__ Maintain insurance sufficient to protect Bank:
Hazard __X__ Flood __X__ Liability _____ Key Principal _____
_____ Maintain its principal transaction account with bank
_____ Direct Deposit - Lock Box: Yes _____ No _____
_____ Other: _____

NEGATIVE COVENANTS

_____ Maximum investment in fixed assets per year _____
_____ Create or incur indebtedness except from Harbor National Bank
_____ Merge, consolidate or transfer assets
_____ Guarantee or become contingently liable
_____ Make loans
_____ Pay or declare dividends in excess of $ _____ or _____ % of pre-tax profits
_____ Encumber assets in excess of $ _____
_____ Other: _____

BORROWING BASE

% Advanced on A/R: _____ % % Advanced on Inventory: _____ %
Eligible Receivables Consist of: _____
Eligible Inventory Consists of: _____
Inventory Cap: $ _____
Maximum Advance on Line Secured by Margined Inventory: _____ %

Date: _____ Signature: _____

BUSINESS PURPOSE LOAN CHECKLIST

[ ] Sec by HNB Cash/CD (Skip sections A & B)	[✓] New Loan/Money (Complete sections A & B)	[ ] Renewal - No Change (Complete Section B)	[ ] Workout Loan (Substandard) (Complete Section B)

THIS PORTION MUST BE COMPLETED UNLESS THE CREDIT REPORT IS AN INTERIM RENEWAL WITH NO NEW MONEY ADVANCED OR A CHANGE IN TERMS. (see directions under each box, above, for sections to complete.)

A. UNDERWRITING POLICY EXCEPTIONS	DOES EXCEPTION EXIST (Y N N/A) COML LOAN	COML R/E	RES. R/E A & D	Will Clear By Closing (Y/N)	JUSTIFICATION FOR EXCEPTION OR COMMENT
1. Loan to Value		n			
2. Loan to Cost		n			
3. Term		n			
4. Guaranty		n			
5. F/S Quality (Company)					
6. Debt Service Coverage		n			
7. Pre Leasing		n			
8. Interest Only Term		n			
9. Interest Reserve		n			
10. Other: Questionable/Undesirable		n			
11. Other:					

B. DOCUMENTATION POLICY EXCEPTIONS	DOES EXCEPTION EXIST (Y N N/A) COML LOAN	COML R/E	RES. R/E A & D	Will Clear By Closing (Y/N)	JUSTIFICATION FOR EXCEPTION OR COMMENT
1. Current Credit Analysis					
2. Current F/S - Borrower		n			
3. Current F/S - Guarantor		n			
4. Current Appraisal/Evaluation		n			
5. Current Guarantor Analysis		n			
6. Cur.Cr.(or Maj.)Tenant Anal.		n			
7. Validation of Underwrtg.Terms		n			
8. Account Monitoring Plan					
9. Permanent Working Cap Analysis					
10. Other:					

C. LIST ANY ADDITIONAL POLICY EXCEPTIONS

D. COMMENTS

Loan Officer's Signature

Concurring Officer's Signature (if applicable)

ATTACH TO NOTE (Checklist is Required for All Business Purpose Loans, Regardless of Size)

Harbor National Bank
Credit Offering

Borrower:	Anthony M. Whitfield	**NAICS Code:**	531110	**Request Date:**	4/30/2012
Address:	2141 Dorchester Road	**Tax ID:**	[redacted]	**Officer:**	Bell
City, State, Zip:	North Charleston, SC 29405	**Loan #:**	See list below	**Analyst:**	Griffin
Principals:	Anthony M. Whitfield	**Loan Ratings:**	4,5	**Referred By:**	Bell
Nature of Business:	Real Estate	**Loss Prob.:**	2	**Bus Phone:**	843-324-2556

Facility		Commitments (000)			Outstandings (000)		
Commitments Under Consideration	**Loan Type**	**Harbor**	**Other**	**Total**	**Harbor**	**Other**	**Total**
See attached list of	TL's	1,269		1,269	1,269		1,269
9 residential properties							
with 9 individual notes &							
mortgages							
Related Debt							
Grand Total		1,269	0	1,269	1,269	0	1,269

TERMS

Request:
Renewal of 9 individual residential mortgages.

Property	Loan Amount	Maturity Date	A/V	App date	TMS
732 Gahagan Roa	$ 132,642	4/13/2012	$ 225,000	4/11/2007	1450705048
110 Mepkin Drive	$ 85,270	4/13/2012	$ 140,000	4/11/2007	2231302020
1055 Black Rush	$ 315,845	5/3/2012	$ 435,000	4/11/2007	5941000507
9708 Jamison	$ 130,453	10/13/2012	$ 200,000	10/3/2007	1540300006
308 Shortleaf	$ 133,309	10/13/2012	$ 195,000	10/3/2007	2420303042
118 Clay Street	$ 128,550	10/13/2012	$ 185,000	10/3/2007	2431204044
109 Mallory	$ 130,453	10/13/2012	$ 190,000	10/3/2007	2341407018
131 Tyron Road	$ 114,263	10/13/2012	$ 167,000	10/3/2007	1291211034
98 Willow Lane	$ 97,819	10/16/2013	$ 135,000	9/30/2008	1541405006

Repayment Plan:
Monthly payments of P&I, 5 year maturity, continuing existing amortization.

PSOR - Rental Income. SSOR - Sale of Collateral

Collateral:
All properties to be appraised and LTV from bank ordered appraisals not greater than 80% each individual property.
In the event LTV on any property is greater than 80% ltv, bank will either take an unmortgage property as additional collateral, or group with another of these 9 properties which may have enough equity to keep both properties within 80% ltv requirement
Title insured first mortgages and assignments of leases, rents and profits.

Analyst Review
RG or SR

Approval	Req'd	Date	Approved	Declined
Bell				
Stout	X			
Working	X	5/29/2012		
Rivers				
Executive Loan Comm				

Comments:
Withdrawn, Customer Never Closed

HMDA?	CRA?	Reg O Activity?
Yes ☐ No ☒	Yes ☐ No ☒	Yes ☐ No ☒

110 Mepkin Dr - Yes CRA

Version 3/2012

Pricing/Terms

No.	Credit Facility	Rate	Fee Amount / Type	Amortization	Term/Maturity
1-9	TL	4.88% 4.75% —	$250.00 each Waive — Processing	Continue remainder of existing amortization (orig 30 yr) 240 mos. all	5 year 25 yr amort.

Deposit Relationship

	Current Balances	$ 94,753		
	Demand	$ 500	3 Months	
	Money Market	$ 94,253	6 Months	
	Certificates		12 Months	
	Business ___ Personal ___		Expected Deposits	

Guarantor Financial Statements (000'S)

Name	Anthony Whitfield	2)	3)	4)	5)
Date	10/1/2011				
Joint w/Spouse (Y/N)	N				
Joint&Several or %? (JS or %)	100				
Assets					
Cash	75				
Marketable Securities					
Retirement Accts					
Private Stock					
CVLI					
Personal Residence					
Other Real Estate	20,360				
Partnership Interests					
Business Property	125				
Personal Property	545				
Total Assets	**21,105**	-	-	-	-
Liabilities					
Accounts Payable					
Notes Payable	367				
Mortgages - Residence(s)	483				
Other Mortgage Debt	8,149				
Loans to related Co.					
Deferred Taxes					
Other Liabilities	35				
Total Debt	**9,034**	-	-	-	-
Net Worth	**12,071**	-	-	-	-
Total Contingent Liability					

Life Insurance (Include amount, Insured, beneficiary, and assignment)

Owner	Beneficiary	Face	CSVLI	Comments:

Harbor National Bank
Credit Narrative Over $1,000,001
Anthony Whitfield

I. **Request**

Purpose: Renewal of 9 loans secured by 1-4 family residential investment properties. (2 of these loans matured in April, 1 is set to mature in May, 5 are set to mature in October, and 1 is set to mature in October 2013).

Terms: 5 – year balloon terms, keeping the same amortization schedules (originally 30 years); rate – ~~4.85%~~ 4.75% for each loan.

Guarantors: Anthony Whitfield

Covenants:

Closing Contingencies:

Sources of Repayment (PSOR and SSOR):
PSOR: Rental income
SSOR: Sale of collateral

II. **Collateral**

A summary of the existing collateral is below. All loans were originated within LTV policy, and are all currently listed on the borrower's PFS as under 80%. The bank has a list of unencumbered properties which may be added as additional collateral if updated appraised value result in a LTV policy exception.

Property Address	Committed Amount	Amount Outstanding	Maturity Date
732 Gahagan Rd	$140,000	$132,774	4-13-2012
110 Mepkin Dr	$90,000	$85,355	4-13-2012
*1055 Black Rush Cir**	*$325,000*	*$316,102*	*5-3-2012*
9708 Jamison Rd	$137,000	$130,582	10-13-2012
308 Shortleaf Dr	$140,000	$133,442	10-13-2012
118 Clay St	$135,000	$128,676	10-13-2012
109 Mallory Dr	$137,000	$130,583	10-13-2012
131 Tyron Rd	$120,000	$114,377	10-13-2012
98 Willow Ln	$101,000	$97,904	10-16-2013
		Total balance = $1,269,795	

*Black Rush Cir is non-income producing and is occupied by the borrower's ex-wife.

III. **Business Review**

Tony Whitfield owns over 100 residential investment properties with a combined value (from his recent PFS) of roughly $20MM that he has acquired over the years from 1987 until 2008. His strategy was to finance them with conventional mortgages, rent the properties for cash flow, and sell once they appreciated to a profitable equity position. His equity position in the individual

properties varies, but he currently has 25 unencumbered properties in his portfolio and approximately $8MM in total real estate debt. Like most real estate investors and operators, Tony's financial position has suffered due to the downtown in the real estate market. He now manages all of these properties by himself. His strained cash flow position has forced him to begin liquidating some of his properties. He sold three properties in 2010 and three more in 2011. He currently has over a dozen properties listed for sale which has made renting these listed properties difficult. Thus his vacancy rates are up, and his rental income is down, but his cash flow is still above 1:1 as outlined below.

Harbor National Bank currently has 8 loans on 8 rental properties and a 9th mortgage on a property that is occupied by Tony's ex-wife, as part of their divorce decree in which the debt is serviced by his global cash flow.

IV. Financial Analysis

All of Tony's rental properties are listed in Sched E of his personal tax returns. He has also provided the bank with an updated PFS and schedule of real estate owned, including a list of the properties in which the monthly payments includes escrows for taxes and insurance. The bank has not been able to verify the escrows but we believe the list to be accurate. (HNB does not escrow Tony's 9 loans). The Analyst has been able to combine information provided in the 2010 TR, the PFS with Sched of REO, and recent credit report into a consolidated global schedule of Tony's real estate. Based on rental income and expenses from his 2010 TR and the proposed renewal debt service, DSC for the bank's 8 rental property loans is 0.87x, insufficient to service the debt. However, from a global perspective, his entire real portfolio provides a DSC of 1.14x. The estimated three year average of cash proceeds from the liquidation of his properties is $172M annually. When including his three year average in his personal cash flow, his global DSC is 1.31x. Based on the number of properties he owns and his equity position, it is reasonable to assume that he can continue to liquidate his properties going forward.

V. Management/Guarantor Review

Tony has been able remain current on all his debts, despite his strained cash flow position. In the meantime, he seems to have the right strategy of liquidating his real estate portfolio and deleveraging. Given his equity position, it is reasonable that he can continue to sell properties to increase his cash flow, even at lower than market values.

VI. Key Risks and Mitigants

1. The HNB properties do not provide adequate cash flow. This is mitigated by his global cash flow and his ability to liquidate his real estate with his high equity position.
2. The majority of Tony's outstanding mortgages are ARMs which have already adjusted into very favorable interest rates below 3.5%. If these rates adjust, he could face significant interest rate risk, further straining his cash flow.
3. The bank is anticipating that at least one or more of our 9 properties will be above 80% LTV once we receive updated appraisals. This will be mitigated by taking additional

unencumbered property as collateral or crossing another existing property so that our loans are properly margined. Adding additional rental property as collateral could also improve our DSC on the HNB properties which is currently under 1:1x.

VII. Summary and Recommendation

It is unlikely that the borrower will be able to refinance these 9 properties with another lender at this time. Renewing this debt at current market rates will lower his debt service and improve his ability to service the debt. The bank is comfortable with Tony's personal cash flow coverage of 1.31x. With properly margined collateral of no greater than 80%, analyst recommends moving forward with the renewals as proposed.

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS CASE NO. 2012-CP-10-5887
HARBOR NATIONAL BANK, Plaintiff, vs. ANTHONY WHITFIELD, CINDY WHITFIELD AND DAVID SWANSON Defendants.	)	**DEFENDANT'S FIFTH AMENDED ANSWER, AFFIRMATIVE DEFENSES, CROSSCLAIM AND COUNTERCLAIMS** (Breach of Contract, Breach of Contract Accompanied by Fraudulent Act, Negligent Misrepresentation, Fraud in the Inducement, Unfair Trade Practices, Promissory Estoppel, Tortious Interference with Prospective Contractual Relations, Abuse of Process, Civil Conspiracy, and Equitable Indemnity) **(Jury Trial Demanded)**

FILED
2016 JAN -8 PM 2:36
JULIE J. ARMSTRONG
CLERK OF COURT

TO: ROBERT A. BERNSTEIN, BRIAN DUFFY, AND SETH WHITAKER, ATTORNEYS FOR PLAINTIFF

Comes now Defendant, Anthony Whitfield (hereinafter, "Mr. Whitfield") and responds to the allegations of Plaintiff's Complaint as follows:

1. Mr. Whitfield admits the allegations of Paragraphs 2, 3, 4, 10 and 19.

2. Mr. Whitfield denies, the allegations of Paragraphs 15 and 27 to the extent such Paragraphs reference previous allegations which are herein denied.

3. Mr. Whitfield admits an assignment was made but denies the event of default as alleged in Paragraph 20, 28, 25, 26 and 27.

4. Mr. Whitfield denies Paragraphs 1, 5, 6, 7, 8, 9, 11, 12, 13, 14, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 28 and 29.

5. Mr. Whitfield denies each and every allegation not specifically enumerated herein.

FIRST AFFIRMATIVE DEFENSE

6. Plaintiff's claims to foreclose on the 2007 Mortgage should be waived, estopped, barred, and/or dismissed as Defendant made all payments as was required under the Note and was told by Plaintiff numerous times that the maturity date as referenced in the Note would be automatically extended.

SECOND AFFIRMATIVE DEFENSE

7. Plaintiff's claims in equity are barred by the doctrine of unclean hands and equitable estoppel.

THIRD AFFIRMATIVE DEFENSE

8. Plaintiff's action should be barred by the doctrines of unconscionability, waiver, fraud and duress.

FOURTH AFFIRMATIVE DEFENSE

9. Plaintiff has failed to comply with the mandatory provisions of the South Carolina Supreme Court Administrative Order 2011-05-02-01. As such, this matter should be stayed or dismissed.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's Failure to Provide Required Truth in Lending Disclosures; Set-Off

10. Defendants, whose ownership interest in the residential property being

foreclosed upon with address of 1055 Black Rush Circle, Mount Pleasant, SC 29466 (the "Subject Property") is subject to the security interest created by the Plaintiff's 2007 mortgage, elect to rescind the mortgage and note being foreclosed upon (the " 2007 Loan").

Plaintiff violated TILA and Regulation Z by, inter alia:

a. failing to provide interest rate disclosures at the 2007 closing;

b. failing to provide material disclosures in a form Defendants could keep prior to consummation of the 2007 closing;

c. failing to provide Notices of Right to Cancel;

d. failing to provide disclosures as part of the 2007 Loan.

11. Plaintiff was obligated to provide the information set forth in the preceding Paragraph as Plaintiff knew, at all material times, that the subject property was residential and was Defendant Cindy Whitfield's primary residence.

12. Plaintiff's violations of the Truth-in-Lending Act give rise to a three year continuing right of rescission on the part of Defendants.

13. Defendants hereby elect to rescind the 2007 loan transaction with Plaintiff, pursuant to the continuing right of rescission.

14. When a consumer elects to rescind pursuant to the Truth-in-Lending Act, any security interest taken in connection with the transaction becomes void. 15 U.S.C. § 1635(b).

15. When a consumer elects to rescind pursuant to the Truth-in-Lending Act, the consumer is not liable for any finance or other charge. 15 U.S.C. § 1635(b).

16. The 2007 mortgage that is the subject of this foreclosure action was taken

in connection with the transaction that Defendant has elected to rescind.

17. Defendant has the ability to tender repayment of their rescission obligations through procurement of a buyer of the home.

18. Since the mortgage is void, the foreclosure action must be dismissed.

SIXTH AFFIRMATIVE DEFENSE

19. Upon information and belief, the subject note attempted to be foreclosed upon is not the original note and therefore Plaintiff does not have standing pursue this foreclosure action.

COUNTERCLAIMS

Factual Allegations

20. In 2006, Mr. Whitfield approached Charlie Rivers (hereinafter, "Mr. Rivers") of Harbor National Bank to purchase and refinance certain real estate in the lowcountry counties of Berkeley, Dorchester and Charleston. Mr. Rivers previously helped Mr. Whitfield refinance over 25 loans when Mr. Rivers was a loan officer with Southtrust Bank. These loans always had 30 year terms and never had balloon payments or required refinancing or re-approval.

21. Mr. Rivers promised Mr. Whitfield the same loans as he was previously given by Mr. Rivers, to-wit, 30 year loans with the best rate possible, with a ½ point origination fee. There was no mention of balloon payments or re-qualification anytime during the 30 year loans. After a review of Mr. Whitfield's financial condition, Mr. Rivers approved $1.5 million in loans to refinance rental properties. At the time, Mr. Whitfield

made clear to Mr. Rivers that the loans could not have demand features or have a balloon payment. Mr. Rivers agreed.

22. In reliance on Mr. Rivers' representations, Mr. Whitfield purchased the property at 1055 Black Rush Circle, Mount Pleasant, SC 29466 (hereinafter, "the Subject Property" or "Black Rush Property").

23. On or about March 27, 2007 Mr. Whitfield was provided documentation from Plaintiff stating that Mr. Whitfield would have the choice of a 7.5% interest rate or a floating rate of prime minus ¼ % (See Exhibit "A" attached hereto).

24. Plaintiff was aware at all material times, before and after the loan was closed, that the home was being purchased as a primary residence for Mr. Whitfield's ex-wife, Cindy Whitfield.

25. Despite being provided documentation by Plaintiff that Mr. Whitfield would have the choice of a 7.5% interest rate or a floating rate of prime minus ¼ %, Mr. Whitfield was provided the higher 7.5% rate as opposed to the lower floating rate of prime minus ¼ %.

26. Despite being provided documents at the closing with a April 13, 2012 maturity date on some of the loans, Mr. Whitfield was assured numerous times by loan officer Angela Bell that the maturity date was just a formality and in fact was just a renewal date and would be extended automatically with only adjustments of interest without any re-qualifying or costs to extend. Despite making such assurances to Mr. Whitfield, loan officer Angela Bell determined as early as 2010 that the loans would not be renewed as she felt Mr. Whitfield was not providing financial information to her. At the time she indicated she needed to "grease the wheel" with Mr. Whitfield's accountant so the

accountant would tell her more information about Mr. Whitfield's financial status.

27. Because of Ms. Bell's assurances and representations, Mr. Whitfield made payments on the loan for the subject properties from the origination of the loan every month until the renewal date.

28. In January, 2012, Plaintiff asked Mr. Whitfield for a copy of his recent tax returns so that the loan could be automatically extended. As late as February 6, 2012, loan officer Angela Bell sent an email to Mr. Whitfield asking him for tax information to work on the "renewals." On February 21, 2012, Mr. Whitfield informed loan officer Angela Bell that he was under some financial pressure, that his health was suffering, and that he wanted interest rates on par with the other mortgages he held with other banks. The following day, Ms. Bell informed Harbor National Bank personnel (but not Mr. Whitfield) that she was going to let Mr. Whitfield know that she would be asking him to move the loans. Although she informed others of her intention not to renew the loans, Ms. Bell never told Mr. Whitfield that he needed to move the loans- at any point in time. Had Mr. Whitfield known Plaintiff never intended to renew the loan, Mr. Whitfield would have previously refinanced the loan with another lender at a time when it was possible.

29. One week later, on February 28, 2012 loan officer Angela Bell wrote Mr. Whitfield to let him know that she would have to have his 2010 tax returns in order to request approval for renewal of his upcoming maturing loans. On April 2, 2012, Mr. Whitfield informed loan officer Angela Bell that his 2010 tax returns were complete and that he urgently wanted his loans modified since the rates were extremely high, and that his health had been an issue. After receiving the information about receiving the tax returns, the following day loan officer Angela Bell told a senior credit analyst at Harbor

National Bank, "I'm just glad the threats of no renewals finally worked." Five days later, on April 8, 2012, Mr. Whitfield suffered a heart attack.

30. Despite making assurances the loans would renew, two notes (732 Gahagan and 110 Mepkin) matured on April 13, 2012 without having been renewed by the Plaintiff. The note for the Black Rush Property came due on May 3, 2012, again without renewal. On June 21, 2012 Charlie Rivers orally agreed to modify the notes and specifically agreed to: (a) extend the notes for a 25 year amortization with another 5 year maturity; (b) eliminate the need for any principal pay downs; (c) eliminate the need for additional collateral to secure the notes; (d) eliminate the need to cross collateralize the loans; (e) waive the default interest rate of 14%; (f) back date the rate of 4.75% to the maturity the May 3, 2012 maturity date; and (g) credit Mr. Whitfield's overpayment of interest.

31. On June 26, 2012, Harbor National Bank vice president Scott Warren signed a loan commitment letter to Mr. Whitfield outlining the terms and conditions of the renewals of all Mr. Whitfield's loans held by Harbor National Bank. The proposed new loans dropped the interest rate to 4.75% and extended the maturities another 5 years. (See loan commitment, attached hereto as Exhibit "B"). On the same day, Mr. Whitfield was given drafts of new notes to sign for the closing which was to be held on June 28, 2012. The new documents contained clauses that all of Mr. Whitfield's properties would be cross collateralized, despite Mr. River's agreement and assurances not to cross collateralize the properties (See Paragraph 30 (d) herein).

32. In reliance upon Mr. Warren's June 26, 2012 commitment letter, Mr. Whitfield attended a scheduled closing at attorney Mark Weeks' law office. At the closing,

Mr. Warren informed Mr. Whitfield that a signed endorsement from a title company was needed so that Mr. Whitfield's ex-spouse Cindy Whitfield would not be required to sign the loan documents for the Black Rush Property, the home that Cindy Whitfield resided in.[1] At a certain point, Mr. Whitfield was informed by the closing attorney that the endorsement could not be procured, that Mrs. Whitfield was refusing to sign the mortgage to the Black Rush Property, and Mr. Warren proposed that it would only be possible to close two of the subject properties -Mepkin and Gahagan, but that if the Black Rush Property ultimately couldn't be closed, all properties including Mepkin and Gahagan would have to be foreclosed upon.

33. Despite Harbor National Bank's representations that a title endorsement was required to renew the Black Rush Property, Mr. Whitfield has subsequently learned that no such endorsement was required from the title company. Moreover, Harbor National Bank failed to renew any of the loans listed in the June 26, 2012 commitment letter despite agreeing to do so, willfully breaching their agreements, and causing Mr. Whitfield damages as to be determined by the trier of fact.

FOR A FOR FIRST COUNTERCLAIM
(Breach of Contract)

34. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

[1] Plaintiff also attempted to procure a "Business Purpose Statement" from Mr. Whitfield indicating that the property was to be used in Mr. Whitfield's business despite having previous knowledge that the Black Rush Property was in a fact residential property for Mr. Whitfield's ex-wife Cindy Whitfield.

35. As described above, Plaintiff indicated before and after the origination of the loan, verbally and in writing, that the loan to the Subject Property would be automatically renewed.

36. Despite repeatedly making these representations and reassurances, Plaintiff failed to renew the loan and instead declared Mr. Whitfield to be in default despite being paid all monthly installments on time, as and when due, breaching their agreement with Mr. Whitfield.

37. Although Plaintiff ultimately promised in writing to renew the loan on June 26, 2012, Plaintiff refused to close the loan on June 28, 2012, as described above, breaching the terms of the offer contained in the writing. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A SECOND CAUSE OF ACTION
(Negligent Misrepresentation)

38. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

39. As described above, Harbor National Bank made affirmative representations to Mr. Whitfield that: (1) the initial loans would be 30 year loans; (2) the maturity date referenced in the Note was simply a renewal date; and (3) the interest rate to be charged would be Mr. Whitfield's choice of 7.5% or prime minus ¼ %. The Plaintiff also made representations, and an offer, that the loans would be renewed at 4.75% with a new maturity date of July 10, 2017.

40. Plaintiff knew these representations were false, misleading, and incomplete when they were made. Such representations were (1) false, misleading and incomplete when made; (2) were made for a pecuniary interest of the Plaintiff; (3) the Plaintiff owed a duty of care to convey truthful information to Mr. Whitfield; (4) the Plaintiff breached that duty by failing to exercise due care; (5) Mr. Whitfield was unaware that the representations were false - and had no reason to suspect they were false as he placed his trust and confidence in Plaintiff. As such, Mr. Whitfield had a right to rely on such information, and did so rely on said information to his financial detriment as outlined above. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A THIRD CAUSE OF ACTION
(Fraud in the Inducement)

41. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

42. At or about the time of the initial loan originations, Plaintiff made affirmative representations to Mr. Whitfield that: (1) the loans would be 30 year loans; (2) that the maturity date referenced in the Notes were simply renewal dates; and (3) that the interest rate to be charged would be Mr. Whitfield's choice of 7.5% or prime minus ¼ %. The Plaintiff also made representations, and an offer, that the loans would be renewed at 4.75% with new maturity dates of July 10, 2017. Such representations were false, incomplete and misleading when made, were material, were known by the Plaintiff to be

false, misleading and incomplete, and were intended to be relied upon.

43. Mr. Whitfield was unaware that the representations were false and had no reason to suspect they were false, as he placed his trust and confidence in Plaintiff. As such, Mr. Whitfield had a right to rely on such information, and did so rely on said information to his detriment financial as outlined above. Had Mr. Whitfield known Plaintiff never intended to renew the loan, Mr. Whitfield would have previously refinanced the loan with another lender at a time when it was possible. At a minimum, the Plaintiff should have relayed their concerns about renewals as early as documentary evidence suggest Harbor National Bank had a concern, to-wit, the year 2010.

44. These false representations were made to induce the Mr. Whitfield to enter a high cost loan, and were made by the Plaintiff with the knowledge of their falsity.

45. Mr. Whitfield reasonably relied on the material representations of Plaintiff and had no knowledge the representations made by the Plaintiff were false and the Mr. Whitfield was, therefore, fraudulently induced by the Plaintiff to enter into the high cost loan.

46. Mr. Whitfield made a mistake in entering into the loan, which mistake was unilateral. Mr. Whitfield was fraudulently induced by the Plaintiff to make the unilateral mistake as a direct, proximate and foreseeable result of the fraud, deceit, misrepresentation, and active concealment perpetrated upon Mr. Whitfield by the Plaintiff.

47. Subsequent to the origination of the loan, Mr. Whitfield has been informed and now believes that the Plaintiff misrepresented the terms of the loan, verbally and in writing by (1) not receiving 30 year loans, (2) representing that the maturity date was simply a renewal date; and (3) charging, and refusing to change, the interest rate of 7.5%.

The Plaintiff also made representations, and an offer, to renew the loans at 4.75% with a new maturity date of July 10, 2017 as agreed. As such, Mr. Whitfield is entitled to avoid or rescind the loan and to be returned to the status quo ante whereby the Plaintiff returns to Mr. Whitfield all monies paid by Mr. Whitfield in exchange for Mr. Whitfield returning the amount of the loan proceeds to the Plaintiff. In addition thereto, Mr. Whitfield is entitled to all incidental, consequential, direct and indirect damages proximately caused by Plaintiff when they fraudulently induced Mr. Whitfield to enter into the loan transaction. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A FOURTH CAUSE OF ACTION
(Violation of Federal Trade Commission Act Section 5(a) 15 U.S.C. §45)
(As made applicable through SC Code §39-5-10 et.seq.)

48. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

49. As stated above, Plaintiff made affirmative representations to Mr. Whitfield that: (1) the loans would be 30 year loans; (2) that the maturity dates referenced in the Notes were simply renewal dates; and (3) that the interest rate to be charged would be Mr. Whitfield's choice of 7.5% or prime minus ¼ %. The Plaintiff also represented, and made an offer, that the loans would be renewed at 4.75% with new maturity dates of July 10, 2017.

50. Plaintiff's acts enumerated above constitute "unfair or deceptive acts or practices in or affecting commerce," as those terms are defined in the Act. This prohibition

applies to all persons engaged in commerce, including banks. An act or practice is unfair where it: (1) causes or is likely to cause substantial injury to consumers; (2) cannot be reasonably avoided by consumers and; (3) is not outweighed by countervailing benefits to consumers or to competition. In this case, Plaintiff's actions discussed above have caused substantial injury to Mr. Whitfield.

51. An act or practice is deceptive where: (1) a representation, omission, or practice misleads or is likely to mislead the consumer; (2) a consumer's interpretation of the representation, omission, or practice is considered reasonable under the circumstances and; (3) the misleading representation, omission, or practice is material. In this case, Plaintiff's actions were deceptive because Plaintiff clearly misrepresented that the loans would be renewed. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A FIFTH CAUSE OF ACTION
(Promissory Estoppel / Detrimental Reliance)

52. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

53. Mr. Whitfield relied on the promises of Angela Bell, Charlie Rivers, and Scott Warren to renew and modify the loans.

54. These promises were unambiguous in their terms and were relied upon by Mr. Whitfield. In particular, there were no contingencies placed upon the June 26, 2012 written offer to renew any of the loans as title insured first mortgages were already in place on the subject properties.

55. The reliance by Mr. Whitfield regarding renewing the loans was more than expected and more than foreseeable by Harbor National Bank.

56. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

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

57. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

58. As stated above, Mr. Rivers made an agreement to renew the loans at the June 21, 2012 meeting with Mr. Whitfield.

59. Plaintiff breached the agreement with Mr. Whitfield by failing to close the renewal of the loan which is the subject of this lawsuit. Such breach was made with the fraudulent intent of never actually intending to close the renewal when that representation was made, and such fraudulent intent was manifested by the fraudulent act of claiming a title endorsement was required to renew the loan when in fact one was never needed.

60. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A SEVENTH CAUSE OF ACTION
(Tortious Interference with Prospective Contractual Relations)

61. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

62. The acts of Plaintiff described herein constituted an interference with Mr. Whitfield's business, were without justification, were done with improper purpose and motive, knowing it would place Mr. Whitfield under duress when filing these unfounded legal proceedings and knowing that it would interfere with Mr. Whitfield's ability to sell and/or rent his properties.

63. As a result of Plaintiff's actions Mr. Whitfield has lost the ability to enter into contracts with identifiable prospective buyers and/or renters of his properties. As a direct and proximate result of the Plaintiff's actions, Mr. Whitfield has suffered special damages including but not limited to a diminished value of their property in the eyes of third parties, loss of income and loss of profits.

64. Plaintiff's actions proximately caused actual, consequential, and special damages, including but not limited to: a) inability to sell and/or rent his properties to third parties who meet requirements for sale and/or rental of his properties; b) foreclosure proceedings having been instituted on his properties; c) a diminished value of his properties in the eyes of third parties; d) damage to Mr. Whitfield's reputation and business standing in the real estate profession; e) financial damage to Mr. Whitfield's business because of time spent away to defend these charges; f) financial damage for his inability to sell his properties following filing of the lis pendens and lawsuit; g) attorneys' fees and costs incurred; h) time spent away from work as a result of the lis pendens and lawsuit; i) emotional distress to Mr. Whitfield; j) injury to his health and mental pain and

suffering; and k) adverse tax consequences.

FOR AN EIGHTH CAUSE OF ACTION
(Abuse of Process as to David Swanson and BNC Bancorp through its employee/agent Scott Warren)

65. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

66. Mr. Scott Warren claims he called Mr. David Swanson for the advice to procure a title endorsement in order to renew the loan for the Black Rush Property.

67. Mr. Swanson claims that Mr. Scott Warren called him regarding the anticipated closing between Mr. Whitfield and Harbor National Bank, said closing set to occur on June 28, 2012.

68. Despite providing such **sworn testimony** by each Mr. Scott Warren and Mr. David Swanson that this advice was given and received before the June 28, 2012 closing, there is **no evidence of any such phone call** as the phone records from Mr. David Swanson's cell phone and his office line show no record of a phone call from Mr. Scott Warren cell phone or office line in June of 2012.

69. Because the telephone records show the phone call never occurred, the sworn testimony that the call was made, when in fact evidence shows it was not made at the time, was given with the ulterior purpose of fabricating a legal defense for the bank's failure to renew its contractual obligations to renew Mr. Whitfield's loans.

70. Mr. David Swanson has represented that Scott Warren called him regarding an anticipated closing, in which he gave advice to Mr. Warren to procure a title endorsement. As alleged previously, Mr. Swanson and his law firm have no proof the advice was ever given as there is no engagement letter, fee agreement, correspondence,

records of any kind, opinion letters, or billing entries at the firm to corroborate the legal defense that Mr. Swanson provided the information at the time he claims the advice was made. Additionally, there is no evidence of the communication itself from Mr. Warren's cell phone or office line to Mr. Swanson's cell phone or office line, further evidence that the communication was never made, when Mr. Swanson and Mr. Warren claim it was.

71. The sworn testimony that the call was placed before closing, when in fact it was not, was a willful or overt act, done with the intent and collateral objective of furnishing a legal defense (advice of counsel) for the bank and injuring Mr. Whitfield.

72. The sworn testimony by each Mr. Scott Warren ad Mr. David Swanson was a misuse and perversion of legal process by fabricating a legal defense (advice of counsel) when one in fact had never been given at the time claimed to have been given. The acts described above and herein have caused damage to Mr. Whitfield by incurring actual damages, both mental and pecuniary, including by way of example only and without limitation: loss of time, injury to property and financial standing, shame, mortification, mental anguish, mental pain and suffering, emotional distress, loss of enjoyment of life, injury to feelings, an overall degradation of health, and was hindered from, and will continue to be hindered from attending to his usual duties and affairs of life, as a direct and proximate result of the aforesaid conduct of Harbor National Bank, in an exact amount of actual, consequential and special damages as to be determined by a trier of fact.

FOR A NINTH CAUSE OF ACTION
(Civil Conspiracy as to David Swanson and BNC Bancorp through its employee/agent Scott Warren)

73. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

74. As alleged above, Mr. Scott Warren claims he called Mr. David Swanson for the advice to procure a title endorsement in order to renew the loan for the Black Rush Property.

75. Mr. Swanson claims that Mr. Scott Warren called him regarding the anticipated closing between Mr. Whitfield and Harbor National Bank, said closing set to occur on June 28, 2012.

76. Despite providing such **sworn testimony** by each Mr. Scott Warren and Mr. David Swanson that this advice was given and received before the June 28, 2012 closing, there is **no evidence of any such phone call** as the phone records from Mr. David Swanson's cell phone and his office line show no record of a phone call from Mr. Scott Warren cell phone or office line in June of 2012.

77. Because the telephone records show the phone call never occurred, the sworn testimony that the call was made, when in fact it was not made at the time, was given with the ulterior purpose of fabricating a legal defense for the bank's failure to renew its contractual obligations to renew Mr. Whitfield's loans.

78. Mr. David Swanson has represented that Scott Warren called him regarding an anticipated closing, in which he gave advice to Mr. Warren to procure a title endorsement. As alleged previously, Mr. Swanson and his law firm have no proof the advice was ever given as there is no engagement letter, fee agreement, correspondence,

records of any kind, opinion letters, or billing entries at the firm to corroborate the legal defense that Mr. Swanson provided the information at the time he claims the advice was made. Additionally, there is no evidence of the communication itself from Mr. Warren's cell phone or office line to Mr. Swanson's cell phone or office line, further evidence that the communication was never made, when Mr. Swanson and Mr. Warren claim it was.

79. The sworn testimony that the call was placed before closing, when in fact it was not, was a willful or overt act, done with the intent and collateral objective of furnishing a legal defense (advice of counsel) for the bank and injuring Mr. Whitfield.

80. The sworn testimony by each Mr. Scott Warren and Mr. David Swanson was a misuse and perversion of legal process by fabricating a legal defense (advice of counsel) when one in fact had never been given at the time claimed to have been given.

81. Mr. David Swanson's actions described above and herein were made for his own personal interest as they were performed outside the scope of his law firm's representation of Harbor National Bank.

82. The actions of David Swanson and Scott Warren as alleged above and herein constitute an combination of two or more persons that was done with the purpose of furnishing a legal defense (advice of counsel) for the bank and injuring Mr. Whitfield which has caused him special damages, beyond damages specified in his other causes of action for having to incur attorney's fees and costs associated with Harbor National Bank's advice of counsel defense which should never have been incurred.

FOR A TENTH CAUSE OF ACTION
(Cross-Claim for Equitable Indemnity as to Co-Defendant Cindy Whitfield)

83. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

84. To the extent, if any, that Mr. Whitfield is held liable to the Plaintiff in this action, which such liability is expressly denied, such liability would be a proximate result of the wrongful acts, breach of duties, omissions, and/or negligence of Cindy Whitfield and/or her agents in failing to give her permission and/or authorization to renew the loan for the subject property located at 1055 Black Rush Circle, Mount Pleasant, South Carolina, said demand being made as a defense of Harbor National Bank to close all of the renewal loans set forth in Exhibit "C".

85. Specifically, the closing attorney Mark Weeks and Mr. Whitfield's previous counsel Lauren Felder have stated that Mrs. Cindy Whitfield's counsel Stanley Jaskiewicz was contacted regarding procuring her consent for the renewal of the Black Rush Property. Lauren Felder was advised by either Stanley Jaskiewicz or his paralegal Dena Hardison that Mrs. Cindy Whitfield, "would not sign off on the mortgage as Mr. Whitfield was solely responsible under the Final Family Court Order." Additionally, Mrs. Cindy Whitfield was told by Mr. Jaskiewicz' paralegal Dena Hardison that, "he [Mr. Whitfield] could not refinance my home or borrow the equity in it as he would be putting another nail in his coffin." According to Mrs. Whitfield, Ms. Dena Hardison gave her this advice before the closing[2] and was also told by Ms. Hardison not to, "do anything until I talk to Stan,"

[2] Mrs. Whitfield indicated this statement was made by Ms. Hardison at the time the appraiser was attempting to gain access to Mrs. Whitfield's home-- in May and June of 2012. Correspondence was sent to Stanley Jaskiwicz advising him of appraisal access issue on June 11, 2012.

regarding gaining access to her home for an appraisal. According to Mrs. Whitfield, Mr. Jaskiewicz never called her back regarding any issues related to procuring her consent to renew her home.

86. To the extent, if any, that Mr. Whitfield is held liable to the Plaintiff in this action, which such liability is expressly denied, these wrongful acts, breach of duties, omissions, and/or negligence of Cindy Whitfield and/or her agents have damaged Mr. Whitfield, including but not limited to consequential and special damages, and the imposition of attorney's fees and costs in defending the foreclosure and prosecuting the Counterclaims as alleged herein. Mr. Whitfield and Mrs. Cindy Whitfield had a special relationship by virtue of their continuing family court obligations that would support a claim for indemnity against Mrs. Cindy Whitfield. Moreover, Mr. Whitfield is wholly without fault for Cindy Whitfield failing to provide her permission and/or authorization to renew the loan for the Black Rush Property.

87. To the extent, if any, that Mr. Whitfield is held liable to the Plaintiff in this action, which such liability is expressly denied, Mr. Whitfield would be entitled to be equitably indemnified for such liability from Cindy Whitfield for any liability that Mr. Whitfield is found to have incurred to the Plaintiff such that Mr. Whitfield would be entitled to recover his consequential and special damages, attorney's fees and costs, monies adjudged owed to the Plaintiff and/or monies expended by way of settlement of Plaintiff's claims as a result of Cindy Whitfield and/or her agents wrongful acts, breach of duties, omissions, and/or negligence as afore-described.

WHEREFORE, Plaintiff prays for relief as set forth below together with such further relief as this court deems just:

a. Actual damages

b. Consequential and Special damages;

c. Statutory damages;

d. Treble Damages

e. Disgorgement of profits;

f. Restitution;

g. Rescission;

h. Injunctive relief;

i. Attorneys' fees and costs;

j. Punitive Damages;

DEMAND FOR JURY TRIAL

Mr. Whitfield demands a jury trial on all counts stated above. These causes of action must be tried before any equitable causes of action asserted by either party can be disposed of. *See* Gardner v. Travis, 316 S.C. 315, 450 S.E.2d 54 (Ct. App. 1994).

Respectfully submitted,

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Attorneys for Defendant

Charleston, SC
January 8, 2016

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2012-CP-10-5887

HARBOR NATIONAL BANK,

Plaintiff,

v.

ANTHONY M. WHITFIELD, CINDY WHITFIELD, and DAVID SWANSON,

Defendants.

FILED
2016 JAN 25 PM 2:25
JULIE J. ARMSTRONG
CLERK OF COURT

PLAINTIFF'S REPLY TO FIFTH AMENDED ANSWER, AFFIRMATIVE DEFENSES, CROSSCLAIM AND COUNTERCLAIMS

Plaintiff Harbor National Bank, replying to the allegations of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims filed by Defendant Anthony M. Whitfield ("Defendant" or "Whitfield"), would show unto this Court:

1. Each and every allegation contained in said Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims not hereinafter specifically admitted is denied.

2. The allegations of Paragraphs One (1) through Nineteen (19) of the Answer, Affirmative Defenses, Crossclaim and Counterclaims fail to make allegations against Plaintiff requiring a response; to the extent they make such allegations, the same are hereby denied.

3. Responding to the allegations of Paragraph Twenty (20) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff admits that Defendant applied to Plaintiff for a credit commitment to purchase and refinance commercial real estate in the furtherance of his business in the Berkeley, Dorchester, and Charleston County areas and that Defendant had financed other transactions with Southtrust Bank; the remaining allegations of Paragraph Twenty (20) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims are denied.

4. The allegations of Paragraphs Twenty-One (21) and Twenty-Two (22) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims are denied.

5. Responding to the allegations of Paragraph Twenty-Three (23) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff admits that it provided the attached Exhibit "A" to Defendant setting forth the terms and conditions upon which it would agree to extend credit to Defendant, the terms and conditions of which are explicitly set forth in the said correspondence, and Plaintiff craves reference to the said correspondence to determine the terms and conditions of such commitment; any allegations contained in Paragraph Twenty-Three (23) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims not hereinafter specifically admitted are denied.

6. The allegations of Paragraph Twenty-Four (24) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims are denied.

7. Responding to the allegations of Paragraph Twenty-Five (25) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, the Plaintiff admits that the Defendant chose a fixed interest rate as set forth in the applicable Note; any allegations contained in Paragraph Twenty-Five (25) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims in addition to or other than this specific admission are denied.

8. The allegations of Paragraph Twenty-Six (26) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims are denied.

9. Responding to the allegations of Paragraph Twenty-Seven (27) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff admits that Defendant made payments under the terms of and pursuant to the Promissory Note; any allegations contained in Paragraph Twenty-Seven (27) of the Fifth Amended Answer,

Affirmative Defenses, Crossclaim and Counterclaims in addition to or other than this specific admission are denied.

10. Responding to the allegations of Paragraph Twenty-Eight (28) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff admits that it requested copies of Defendant's tax returns pursuant to the terms of line of credit and the note and mortgage, that Defendant requested to be provided with a lower interest rate, and that Plaintiff was considering terminating the loans due to Defendant's failure to provide necessary documentation; any allegations contained in Paragraph Twenty-Eight (28) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims in addition to or other than this specific admission are denied.

11. Responding to the allegations of Paragraph Twenty-Nine (29) of the Amended Answer, Affirmative Defenses and Counterclaims, Plaintiff admits that it wrote to Defendant again advising of the need for sufficient financial information, including tax returns, to evaluate the proposal to renew loans with Defendant, that Defendant thereafter advised of the completion of the tax returns, that Defendant requested modified terms for the loans, and that Angela Bell communicated with a senior credit analyst regarding the successful receipt of required documentation from Defendant; any allegations contained in Paragraph Twenty-Nine (29) of the Amended Answer, Affirmative Defenses and Counterclaims in addition to or other than this specific admission are denied.

12. Responding to the allegations of Paragraph Thirty (30) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff admits that the Notes secured by mortgages on 732 Gahagan and 110 Mepkin matured by their terms, that in a meeting with Defendant that an agreement was reached upon the terms and conditions upon which certain

loans could be renewed, and that renewal terms included the terms contained in a June 26, 2012 letter to Whitfield; any allegations contained in Paragraph Thirty (30) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims in addition to or other than this specific admission are denied.

13. Responding to the allegations of Paragraph Thirty-One (31) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff admits that Scott Warren issued a terms letter to Whitfield setting forth the terms and conditions under which it would agree to renew the loans in existence and that the letter is attached to the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims as Exhibit "B"; any allegations contained in Paragraph Thirty-One (31) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims in addition to or other than this specific admission are denied.

14. Responding to the allegations of Paragraph Thirty-Two (32) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff admits that Plaintiff attended a scheduled closing at the office of attorney Mark Weeks, that it was discovered that Defendant had transferred an interest in the Black Rush property to his ex-wife, Cindy Whitfield, and that it was required as a condition of the closing either that Mrs. Cindy Whitfield sign the new mortgage or that a title endorsement be obtained; any allegations contained in Paragraph Thirty-Two (32) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims in addition to or other than this specific admission are denied.

15. Responding to the allegations of Paragraph Thirty-Three (33) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff admits that the closing of the new loans never took place; any allegations contained in Paragraph Thirty-Three (33) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims

in addition to or other than this specific admission are denied.

FOR A FIRST DEFENSE TO THE FIRST COUNTERCLAIM
(Denial)

16. Responding to the allegations of Paragraph Thirty-Four (34) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Fifteen (15) of this Reply as if repeated herein verbatim.

17. The allegations of Paragraphs Thirty-Five (35), Thirty-Six (36), and Thirty-Seven (37) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims are denied.

FOR A FIRST DEFENSE TO THE SECOND COUNTERCLAIM
(Denial)

18. Responding to the allegations of Paragraph Thirty-Eight (38) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Seventeen (17) of this Reply as if repeated herein verbatim.

19. Responding to the allegations of Paragraph Thirty-Nine (39), Plaintiff admits that it proposed to finance the line of credit through either a fixed rate or floating rate to be chosen by Defendant and that it stated its intention to agree to refinance the book of loans Defendant had with Plaintiff provided that Defendant met the terms and conditions imposed upon the proposed transaction; the remaining allegations of Paragraph Thirty-Nine (39) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims are denied.

20. The allegations of Paragraph Forty (40) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims are denied.

FOR A FIRST DEFENSE TO THE THIRD COUNTERCLAIM
(Denial)

21. Responding to the allegations of Paragraph Forty-One (41) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Twenty (20) of this Reply as if repeated herein verbatim.

22. The allegations of Paragraphs Forty-Two (42), Forty-Three (43), Forty-Four (44), Forty-Five (45), Forty-Six (46), and Forty-Seven (47) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims are denied.

FOR A FIRST DEFENSE TO THE FOURTH COUNTERCLAIM
(Denial)

23. Responding to the allegations of Paragraph Forty-Eight (48) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Twenty-Two (22) of this Reply as if repeated herein verbatim.

24. Responding to the allegations of Paragraphs Forty-Nine (49) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff admits that it proposed to finance the line of credit through either a fixed rate or floating rate to be chosen by Defendant and that it stated its intention to agree to refinance the book of loans Defendant had with Plaintiff provided that Defendant met the terms and conditions imposed upon the proposed transaction; the remaining allegations of Paragraph Forty-Nine (49) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims are denied.

25. The allegations of Paragraphs Fifty (50) and Fifty-One (51) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims are denied.

FOR A FIRST DEFENSE TO THE FIFTH COUNTERCLAIM
(Denial)

26. Responding to the allegations of Paragraph Fifty-Two (52) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Twenty-Five (25) of this Reply as if repeated herein verbatim.

27. The allegations of Paragraphs Fifty-Three (53), Fifty-Four (54), Fifty-Five (55), and Fifty-Six (56) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims are denied.

FOR A FIRST DEFENSE TO THE SIXTH COUNTERCLAIM
(Denial)

28. Responding to the allegations of Paragraph Fifty-Seven (57) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Twenty-Seven (27) of this Reply as if repeated herein verbatim.

29. The allegations of Paragraphs Fifty-Eight (58), Fifty-Nine (59), and Sixty (60) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims are denied.

FOR A FIRST DEFENSE TO THE SEVENTH COUNTERCLAIM
(Denial)

30. Responding to the allegations of Paragraph Sixty-One (61) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Twenty-Nine (29) of this Reply as if repeated herein verbatim.

31. The allegations of Paragraphs Sixty-Two (62), Sixty-Three (63), and Sixty-Four

(64) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims are denied.

FOR A FIRST DEFENSE TO THE EIGHTH COUNTERCLAIM
(Denial; Plaintiff denies that Scott Warren was an employee or agent of BNC Bancorp)

32. Responding to the allegations of Paragraph Sixty-Five (65) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Thirty-One (31) of this Reply as if repeated herein verbatim.

33. Responding to the allegations of Paragraph Sixty-Six (66) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff admits that Scott Warren has testified that he sought and received, on behalf of Plaintiff, advice in connection with the closing scheduled to take place on or about June 28, 2012; any allegations contained in Paragraph Sixty-Six (66) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims in addition to or other than this specific admission are denied.

34. Responding to the allegations of Paragraph Sixty-Seven (67) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff admits that David Swanson has testified that Scott Warren sought and received, on behalf of Plaintiff, advice in connection with the closing scheduled to take place on or about June 28, 2012; any allegations contained in Paragraph Sixty-Seven (67) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims in addition to or other than this specific admission are denied.

35. The allegations of Paragraphs Sixty-Eight (68) and Sixty-Nine (69) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims are denied.

36. Responding to the allegations of Paragraph Seventy (70) of the Fifth Amended

Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff admits that David Swanson has testified that Scott Warren sought and received, on behalf of Plaintiff, advice in connection with the closing scheduled to take place on or about June 28, 2012; the remaining allegations of Paragraph Seventy (70) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims are denied.

37. The allegations of Paragraphs Seventy-One (71) and Seventy-Two (72) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims are denied.

FOR A FIRST DEFENSE TO THE NINTH COUNTERCLAIM
(Denial; Plaintiff denies that Scott Warren was an employee or agent of BNC Bancorp)

38. Responding to the allegations of Paragraph Seventy-Three (73) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Thirty-Seven (37) of this Reply as if repeated herein verbatim.

39. Responding to the allegations of Paragraph Seventy-Four (74) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff admits that Scott Warren has testified that he sought and received, on behalf of Plaintiff, advice in connection with the closing scheduled to take place on or about June 28, 2012; any allegations contained in Paragraph Seventy-Four (74) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims in addition to or other than this specific admission are denied.

40. Responding to the allegations of Paragraph Seventy-Five (75) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff admits that David Swanson has testified that Scott Warren sought and received, on behalf of Plaintiff, advice in connection with the closing scheduled to take place on or about June 28, 2012; any allegations

contained in Paragraph Seventy-Five (75) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims in addition to or other than this specific admission are denied.

41. The allegations of Paragraphs Seventy-Six (76) and Seventy-Seven (77) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims are denied.

42. Responding to the allegations of Paragraph Seventy-Eight (78) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff admits that David Swanson has testified that Scott Warren sought and received, on behalf of Plaintiff, advice in connection with the closing scheduled to take place on or about June 28, 2012; the remaining allegations of Paragraph Seventy-Eight (78) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims are denied.

43. The allegations of Paragraphs Seventy-Nine (79), Eighty (80), Eighty-One (81), and Eighty-Two (82) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims are denied.

FOR A FIRST DEFENSE TO THE FIRST CROSSCLAIM
(Denial)

44. Responding to the allegations of Paragraph Eighty-Three (83) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Forty-Three (43) of this Reply as if repeated herein verbatim.

45. Responding to the allegations of Paragraphs Eighty-Four (84), Eighty-Five (85), Eighty-Six (86), and Eighty-Seven (87) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff asserts that these allegations are not directed to, at, or against Plaintiff such that a response from Plaintiff is required; to the extent a response from

Plaintiff is required, the allegations of Paragraphs Eighty-Four (84), Eighty-Five (85), Eighty-Six (86), and Eighty-Seven (87) of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims are denied.

FOR A SECOND DEFENSE
(Statutes Of Limitations)

46. Further responding to the allegations of all Counterclaims, Plaintiff would show that such claims are barred by the applicable statutes of limitations, for which reason Defendant cannot recover in any sum whatsoever.

FOR A THIRD DEFENSE
(Failure To State A Claim)

47. Further responding to the allegations of all Counterclaims, Plaintiff would show that such Counterclaims fail to state claims upon which relief can be granted, for which reason Defendant cannot recover in any sum whatsoever.

FOR A FOURTH DEFENSE
(Lack of Reliance)

48. Further responding to the allegations of the Second and Third Counterclaims, Plaintiff would show that Defendant failed to rely or have any right to rely upon the alleged representations other than as contained in the written contracts between the parties, for which reason Defendant cannot recover in any sum whatsoever.

FOR A FIFTH DEFENSE
(Regulated Transactions)

49. Further responding to the allegations of the Fourth Counterclaim, Plaintiff would show that the actions and activities of Plaintiff are regulated by the state and federal government, that the performance of said actions were in compliance with said state and federal regulations, and thus that the transactions are exempt from S.C. Code Ann. §§ 39-5-10 *et seq.*

FOR A SIXTH DEFENSE
(Other Claim Already Pending)

50. Further responding to the allegations of the Counterclaims, Plaintiff would show that another action is pending between the same parties for the same counterclaims, for which reason the said counterclaims are improper and should be dismissed pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure.

FOR A SEVENTH DEFENSE
(Statute of Frauds)

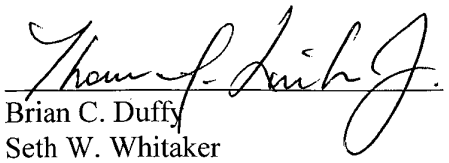
51. Further responding to the allegations of the Counterclaims, Plaintiff would show that Defendant's claim fails to comply with the statute of frauds, S.C. Code Ann. § 32-3-10, and the lender liability statute of frauds, S.C. Code Ann. § 37-10-107.

FOR AN EIGHTH DEFENSE
(Failure to Plead Special Damages)

52. Further responding to the allegations of the Ninth Counterclaim, Plaintiff would show that Defendant has failed to specifically plead and sufficiently allege special damages separate and apart from those damages sought by way of the other Counterclaims asserted in the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims.

WHEREFORE, having fully responded to the allegations of the Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Plaintiff prays that the same be dismissed and that this Court enter judgment for the relief sought in the Complaint.

[SIGNATURE ON FOLLOWING PAGE]



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Attorneys for Plaintiff

January 25, 2016
Charleston, South Carolina

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	CASE NO.: 2012-CP-10-5887
Harbor National Bank,	
Plaintiff,	
vs.	**THIRD PARTY DEFENDANT DAVID SWANSON'S ANSWER TO DEFENDANT/THIRD PARTY PLAINTIFF'S FIFTH AMENDED ANSWER AFFIRMATIVE DEFENSES, CROSSCLAIM, COUNTERCLAIMS AND THIRD PARTY COMPLAINT (JURY TRIAL DEMANDED)**
Anthony Whitfield and Cindy Whitfield	
Defendants.	
Anthony Whitfield	
Third Party Plaintiff	
vs.	
David Swanson	
Third Party Defendant	

FILED
2016 FEB 18 PM 3:09
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: BRENT HALVERSEN, ESQ. AND DANIEL SLOTCHIVER, ESQ., ATTORNEYS FOR DEFENDANT/THIRD PARTY PLAINTIFF ANTHONY WHITFIELD:

Third Party Defendant David Swanson hereby responds to the above-captioned Third Party Plaintiff's Complaint as follows:

1. The Allegations contained in Paragraphs 1 through 19 of Defendant's Answer, Crossclaim, Counterclaims and Third Party Complaint assert defenses to Plaintiff's Complaint, to which Third Party Defendant need not respond. To the extent the allegations in Paragraphs 1 through 19 suggest or imply liability against the Third Party Defendant, those allegations are expressly denied.

2. Third Party Defendant is without sufficient knowledge and information to form an opinion as to the allegations contained in Paragraphs 1 through 65 of Plaintiff's Complaint, and therefore denies the same.

3. Responding to the allegations contained in Paragraphs 66 and 67 of Third Party Plaintiffs Complaint, Third Party Defendant admits only so much of the allegations contained in Paragraph 66 and 67 as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraphs 66 and 67.

4. Third Party Defendant denies the allegations contained in Paragraphs 68 and 69 of Third Party Plaintiff's Complaint.

5. Responding to Paragraph 70 of Third Party Plaintiff's Complaint, Third Party Defendant admits only so much of the allegations contained in Paragraph 70 of Third Party Plaintiff's Complaint as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraph 70.

6. Third Party Defendant denies the allegations contained in Paragraphs 71 and 72 of Third Party Plaintiff's Complaint.

7. In response to Paragraph 73 of Third Party Plaintiff's Complaint, Third Party Defendant repeats and re-alleges every preceding paragraph of this Third Party Answer as if restated herein verbatim.

8. Responding to Paragraphs 74 and 75 of The Third Party Plaintiff's Complaint, Third Party Defendant admits only so much of the allegations contained in Paragraphs 74 and 75 of Third Party Plaintiff's Complaint as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath

concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraph 74 and 75.

9. Third Party Defendant denies the allegations contained in Paragraphs 76 and 77 of Third Party Plaintiff's Complaint.

10. Responding to Paragraph 78 of The Third Party Plaintiff's Complaint, Third Party Defendant admits only so much of the allegations contained in Paragraph 78 of Plaintiff's Complaint as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraph 78.

11. Third Party Defendant denies the allegations contained in Paragraphs 79 through 82 of Third Party Plaintiff's Complaint.

12. In response to Paragraph 83 of Third Party Plaintiff's Complaint, Third Party Defendant repeats and re-alleges every preceding paragraph of this Third Party Answer as if restated herein verbatim.

13. Third Party Defendant is without sufficient knowledge and information to form an opinion as to the allegations contained in Paragraphs 84 through 87 of Third Party Plaintiff's Complaint, and therefore denies the same.

14. Defendant denies each and every allegation not specifically admitted herein.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

15. Third Party Plaintiff's Complaint fails to allege facts sufficient to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6), SCRCP.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

16. Third Party Defendant was at all times acting as an attorney in the course and scope of providing legal services to his client and is immune from liability to third-parties such as Third Party Plaintiff.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

17. No act or omission of Third Party Defendant was the cause of any damages to Third Party Plaintiff.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

18. Third Party Plaintiff's claims against Third Party Defendant are barred to the extent relief is obtainable from other avenues.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

19. Third Party Plaintiff lacks standing to pursue one or more claims against Third Party Defendant.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

20. Third Party Plaintiff's claims are or may be barred by the doctrines of waiver, estoppel and/or unclean hands.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

21. At all relevant times, Third Party Defendant exercised the necessary degree of care and skill maintained by other attorneys under similar conditions and in like circumstances.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

22. Third Party Plaintiff's Complaint alleges duplicative causes of action that should be dismissed or merged as provided by law.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

23. Third Party Plaintiff's Complaint fails to state a claim upon which attorney's fees can be awarded or allege facts which, if proven, would entitle Third Party Plaintiff to an award of attorney's fees.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

24. Third Party Plaintiff's Complaint fails to state a claim upon which treble damages can be awarded or allege facts which, if proven, would entitle Third Party Plaintiff to an award of treble damages.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

25. Third Party Plaintiff's Complaint fails to state a claim upon which punitive damages can be awarded or allege facts which, if proven, would entitle Third Party Plaintiff to an award of punitive damages.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

26. Any award of punitive or exemplary damages in this action would be in violation of the rights of Third Party Defendant under the United States Constitution and the Constitution of the State of South Carolina.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

27. Third Party Defendant reserves any additional and further defenses that may be revealed by information obtained during the course of investigation and discovery as consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the allegations of Third Party Plaintiff's Complaint, Third Party Defendant prays that Third Party Plaintiff's Complaint be dismissed with prejudice, for all costs of the action to be cast upon Third Party Plaintiff, and for such other and further relief as this Court may deem just and proper.

This 15 day of February, 2016.

Respectfully submitted,

EARHART OVERSTREET, LLC

By: _____
DAVID W. OVERSTREET
State Bar No.: 16965

STEVEN R. KROPSKI
State Bar No.: 101441

Attorneys for Third Party Defendant David Swanson

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843-972-9404

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2012-CP-10-5887

HARBOR NATIONAL BANK,

Plaintiff,

v.

ANTHONY M. WHITFIELD and CINDY WHITFIELD,

Defendants.

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIMS

FILED
2014 SEP 15 AM 10: 22
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Plaintiff Harbor National Bank has loaned $1.325 million to Defendant Anthony Whitfield, secured by mortgages on nine different properties. One of those properties is the subject of the present foreclosure action. Whitfield does not dispute that he has not paid the money back as required. Rather than meet his obligations, Whitfield seeks to evade them by a series of counterclaims contending that Harbor somehow orally contracted to renew his loans on specific terms or misrepresented facts to him. Whitfield is a very sophisticated real estate investor who now seeks to transform a term sheet which expressly states that it is "not a commitment to lend" into something it is not. June 26, 2012 Term Sheet (attached hereto as Exhibit A.)

The South Carolina Supreme Court's recent decision in Stevens and Wilkinson v. City of Columbia, ___ S.C. ___, ___ S.E.2d ___, 2014 WL 4087936 (August 20, 2014), is controlling. In it, the Court grants summary judgment for a defendant on a breach of contract claim, holding "that where the language of a purported contract clearly expresses the intent to be non-binding, the analysis [of whether a contract exists] is limited to the four corners of the document." Id. at

*4.[1] All of the extrinsic evidence which Whitfield seeks to admit of a supposed intent on the part of Harbor contrary to the plain language of the term sheet is thus inadmissible under the rule in Stevens. Furthermore, under the lender statute of frauds, any agreement of the form Whitfield claims must be in writing, so no alleged oral representation is actionable. Summary judgment is therefore appropriate.

STATEMENT OF UNDISPUTED FACTS

Plaintiff Harbor National Bank has nine outstanding loans to Anthony Whitfield secured by nine separate residential mortgages, all of which are now in default and the subject of foreclosure actions in Dorchester, Berkeley, and Charleston Counties. One of the mortgaged properties is the subject of the present Charleston foreclosure case.

The nine loans in question were originated in 2007 and 2008, pursuant to a $1.5 million guidance line to Whitfield. March 27, 2007 Guidance Line Letter (attached hereto as Exhibit B). Each loan was the subject of its own note, mortgage, and assignment of leases and rents, all of which had five-year terms, thirty-year amortizations, and fixed interest rates specified in the loan documents. The documents relevant to the loans at issue in this case are attached to the Complaint. Whitfield made regular monthly payments on all the loans for the five-year loan period of each.

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[1] Whitfield's "response" to the present motion filed August 28, 2014 (not to be confused with his sixty-eight page "memorandum in opposition," filed September 12, 2014), contends that counsel for Harbor is "judge-shopping" because the present motion is "identical to" motions for summary judgment which Harbor filed in cases previously pending in Dorchester County. Id. ¶ 5. Those motions were indeed based on much the same set of operative facts, and were denied on July 15, 2014.

Harbor's present motion is based primarily on the Stevens case, which was decided after the Dorchester County motions were ruled on, and therefore presents new, controlling legal precedent which had not been decided when the motions were before the Dorchester County court. Harbor would have renewed its motions for summary judgment in the Dorchester County cases at the same time it filed the present motion, but it cannot, as those cases have been removed from the trial docket under Rule 40(j) and have not yet been restored.

Upon the maturity of the first three loans in 2012, including the loan at issue here, Harbor and Whitfield had difficulty coming to terms for their renewal. By the time the 2012 renewals were due, Mr. Whitfield was a poor credit risk; so much so, in fact, that he asked Harbor, as well as another bank, to provide him with a letter indicating that it would not be possible or prudent to extend him more credit. Whitfield June 17, 2014 Dep. 97:7-98:16 (transcript attached hereto as Exhibit C). He had also failed to provide Harbor with financial information when requested. Id. 100:10-17. When Whitfield provided some financial information in April 2012, it consisted of Whitfield's 2010 tax returns. Id. 111:23-112:1.

Despite these difficulties, Charlie Rivers, the president of Harbor, agreed to meet with Whitfield on June 21, 2012 in an effort to identify terms on which the loans could be renewed.[2] After their conversation, Rivers instructed Scott Warren, a loan officer at Harbor, to prepare a term sheet based on the general terms agreed to in the June 21 meeting and move the loans toward a closing.

On its face, the Term Sheet was an "agreement to agree;" it was plainly a preliminary document and not a legally binding contract. Among the statements in the Term Sheet making this point clear are:

- that "[t]he following is not a commitment to lend, but is our proposal for the general terms and conditions of the subject loans if the transactions were to close on June 28, 2012," Term Sheet at 1 (emphasis added);

[2] Whitfield erroneously contends, on page 18 of his brief in opposition to this motion, that Harbor admitted in its reply that it "reached an agreement on June 21, 2012" whose terms were reflected in the June 26 Term Sheet. The actual admission is that "an agreement was reached upon the terms and conditions upon which certain loans could be renewed." Reply to 2nd Am. Counterclaims ¶ 12; see also Reply to 3rd Am. Counterclaims ¶ 12 (same). No binding contract was reached, and Harbor has not admitted or contended otherwise.

- that "the Bank will require a minimum of title updates & new title opinion(s), but additional services and documentation may be required," id. at 2 ¶ A(6);
- that the "proposed renewals/modifications will be closed under the supervision of the borrower's attorney," id. ¶ B(2) (emphasis added); and
- that "[u]pon reaching an agreement on these general terms, we can proceed to a formal commitment very quickly," id. at 3 (emphasis added).

Whitfield testified that he received the Term Sheet from Scott Warren at a meeting on June 27, 2012. Whitfield June 17, 2014 Dep. 162:6-16. Before that meeting, Harbor had become aware of a potential title defect in its collateral for the loan which is the subject of the present case, because Whitfield had conveyed a one-half interest in the subject property to his ex-wife, Cindy Whitfield. Whitfield does not dispute that Warren told him at their meeting that a title endorsement might be required. Whitfield Br. at 4.

On June 28, 2012, Warren and Whitfield attended an attempted closing of the renewal transactions at the office of Mark Weeks, Esq. On the advice of its counsel, David Swanson, Esq., Harbor refused to close without a title endorsement or co-signature from Cindy Whitfield.[3] When contacted during the attempted closing, Cindy Whitfield's counsel advised the parties that she would not sign. Harbor did not close the loans that day as a result, and after further abortive attempts to resolve the parties' differences, this litigation followed.

[3] Whitfield has argued repeatedly in this case to date, and is expected to contend at the hearing on this motion, that Mr. Swanson's legal advice to the bank that a title endorsement or co-signature would help protect Harbor's lien position is incorrect as a matter of law. While Harbor believes strongly in the advice of Mr. Swanson, an experienced South Carolina real estate lawyer, whether his analysis is correct or not legally is not at issue here. Because Harbor had no contractual obligation to Whitfield to close the renewals of the loans, it had no obligation to close. The question whether it had a sufficient ground for refusing to close is not relevant.

ARGUMENT

I. The June 26, 2012 Term Sheet cannot be a contract as a matter of law.

By his own admission, Whitfield relies on the June 26, 2012 Term Sheet as the "contract" on which he brings this action. Whitfield Br. at 13-14. The Supreme Court's recent Stevens decision is controlling as to Whitfield's contention that the June 26, 2012 Term Sheet is a binding contract. Stevens involved a memorandum of understanding ("MOU") among the owner, the City of Columbia, and project team for construction of a hotel. 2014 WL 4087936, at *1. The MOU documented the parties' understanding about the financing, development and operation of the hotel, and contemplated future agreements "to fully define the duties of the parties." Id. It was also specifically contingent on bond financing. Id. at *2.

The architect, Stevens & Wilkinson ("S & W"), demanded payment for work it did based solely on the MOU, before any bond financing closed or any further agreements were reached. Id. at *2. The City eventually contracted with a different project team to construct the hotel based on a different proposal in which S & W was not involved. S & W sued for breach of contract based on the terms of the MOU. The circuit court granted summary judgment for the City, holding that the MOU was not a binding contract, but rather an "agreement to agree." Id. It likewise held that there was no evidence of any benefit conferred on the City, or of any promise to pay in the MOU, or that any reliance on the MOU for payment was reasonable, and that S & W was thus likewise not entitled to equitable relief on a quantum meruit theory. Id.

The South Carolina Supreme Court upheld the trial court's original ruling. In Stevens, as in this case, the party asserting existence of the contract claimed that the document "lack[s] no material terms" and "fully identifies the understandings of the parties." Id. at *3; accord Whitfield Br. at 11-13. The Court stated the familiar rule that where a contract's language is

plain and capable of legal construction, that language alone determines its force and effect. Id. It then applied that rule to determining the existence of a contract as well as its construction, and held "that where the language of a purported contract clearly expresses the intent to be non-binding, the analysis is limited to the four corners of the document." Id. at *4.

Whitfield advances the exact same failed argument here—that he can use extrinsic evidence of intent to transform the term sheet, which is plainly not a contract on its face, into a contract. His theory fails as a matter of law under the rule in Stevens, and Harbor is therefore entitled to summary judgment.

The result in Stevens is fully in keeping with prior South Carolina law. There is no factual dispute that the June 26, 2012 Term Sheet was signed by Harbor and given to Whitfield. The only issue is whether the term sheet is a contract. Where the material facts concerning the formation of an alleged contract are not in dispute, the issue of contract vel non is a question of law. W.E. Gilbert & Associates v. South Carolina Nat'l Bank, 285 S.C. 421, 423, 330 S.E.2d 307, 308 (Ct. App. 1985). This Court may therefore properly address this issue on summary judgment, as it did in Stevens.

"The preliminary negotiations leading up to execution of a contract must be distinguished from the contract itself. There is no meeting of the minds of the parties while they are merely negotiating as to the terms of an agreement to be entered into." McLaurin v. Hamer, 165 S.C. 411, 420 164 S.E. 2, 5 (1932) (emphasis in original) (quoting 13 Corpus Juris ¶ 100). The June 26, 2012 Term Sheet was a part of the preliminary negotiation process for closing renewals of Mr. Whitfield's loans, to permit the parties to prepare for execution of the transaction documents. It does not constitute an offer for a binding contract between the parties.

Such a result also comports with common sense. In complex commercial transactions, parties must be free to discuss and exchange in writing terms of a potential deal without every such writing being deemed a contract. This is the reason for the common banking practice of distinguishing between a "term sheet" and a "commitment letter"—a distinction recognized by the lender statute of frauds, S.C. Code § 37-10-107, and which Harbor plainly observed here.

II. No alleged oral representation by Harbor is actionable because the lender statute of frauds, S.C. Code § 37-10-107, applies to such representations.

In an effort to rescue his claim, Whitfield contends that oral statements made to him by bank personnel in the days leading up to the attempted closing of the loan renewals on June 28, 2012 constitute the terms of a contract committing Harbor to renew his loans. While the facts of such statements are in dispute, the Court need not reach those factual disputes because the South Carolina lender statute of frauds, S.C. Code § 37-10-107, applies. It states in pertinent part that:

> No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:
>
> (a) to lend or borrow money;
> (b) to defer or forbear in the repayment of money; or
> (c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.

S.C. Code § 37-10-107(1). Of note, this statute pertains to "commitments," but not term sheets, thus recognizing in law the distinction in banking practice between these two types of documents. The statute precludes Whitfield's claims for breach of contract, breach of contract accompanied by a fraudulent act, negligent misrepresentation, and promissory estoppel. S.C. Code § 37-10-107(1), (2).

The only document in this case which can even arguably satisfy this statute is the June 26, 2012 Term Sheet. Under Stevens, it cannot be a contract. Nor can it somehow "rescue" an alleged oral agreement between Whitfield and Harbor of June 21, 2012 by serving as a written memorandum thereof. Under South Carolina law, for a writing to be a memorandum sufficient to take a writing out of the statute of frauds, it must "sufficiently indicate a contract has been made between the parties." Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 895 (1989) (emphasis added); accord Smith v. McClam, 289 S.C. 452, 456, 346 S.E.2d 720, 723 (1986). As described in detail above, the Term Sheet is plainly not a contract under the rule of construction laid down by Stevens, and therefore also cannot satisfy the statute of frauds' requirements. Whitfield's attempt to make the term sheet into a commitment letter, Whitfield Br. at 20-25, requires him to resort to extrinsic evidence, thus again running afoul of both Stevens and Player. Because no document satisfying the statute of frauds exists, and all Whitfield's arguments require him to resort to doubtful and contradictory extrinsic evidence—the very thing the statute of frauds is meant to prohibit!—Harbor is entitled to summary judgment on the relevant claims.

The South Carolina Supreme Court has applied the lender statute of frauds to preclude liability in a similar context. In Sea Cove Development, LLC v. Harbourside Community Bank, 387 S.C. 95, 98, 691 S.E.2d 158, 159 (2010), plaintiff was under contract to purchase real property on Hilton Head Island. It applied to defendant bank for a loan to effect the purchase, and received in return a prequalification letter which was subject to certain requirements, including necessary documentation, a satisfactory appraisal, and clear title. Id. The Supreme Court upheld summary judgment for defendant bank on plaintiff's breach of contract claim, holding that none of the documents, including the prequalification letter, contained "any indication of a promise, undertaking, accepted offer, commitment or agreement between the

parties as contemplated by the legislature within § 37-10-107." Id. at 107, 691 S.E.2d at 164. The Court also recognized that "any alleged oral assurances could not be used to alter the requirement for a writing." Id. at 106, 691 S.E.2d at 164.

The Sea Cove decision supports summary judgment here. Like the prequalification letter at issue in that case, the term sheet at issue here makes any renewal of the loan conditional. The Sea Cove letter stated that the borrower was "conditionally qualified," and that the qualification was "subject to" verification of information already provided and potential requests for additional information. Id. at 107, 691 S.E.2d at 164. Likewise, in this case, "additional services and documentation may be required" for the loan to close, and the "proposed renewals/modifications will be closed under the supervision of the borrower's attorney," Term Sheet at 2 ¶¶ A(6), B(2).

Whitfield's last-ditch argument is that he made a "part performance" by making payments on of some of his outstanding loans with Harbor the day after he met with Mr. Rivers. Whitfield Br. at 31-34. He even goes so far as to imply that the bank should have rejected loan payments from a borrower who owed it in excess of $1 million! Id. at 31.

This argument is not just practically absurd: it fails as a matter of law. To qualify as a part performance, the performance at issue must "clearly and unequivocally" relate to the agreement to be taken out of the operation of the statute of frauds, and must be "exclusive of any other relation between parties touching such an agreement." Player, 299 S.C. at 105, 382 S.E.2d at 894. The lender statute of frauds contains language producing the same result; it only permits part performance to apply "to the extent that the part performance may be explained only by reference to the promise, undertaking, accepted offer, commitment, or agreement [that is, the qualifying writing]." S.C. Code § 37-10-107(2)(c) (emphasis added). The existing debts,

evidenced by nine promissory notes, three of which had matured with balloon payments, and which Whitfield admits he was paying by tendering his payments, Whitfield Br. at 31, are plainly existing obligations on which Whitfield was performing, not a part performance on a new oral contract rescuing his claim from the statute of frauds.

III. Whitfield has failed to establish several elements of his fraud claims.

To establish his claim for fraud in the inducement, Whitfield must prove twelve different elements. The first nine are the elements of common-law fraud in South Carolina: "(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." Moseley v. All Things Possible, Inc., 388 S.C. 31, 35-36, 694 S.E.2d 43, 45 (Ct. App. 2010). To establish fraud in the inducement, a plaintiff must also establish three additional elements: "(1) that the alleged fraudfeasor made a false representation relating to a present or preexisting fact; (2) that the alleged fraudfeasor intended to deceive him; and (3) that he had a right to rely on the representation made to him." Id. Thus, a forward-looking statement cannot be the subject of an action for fraud in the inducement, because the misrepresentation must relate to a present or preexisting fact.

Fraud must be proved by clear and convincing evidence. Moseley, 388 S.C. at 35, 694 S.E.2d at 45. A party must come forward with more than just a "scintilla" of evidence to defeat summary judgment on a factual issue involving a heightened burden of proof. Hancock v. Mid-South Management Co., 381 S.C. 326, 330-31, 673 S.E.2d 801, 803 (2009).

Whitfield has come forward with no evidence that any of Harbor's statements regarding any present or preexisting fact were false. Rather, all indications are that Harbor made a good-

faith effort to come to terms with Whitfield for a renewal of all his outstanding loans. After Whitfield met with Charlie Rivers, president of Harbor, on June 21, 2012, and agreed on some of the general terms of the renewals, Whitfield was referred to a Harbor loan officer to handle the closing. That loan officer, Scott Warren, prepared the June 26, 2012 Term Sheet. There is no evidence in the record that any statement Harbor made either at the June 21, 2012 meeting or in the June 26, 2012 term sheet regarding any present or preexisting fact was false.

The language of the term sheet also makes plain that Harbor had no intent that such sheet be relied on, or that any such reliance would be justifiable. Instead, it states that it is not a commitment to lend, discusses the need for at least some title work, contemplates a closing, and mentions proceeding to a formal commitment. Nor is there any evidence that Whitfield was ignorant of the truth or "falsity" of any of the statements in the term sheet.

Whitfield also cannot establish actual or justifiable reliance, or a right to rely. Whitfield has come forward with no evidence that he took any action to change his position in reliance on any such representation. For instance, he did not apply to some other bank to refinance his loans but then withdraw that application based on Harbor's representations. He avers that he made a loan payment after his discussion with Rivers and in reliance thereon, Whitfield June 19, 2014 Aff. ¶ 7, but this is simply a payment of money he had already borrowed from, and owed back to, Harbor—whether the loan was renewed or not. After Harbor refused to close on June 28, 2014, Whitfield knew the truth of the matter, and no action he took after that date could possibly be in reliance on any alleged fraud.

Furthermore, Whitfield understands the real estate loan closing process thoroughly. He is a sophisticated real estate investor who has owned hundreds of residential properties. Whitfield June 17, 2014 Dep. 244:6-13. For him to claim that a preliminary conversation with a banker, or

a term sheet which clearly states that it is not a commitment to lend, is a representation on which he had a right to justifiably rely strains credulity beyond what a reasonable factfinder could bear.

Thus, Harbor is entitled to summary judgment on Whitfield's fraud claim. Furthermore, the elements of false representation, justifiable reliance, and right to rely are also elements of a claim for negligent misrepresentation. Brown v. Stewart, 348 S.C. 33, 42, 557 S.E.2d 676, 680-81 (2001). A fraudulent act accompanying a breach of a contract, which must also be proved by clear and convincing evidence, is required for a claim for breach of contract accompanied by a fraudulent act. Vann v. Nationwide Ins. Co., 257 S.C. 217, 220, 185 S.E.2d 363, 364 (1971). A right to rely is also an element of a claim for promissory estoppel. Powers Construction Co., Inc. v. Salem Carpets, Inc., 283 S.C. 302, 322 S.E.2d 30 (Ct. App. 1984) (promissory estoppel). Harbor is therefore entitled to summary judgment on those claims as well.

IV. Whitfield has no right of action under the South Carolina Unfair Trade Practices Act.

Whitfield's fourth cause of action purports to be for violation of the South Carolina Unfair Trade Practices Act. Such a claim falls far short of the mark.

Whitfield has produced no evidence whatsoever of any effect of any of Harbor's alleged conduct in this case on any other person, in South Carolina or elsewhere. He even admits that has not investigated that issue. Whitfield June 17, 2014 Dep. 220:20-223:10. In order to constitute violation of the Act, a party's conduct must affect the public interest. The South Carolina Supreme Court recently held that if conduct only affects the parties to a transaction, it does not affect the public interest, and is thus beyond the scope of the Act. Woodson v. DLI Properties, 406 S.C. 517, 530-31, 753 S.E.2d 428, 435 (January 8, 2014). Whitfield's claim is thus insufficient as a matter of law and a fit subject for summary judgment.

V. No genuine issue of material fact exists as to promissory estoppel.

The equitable claim of promissory estoppel requires (1) a promise unambiguous in its terms; (2) reasonable reliance on the promise by Whitfield; (3) reliance expected and foreseeable by Harbor; and (4) injury in reliance on the promise. Powers Construction Co., Inc. v. Salem Carpets, Inc., 283 S.C. 302, 322 S.E.2d 30 (Ct. App. 1984). In cases involving real property, such as this one, the burden of proof for a promissory estoppel claim is clear and convincing evidence. Satcher v. Satcher, 351 S.C. 477, 570 S.E.2d 535 (Ct. App. 2002).

For the reasons discussed above, Whitfield cannot establish a genuine issue of material fact that Whitfield reasonably relied on any of Harbor's representations. See Part III, supra. Whitfield may not establish promissory estoppel based on oral representations in any event, due to the lender statute of frauds. See Part II, supra. Furthermore, Harbor's promises were not unambiguous, in that they were subject to numerous conditions. Nor has Whitfield come forward with any evidence that he was injured by his reliance. This court should thus grant summary judgment as to Whitfield's equitable promissory estoppel claim.

VI. No genuine issue of material fact exists as to tortious interference with prospective contractual relations, as Whitfield cannot identify a specific prospective contract with which Harbor interfered.

To establish tortious interference with a prospective contract, Whitfield must provide evidence of a specific prospective contract with which Harbor intentionally interfered, for an improper purpose or by improper methods. United Educational Distributors, LLC v. Educational Testing Service, 350 S.C. 7, 14, 564 S.E.2d 324, 328 (Ct. App. 2002). "There can be no intentional interference with prospective contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its own contractual rights with a third party." Id.

Whitfield's claim purports to be for interference with his ability to sell or rent the subject properties. Answer ¶ 49. But he cannot identify any rental contract with which Harbor intentionally interfered, because by his own admission he stopped trying to rent the properties after the attempted closing on June 28, 2012. Whitfield June 17, 2014 Dep. 23:1-21; 26:2-7; 29:5-17; 33:1-7. Likewise, his efforts to sell the properties failed not because of any conduct of Harbor, but either because the buyers could not qualify for a loan, or because the properties would not sell for sufficient funds to pay off the loans and Whitfield refused to make up the shortfall, or because the potential buyers simply changed their minds. Id. 23:22-24:4; 30:6-33:22; 227:25-229:11. Harbor's action in providing payoff letters for the loans based on their stated default rates and other terms is a proper pursuit of its own contractual rights. Nor is there any evidence that Harbor ever had any contact with any prospective tenant or buyer of any of Whitfield's properties which could constitute interference. Summary judgment on this claim is therefore appropriate.

VII. To the extent that any of Whitfield's claims are based on conduct at the time the initial loans were made in 2007, the statute of limitations applies to bar such claims.

Whitfield makes various claims regarding the circumstances of the initial loans in 2007. For instance, he contends that he was charged the wrong interest rate or that his payments were not properly applied to principal and interest. In all such cases, Harbor acted according to the terms of the loan closing documents. Furthermore, Whitfield made five years' worth of payments on these loans according to the terms of those documents. His counterclaims were not brought until after Harbor initiated foreclosure proceedings, in each case more than five years after the loan closed.

Under S.C. Code § 15-3-530, the statute of limitations for all such claims is three years. Whitfield had copies of all the closing documents and made regular monthly payments based on

them; he cannot, therefore, claim a lack of knowledge of the existence of such claims. All such claims arising from the circumstances of the initial 2007 loans are therefore time-barred.

WHEREFORE, Harbor National Bank respectfully prays this Court for an order granting summary judgment in its favor on all of Defendant Anthony Whitfield's counterclaims, and for such other and further relief as it may deem just and proper.

This 15th day of September, 2014 at Charleston, South Carolina.

Brian C. Duffy
Seth W. Whitaker
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, South Carolina 29401
(843) 720-2044 (phone)
(843) 720-2047 (fax)

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5418-B Rivers Avenue
North Charleston, South Carolina 29406-6129
(843) 529-1111 (phone)
(843) 529-0035 (fax)
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIMS** has been served upon each of the parties to this action by depositing same in the United States mail, postage prepaid, in an envelope(s) addressed as follows:

Brent S. Halversen, Esq.
HALVERSEN & ASSOCIATES, LLC
171 Church Street, Suite 330
Charleston, South Carolina 29401

Daniel S. Slotchiver, Esq.
Andrew J. McCumber, Esq.
SLOTCHIVER & SLOTCHIVER, LLP
44 State Street
Charleston, SC 29401

Attorneys for Defendant Anthony Whitfield

This 15th day of September, 2014.

DUFFY & YOUNG, LLC

FILED
2014 SEP 15 AM 10:22
JULIE J. ARMSTRONG
CLERK OF COURT
BY

EXHIBIT A

HARBOR NATIONAL BANK

June 26, 2012

Re: Renewal & Modification Existing Debt on 9 Residential Properties

Dear: Mr. Whitfield

Thank you very much for the opportunity to offer renewals and modifications on the 9 loans you presently have financed with Harbor National Bank. The following is not a commitment to lend, but is our proposal for the general terms and conditions of the subject loans if the transaction were to close on June 28, 2012.

A. GENERAL TERMS.

1. BORROWER: Anthony M. Whitfield (hereinafter referred to as "Borrower")

2. AMOUNT OF LOAN: Up to the current outstanding principal balances *(accrued interest must be paid prior to renewal & is subject to change based on per diem).*

Loan #	*Property Address	6/28 Principal Balance	Accrued Interest
0400076000	98 Willow	$ 97,627.80	$ 295.08
0400047100	131 Tryon	$114,010.17	$ 344.61
0400047000	109 Mallory	$130,164.03	$ 393.44
0400046900	118 Clay	$128,263.84	$ 387.70
0400046800	308 Shortleaf	$133,014.21	$ 402.06
0400046700	9708 Jamison	$130,163.98	$ 393.44
0400031600	732 Gahagan	$132,641.57	$ 121.23
0400031700	110 Mepkin	$ 85,269.58	$ 77.93
0400032000	1055 Black Rush Cir.	$314,866.30	$1,379.21
Total		$1,266,021.48	$3,795.30

3. MATURITY: The maturity dates of all loans will be changed to July 10, 2017.

4. INTEREST RATE: Fixed Rate of 4.75% for the term of the loan.
This rate is not guaranteed beyond July 10, 2017 & is subject to the loan closing by June 28th & performing as required.

EXHIBIT 35 11-12-13 AB PENGAD 800-631-6989

yes

5. ORIGINATION FEE: None

6. COLLATERAL: *Title Insured 1st Real Estate Mortgage(s) plus an Assignment of all Leases, Rents, and Profits on real properties that were previously pledged as collateral to Harbor National Bank & identified under Section A (General Terms) part 2 of the subject term sheet. *The borrower's attorney will be responsible for conducting the closing and ensuring that the bank maintains its priority interest in the collateral. The Bank will require a minimum of title updates & new title opinion(s), but additional services and documentation may be required.*

7. REPAYMENT: Monthly payments of principal and interest to be based on a 25 year amortization with the balance due at maturity.

The due dates will all be changed to the 10th of the month with the first payment due on August 10th, 2012.

Taxes & Insurance are not escrowed & must be paid directly by the borrower

Estimated Initial Payments	
98 Willow	*$ 561.40*
131 Tryon	*$ 655.60*
109 Mallory	*$ 748.49*
118 Clay	*$ 737.57*
308 Shortleaf	*$ 764.88*
9708 Jamison	*$ 748.49*
732 Gahagan	*$ 762.74*
110 Mepkin	*$ 490.33*
1055 Black Rush Circle	*$1,810.60*
Total:	$7,275.02

8. PREPAYMENT PENALTY: None

B. GENERAL CONDITIONS:

1. The borrower will provide the bank updated financial statements to the bank on an annual basis. Tax Returns and an updated personal financial statement will be provided to the bank by April 15th of each year.
2. The proposed renewals/modifications will be closed under the supervision of the borrower's attorney. The borrower's attorney must ensure (a) the new closing documents are constructed & executed to be enforceable loan documents, and (b) ensure that parties signing the documents are educated about the content, their responsibilities, and the nature of their involvement. ***All attorney fees will be paid by the borrower at or prior to closing (cost TBD by borrower's attorney).***

3. Bank shall order or be provided an appraisal of the property in form and substance satisfactory to Bank. ***$2,700 is the cost of the appraisals*** (as invoiced by 3rd party vendors), and the borrower will pay the bank directly

WAIVER OF APPRAISAL RIGHTS. You are hereby notified pursuant to Section 29-3-680 of the 1976 Code of Laws for the State of South Carolina, prior to the transaction described above, that a Waiver of Appraisal Rights will be required as a condition of the Loan.

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 thirty (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. Pursuant to Section 29-3-680 of the Code of Laws of South Carolina, **THE UNDERSIGNED HEREBY WAIVE AND RELINQUISH 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.**

Upon reaching an agreement on these general terms, we can proceed to a formal commitment very quickly.

Sincerely,

Scott Warren
Vice President

EXHIBIT B

HARBOR NATIONAL BANK *yes!*

March 27, 2007

Mr. Anthony Whitfield
2141 Dorchester Road
N. Charleston, SC 29405

Re: Line of Credit

Dear Tony:

Harbor National Bank has approved an extension of credit to you subject to the specific terms and conditions outlined in the financing commitment below.

A. GENERAL TERMS.

1. BORROWER: Anthony M. Whitfield (hereinafter referred to as "Borrower")

2. AMOUNT OF LINE: Up to One Million Five Hundred Thousand and no/100 Dollars ($1,500,000.00). Each advance under this line to be approved individually by the Bank.

3. PURPOSE: Guidance Line of Credit to finance individual investment properties.

4. INTEREST RATE: Each individual credit facility shall bear and accrue interest at borrower's choice of 1) a fixed rate for each advance to be determined at time of advance (for example, loans approved today would be fixed at 7.50%) or 2) a floating rate of prime minus ¼ %.

5. ORIGINATION FEES: At Closing of each individual loan, Borrower will pay Bank origination fee of ½ %.

6. ~~GUARANTY: All loans and extensions of all credit shall be unconditionally guaranteed by Whitfield Realty.~~

7. MATURITY: Guidance Line to be approved and renewed on an annual basis. Each individual loan will mature 60-months from its closing date.

8. REPAYMENT: Monthly principal and interest payments based on a 30-year amortization with a 60 month maturity.

9. COVENANTS:

On new purchases:

- Loan to Value will not be greater than 75%,
- minimum cash equity/down payment of 15%,
- with minimum Debt Service Coverage ratio of 1.0 times.

On refinances:

- Loan to Value will be not greater than 75%,
- with minimum Debt Service Coverage ratio of 1.0 times.

B. **SECURITY.** Title Insured First Mortgage on each property. In addition, Bank requires an assignment of all leases, rents, and profits.

C. **APPRAISAL.** Prior to each loan closing, Bank shall order and receive an appraisal of the Property in form and substance satisfactory to Bank. Based on the appraisal, the loan will not exceed 75% of the value of the property.

D. **SURVEY.** Prior to closing, Bank shall receive and approve a survey, acceptable to the title company, showing the location of all physical matters affecting the Property, identified in Section B above. Such survey shall indicate the location of all boundary lines, means of ingress and egress, easements, rights of way and shall include a legal description of the Property.

Bank will waive such survey in the event that no exception would result with the title company.

E. **TITLE INSURANCE.** Receipt of an ALTA title insurance policy, and all title endorsements.

F. **INSURANCE.** Borrower will provide proof of insurance coverage with insurance companies satisfactory to Bank, on the Collateral, in such amounts and against such risks as typically required in this type of transaction.

G. **ENVIRONMENTAL.** Prior to loan closing, Bank shall be provided with proof of acceptable environmental conditions for the property through its environmental due diligence process. If Bank determines an environmental risk in this process, it reserves the right to require additional third party studies and/or insurance.

H. **FINANCIAL REPORTS AND OTHER DATA.**

1. Borrower will furnish Bank with annual personal financial statements and copies of tax returns within forty-five (45) days of filing with the Internal Revenue Service.

2. Within sixty (60) days after the close of each fiscal year, Borrower shall furnish Bank with annual financial statements, consisting of balance sheets, operating statements and such other statements as Bank may reasonably request. Copies of tax returns will be required on an annual basis within 45 days of filing.

I. **GENERAL CONDITIONS.**

1. Borrower shall be responsible for all reasonable and necessary expenses incidental to the transaction, including, but not limited to, all pre-closing, closing and post-closing expenses such as appraisal fees, legal fees, title insurance premiums, and architect's, surveyor's, engineer's expenses.

2. Unless otherwise provided in the Loan Documents, all terms, representations, warranties, covenants and agreements made herein and the terms and provisions thereof shall survive the making of the credit facilities described herein and the delivery of the Loan Documents, and shall continue in full force and effect, so long as the facilities remain outstanding and unpaid. These are not necessarily intended to represent all the conditions and requirements of our commitment that would be included in the subsequent loan documentation. In the event of irreconcilable inconsistency with any of the Loan Documents, the terms of the Loan Documents shall control. If the Loan Documents are silent to the issue, the terms of this Commitment Letter shall control.

If the aforementioned conditions are acceptable, please sign in the appropriate space and return to the undersigned. Unless accepted within ten (10) days, this commitment will be null and void. If this commitment is accepted, it will remain open for thirty (30) days after the acceptance date, at which time it will be null and void if the facility is not closed.

Sincerely,

Angela K. Bell
Vice President

Accepted this 28th day of March, 2007.

Anthony M. Whitfield

Signature

Guarantors

By:_____
Whitfield Realty

EXHIBIT C

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF DORCHESTER

HARBOR NATIONAL BANK,

Plaintiff,

vs.

ANTHONY M. WHITFIELD,

Defendant.

Case Nos.
2012-CP-18-2738
Berkeley 2618
Berkeley 3478
Charleston 5887
Dorchester 2119
Dorchester 2738
Dorchester 358

VIDEOTAPED
DEPOSITION OF: ANTHONY M. WHITFIELD

DATE: June 17, 2014

TIME: 9:45 AM

LOCATION: Halversen & Associates
171 Church Street, Suite 330
Charleston, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: SANDRA K. BJERKE, RDR, CRR, CBC

A. WILLIAM ROBERTS, JR. & ASSOCIATES

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can go back and find them.

Q. Well, I don't know what you have, so it's hard for me to know what hasn't been given to us.

A. You made another request, and I don't remember if we gave them to you. So I'll be happy to give them to you.

Q. Do you have any records of efforts to lease the properties involved in the litigation?

A. You mean the nine properties?

Q. Yes.

A. Eight properties. There's only eight rentals. The ex-wife lives in one of them. That's her personal home. Efforts to rent them?

Q. Yes.

A. I probably have MLS -- if I put them in MLS, sometimes I offer them in MLS to help get them rented. But most of the time I advertise them myself on Craigslist. So I don't know how far those -- those ads go back, but if I can find them I'll be happy to show you.

But I had signs out in front of them, I had ads, I had some of them in MLS as rentals, and I had them up for sale. So I didn't try to rent them after this -- Mr. Rivers backed out of the

deal because I was forced into putting them up for sale. So then after that point they no longer became rentals.

The ones that were occupied I continued to encourage the tenants to buy them. And that failed. So they didn't -- they couldn't qualify or they changed their mind.

So then I had to -- they skipped on me or didn't pay the rent when they found out there were issues. And one of them I tried to get to buy, and they just said no.

109 Mallory, they changed their mind. They wanted me to lease it to them for another year. And I said, I have to sell this. And I didn't explain why I had to sell it, but I had to give them notice to vacate. A perfectly good tenant paying $1,200 a month so I could put that house up for sale.

Q. Why would you have to give them notice to vacate to list the property for sale?

A. Because I had to do some upgrades, and I can't -- the chances of selling with a tenant in there is slim to none.

Q. Well, if you were buying investment property to rent, wouldn't you like to have a

they're going to buy. They're not going to buy my property and pay me anywhere near market, whether it's got a tenant or not, because the rental market skyrocketed in 2012.

So the rents went up. And since buyers started coming out, then homes were taken off the rental market and rents were high. So people were selling their houses. They were not renting them.

Q. So since the foreclosure suits were filed, you have not made any attempt to rent the properties; is that right?

A. I immediately started trying to sell them. That's all. I wanted to sell them. I wanted to liquidate to pay your client.

Q. Since 2012 have you sold any of your other properties?

A. As of today I closed one yesterday and I closed one Friday. That makes it -- 29 properties I had to liquidate already. That's not including the Harbor National's which you seized from me.

Q. You're in the business of selling the properties, aren't you?

A. Yes.

Q. Okay. And the 29 properties that you

been calculated.

Q. What was it in 2012?

A. I don't remember, but it wasn't much and it was offset, so I didn't have any tax liability.

Q. When you say it wasn't much, give me a range.

A. I had some -- I had some capital gains for three houses sold. And my rentals were still up there, but I still had a number of losses. So I didn't have any tax liability.

Q. All right. We started this part of the discussion by asking what documents, if any, you had about your efforts to lease the -- lease eight of the nine properties since 2012. And I believe you told me that you didn't make any efforts to rent them after foreclosure suits were filed; is that right?

MR. HALVERSEN: Form.

THE WITNESS: I don't remember the exact date, but I had to revert from renting properties to strictly sales. And it was because of your client foreclosing on me and threatening to foreclosure on me.

So actually, I probably reverted to

sales well before the foreclosure. But I -- when a property came vacant, you know, I just didn't boot out good tenants. The only one I had to give notice to was 109 Mallory because I was forced to sell it. And I thought I would be able to turn it.

But the problem why I couldn't turn Harbor National properties is because every time I asked for a payoff you demanded 14 percent default interest plus your attorney's fees. So there wasn't enough to sell the properties and at least break even.

BY MR. DUFFY:

Q. What offers did you receive on any of the properties?

A. I received offers on Mepkin, Gahagan, Clay. A lot of agents, what we do is we do oral. We do phone call offers or some of them that they're so ridiculous I just put in the trash.

But I do have -- I do have maybe one, if I can find it, on Mepkin that fell apart because Mr. Bernstein sent me a payoff that was just totally ludicrous. I mean, there was no fairness to it. I mean, if he'd have said 4.75 percent and waive the attorney fees, then that would have been paid off.

Gahagan I had some lowball offers because the word got out that I was in foreclosure. And everybody out there were like vultures. They were bringing in lowball offers, cash offers, discounting the prices 30 percent. So it made it very difficult to sell the properties.

Q. Okay. Do you have records of any efforts you made to sell any of the properties you have financed by -- or had financed by Harbor National Bank?

A. Yes. I have them in MLS. I listed every one of them in MLS when I tried to sell them.

Q. When did you first list the properties? Do you have to go through them individually?

A. I'd have to go through them and pull up each history on each one. What's nice is that MLS has a history, so it shows when I put them it for sale. So I could find...

I know I had 118 Clay on the market for a long time. I had 732 Gahagan on the market for a very long time. Mepkin -- as a matter of fact, those last receivership reports that you have shows the date they went vacant. Mepkin went vacant because she quit paying the rent when she couldn't buy and she found out that I had to sell it.

Jamison, he couldn't buy 9708. He skipped on me and left the place trashed. Tyron was the only one sticking around when you seized the properties through receivership.

Q. Let's talk about what documents you have.

A. I'm trying to tell you here, sir.

Q. Well, you're telling me --

A. I'm going through each from memory.

Q. Okay. I want to know what documents you have that you have in your control.

A. I just told you. The only thing I have is my MLS records to show that I was trying, making an effort to sell them.

Q. Okay. And your MLS records --

A. Anybody can get them. Somebody that works -- has a buddy of -- Harbor National Bank, an agent, any agent can pull up these properties and pull a history on them.

Q. Are you able to pull up the properties and give me the records of your efforts to sell the properties you financed with Harbor National Bank?

A. I can do the best I can. I don't know if I can pull up my Craigslist ads because I tried to advertise on Craigslist plus MLS, plus signs.

That's basically how I sell.

Q. Okay. Well, if you haven't produced those in this litigation please produce any records of your efforts to sell any of the individual properties that are financed through Harbor National Bank.

A. Okay. I can get those for you.

Q. And if there are any records of efforts to lease those properties, please provide those as well.

A. I didn't try to lease them after the problems existed after the -- Mr. Rivers backed out of the agreement on the 28th of June. I tried to sell them.

Do you want me to go with the other properties? Shortleaf, tried to buy that house for four years. Couldn't get the credit so he skipped. So that made that one vacant. So let's see. We covered Clay, Cahagan, Mepkin, Jamison, Tyron, Shortleaf. Which one am I missing? Mallory. We already talked about Mallory. I had to give them a notice and move out a perfectly good tenant to try to sell it so I could pay Harbor National.

I think that's it. No. Willow I had a buyer. Had a tenant in there that wanted to buy

me in contempt of court because I wasn't able to comply with the cash payments.

Q. And what was the resolution of that?

A. We had a mediation agreement.

Q. Were you held in contempt of court?

A. No.

Q. Did you ask Ms. Bell to provide your attorney a letter indicating it wouldn't be possible or prudent to extend more credit to you?

A. Yes. I told her and actually explained it to Ned Jervey, that I would be in a much better situation rather than be going into more debt which could cause the whole business to go under, especially with my health issues. I wasn't feeling good at the time.

Let's see. What date was this? It was pretty close to before my heart failure on April 8th. And that putting me in more debt would be a jeopardy to the business. I was trying to hold my own on the debt I had.

So the alternative suggested by my former attorneys, Blair Jennings and Steve MacKenzie, I was to have the bank say that it would be better to give my ex-wife properties in lieu of cash, which I offered, which she rejected.

So we mediated a payment plan on how to pay the amount I was behind on. And I got it all paid back. So she is totally paid through June of this year.

Q. Did Mr. -- did you request the same thing of Mr. Jervey?

A. Yes.

Q. Did he provide you a letter?

A. He -- yes. It would not be -- he could not approve additional financing --

Q. Do you have a copy of that letter?

A. -- at the time. I don't know. I may if I could find it.

Q. Okay. I'd ask you to produce that as well, as well as any communications requesting it from him.

You indicate here your health has suffered and relate it to working 70 plus hours in running your business; is that right?

A. That's what it says, yep.

Q. What issues or concerns did you have with your loans with Harbor National Bank in February of 2012?

A. What are you referring to? Is there something in this email?

Now, that's the first time I basically cut off a bank. I mean, normally they stop loaning me money when I reach a certain limit. Normally I had $3 million in a limit with banks. 3 to 4 million.

First Federal, I don't know how many that is for 80 loans and then 35 with Community First Bank, which is now CresCom, and the SouthTrust and Wachovia, Wells Fargo and SunTrust.

But anyway, the conversation was, she was demanding my tax returns and financials in 2010 when I wasn't asking for any more money. And I said to her, I said, you know, why are you needing to see my financial information when I'm not borrowing any more money from you? See, that was something else that was never explained to me. I've never had to do that before with any bank.

Q. You mentioned the interest rate on the Palmetto -- is it Palmetto Bluff?

A. That's correct.

Q. Palmetto Bluff property?

A. (Witness moves head up and down.)

Q. Did you attempt to refi or to finance that property with any other bank?

A. It was sold.

per appraisal for nine appraisals.

I talked to them, and they said appraisals weren't required. I looked up the law to verify it, and I presented that to Mr. Rivers on June 21st. And he looked like he had mud in his face as soon as I brought this to his attention.

Q. Now, you indicated that everything was going fine, just getting the tax returns together; right?

A. That's it. That was my last requirement.

Q. And that was early April 2012 is the time.

A. Yeah, I got whatever the date was. That was the date when she got the tax returns that she was bragging to her coworkers in the bank that threats of nonrenewal work, and a week later I had my heart failure and went in the hospital and almost died.

Q. Now, you had not seen any internal bank emails before this litigation started.

A. No, I didn't.

Q. Okay. So the tax returns we're talking about that were provided by you or your accountant in April of 2012 were the 2010 tax returns; right?

A. Correct.

Q. Okay. And sometime subsequent to that is when you say that additional demands came that you weren't expecting.

A. Right after I sent the email to Angie Bell telling her I had a heart failure, and I was trying to work out back payments with my ex-wife.

MR. DUFFY: Please mark that.

(PLF. EXH. 45, Email String Beginning with an Email to Mr. Whitfield from Ms. Bell dated 4-23-12, marked for identification.)

BY MR. DUFFY:

Q. Okay. Exhibit 45, Mr. Whitfield. Is this the email you've been referring to?

A. Looks like it.

Q. Okay. So you had an episode with congestive heart failure?

A. Correct.

Q. Okay. And you indicated it was sometime after this that you got the additional requirements from Ms. Bell that caused you concern.

A. Yes.

MR. HALVERSEN: Brian, do you want to break for lunch?

MR. DUFFY: Yeah, let's break. If

MR. DUFFY: Sure.

MR. HALVERSEN: There's something I need to tell you that pertains to this.

THE VIDEOGRAPHER: We are now off the record. The time is approximately 2:30 PM.

(A recess transpired from 2:30 until 2:36.)

THE VIDEOGRAPHER: We are now back on the record. Today's date is June 17th, 2014. The time is approximately 2:36 PM. This is the Video No. 3 in the video deposition of Anthony Whitfield.

BY MR. DUFFY:

Q. Mr. Whitfield, we're looking at Exhibit 9 from your first deposition, and it is a letter dated June 26 of 2012. Can you tell me how you received this letter?

A. When I went in to discuss the new documents for the renewal on the 27th of June at the Harbor National office downtown, I believe it was.

Q. Okay. This was provided to you then; is that right?

A. Yes.

Q. And I believe your conversations with counsel off the record, there was some indication

that this was the cover letter of a packet of information you got?

A. I had -- I'm reasonably certain that I got packages on each loan that had draft across it, and they were all new replacement notes and loan agreements and business loan agreements and assignments of rents and whatever. It was all in the package.

Plus, there was a -- I don't remember if there was any history. I do remember the Black Rush, but I think they may have attached it. On three of the loans they did this partial history which didn't cover the whole loan. And I questioned Scott Warren about that because I like to see the whole histories, and -- but they were only for the matured loans at the time. The matured loans were Mepkin, Gahagan and Black Rush.

Q. Now, Exhibit 9 was something that was given to you by Scott Warren with this packet of information. Is that what you're telling me?

A. Yes.

Q. Is it -- was this the cover -- was this the top of the packet?

A. No. It was loose. It was all together. I mean, it was on the table in the

that were agreed with Charlie Rivers as -- on June 21st as sealing the deal.

Q. Okay.

A. That reconfirmed the deal.

Q. This -- for example, those facts are the same for all of your counterclaims across the suits; is that right? This applies equally to your contention in every lawsuit.

A. It should, because there's -- all nine loans are listed there.

Q. You contend you were fraudulently induced into the 2007 and 2008 loans with a promise that they were going to be 30-year loans?

A. Absolutely.

Q. And were aware of no writing that indicates there was going to be 30-year loans for any of those; is that right?

A. My mistake. I put too much trust in Mr. Rivers and Ms. Bell.

Q. Now, you have a claim for a violation of Unfair Trade Practice Act. Are you familiar with that?

A. Yes.

Q. Is this claim based on your agreements with the bank, the loan agreements with the bank?

A. I'm not following you. Please be more specific.

Q. There are indications here of unfair or deceptive trade -- I'm sorry -- unfair or deceptive acts. And I'm presuming the basis of that is your dealings with them on your loans that are the subject of this -- of the litigation.

A. Yes.

Q. Okay. So they're ultimately based on agreements that you entered into. You contend something was unfair or deceptive about that.

A. Prior to the initial closings in 2007 and all the way to the foreclosures.

Q. Are you aware of any other instance of Harbor National Bank doing the type of unfair or deceptive practices that you contend they did here?

A. I believe they have a habit of doing that because they have a lot of litigation similar to mine out there.

Q. Do you have any evidence of other instances where you contend they did the same thing that was unfair to you?

A. Well, I think some of the emails that were thrown in the box by Mr. Bernstein revealed that they treated other customers as poorly as I.

A good friend of ours, his name is Sandy something. Mr. Warren made sly remarks about the way Mr. Sandy --

THE WITNESS: Do you remember his last name?

MR. HALVERSEN: I'm not being deposed.

THE WITNESS: Okay. They made -- he made a derogatory -- a very unprofessional comment regarding me and Mr. Ogden, I think it is. Sandy Ogden.

BY MR. DUFFY:

Q. Okay. None of which would have been outside the bank until you requested those documents in litigation; is that right?

A. I don't quite follow you there. There was an email, and it referred to me, other customers and Sandy Ogden in a very derogatory manner. So there's no reason for me to believe that other customers weren't treated the same way.

Q. And that's something that's a derogatory email. Is there any other indication that you're aware of of the --

A. Well, the way I look at it, I'm really 10 customers. I could be considered 10 customers, because I put 10 -- I gave -- signed loans with the

bank, Harbor National, 10 times. So I was treated repetitiously, 10 times, poorly, dishonesty, deceptively, unfairly. So that's pretty good repetition there. And that's why I was looking into all their other background and issues, and that's why they sold their bank.

Q. So you're aware of no one else; is that right?

A. Not offhand. I haven't really investigated it.

Q. There's a claim for promissory estoppel and detrimental reliance and an indication that you relied on promises of Angela Bell, Charlie Rivers and Scott Warren to renew and modify the loans. Which promises in writing, if any, can you identify that you relied on that is referred to in here?

A. Whatever I've already testified to. I'm trying to refresh my memory on that. I'm going to rely on whatever I said already.

Q. Okay. It says you've been injured by your reliance on Harbor National Bank's promises. In particular, placed -- the contingencies placed on June 26, 2012.

MR. DUFFY: Well, strike that.

BY MR. DUFFY:

Q. Have you sold them?
A. Obviously not, because you stole them.
Q. You still own them, don't you?
A. I can't sell them. How am I supposed to sell them with tenants in there? I didn't have anything to do with these tenants in there. I don't know who they are. They didn't sign my leases. They didn't do my applications. I didn't approve them. I don't know whether they have pets. I don't know who's living in the house.

I don't know how many violations they would have on my leases because I had my own leases. I don't use anybody else's leases. I've been in the business 35 years. I have my own structured business.

They interfered with my business. They took control of my properties. They put who they wanted to in there. I don't know if they have four dogs, 15 people, 15 cars. I don't know what they have.

Q. Okay. Is your claim here related to the properties being under receivership?
A. That's part of it.
Q. Okay. What other identifiable prospective buyers and/or renters did you lose the

ability to enter into contracts with because of Harbor National Bank?

A. I couldn't rent them and I couldn't sell them. I tried to sell them, but you wouldn't take a reasonable payoff so I couldn't even get them sold.

Q. Tell me which property you had an offer on.

A. I had offers on Gahagan, Clay, Mepkin. The others were occupied, and I was trying to get the tenants to buy them.

Q. Were there offers on those three properties?

A. Mepkin was occupied too, and then she split.

Q. Were there offers on those three properties that you wanted to accept?

A. I couldn't because they were too low. Mepkin, by the time I got the payoff from Mr. Bernstein, it didn't work. So I had to reject the offer.

Q. Are there any identifiable prospective buyers who you contend were -- would have bought these properties at a price that you were willing to accept?

A. Yeah, I probably would have been able to negotiate if I didn't have to -- I would have -- I was willing to sell them and then take up the loss with Harbor National afterwards so I could at least mitigate the damages. But I attempted, but I couldn't get enough without having to come out of my pocket and take a big, severe beating trying to sell them because of your demands for 14 percent and attorney fees.

Q. Are you talking about the three properties that you just mentioned?

A. I'm talking about all of them.

Q. Okay. You had -- tell me -- you could have sold all of these if it weren't for the bank is what you're saying.

A. I probably could have. But I would have had to sell them, just like the others, at distressed prices.

Q. Okay. Would you have sold them if -- would you have sold all the other ones?

A. Would I have sold them when, why, how?

Q. If -- whatever it is that Harbor National Bank caused you to lose the ability to enter into contracts. Let's start there. What did Harbor National Bank do to cause you to lose the

Q. Whatever files you keep about the properties.

A. I looked up, yeah, the Harbor National files. That's all. I didn't have to look up the other files. But I did look up -- because I was curious about the SouthTrust because the product that Mr. Rivers sold me for Harbor National was not what he promised to give me because he promised the same product that he gave me at SouthTrust and it was quite different. It was a big lie. It was a big deception. There's quite a difference when you give a 30-year ARM that will go down in rate as the market floats down.

Q. You're a sophisticated investor in real estate, aren't you, Mr. Whitfield?

A. I'm not ignorant about it. Yeah, I've been doing it for a while.

Q. And how many loan transactions have you closed that you borrowed money from a bank for property?

A. A lot.

Q. How many?

A. I don't know, but --

Q. Well, when you say lot --

A. I never had a balloon payment in any of

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	CASE NO.: 2012-CP-10-5887
Harbor National Bank,	
Plaintiff,	
vs.	**THIRD PARTY DEFENDANT DAVID SWANSON'S ANSWER TO DEFENDANT/THIRD PARTY PLAINTIFF'S FIFTH AMENDED ANSWER AFFIRMATIVE DEFENSES, CROSSCLAIM, COUNTERCLAIMS AND THIRD PARTY COMPLAINT (JURY TRIAL DEMANDED)**
Anthony Whitfield and Cindy Whitfield	
Defendants.	
Anthony Whitfield	
Third Party Plaintiff	
vs.	
David Swanson	
Third Party Defendant	

FILED
2016 FEB 18 PM 3:09
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: BRENT HALVERSEN, ESQ. AND DANIEL SLOTCHIVER, ESQ., ATTORNEYS FOR DEFENDANT/THIRD PARTY PLAINTIFF ANTHONY WHITFIELD:

Third Party Defendant David Swanson hereby responds to the above-captioned Third Party Plaintiff's Complaint as follows:

1. The Allegations contained in Paragraphs 1 through 19 of Defendant's Answer, Crossclaim, Counterclaims and Third Party Complaint assert defenses to Plaintiff's Complaint, to which Third Party Defendant need not respond. To the extent the allegations in Paragraphs 1 through 19 suggest or imply liability against the Third Party Defendant, those allegations are expressly denied.

2. Third Party Defendant is without sufficient knowledge and information to form an opinion as to the allegations contained in Paragraphs 1 through 65 of Plaintiff's Complaint, and therefore denies the same.

3. Responding to the allegations contained in Paragraphs 66 and 67 of Third Party Plaintiffs Complaint, Third Party Defendant admits only so much of the allegations contained in Paragraph 66 and 67 as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraphs 66 and 67.

4. Third Party Defendant denies the allegations contained in Paragraphs 68 and 69 of Third Party Plaintiff's Complaint.

5. Responding to Paragraph 70 of Third Party Plaintiff's Complaint, Third Party Defendant admits only so much of the allegations contained in Paragraph 70 of Third Party Plaintiff's Complaint as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraph 70.

6. Third Party Defendant denies the allegations contained in Paragraphs 71 and 72 of Third Party Plaintiff's Complaint.

7. In response to Paragraph 73 of Third Party Plaintiff's Complaint, Third Party Defendant repeats and re-alleges every preceding paragraph of this Third Party Answer as if restated herein verbatim.

8. Responding to Paragraphs 74 and 75 of The Third Party Plaintiff's Complaint, Third Party Defendant admits only so much of the allegations contained in Paragraphs 74 and 75 of Third Party Plaintiff's Complaint as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath

concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraph 74 and 75.

9. Third Party Defendant denies the allegations contained in Paragraphs 76 and 77 of Third Party Plaintiff's Complaint.

10. Responding to Paragraph 78 of The Third Party Plaintiff's Complaint, Third Party Defendant admits only so much of the allegations contained in Paragraph 78 of Plaintiff's Complaint as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraph 78.

11. Third Party Defendant denies the allegations contained in Paragraphs 79 through 82 of Third Party Plaintiff's Complaint.

12. In response to Paragraph 83 of Third Party Plaintiff's Complaint, Third Party Defendant repeats and re-alleges every preceding paragraph of this Third Party Answer as if restated herein verbatim.

13. Third Party Defendant is without sufficient knowledge and information to form an opinion as to the allegations contained in Paragraphs 84 through 87 of Third Party Plaintiff's Complaint, and therefore denies the same.

14. Defendant denies each and every allegation not specifically admitted herein.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

15. Third Party Plaintiff's Complaint fails to allege facts sufficient to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6), SCRCP.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

16. Third Party Defendant was at all times acting as an attorney in the course and scope of providing legal services to his client and is immune from liability to third-parties such as Third Party Plaintiff.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

17. No act or omission of Third Party Defendant was the cause of any damages to Third Party Plaintiff.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

18. Third Party Plaintiff's claims against Third Party Defendant are barred to the extent relief is obtainable from other avenues.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

19. Third Party Plaintiff lacks standing to pursue one or more claims against Third Party Defendant.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

20. Third Party Plaintiff's claims are or may be barred by the doctrines of waiver, estoppel and/or unclean hands.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

21. At all relevant times, Third Party Defendant exercised the necessary degree of care and skill maintained by other attorneys under similar conditions and in like circumstances.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

22. Third Party Plaintiff's Complaint alleges duplicative causes of action that should be dismissed or merged as provided by law.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

23. Third Party Plaintiff's Complaint fails to state a claim upon which attorney's fees can be awarded or allege facts which, if proven, would entitle Third Party Plaintiff to an award of attorney's fees.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

24. Third Party Plaintiff's Complaint fails to state a claim upon which treble damages can be awarded or allege facts which, if proven, would entitle Third Party Plaintiff to an award of treble damages.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

25. Third Party Plaintiff's Complaint fails to state a claim upon which punitive damages can be awarded or allege facts which, if proven, would entitle Third Party Plaintiff to an award of punitive damages.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

26. Any award of punitive or exemplary damages in this action would be in violation of the rights of Third Party Defendant under the United States Constitution and the Constitution of the State of South Carolina.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO:

27. Third Party Defendant reserves any additional and further defenses that may be revealed by information obtained during the course of investigation and discovery as consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the allegations of Third Party Plaintiff's Complaint, Third Party Defendant prays that Third Party Plaintiff's Complaint be dismissed with prejudice, for all costs of the action to be cast upon Third Party Plaintiff, and for such other and further relief as this Court may deem just and proper.

This 15 day of February, 2016.

Respectfully submitted,

EARHART OVERSTREET, LLC

By: _____
DAVID W. OVERSTREET
State Bar No.: 16965

STEVEN R. KROPSKI
State Bar No.: 101441

Attorneys for Third Party Defendant David Swanson

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STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	) CASE NO.: 2012-CP-10-5887
	)
Harbor National Bank,	)
	)
Plaintiff,	)
	)
vs.	) **CERTIFICATE OF SERVICE**
	)
Anthony Whitfield and Cindy Whitfield	)
Defendants.	)
	)
Anthony Whitfield	)
	)
Third Party Plaintiff	)
	)
vs.	)
	)
David Swanson	)
Third Party Defendant	)

FILED
2016 FEB 18 PM 3:09
JULIE J. ARMSTRONG
CLERK OF COURT
BY

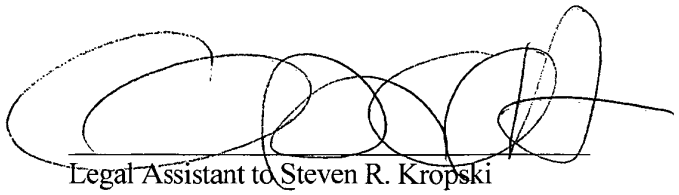
I hereby certify that I have this day served a copy of the within and foregoing ***Third Party Answer*** upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

Brent S. Halverson, Esq.
Halversen & Associates, LLC
171 Church Street, Suite 300
Charleston, SC 29401

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Brian C. Duffy, Esq.
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Duffy & Young, LLC
96 Broad Street
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This 15th day of February, 2016.



Legal Assistant to Steven R. Kropski

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February 15, 2016

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street
Charleston, SC 29401

Re: Harbor National Bank v. Whitfield v. Swanson
Case No.: 2012-CP-10-5887
EO File No.: 130-0163

Dear Julie:

Enclosed for filing please find Third-Party Defendant David Swanson's Answer to the Third-Party Complaint regarding this matter. By copy of this correspondence to all counsel of record, I am serving them with the same. If you have any questions or concerns, please do not hesitate to contact me. With best regards, I am

Sincerely,

STEVEN R. KROPSKI

RAE:tmm
Enclosure
cc: Brian Duffy, Esq.
Brent Halversen, Esq.
Daniel Slotchiver, Esq.

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO. 2012-CP-10-5887
BANK OF NORTH CAROLINA, as successor in interest to HARBOR NATIONAL BANK Plaintiff, vs. ANTHONY M. WHITFIELD, CINDY WHITFIELD, AND DAVID SWANSON Defendants	)	**MEMORANDUM IN OPPOSITION TO DAVID SWANSON'S MOTION FOR SUMMARY JUDGMENT**

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2017 AUG 25 PM 3:12
JULIE J. ARMSTRONG
CLERK OF COURT
BY DS

Introduction

1. As this Court is familiar, in 2007 and 2008, Plaintiff made nine loans to Mr. Whitfield, for nine different residential properties. One loan covers property in Charleston County, and the other 8 loans cover property in Berkeley and Dorchester Counties. All of the properties were rentals, except the Charleston County property which was purchased by Mr. Whitfield for his wife at the time, in order to meet his family court obligations in 2007. The bank denies that it knew the property was being purchased for his wife at the time, but there is ample evidence to the contrary – including the purchase contract provided to the bank in 2007 which stated the property was being purchased pursuant to family court obligations. There is no denying that the bank knew Mr. Whitfield's ex-wife was living in the property as her primary residence since the loan was initiated. The 2007 loans were all for 5 year terms and were beginning to come due under their balloon

features in 2012. Mr. Whitfield reached an agreement with the bank president Mr. Charlie Rivers on June 21, 2012 to renew all the loans for another 5 years, and reduce the interest rate to 4.75%. The bank asked that a closing be set up to renew the loans, and such closing was set for 7 days later with closing attorney Mark Weeks, on June 28, 2012. The bank transmitted to the closing attorney new notes for all of the properties for Mr. Whitfield to sign that incorporated the terms that Mr. Rivers agreed to at the meeting, namely, reducing the interest rate to 4.75% and extending the loan term another 5 years. Mr. Whitfield never missed a regularly scheduled payment with any of the loans.

2. Mr. Whitfield and Mr. Scott Warren (the loan officer from Harbor National Bank) attended the closing on June 28, 2012. At the closing table, Mr. Scott Warren stated the bank could not renew **any** of the loans based upon its statement at the time that Mr. Whitfield's ex-wife's partial ownership in the Charleston County property (hereinafter, "Black Rush") prevented it from renewing Black Rush AND all the other 8 properties (although there was nothing in writing or verbally that said all loans had to be renewed as one.[1])

3. Mr. Weeks, the closing attorney, has testified that he could have closed any or all 9 of the loans, including Black Rush, had it not been for the Plaintiff's demand for a title endorsement. (See Affidavit of Mark Weeks, attached as Exhibit "B" to Mr. Whitfield's Memorandum Opposing Summary Judgment, filed with this Court on September 12, 2014).

4. Inexplicably, Plaintiff refused to renew any of the loans despite agreeing to do so, and initiated six foreclosure lawsuits covering nine (9) different properties. In

[1] In fact, the bank structured the renewals separately, sending individual renewal notes with the new terms of reduced interest rate and extended 5 year term to the closing attorney.

response to the foreclosure lawsuits, Mr. Whitfield counterclaimed in each of the lawsuits claiming, *inter-alia*, that Harbor National Bank made an agreement to renew all the loans for another five year term, breached that agreement, and caused him damages. The bank denied that it made an agreement to renew the loans, and has largely defended Mr. Whitfield's claims that the bank breached an agreement to renew the loans on two grounds as enumerated in its later filed Replies: 1) that Mr. Whitfield's ex-wife was required to sign a mortgage to her home in Charleston County[2] in order to renew all of the loans in Charleston, Berkeley, and Dorchester County; or 2) that a title endorsement was necessary for the property in Charleston County to renew **all** of the loans in Charleston, Berkeley, and Dorchester County.

5. As part of the Plaintiff's "title endorsement" defense for the failure to renew the loans, Mr. Scott Warren testified on November 13, 2013, that he had called and sought the advice of a real estate transactional attorney, Mr. David Swanson, who recommended that the bank should procure a title endorsement to the Charleston County property. This telephone call would have had to have occurred between June 21, 2012 (when the agreement was made to renew and after Scott Warren was assigned as the new loan officer to the Whitfield loans, and before June 28, 2012 (the date of the closing).

6. Mr. Swanson testified as a fact witness at deposition in 2014 that he was telephoned at his office by Mr. Warren. Mr. Whitfield then subpoenaed the telephone records of Mr. Warren and Mr. Swanson, which revealed that there was **no documentation of the telephone call** between the two during this time period[3]. Mr.

[2] Closing attorney Mark Weeks never made this demand. *See* Paragraph 10 Affidavit of Mark Weeks, attached as Exhibit "B" to Mr. Whitfield's Memorandum Opposing Summary Judgment, filed with this Court on September 12, 2014.

[3] See telephone records attached to Mr. Whitfield's Motion to Amend, filed with this Court on June 25, 2015.

Whitfield also subpoenaed Mr. Swanson's law firm of Haynesworth Sinkler Boyd, P.A. for records concerning the claimed advice. **The law firm has stated that no records exist**.

7. Because there was **zero physical evidence** of the communication, and that there was **no evidence** that the lawyer had undertaken any work to render such advice, Mr. Whitfield amended his lawsuit to assert counterclaims against the bank and Mr. Swanson, alleging that the supposed advice never occurred, was concocted, after the fact, to provide a legal defense to what otherwise would have been a completely indefensible position of why the bank did not honor its own agreement to renew the loans. As alleged in Mr. Whitfield's counterclaims, the actions of the bank and Mr. Swanson to provide such testimony when it never occurred were willful acts, done with the collateral objective of providing a bolstered legal defense for the bank, predicated on events that never happened. Providing the testimony concerning the advice of counsel was made to mutually benefit Harbor National Bank and Haynesworth Sinkler Boyd, P.A. and made to Mr. Whitfield's detriment.

8. Mr. Swanson has now moved for summary judgment. Although Mr. Swanson's motion does not state with particularity the grounds for which he seeks summary judgment as required by SCRCP 7(b)(1), any argument for summary judgment that is predicated upon Mr. Swanson or Mr. Warren's testimony that the phone call was made and that advice was given, must necessarily be an issue of fact because Mr. Whitfield has presented to the Court, as stated above and herein, that ample evidence exists that the communications never occurred at the time claimed.

9. The only question left presented for this Court to determine is whether, if a client and an attorney jointly collaborate to fabricate testimony in deposition setting to aid that client's litigation objectives, that a conspiracy and abuse of process has occurred.

SUMMARY JUDGMENT STANDARD

Summary judgment should only be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Lord v. D&J Enterprises, Inc., 407 S.C. 544, 757 S.E.2d 695, 699 (2014). In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Id.* Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law and should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Bell v. Progressive Direct Ins. Co., 407 S.C. 565, 757 S.E.2d 399, 404 (2014). Moreover, because summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. Lord, 757 S.E.2d at 699.

ARGUMENT

A. Mr. Swanson and his law firm have no documents (of any kind) pertaining to the advice Mr. Warren claims he received and Mr. Swanson claims he provided from his law firm.

Mr. David Swanson conceded that his advice to procure a "title endorsement" was provided to Harbor National Bank without opening a file, reviewing any documents, without performing any legal research, without providing any written opinion, and without charging the bank any money for the advice. In fact, *there is not a single document at Mr. Swanson's law firm suggesting that the advice was ever given*. Mr. Warren sat for a deposition in 2013 and stated that the reason why a "title endorsement" was needed was because he called– David Swanson- and Mr. Swanson told him that a title endorsement was needed on the Black Rush Property. (Dep. S. Warren, P.47, L. 22 – P. 48, L. 20).

After the deposition, Mr. Whitfield sent a document subpoena to Mr. Swanson and his law firm to which he is a partner, Haynesworth Sinkler Boyd, P.A.- and the firm eventually responded stating that there were no documents responsive to the subpoena. The managing director of Haynesworth Sinkler Boyd swore out an affidavit that there were no billings related to Harbor National Bank and Mr. Whitfield. (See Affidavit attached hereto as Exhibit "A"). However, the managing partner did testify that sometimes they don't open up a new matter. "For a lot of our recurring clients we have a general file or an advice and counsel file. It can be called any number of things. And so we just place time on that file matter, and so a new matter is not opened." (See Dep. of B. Nicholson, P. 15, L. 7-11). So, although the law firm will bill for "advice and counsel" without opening up a new file, no "advice and counsel" file was opened for the advice the bank and Swanson claim occurred in this case. Mr. Swanson testified that in 2012, he billed $350.00 per hour and he bills in 12 minute increments, or $70.00 for every 12 minutes of time.

(Dep. of D. Swanson taken April 18, 2017, P. 19, L. 3-11). Mr. Swanson also stated that he didn't bill the bank for this advice because, "I didn't consider it something I could bill." (Dep. of D. Swanson taken April 18, 2017, P. 21, L. 10-11). This is evidence the advice was never given.

B. No telephone record of when Mr. Warren and Mr. Swanson testified that a call took place.

As referenced above, Mr. Whitfield subpoenaed the telephone records from Mr. Swanson's cell phone and law office line. Mr. Scott Warren's telephone numbers (which were identified by the bank) were not present in the records when the call was claimed to have been made. In fact, Mr. Warren testified there could have been more than one call made with Mr. Swanson before the closing. (Dep. of S. Warren taken March 24, 2015, P. 13, L. 12- 19). Despite the call, or multiple calls, no call was found in the phone records for that time period. This is evidence the advice was never given.

C. Mr. Swanson's law firm Haynesworth Sinkler Boyd, P.A. had computer systems in place which documented telephone calls in 2012 on its call accounting software, but has since destroyed the data containing the telephone records.

Mr. Whitfield deposed the IT Director for Haynesworth Sinkler Boyd, P.A. pursuant to a Rule 30(b)(6) deposition regarding the corporate representative's knowledge of the law firm's telephone records and phone systems in 2012 and 2013. The deponent, Ms. Mary Gwinn, testified that in 2012 all incoming and outgoing telephone calls were tracked with the law firm's call accounting software. (Dep. of M. Gwinn, P. 11- 18). Ms. Gwinn testified the data, "had been disposed of." (Dep. of M. Gwinn, P. 18, L. 15-19). She testified that if the hard drive were in existence, it would have been possible to see the

calls that had been placed between the law firm and the bank (Dep. of M. Gwinn,P. 20, L. 11-16). Ms. Gwinn testified there was no need to retain the records, and that she did not recall who made the determination to destroy the records. (Dep. of M. Gwinn, P. 19, L. 7-11). She testified there was no policy in place that covered destruction of telephone records. (Dep. of M. Gwinn, P. 19, L. 24 – P.20, L. 3).

Ms. Gwinn testified that the telephone records were not destroyed until 2014 or 2015. (Dep of M. Gwinn, P. 21, L. 19-22). After Ms. Gwinn's deposition, Haynesworth Sinkler, Boyd, P.A. produced records of what it claims were the vendors it hired to destroyed the internal telephone systems and data. According to the records it located from the vendors, the law firm asserts / believes the records were destroyed on or before June 11, 2013, but stated that, "it is possible that the hard drive destruction was part of those items identified in the March 19, 2014 invoice. (See Correspondence from D. Quattlebaum, attached hereto as Exhibit "B "). Accordingly, the law firm acknowledges that the data could have been destroyed as late as March 19, 2014. Mr. Whitfield first subpoenaed Mr. Swanson and Haynesworth Sinkler Boyd, P.A. for records on December 3, 2013. Mr. Swanson and Haynesworth Sinkler Boyd, P.A. filed a Motion for Protective Order and Order to Quash the Subpoena on December 17, 2013. Although Mr. Whitfield's subpoena did not specifically call out "telephone records" in the document subpoena, *the law firm and Mr. Swanson were aware that Mr. Swanson's communications with the bank was an issue* **before** the internal telephone records were destroyed on or before March 19, 2014. In fact, after the motion was protective order was filed by the law firm, Harbor National Bank first offered a waiver of its privileges with Mr. Swanson related to the document subpoena on January 24, 2014 stating, "the waiver shall extend only to

communications between Mr. Swanson and employees or agents of Harbor National Bank on or about June 28, 2012 and arising out of the request from employees or agents of Harbor National Bank to Mr. Swanson for professional advice regarding the refinancing of Mr. Whitfield's loan. . ." (See Correspondence from S. Whitaker dated January 24, 2014, attached hereto as Exhibit "C"). This privilege offer made in conjunction with the document subpoena was also sent to Mr. Swanson. The offer to waive the privilege with regard to the document subpoena concerning Mr. Swanson's communications with the bank was made while the law firm had data within its possession which could have shown whether or not the phone call(s) were made. *Unfortunately, the law firm destroyed these records, at a time when it was aware the communications between Mr. Swanson and the bank was an issue.* "When evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party." Stokes v. Spartanburg Reg'l Med. Ctr., 368 S.C. 515, 521, 629 S.E.2d 675, 678 (Ct. App. 2006). A negative inference instruction to the jury concerning the law firm's destruction of the internal telephone data in this case demonstrates that there is a triable issue of fact on this matter alone. This is evidence the advice was never given.

D. Mr. Swanson himself, tellingly, could not testify as to when the phone call occurred when first asked at his first deposition.

Q. Okay. Let's talk about the phone call. What do you recall from -- from Mr. Warren's phone with you?

A. What I recall, I was sitting at my desk that day. The phone rang. This is Scott. And so Scott, he -- he outlines to me -- and it – you know, a fact situation, which is frequently what happens when I get phone calls from lenders or whomever. And so the -- what -- what he was talking about was, **he *had* a closing**. I don't know if he mentioned Mr. Whitfield's name or not. That may have -- he may have filled in

> the gaps later on. He said, they had a closing -- ***or there --there was a closing that was -- was anticipated, proposed, whatever***. And so -- and an issue had come up.

(Dep. D. Swanson, P. 15, L. 3-19)(emphasis added).

When Mr. Swanson was first deposed and was asked about the telephone call, Mr. Swanson first described Mr. Warren relaying to him that the closing **had already happened- in the past tense**. Mr. Swanson later attempts to correct himself and says the closing was "anticipated, proposed, whatever." This is evidence that Mr. Whitfield's allegations are true: when first asked about the call, Mr. Swanson described it as having occurred *after* the closing. This is precisely what Mr. Whitfield alleges, the advice was made up after the fact and was never given at the time claimed (pre-closing). This is evidence the advice was never given. Mr. Swanson has also given completely inconsistent testimony regarding whether he spoke to Mr. Warren after the advice was supposedly given on June 28, 2012. When Mr. Swanson was first deposed as a witness in 2014 he stated that he had discussions with Mr. Warren after the alleged telephone call:

> Q. Okay. Let's talk about the phone call. What do you recall from -- from Mr. Warren's phone [sic] with you?
>
> A. What I recall, I was sitting at my desk that day. The phone rang. This is Scott. And so Scott, he -- he outlines to me -- and it – you know, a fact situation, which is frequently what happens when I get phone calls from lenders or whomever. And so the -- what -- what he was talking about was, he had a closing. I don't know if he mentioned Mr. Whitfield's name or not. That may have -- **he may have filled in the gaps later on**.

Dep. of D. Swanson, taken May 14, 2014(P. 15, L. 3-16)(emphasis added).

Fast forward to 2017, after Mr. Swanson was named as a party defendant to the conspiracy and abuse of process claims, and Mr. Swanson denies ever speaking to Mr. Warren about the properties since the supposed phone call:

Q. Other than the conversation that you allegedly had in the phone call with Scott Warren, have you had any other conversations with Scott Warren about these properties ?

A. No.

Dep of D. Swanson taken April 17, 2017, (P. 24, L. 21-25).

E. <u>Mr. Swanson's sole evidence that the advice was given at the time claimed is an email from the day before closing that Mr. Warren and Mr. Swanson have conflicting testimony regarding</u>.

Mr. Swanson's only documentary evidence of giving the advice to obtain a title endorsement before closing (on June 28, 2012) is in the form of an email the day before closing from Mr. Scott Warren to Teresa Farley, a paralegal in Mark Weeks office, discussing the fact that Mr. Whitfield's ex-wife Cindy Whitfield was on title. The email states:

Teresa,

Thank you for your work on this. . .

I called **bank council** to get some advice on how to handle it.

(a) We need a title endorsement on Black Rush only. . . We can rely on your title opinion and existing policies for the others.
The e-mail to Stewart states that the maturity dates are not changing but they are. . . The maturity date on Black Rush was this past May.

(b) We also need an affidavit from Tony that these properties are owned and pledged for business purpose.

Thanks again. Felecia is getting you the updated payoff for Black Rush & **we should be good to close if you can satisfy the two requirements above**.

Best regards,

Scott

Email from Scott Warren to Teresa Farley and Felicia Pringle dated June 27, 2012, attached as Exhibit 13 to Dep. of S. Warren taken on November 13, 2013. (Emphasis added).

When Mr. Warren was asked under oath who "bank council" was, Mr. Warren identified the lawyer David Swanson. (Dep. of S. Warren, P. 48, L. 4). Although Mr. Warren identified Mr. Swanson in deposition as the source of the advice indicated above, Mr. Warren testified that he could not specifically remember his phone conversation with Mr. Swanson. (Dep. of S. Warren, P. 48, L. 21-23.) Mr. Warren stated that the advice in subsection (a) of the above email (regarding a title endorsement) came from David Swanson. (Dep. of S. Warren, P. 50, L. 12-18). When asked whether the advice to get a business purpose affidavit in subsection (b) above came from Mr. Swanson, Mr. Warren vacillated:

> Q. Did Mr. Swanson give you that advice, too, about needing the affidavit for business, that they're only pledged for business purpose?
>
> A. I don't know if that was advice of Swanson, or -- I can't recall that piece of it specifically.

(Dep. of S. Warren P. 50, L. 19-23)

When questioned again about the business purpose affidavit as being advice from Mr. Swanson, Mr. Warren again equivocated on the subject:

> Q. All right. And that was one of the items that Mr. Swanson had suggested with you on the previous E-mail about, (a) need a title endorsement, and (b) own and pledge for business purpose, correct?
>
> A. Again, my recollection of the conversations with Swanson is more around the endorsement -- title endorsement. **But, you know, business affidavit was on that E-mail you referenced, and as far as specific conversations with Swanson on the business purpose affidavit, I'm a little more fuzzy**.

(Dep. of S. Warren, P. 77:13-22)(emphasis added).

Mr. Warren was pressed further in his deposition about where the advice for a business purpose affidavit came from:

Q. [a]nd then you respond and say, "Thank you for your work on this. I called bank counsel to get some advice on how to handle it." And then you say, (a) need to get a title endorsement on Black Rush, da, da, da. And then you say, (b) "We also need an affidavit from Tony that these properties are owned & pledged for business purpose." Do you recall -- I'm assuming that that was part and parcel of your discussion with Mr. Swanson since the way you have the E-mail laid out, but it may not be, and that's all I was trying to figure out.

A. That -- I can -- you know, we're going off recollections, you know, prior conversations, and as far as what I can say with certainty, I remember a lot about the discussions as far as title endorsements, and I remember less about the business purpose affidavit. And if that was -- **it makes sense that it was discussed with Swanson.** I can't give you any specifics on that conversation. My recollection is not good enough.

Q. Okay. Let me ask you this then and I hear what you're saying: Is there somebody else that would have put that in as a demand about the business -- the affidavit signed for -- that the properties are owned and pledged for business purpose other than Mr. Swanson?

A. Is there somebody that would have put it in as a demand? You know, as you can see, group effort, third parties within the bank come up with the best closing package specific to this situation and, **yes, it's possible somebody else came up with that as a way to do it**.

Q. Because if it's not somebody else and this is an instruction coming from you to them, that we need (a) and (b), and all I want to know is, did the idea for (b) come from just you or did it come from somebody else, or maybe it came from Mr. Swanson, but you really don't remember?

A. Again, at this time, I don't remember enough to speak to that. I can go back through the E-mails and try to -- or prior conversations, whatever I can do to clarify it, but I cannot speak to that right now as far as where the idea came from.

Q. Okay.

A. And that's what's being asked I believe.

Q. Correct. And I think you're not sure if that was your idea --

A. Correct.

Q. -- given what you're telling me?

A. Correct.

Dep. of S. Warren, P. 80, L. 6 – P. 82, L. 4)

On one hand Mr. Warren is testifying the advice for a business purpose affidavit came from David Swanson, and moments later Mr. Warren concedes <u>that demand could have come from someone else</u>, and he wasn't sure.

Mr. Swanson, for his part, knew at deposition that the issue of asking Mr. Whitfield to sign an affidavit that his properties were owned and pledged for a business purpose was a hot potato, as the bank undeniably knew at this time that the Black Rush loan was a consumer loan in order to fulfill Mr. Whitfield's family court obligations. Essentially Harbor National Bank's "demand" that Mr. Whitfield swear out an affidavit that Black Rush was for a "business purpose" as a condition of their renewing the Black Rush loan was asking Mr. Whitfield to lie about who was living in the property and why. Presumably that is why Mr. Swanson was emphatic that he did not give advice to Mr. Warren regarding procuring a business purpose affidavit (subsection (b) of the email):

Q. Okay. Did you advise Mr. Warren that -- that he needed to procure an affidavit from the borrower, that the property was to be pledged for business purposes?

A. **No. I didn't get into that. I read about that in that -- I guess his deposition, but he didn't ask me about that particular issue**.

Q. Okay. So that wasn't advice you gave him?

A. **No.**

Q. Okay. If Mr. Warren said that, would you disagree with him?

A. If he said what?

Q. If he suggested that -- or stated that you told him to get a business-purpose affidavit from Mr. Whitfield for the house that the ex-spouse was living in? If he said that, would you disagree with him?

A. **Yeah. I think I would disagree with that.**

(Dep. of D. Swanson, P. 43, L. 16 – P. 44, L. 10)(emphasis added).

Curiously, Mr. Warren later in 2015 (nearly three years into the lawsuit) testified that Mr. Swanson was incorrect, and that they definitely discussed the issue of procuring a business purpose affidavit:

Q: Regarding the second page of Exhibit 5, your E-mail that starts, "I called bank counsel," I believe I asked this of you in your individual deposition. Subparagraph (b) where it says, "We also need an affidavit from Tony that these

properties are owned and pledged for business purpose." You've had a chance to review Mr. Swanson's testimony ?

A. Correct.

Q. Mr. Swanson said that that demand did not come from him?

A. Correct. It said that.

Q. And do you agree with that?

A. **No, I don't agree with it.**

Q. Okay. You're pretty sure he said you better get a business purpose affidavit, or something to that effect?

A. **Yes. It was discussed and, yes.**

(Dep. of S. Warren taken March 24, 2015, P. 42, L. 22 - P. 43, L. 3 -14)(emphasis added)

In 2013, Mr. Warren testified that he discussed the business purpose affidavit with Mr. Swanson although he was a "little fuzzy." A year and half later, seemingly, Mr. Warren's memory improved, and, as stated above, Mr. Warren testified that the business purpose affidavit was discussed with Mr. Swanson and that the demand for the endorsement came from Mr. Swanson.

There are only two logical interpretations of Mr. Warren and Mr. Swanson's conflicting testimonies on the demand for a business purpose affidavit. According to Mr. Warren, a business purpose affidavit was discussed with Mr. Swanson and demanded by Mr. Swanson, and then Mr. Warren incorporated the title endorsement and business purpose affidavit demands into his June 27, 2012 email as a condition to close. In this scenario, both the bank and its lawyer were asking Mr. Whitfield to suborn perjury that Black Rush was a commercial loan versus a consumer loan by signing the business purpose affidavit. Mr. Warren and Mr. Swanson's agreement on this issue is evidence of a conspiracy and an abuse of process, even if Mr. Warren's testimony on the business

purpose affidavit is accepted as true. The business purpose affidavit was actually drafted by Mark Weeks law office, and was produced in response to a document subpoena served upon them. (See Business Purpose Affidavit, attached hereto as Exhibit "D").

According to Mr. Swanson's testimony, a business purpose affidavit was never discussed when he was consulted. If this is believed, Mr. Warren's representation that a business purpose affidavit was discussed and incorporated into the bank's condition to close to the closing agent is false and a fraud. Either way, the conflicting testimonies surrounding the June 27, 2012 email are evidence that at the very least, some of the advice offered in the June 27, 2012 email as a condition to close was not given- which is evidence of fabrication. One need look no further than Mr. Warren and Mr. Swanson's respective testimony that each other are lying for this determination. This is de facto proof that the "advice" for both subsections (a) and (B) contained in the e-mail is unreliable and fabricated.

There is also other evidence from the bank itself that Mr. Swanson was not involved with transaction on or before the closing on June 28, 2012. The bank did seek advice from on the Monday after the failed closing on Thursday, June 28, 2012 from Patti Blenden, an outside (non-employee) regulatory compliance expert regarding the attempted closing. If Mr. Swanson was involved pre-closing, then why did Mr. Warren seek a non-lawyer's advice after closing ? Why did he not go back to Mr. Swanson, if Mr. Swanson was in fact already involved ? Ms. Blenden told the bank on Monday July 2, 2012 after the failed closing via email:

> "[t]his is a mess ! **Definitely get the bank's attorney involved** from a perspective of a proper security rights. If the divorce decree made him solely responsible for the wife's residence, she may not have to sign anything.....Unless the wife actually signed a rental

> agreement with the husband, then it is definitely not rental property **and therefore a consumer loan**. If the husband is responsible for providing the home to the wife per the divorce decree, **it is really important to see if the bank attorney believes the bank is protected**."

Email from Patti Blenden to Mark Shannon and Kathy Hall, attached as Exhibit "1" to Dep. of P. Blenden. (emphasis added).

Obviously, this email is evidence, again, that no attorney was involved at this point in time, four days after the failed closing. Ms. Hall was deposed and testified that she could not recall Mr. Warren telling her that she had gone to Mr. Swanson for advice (Dep. of K. Hall, P. 35, L. 1-11). . Mr. Mark Shannon, an internal compliance officer at Harbor National Bank, and recipient of the above email responded to Ms. Blenden's email above and stated:

> "I think they are trying to kill me with all these wild questions right off the bat....haha ! **That's what I was thinking when I was listening to the loan officer tell us this over the phone – this screams attorney involvement**."

Email from Mark Shannon to Patti Blenden, attached as Exhibit "1" to Dep. of P. Blenden (emphasis added).

The loan officer identified in the email re-printed above is Mr. Scott Warren. Again, if Mr. Shannon had just spoken with Mr. Warren over the phone about the situation, why would Mr. Shannon state after the closing that the situation "screamed attorney involvement " ? Mr. Shannon was deposed and testified that Mr. Warren did not mention anything about getting a title endorsement or business purpose affidavit at the time of his call with Mr. Warren. (Dep. of M. Shannon, P. 28, L. 24 – P. 29, L. 11). This is evidence the advice was never given.

F. "Bank council" is not the same as thing as bank counsel.

Mr. Warren's email of June 27, 2012 states he called "bank council" not bank counsel. "Bank council" is a part of the South Carolina Bankers Association (the "SCBA") which is an 18 member council established in 1994 that represents community banks in South Carolina. "Its mission is to recognize and voice the unique needs of community bankers and to review and recommend products and services that may help make community banks more profitable and efficient." In 2012, Harbor National Bank was one of the SCBA's member banks, and could have been whom Mr. Warren actually contacted for the "advice" given in the June 27, 2012 email. (See SCBA pamphlet, attached hereto as Exhibit "E"). Other national community bank council exist for the purpose of providing banks in each State "expert on call" advice[4]. If Mr. Warren's email is read literally as it reads, it says he called a "bank council" – not the bank's counsel or attorney. If Mr. Swanson's testimony is to believed, the Harbor National Bank loan officer does not know how to spell, and misspelled "bank counsel." Additionally, the flavor of the advice from the email, especially subsection (b)- concerns a matter of regulatory concern- one to which a banker- rather than a lawyer- would be concerned with. If this advice was given from a non-lawyer bank council, the advice could constitute the unauthorized practice of law. This is evidence the advice was never given.

G. Mr. Swanson's legal justifications for his "advice" is not the law, anywhere.

Importantly, Mr. Swanson admitted in his deposition that the Black Rush Property transaction **could have been renewed without a title endorsement:**

[4] See, for example, The American Bankers Association Community Banks Council, https://www.aba.com/Tools/Function/Community/Pages/CommunityBanking_about.aspx

Q. Let me ask you this: Could this transaction have been renewed without the title endorsement?

A. **It probably could have.**

(Dep. D. Swanson, P.28, L. 19 - 22).

Not only did Mr. Swanson concede the Black Rush property transaction could have proceeded without the endorsement, but Mr. Swanson acknowledged that he was not consulted regarding the bank's ability to close Mr. Whitfield's other 8 loans:

Q. Did Mr. Warren discuss the fact that the bank was agreeing to renew eight other properties in addition to the – the one about this – the marital property?

A. No. **He didn't mention anything about any other loans**.

Q. He didn't. Is there any reason in your mind that renewing those loans, that it would be necessary to get a title endorsement for the marital home in order to do the renewal of the other loans absent a contractual agreement between the parties to that effect ?

A. **Yeah. And I -- I don't -- I don't know anything about these other loans, so, you know, I wasn't asked about – he didn't bring up any other loans**.

Q. Let's put it this way. Your concern, in asking for the title endorsement, was for potential claims that the spouse, ex-spouse may have with regard to **that property only**, correct?

A. **Correct**.

(Dep. of D. Swanson, P. 42, L.19 – P. 43, L. 15)(Emphasis added).

Despite Mr. Swanson's testimony that he was not consulted regarding anything to do with the eight other loans, the bank has raised the "title endorsement defense" as a defense to Mr. Whitfield's counterclaims in all of the other foreclosure actions pending in Berkeley and Dorchester Counties[5]. This is de facto proof that the bank is using Mr. Swanson's

[5] *See* BNC Reply to Fifth Amended Answer and Counterclaims, filed March 24, 2016, 2012-CP-08-2618, Reply to Fourth Amended Answer and Counterclaims, filed March 24, 2016, 2012-CP-08-3478, Reply to Fourth Amended Answer and Counterclaims filed March 24, 2016 2014-CP-18-1792, Reply to Fifth Amended Answer and Counterclaims filed March 24, 2016, 2014-CP-18-1793, Reply to Amended Answer and Crossclaims filed March 24, 2016, in 2014-CP-358.

advice to defend its actions in the outside counties *when Mr. Swanson himself acknowledges he was not consulted regarding the other loans*.

Mr. Swanson also admitted Mrs. Whitfield's ownership interest was not a title defect. Title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on title. Firstland Vill. Assocs. V. Lawyer's Title Co., 277 S.C. 184, 186, 284 S.E.2d 582, 583 (1981). A title insurer is generally liable for losses or damages caused by defects in the property's title, and defects for which title insurance policies provide coverage may generally be defined as liens and encumbrances that result in a loss in the title's value. Whitlock v. Stewart Title Guar. Co., 399 S.C. 610, 615, 732 S.E.2d 626, 628 (2012).

Mr. Swanson conceded the ½ interest title transfer to Mr. Whitfield's wife was not a title defect:

> Q. Okay. All right. The transfer, the deed transfer to the ex-spouse, do you believe that that's a defect in the title?
>
> A. The deed transfer to the spouse?
>
> Q. Right. Would you characterize that as a title defect?
>
> A. No.
>
> Q. Okay.
>
> A. Well, let me -- I mean, it was -- no. No, it's not a defect. It was just a transfer -- a transfer of one-half undivided interest.

(Dep. of D. Swanson, P. 44, L. 11 - 22).

Therefore, title insurance would not have provided any benefit to the bank because Mrs. Whitfield being on title was neither an encumbrance, nor a title defect. Finally, Mrs. Whitfield never needed to sign the new mortgage because she expressly took title subject to the Harbor National Bank mortgage which was recorded in 2007. (See Affidavit of Peter

Seitz, ¶ 5, attached hereto as Exhibit "F") (See also, Plaintiff's Foreclosure Complaint referencing Mrs. Cindy Whitfield's on-half interest, ¶ 22, "her claim to the said property **is subordinate** to the claim of the Plaintiff herein").

Finally, Mr. Whitfield has retained a bankruptcy expert, Mr. Richard Gleissner, to opine, and specifically rebut the substantive legal testimony of David Swanson. (See Affidavit of Rick Gleissner, attached hereto as Exhibit "G"). Mr. Swanson's justification for his supposed advice was predicated on a theory called "equitable subordination," wherein Mr. Swanson was concerned that Mrs. Cindy Whitfield could object to the transaction such that the bank's claim of mortgage lien would be subordinated to her one-half fee interest. Mr. Gleissner has opined that equitable subordination has no application to the instant matter, is applied in bankruptcy contexts, and that Mr. Swanson's advice (assuming it was given) would have been incompetent, if rendered. In plain English: the advice is non-sensical. This too is evidence the advice was never given.

H. Mr. David Swanson's supposed advice was never brought up at the closing itself or in the summer's long communications that Harbor National Bank's previous lawyer made with Mr. Whitfield's previous lawyers after the failed closing on June 28, 2012 and before the foreclosure lawsuit was filed on September 7, 2012 as a reason for non-renewal. Mr. Swanson's advice was never even proffered as a defense to Mr. Whitfield's counterclaims until a year into this litigation.

The closing attorney, Mark Weeks, reviewed the deposition of David Swanson after Mark Weeks' deposition, and supplied an affidavit ***that stated in no uncertain terms that he never spoke to David Swanson, that Scott Warren (or anyone) never spoke to him about Mr. Swanson's involvement at the time, and that if Mr.***

Swanson's opinions were so critical, the bank should have brought them to his attention which they never did:

1. My name is Mark Weeks, I am over the age of eighteen, and have personal knowledge of the facts stated herein.

2. Since I gave my first affidavit in this matter and deposition last year, I have had occasion to review the deposition transcript of David Swanson, given in this matter. Notably, Mr. Swanson reviewed no relevant documents (the deed, mortgage, or my title opinion) in rendering his opinions to the bank.

3. First, having reviewed the transcript, I do not believe the bank had a valid or legal reason in relying upon Mr. Swanson's opinion in deciding not to close on Mr. Whitfield's loans. Mr. Swanson's opinions given to the bank were limited to advice rendered concerning the Black Rush property—which had nothing to do with the eight other loans the bank sent to my office to close. For this reason, there was absolutely no valid or legal reason that these eight loans could not have been closed. It is my opinion that Harbor National Bank had absolutely no valid or legal reason to refuse to close the loan renewal of the Black Rush property, either. **There was no new mortgage or no new modification of mortgage provided to my office for Mrs. Whitfield to sign. No one advised my office that a new mortgage or new modification of mortgage was required to be signed in order to renew these loans. Neither was not needed in fact or law to renew the loan, and I did not require either.**

4. The Black Rush loan could have been renewed had it not been for the bank's unilateral decision to demand a title endorsement. One was not required, and I could have closed this loan and still ensured the bank maintained its priority interest in the collateral as I had conducted a title search on all of the properties and found there to be good and marketable title to all.

5. Second, it appears Mr. Swanson himself conceded in his deposition that the Black Rush loan could have been closed *without* the title endorsement. In light of this statement I especially believe the bank was not reasonable nor acted in good faith in relying on Mr. Swanson's advice in directing me not to close the Black Rush loan. In fact, I would say the opposite is true: I believe the bank foreclosed on Mr. Whitfield's loans without a valid or legal reason. **If Mr. Swanson's opinions were so important to the bank, they should have brought them to my attention, which they never did.**

6. **I was never told by Mr. Scott Warren (or anyone at the bank) at the closing on June 28, 2012 (or at any point in time) that Mr. Swanson had given any advice to the bank that it was relying upon in not deciding to close. Furthermore, Mr. Swanson never contacted me at any time to discuss his opinions**.

7. **Had I been so contacted by Mr. Swanson, or had Mr. Warren indicated his reasons (as supposedly indicated by Mr. Swanson) for not closing the loans on June 28, 2012, I would have advised all parties**

concerned that all of the loans could have, and should have been, closed that day.

8. If Mr. Swanson's testimony was the basis for the bank's refusal to close the loans, I believe the bank was without excuse in its decision not to close any of the loans. In particular, there was no risk whatsoever to the bank in closing the Black Rush loan based upon Mr. Swanson's hypothetical concern that Mrs. Whitfield would object to the transaction—since Mrs. Whitfield was the main beneficiary of the renewal, as it is my understanding she lives in the home.

9. Furthermore, Mr. Swanson based his recommendation upon a theory called "equitable subordination," indicating that Mrs. Whitfield's ½ ownership interest could jeopardize the bank's previous first secured mortgage interest if the loans were to renew without her consent. I have closed over 40,000 real estate loans in my career and have never seen a single instance in which a property owner defeated a bank's claim of lien by deeding a portion of its ownership interest to another person. I do not believe there is law in South Carolina or any State that stands for that proposition.

See Supplemental Affidavit of Mark Weeks, attached hereto as Exhibit "H" (emphasis added). Mr. Warren also conceded in deposition that he did not identify David Swanson to Mark Weeks as a source of the reason the bank decided not to close the loans (Dep. of S. Warren taken March 24, 2015, P. 9, L. 19 – P. 11, L. 18). Mr. Warren also admitted that he did not share Mr. Swanson's advice with Mr. Whitfield after the failed closing when having a discussion with Mr. Whitfield in Mark Weeks' law office parking lot regarding why the loans were not renewed. (Dep. of S. Warren taken March 24, 2015, P. 11, L. 19 – P. 12, L. 8).

After the failed June 28, 2012 loan closing, there were numerous written and oral communications between Harbor National bank previous attorney, Mr. Robert Bernstein, and Mr. Whitfield's previous attorneys Blair Jennings and Steve McKenzie. There were also numerous attorney-client email communications between Mr. Robert Bernstein and the officers of the bank that were inadvertently produced by Mr. Bernstein to Mr. Whitfield in the litigation. Nowhere in any of these documents is "David Swanson" or "title

endorsement" mentioned or brought up as reason why the bank could not renew the loans.

On June 6, 2014, Mr. Whitfield served a subpoena on Mr. Bernstein for any documents regarding communications that were within Mr. Bernstein's possession relating to offers and rejections the bank made to Mr. Whitfield, and documentation concerning the advice of Mr. David Swanson to procure a title endorsement. The bank withheld producing certain documents of Mr. Bernstein's on the basis of attorney-client and work-product privileges. In response, Mr. Whitfield filed a motion to compel on June 27, 2014 and argued to this Court that the privileges were waived due to the bank putting the advice of its counsel at issue. This Court agreed, and entered an Order filed in this matter on September 17, 2014 which allowed production of certain documents from the Bernstein subpoena that had been withheld and the Court stated in its Order the documents were, "**discoverable due to the waiver by the Plaintiff of the attorney client privileges and work product privileges due to Plaintiff's assertion of the advice of counsel defense**." This Order is the law of the case. Mr. Bernstein's deposition was thereafter taken on November 10, 2014, and Mr. Bernstein was asked:

Q: I assume you knew there was a closing that had been established ?

A: I knew that there had been a planned closing which fell through.

Q: Okay. Did you inquire as to anybody as to why it didn't close ?

A: I spoke to my client as to what happened.

Q: And that would have only been Mr. Rivers and Mr. Werking ?

A: Correct.

Q: **Did they ever mention the name David Swanson to you in those conversations** ?

A: **You know, it depends upon whether -- I guess my question is whether or not the lack of communication from a client constitutes attorney-client**

privilege or not. So you're asking me if, yes, it's attorney-client privilege, or no, I t's not attorney-client privilege. Is that the way you look at it ? Or is it the fact that there's a discussion- I believe the general topic of discussion is protected, and for that reason, I'm asserting the attorney-client privilege.

Q: Okay. **Did you ever contact Mr. Swanson, Mr. David Swanson, after you were retained, but before the July 25, 2012 meeting** ?

A: **I did not.**

Q: Is there any reason why you didn't ?

A: We were in the process of trying to meet to resolve the problem, We weren't in litigation mode at that point.

Q: **Well, wasn't the whole reason why it didn't close was because of Mr. Swanson's advice ? Wouldn't it have been prudent to follow up with the person who said there was a problem ?**

A: **I wasn't clear why it didn't close.**

Dep. of R. Bernstein, P. 32, L. 7 – P. 33, L. 20). (emphasis added).

The above testimony is evidence that immediately after the failed closing, Mr. Bernstein did not know the reason why the loans were not renewed, and the testimony is further evidence that Mr. Swanson's name was never even mentioned as an excuse for not renewing the loans, in the month after the failed closing on June 28, 2012.

Harbor National Bank filed its foreclosure lawsuit in this case on September 7, 2012. Mr. Warren's deposition was taken a full year later on November 13, 2013. Before Mr. Warren's deposition was taken, David Swanson's name was never mentioned, or put on any witness list, or his advice never brought up or made a defense to any of Mr. Whitfield's counterclaims. In fact, before Mr. Warren's deposition was taken, ***Harbor National Bank admitted in its pleadings it, " made an agreement to renew the loan"***[6] in response to Mr. Whitfield's original breach of contract counterclaim filed on April 1, 2013. Importantly, there was no mention or stated defense in the bank's first Reply to Mr.

[6] See Paragraph 14 of Harbor National Bank's Reply to Mr. Whitfield's Counterclaims, filed April 25, 2013.

Whitfield's counterclaims filed on April 25, 2013 that Mrs. Whitfield was required to sign a mortgage, or that a "title endorsement" was required to renew the loans. It was not until the time when Mr. Warren's November 13, 2013 deposition was taken, that Mr. Swanson's advice was ever put forth as a justification and defense for the bank's actions. This is evidence the advice was never given.

CONCLUSION

There is more than a scintilla of evidence that Mr. Swanson was never involved in the transaction at the time it has been claimed. Namely, and as set forth above in detail:

- A) No documents at the law firm corroborating that legal advice was actually given;
- B) No record of the call or calls Mr. Warren claims he made when those calls were made;
- C) Internal law firm data containing the telephonic records of calls destroyed after the bank waived its privilege with regard to documents held at the bank covering communications with Mr. Swanson and the bank, supporting a negative inference instruction to the jury;
- D) Mr. Swanson's initial testimony Mr. Warren told him the closing had already happened when he called for advice, supporting Mr. Whitfield's allegations of fabrication;
- E) Mr. Swanson and Mr. Warren's conflicting testimony regarding whether Mr. Swanson gave advice for the bank to get a business purpose affidavit as a condition of closing the renewals;

- F) Mr. Warren stating in an email pre-closing that he called "bank council," not bank counsel, or the bank's lawyer or attorney;
- G) Mr. Swanson's supposed advice has no legal basis; and
- H) Mr. Swanson was never mentioned as a source of the advice for the title endorsement at the time of closing to the closing attorney, to Mr. Whitfield, or to Mr. Bernstein before the law suit was filed, up until November 13, 2013 when Mr. Scott Warren's first deposition was taken.

Because all this constitutes evidence that the advice was never given at the time Mr. Warren and Mr. Swanson claim it was made, if the finder of fact decides by a preponderance of evidence the advice was never given as claimed, it can also rightly conclude that the bank and David Swanson engaged in a scheme to fabricate a legal defense for the bank that was based on events that never happened. There is record evidence that Mr. Swanson and the bank officers are longstanding friends and run in the same social circles. As such, Mr. Swanson had personal motives for assisting Harbor National Bank in whatever manner he could. Mr. Swanson, in speaking of the bank president and CEO Charlie Rivers and Willard Stout executive vice president:

> **They're my friends**. I know Charlie Rivers, Willard Stout. I've known them both for a long time.

Dep. of D. Swanson, (P. 9, L.11-13)

> **I have known Charlie Rivers all my life, friend of mine.**

Dep. of D. Swanson P. 11, L. 3-4

> Q. Do you have social relationships with any of the persons involved in this case from Harbor National Bank, now Bank of North Carolina?
>
> A. Which persons are you talking about?
>
> Q. Well, we can go through a list of them, but, for example, Charlie Rivers?

A. Yes, I do have a social relationship with him.

Q. You have known him most of your life?

A. Yes.

Q. Who else?

A. That's probably it down there. I see Willard from time to time over in the country club

Dep. of D. Swanson taken April 17, 2017, (P. 72, L. 1-12).

Mr. Swanson, in speaking of the Harbor National Bank board members and investors, also stated:

Q. Are any of them members of the Carolina Yacht Club or Country Club II?

A. Yeah, a bunch of them.

Dep of D. Swanson taken April 17, 2017 (P. 74, L. 2-4)

The law regarding what constitutes a civil conspiracy in South Carolina states:

> Conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators and other circumstances. [citations omitted] Civil conspiracy is an act which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence; concert of action, amounting to a conspiracy, may be shown by circumstantial as well as direct evidence. [citations omitted]. And in order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise. Proof showing concert of action in the commission of the unlawful acts, from which the natural or reasonable inferences arise that the acts were in furtherance of the common design of the alleged conspirators, is sufficient; at least to establish a prima facie case of conspiracy. [citations omitted]

Island Car Wash, Inc. v. Norris, 292 S.C. 595, 601-02, 358 S.E.2d 150, 153 (Ct. App. 1987).

Here, the relationship of Mr. Swanson and the bank officers and investors is long standing, close, and also exclusive. On the authority of Island Car Wash, Mr. Whitfield has evidence of a civil conspiracy as he has proof the advice of counsel defense was based upon events that never occurred, and that a combination of persons (Scott Warren and David Swanson) was made, for the purpose of an unlawful objective: to wrongfully benefit the bank in defense of Mr. Whitfield's counterclaims. Although Mr. Warren and

Mrs. Swanson had conflicting testimonies on the demand for a business purpose affidavit, both agreed that a call for advice was placed pre-closing regarding procurement of the title endorsement. "A conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators, and other circumstances. Importantly, a civil conspiracy is an act, which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence." Roddey v. NationsWaste, Inc., No. 2005-UP-472, 2005 WL 7084315, at *4 (Ct. App. 2005). As for the condition for Mr. Whitfield to sign a business purpose affidavit (covering Black Rush which the bank's own compliance analyst Patti Blenden deemed a consumer loan), if Mr. Warren's testimony is accepted as true, both he and Mr. Swanson discussed procuring a business purpose affidavit from Mr. Whitfield, and Mr. Swanson confirmed it was needed. This is also evidence of a conspiracy, if Mr. Warren's own testimony is accepted as true.

In speaking of the tort of abuse of process, our Court of Appeals has held, "the tort is intended to compensate a party for harm resulting from another's misuse of the legal system." TCI Media, Inc. v. NuVox Commc'ns, Inc., No. 2009-UP-004, 2009 WL 9524541, at *3 (Ct. App. 2009) *citing* Food Lion, Inc. at 74 n .5, 567 S.E.2d at 255 n. 5. The law in South Carolina defines abuse of process as the following:

> "Abuse of process has been defined as " 'the employment of legal process for some purpose other than that [for] which it was intended by the law to effect-the improper use of a regularly issued process.' "The elements of abuse of process are "an ulterior purpose and a willful act in the use of the process not proper in the regular course of the proceeding." Furthermore, "[t]he improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself."

Whitfield Const. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 223, 525 S.E.2d 888, 897 (Ct. App. 1999).

* * *

> As to the second, or "willful act" element, our supreme court has stated that "[s]ome definite act ... not authorized by the process or aimed at an object not legitimate in the use of the

> process is required." [citations omitted] Thus, the element comprises three components: 1) a "willful" or overt act 2) "in the use of the process" 3) that is improper because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective.

Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 351 S.C. 65, 71, 567 S.E.2d 251, 253–54 (Ct. App. 2002).

In this case, Messrs. Swanson and Warren agreeing to construct a legal defense based upon factual events that never happened, and taking the further definite act of providing false testimony in a deposition setting is plainly not authorized or sanctioned under legitimate process as each took an oath to swear to tell the truth. Assuming as this Court must for summary judgment purposes that they fabricated the phone call after the fact, that is more than simply not telling the truth in a deposition: it is using the legal process for a means for which it was not intended: providing false testimony in a deposition setting to get something of value in return, a collateral advantage. To state the obvious, Harbor National Bank and Haynesworth SInkler Boyd, P.A. have recurring and longstanding legal and financial relationships separate and apart from Mr. Whitfield (See Dep. of D. Swanson and B. Nicholson taken April 18, 2017).

It is abundantly clear that Harbor National Bank has benefited from Mr. Swanson's testimony that he gave advice to the bank, as the bank has used his testimony as a defense in its pleadings to Mr. Whitfield's counterclaims. The bank has also used Mr. Swanson's advice continually throughout this litigation as a means of defending its actions, see for example, Plaintiff's Memorandum In Support of its Summary Judgment Motion filed September 15, 2014, "On the advice of its counsel , David Swanson, Esq., Harbor refused to close without a title endorsement or co-signature from Cindy Whitfield." The bank also relied up Mr. Swanson's advice in support of its Motion for Summary

Judgment lodged in Dorchester County (*See* Memoranda filed June 23, 2014 in Support of Summary Judgment in Case Nos. 2012-CP-18-2119, 2012-CP-18-2738).

Mr. Whitfield has evidence of abuse of process, because, if the allegations are true that no call or advice was made at the time claimed (which for summary judgment purposes the Court must accept as true), the sworn testimony by each Mr. Scott Warren and Mr. David Swanson was a misuse and perversion of the legal process by fabricating a legal defense (advice of counsel) through the use of deposition testimony towards an unlawful end: providing the bank an excuse to shirk its contractual obligations with Mr. Whitfield. Additionally, if Mr. Warren is to be believed, he and Mr. Swanson discussed the procuring a business purpose affidavit from Mr. Whitfield as a condition to close the renewals **and Mr. Swanson recommended he get it**:

> Q. Okay. You're pretty sure he said you better get a business purpose affidavit, or something to that effect?
>
> A. **Yes. It was discussed and, yes.**

Dep. of S. Warren taken March 24, 2015, P. 42, L. 22 - P. 43, L. 3 -14)(emphasis added).

Clearly, asking a person to misrepresent the true nature or his real estate, in the form of an affidavit, in order for the bank to fulfill its contractual obligations is a misuse and perversion of the legal process, and an abuse of process.

South Carolina law has broadened the tort of abuse of process to include the affidavits or depositions, or any matter attendant to litigation:

> To sustain a claim for abuse of process, it is axiomatic that "**the judicial process must in some manner be involved**." Keeton, *supra,* § 121 at 898; *see Kirchner v. Greene,* 294 Ill.App.3d 672, 229 Ill.Dec. 171, 691 N.E.2d 107 (Ill.Ct.App.1998) (holding that where no court process is involved there can be no abuse of process); 72 C.J.S. *Process* § 106 at 697 (1987) ("[I]f the process is not used at all, no action can lie for its abuse."). Although no South Carolina case has defined the term "process" in the context of the tort, we agree with Food Lion that the trial court erroneously circumscribed its meaning by giving it the technical construction found in *Royal Exchange Assurance of London v. Bennettsville & C.R. Co.,* 95 S.C. 375, 79 S.E. 104 (1913). **In our view, "process," as it pertains to the**

> **abuse of process tort, embraces the full range of activities and procedures attendant to litigation**. *See Hart v. O'Malley,* 436 Pa.Super. 151, 647 A.2d 542, 551 (Pa.Super.Ct.1994) ("The word 'process' as used in the tort of abuse of process has been interpreted broadly and encompasses the entire range of procedures incident to the litigation process.") (citation omitted); *Nienstedt v. Wetzel,* 133 Ariz. 348, 651 P.2d 876, 880 (Ariz.App.1982)

Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 351 S.C. 65, 70, 567 S.E.2d 251, 253 (Ct. App. 2002)

In this case, the judicial process was "in some manner involved" through Mr. Swanson and Mr. Warren's use of either sworn deposition testimony to manufacture a legal defense Harbor National Bank never had in fact, or, asking Mr. Whitfield to swear to a misrepresentation in the form of an affidavit as a condition to renew the bank's contractual obligations.

"The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 351 S.C. 65, 69, 567 S.E.2d 251, 253 (Ct. App. 2002). In Pallares v. Seinar 407 S.C. 359, 756 S.E.2d 128 (2014) the South Carolina Supreme Court reversed a trial court's granting of summary judgment on an abuse of process claim. The Court determined there were genuine issues of fact concerning the elements of the abuse of process claim. Id at 134. In the case, a homeowner caused to be filed a complaint in probate court against a neighbor that were alleged to be baseless. The Court determined that filing the probate court petition without a sufficient basis to do so constituted an "ulterior motive" and a "willful act":

> "We find Respondents' act of escalating this "bad neighbor" dispute to the point of seeking the mental commitment of Pallares constitutes evidence of both an ulterior motive and a willful act. The motive was their obvious dislike of Pallares and their alleged desire to drive her from the neighborhood. As for the element of a willful act, Respondents sought the commitment of Pallares when they apparently had no legal authority to do so"

Id.

In this case, there is no difference with Messrs. Swanson and Warren use of deposition testimony which Mr. Whitfield alleges to have no factual basis (or their asking Mr. Whitfield to lie in the form of an Affidavit if Mr. Warren is to believed), and the neighbors institution of a civil complaint that was deemed to be evidence of an ulterior motive and a willful act. Mr. Whitfield has been damaged by the conspiracy incurring unnecessary litigation expense in disputing the bank's advice of counsel defense. Mr. Whitfield has also been damaged by the abuse of process by Messrs. Swanson and Warren as the claimed conditions in the June 27, 2012 email are the basis of the bank's refusal to honor its contractual agreements to renew the loans with Mr. Whitfield, and the resulting damages of the ensuing foreclosure and receivership proceedings the bank since instituted.

This Court, for purposes of summary judgment, must accept all allegations and facts stated herein in support thereof as true. Assuming Messrs. Swanson and Warren jointly collaborated a scheme to provide a legal defense to the bank when they had none in fact, Mr. Whitfield respectfully states that he has brought forth both more than a scintilla of evidence of a civil conspiracy and an abuse of process as stated herein. Accepting Mr. Warren's testimony as true that he and Mr. Swanson collaborated and asked Mr. Whitfield to misrepresent his properties in the form of a sworn affidavit, Mr. Whitfield respectfully states he has brought forth more than a scintilla of evidence of a civil conspiracy and an abuse of process as stated herein. For these reasons, Mr. Swanson's motion must be denied.

Respectfully submitted,

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S.C. Bar No. 101559

&

Daniel S. Slotchiver, Esquire
SLOTCHIVER & SLOTCHIVER, LLP
44 State Street
Charleston, SC 29401
Phone: (843) 577-6531
Facsimile: (843) 577-0261
dan@slotchiverlaw.com
S.C. Bar No. 15129

Attorneys for Defendant Anthony M. Whitfield

_____, 2017
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Harbor National Bank,

Plaintiff,

v.

Anthony M. Whitfield,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

C.A. No.: 2012-CP-10-5887

AMENDED AFFIDAVIT OF BOYD B. NICHOLSON, JR.

Personally appeared before me, Boyd B. Nicholson, Jr., who being duly sworn, deposes and states as follows:

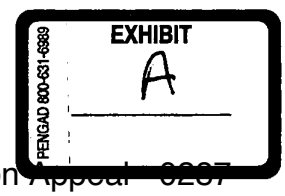
1. I am over the age of eighteen (18) and am competent to testify to matters set forth herein based upon my personal knowledge and records available to me in the ordinary course of my business.

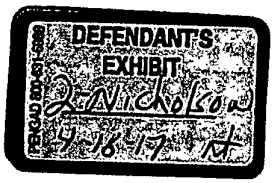
2. I am a shareholder with the law firm of Haynsworth Sinkler Boyd, P.A., in Greenville, South Carolina, and serve as the Managing Director for the firm's Management Committee.

3. I am familiar with the notice of deposition for Rule 30(b)(6) deposition for Haynsworth Sinkler Boyd, P.A., and the accompanying subpoena *duces tecum* requiring that the law firm produce certain documents.

4. I have been informed that at a hearing before the Court on July 20, 2016, on Defendant Whitfield's motion to compel, the Court limited the firm's production requirement as to the billing records of Plaintiff for the years 2009 through 2012 to only those records relating to Anthony M. Whitfield.

5. I am also aware that during the hearing the Court gave the following instruction:





THE COURT: --- then submit an affidavit from whoever your managing attorney is at Haynsworth an affidavit stating that there are no records, okay. And I want in that affidavit if some records appear at a later date then he is subject to perjury and contempt of court. I want that affidavit. If you don't have it fine; that's great. But I want that affidavit from your managing partner you understand?

6. I am aware that the Court subsequently entered an order on September 9, 2016 that stated "Defendant's Motion to Compel filed on 6/2/16 is denied. However, an affidavit must be submitted stating that the records in question do not exist. If an affidavit is not produced, the lawyers are subject to contempt."

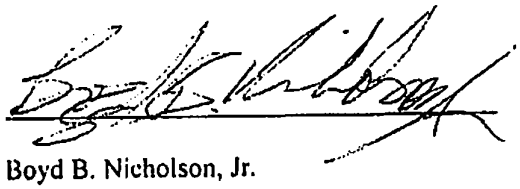
7. I am providing this affidavit pursuant to the Court's order.

8. I have personally reviewed all of the printed invoices from the firm to Harbor National Bank for the years 2009 through 2012. Additionally, I have performed electronic searches of all firm time entries related to Harbor National Bank from 2006 to the present using the following search terms: Whitfield, Whit, Anthony, Tony, Warren, Scott, endorsement and Black Rush.

9. For the years 2009 through 2012, the firm has never charged Harbor National Bank for any fees or services which relate to Anthony M. Whitfield.

10. As full disclosure, after this lawsuit was filed in 2012, fees were incurred and charged to Harbor National Bank for an associate's work relating to previous subpoenas to the firm and the deposition of third-party defendant, David Swanson. These fees are related to the defense of the case and not related to any transactional work and, therefore, it is our understanding this would not fall within the scope of the production required by the Court. Furthermore, it is protected by attorney-client privilege and the attorney work product doctrine.

FURTHER AFFIANT SAYETH NOT.



Boyd B. Nicholson, Jr.

SWORN TO AND SUBSCRIBED BEFORE ME

this 31st day of October, 2016

Notary Public for South Carolina

My Commission Expires: 3/12/2019

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

ONE NORTH MAIN, 2ND FLOOR (29601-2772)
POST OFFICE BOX 2048 (29602-2048)
GREENVILLE, SOUTH CAROLINA
TELEPHONE 864.240.3200
FACSIMILE 864.240.3300
WEBSITE www.hsblawfirm.com

J. DERRICK QUATTLEBAUM
DIRECT DIAL NUMBER 864.240.3249
EMAIL dquattlebaum@hsblawfirm.com

April 28, 2017

VIA EMAIL (dan@slotchiverlaw.com) AND U.S. MAIL
Daniel Scott Slotchiver, Esquire
Slotchiver & Slotchiver, LLP
44 State St.
Charleston, SC 29401

Re: Harbor National Bank v. Anthony M. Whitfield
C.A. No.: 2012-CP-10-5887

Dear Dan:

I am writing in response to your April 21, 2017 letter requesting Firm records indicating "when the hard drive containing the phone logs was destroyed." For clarification, the Firm did not create or maintain "phone logs" or other documents identifying telephone calls to or from the Firm. Rather, the Firm's previous telephone and computer systems recorded data on a hard drive consisting of the telephone numbers of incoming and outgoing telephone calls. The data was recorded to enable the Firm to recover certain long distance charges. The Firm no longer attempts to recover long distance charges.

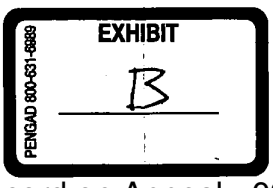
Both the telephone and computer systems were replaced by 2012 as part of a firm wide technology upgrade. Attached are the invoices from the two vendors that were used to destroy the obsolete telephone and computer systems, including the hard drive that would have held the telephone call data. Based on the information contained in the invoices, it is our belief that the hard drive containing the telephone data was most likely destroyed on or before June 11, 2013. However, it is possible that the hard drive destruction was part of those items identified in the March 19, 2014 invoice.

Sincerely,

HAYNSWORTH SINKLER BOYD, P.A.

J. Derrick Quattlebaum

JDQ/jmb
Enclosures



cc: David Overstreet, Esquire
Brent Souther Halversen, Esquire
Paul B. Ferrara, III, Esquire
Brian C. Duffy, Esquire

4-18

Strickland Electronic Recycling

Strickland Electronic Recycling, LLC
546 Salem Branch Rd
North, SC 29112

(803)247-5190
stricklandelectronicrecycling1@aol.com
stricklandelectronicrecycling.com

Invoice

Date	Invoice No.
03/19/2014	1121
Terms	**Due Date**
Net 30	04/18/2014

1117601 6

Bill To

Haynsworth Sinkler Boyd, P.A
134 Meeting St, 1st floor,
Charleston , SC 29401

Amount Due	Enclosed
$269.64	

Please detach top portion and return with your payment

Date	Activity	Quantity	Rate	Amount
03/19/2014	Pallet 1	945	0.00	0.00
03/19/2014	Pallet 2	926	0.00	0.00
03/19/2014	Pallet 3	1083	0.00	0.00
03/19/2014	Pallet 4	939	0.00	0.00
03/19/2014	Pallet 5	697	0.00	0.00
03/19/2014	Pallet 6	257	0.00	0.00
03/19/2014	Pallet 7	409	0.21	85.89
03/19/2014	Pallet 8	516	0.21	108.36
03/19/2014	Pallet 9	359	0.21	75.39
03/19/2014	No Charge for PC.			

OK Lmm
CHS
3/24/14
63708

	Total	$269.64

The electronic equipment referenced above has been completely destroyed by tear down procedures in our facility. All proprietary data has been completely eliminated as a result. The material was processed in accordance with our environmental policies and in compliance with all federal, state and local regulations.

Thank you for your business.

6/30

Fisher Recycling, LLC

Fisher Recycling, LLC
2750 Avenue B North
North Charleston, SC 29405

(843)554-6099
http://www.fisherrecycling.com

Invoice

Date	Invoice #
06/10/2013	1176240
Terms	**Due Date**
Due on receipt	06/30/2013

Bill To

Lee Moran
Haynsworth Sinkler Boyd
Haynsworth Sinkler Boyd, PA
PO Box 340
Charleston, SC 29402-0340

Ship To

Lee Moran
Haynsworth Sinkler Boyd
HAYNESWORTH SINKLER & BOYD
134 Meeting Street
Third Flr
CHARLESTON, SC 29401

00797

Time of Job	Class
FRIDAY PM	TRAILER 1

Date	Activity	Quantity	Rate	Amount
05/31/2013	***Collection/drop off of parts, electronic equip, keyboards, etc. Date of Collection: FRIDAY	1	35.00	35.00
	4)monitors 3) 21" flat screen monitors 4) lap tops 1)multi unit disk drive 10)computers 2)fax machine 2)APC UPS batteries Box of misel batteries and ballasts 3) boxes of misel circuit boards and misel electronic equipment (15) boxes of old telphones (p/u 6/10)			
05/31/2013	***Computer Monitor Collection (priced per unit) Date:5/31	7	17.00	119.00
05/31/2013	***Other Electronic Parts to include: see notes in first section	1133	0.28	317.24
06/11/2013	***Collection/drop off of parts, electronic equip, keyboards, etc. Date of Collection: 6/11	1	35.00	35.00
06/11/2013	***Computer Monitor Collection (priced per unit) Date: 6/11	2	17.00	34.00
06/11/2013	***Other Electronic Parts to include: telephones misc boxes	348	0.28	97.44

RECEIVED JUN 18 2013

OK Cum. CHS 63708 6/17/13

Total	$637.68

1208914 4

STAPLES

Thank You for Your Order

A confirmation email will be sent to you at **aking06@yahoo.com** with your complete order details.

If you have any questions about your order, please visit our Help Center.

Order No 1: 9759452298
Order date: August 22, 2017

You'll also find complete details of this order in the Order Status section of My Account. You can view this information 15 minutes after your order is submitted.

Deliver to: Ashley King, 171 Church St, 330, Charleston, SC 29401

Delivered By: Wednesday, August 23

Item No.	Name	Price	Qty	Coupons & Rewards	Subtotal
649243	Staples® Multipurpose Paper, 8 1/2" x 11", Bright White, Case	$67.99 5,000/Case	1.0	-$34.00	**Price:** ***$33.99***

Billing Address

Ashley King
Halversen & Associates
171 Church St
330
Charleston, SC, 29401
(843) 284-5790

Order Subtotal (Including Coupons):	**$33.99**
Base shipping fee:	**$9.95**
Estimated tax:	**$2.38**
Remaining Balance:	**$$46.32**

Remaining Balance will be applied to following:

AMEX Credit Card ending in 6012

Hold on to your Staples Rebate Visa Cards and Prepaid Gift Cards until your order has been received

If you have any questions or concerns about your order, please call 1-800-STAPLES (1-800-782-7537) or email support@orders.staples.com

Important information concerning coupons and sales tax can be found at: coupons and sales tax

The tax shown is estimated. **Your Order Confirmation Email** will include shipment details, product availability and estimated tax.

Important information concerning return policy can be found at: return policy.

For complete order details like sales tax, shipping info and Software Download instructions, keep an eye out for an email from Staples at the address above.You'll also find complete details of this order in the Order Status section of My Account. You can view this information 15 minutes after your order is submitted.

Sign up to receive Staples emails with great online and in-store offers and exclusive money-saving discounts.

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Live Chat

Have a question?

Chat with a Staples expert

Chat Now

DUFFY & YOUNG LLC
96 BROAD STREET, CHARLESTON SC 29401
telephone 843-720-2044 facsimile 843-720-2047
ATTORNEYS AT LAW

January 24, 2014

VIA ELECTRONIC MAIL
AND FIRST-CLASS MAIL

Brent S. Halversen, Esq.
Halversen & Associates, LLC
171 Church Street, Suite 330
Charleston, SC 29401

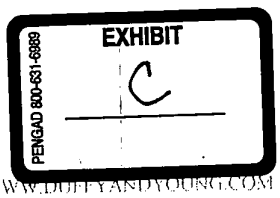
RE: Harbor National Bank v. Whitfield
Charleston County Case No.: 2012-CP-10-5887

Dear Brent:

I write with reference to your subpoena dated December 3, 2013 to David Swanson, Esq. of Haynsworth Sinkler Boyd, P.A. requesting information regarding the loan closing which was scheduled for June 28, 2012 and which is at issue in this matter. Haynsworth Sinkler Boyd, as attorneys for my client, Harbor National Bank, objected to the subpoena and moved for a protective order and to quash the subpoena on December 17, 2013.

As we have discussed previously, my client will agree to a limited waiver of the attorney-client privilege with respect to carefully specified subject-matter, in return for your agreement that discovery of documents pursuant to such limited waiver will satisfy the subpoena, and that no discovery of any other attorney-client communications between Harbor National Bank and Mr. Swanson or any other attorney will be authorized thereby. Any deposition conducted regarding such communications will be likewise limited in scope.

In particular, the waiver shall extend only to communications between Mr. Swanson and employees or agents of Harbor National Bank on or about June 28, 2012 and arising out of the request from employees or agents of Harbor National Bank to Mr. Swanson for professional advice regarding the refinancing of Mr. Whitfield's loan with security in the form of a mortgage on the real property at 1055 Black Rush Circle, Mount Pleasant, South Carolina. No communications between any attorney and any employee or agent of Harbor National Bank on any other subject or at any other time shall be included.



If you are in agreement, please so indicate by countersigning this letter in the space below.

With best regards, I remain,

Very truly yours,

Seth W. Whitaker

I CONSENT:

_____

Brent S. Halversen, Esq.

Enclosures
cc: David Swanson, Esq.

AFFIDAVIT

State of South Carolina)
)
County of _____)

The undersigned, **Anthony M. Whitfield** does hereby certify that the following properties are owned and pledged for business purposes:

118 Clay Street, Goose Creek, SC 29445

109 Mallory Drive, Goose Creek, SC 29445

110 Mepkin Drive, Summerville, SC 29483

308 Shortleaf Drive, Ladson, SC 29456

1055 Black Rush Circle, Mt. Pleasant, SC 29466

732 Gahagan Road, Summerville, SC 29485

131 Tyron Road, Summerville, SC 29485

9708 Jamison road, Ladson, SC 29456

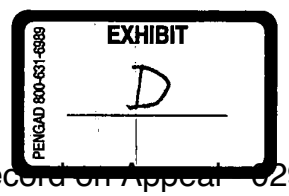
98 Willow Lane, Ladson, SC 29456

DATED this _____ day of June, 2012.

_____
Anthony M. Whitfield

SWORN to before me this ___
day of June, 2012.

Notary Public
My Commission expires:



South Carolina Bankers Association

About Us

The South Carolina Bankers Association (SCBA) has proudly served South Carolina's banking industry for 112 years. SCBA is the professional trade association organized to effectively represent the common interest and welfare of the banking industry in South Carolina and to promote the professional development of its members and individual practitioners.

Governed by our Board of Directors, the SCBA employs a full-time staff of professionals dedicated to carrying out every phase of our Strategic Plan. It is the mission of the South Carolina Bankers Association to be the key advocate in making the communities served by our members the best possible places to do business by providing leadership of legislative, regulatory, educational, and value-added services. Associate Members round out our roster with third-party merchant offerings.

Our Chief Offerings

Government Relations
Our legislative and regulatory advocacy allows banks to be the market leaders in the financial services industries. We engage in state, federal, and grassroots lobbying, as well as administer our own SCBA BankPAC. We work hand in hand with the American Bankers Association which includes an annual trip to Washington, D.C.

Education
Our membership enjoys engaging educational offerings by way of seminars, schools, conventions, conferences and e-learning as planned by our staff and trainers with the input of the 18 SCBA expert committees (e.g. bank security, human resources, operations, economic development, etc.) and external partners such as the FDIC. Additionally, The South Carolina Bankers School, born in 1961, is consistently rated as a top choice for certification in the Southeast.

Products and Services
The SCBA's wholly-owned subsidiary, SCBA Services Inc., is charged with identifying and vetting value-added products and services designed to make life easier for our bankers. Our Preferred Vendors program, administered by the Community Bankers Council, is of particular assistance to smaller banks wishing to keep overhead low. The South Carolina Bankers Employee Benefits Trust offers health, dental, vision, life, LTD, STD, and voluntary life insurance policies for banks.

Young Bankers Division
Established in1955 with its own Board of Directors and bylaws, the Young Bankers Division provides leadership training and community outreach on behalf of the SCBA's membership. Our young bankers lead the charge with financial literacy efforts, including our financial education program PEP (Personal Economics Program), in South Carolina. Also, they raise money for multiple scholarships and teach college students about potential careers in banking at Banking Careers 101, a free event for SC students.

Community Bankers Council
The Community Bankers Council is an 18-member council established in 1994 that represents community banks in South Carolina. Its mission is to recognize and voice the unique needs of community bankers and to review and recommend products and services that may help make community banks more profitable and efficient. A community bank is defined as an independently-owned bank operating in South Carolina with $750 million or less in deposits.

PENGAD 800-631-6989
EXHIBIT
E

About Associate Membership

Thank you for your interest in becoming an Associate Member. Associate Membership is for those organizations which have products or services that may be of interest to our member banks. Businesses enjoy increased visibility and expanded marketing opportunities while banks are receiving more options for top-quality, cost-effective products and services. By joining SCBA, each organization has a unique opportunity to increase your exposure in the market and form valuable partnerships with member banks.

Here are a few things you can count on when you become an associate member:

Networking
Invitations to all educational seminars, conventions, conferences, trade shows and association seminars that will allow for you to build relationships with South Carolina bankers.

Exposure
Your company will be listed as an Associate Member in the online *membership directory*, including a company description, general contact information and a link to your website; Have the opportunity to be featured on SCBA's social media networks; Become eligible for speaking opportunities at key events throughout the year; A brief profile in *Palmetto Banker* magazine upon membership, followed by the opportunity to author articles on various banking issues.

Sponsorship
All sponsorship opportunities featuring multiple media name/logo recognition during our annual convention, Young Bankers Division conference and annual scholarship golf tournament and various seminars throughout the year.

Exhibit Space
Associate Members are given priority when reserving space at the SCBA Annual Convention and receive a discount on the exhibit fee.

Publications
Associate Members receive a subscription to the *Palmetto Banker* magazine, the SCBA's Two Cents Biweekly E-Bulletin, access to the online *membership directory* and communications on upcoming events, educational opportunities and the latest industry news.

Articles
Informative articles for the *Palmetto Banker* magazine may be submitted at no cost. Associate Members receive first consideration.

Advertising
Reduced-rate advertising opportunities in *Palmetto Banker*.

The associate member agrees to pay $1000 annually in advance and understands that membership is approved on an annual basis. Associate membership may be cancelled at the end of any membership year, or at the discretion of the Board of Directors of the South Carolina Bankers Association.

If building strong relationships with South Carolina banks would benefit your organization, there is no better choice than to become an Associate Member of the SCBA.

SCBA Sponsorship Opportunities

Educational

Bank Security Conference • Community Bankers Forum • Human Resource Conference • BSA & AML Conference • Bank Ops Conference • Credit Conference •Trust Conference • Asset Liability Conference • Banking Careers 101

Premier Events

Dinner at the Fall Peer Group • Young Bankers Scholarship Golf Tournament • Dinner at the Spring Peer Group • Young Bankers Annual Conference • Annual Convention and Trade Show

SCBA's Educational Opportunities

In addition to the conferences listed above, Associate Members are invited to attend these: Community Bankers Forum, Call Report Seminar, IRS Reporting Seminar, Commercial Lending School, Economic Developers Conference, Compliance Conference, and other conferences as needed.

SCBA Proudly Represents Our Member Banks

The SCBA is the only financial trade association in the state to represent financial institutions of ALL asset sizes.

Abbeville Savings & Loan • Allendale County Bank • American Community Bank • Ameris Bank • Anderson Brothers Bank • Arthur State Bank • Atlantic Community Bank • Bank of America • Bank of Clarendon • Bank of Greeleyville • Bank of Travelers Rest • Bank of Walterboro • Bank of York • BankGreenville • BB&T • Blue Ridge Bank • BNC Bank • Capital Bank • Carolina Alliance Bank • Carolina Bank & Trust Co. • CBC National Bank • CertusBANK, N.A. • Citizens Building & Loan • Clover Community Bank • Coastal Carolina National Bank • CoastalStates Bank • Community First Bank • Congaree State Bank • Cornerstone National Bank • Countybank • CresCom Bank • Enterprise Bank of SC • Farmers & Merchants Bank of SC • First Capital Bank • First Citizens • First Community Bank • First Federal Bank • First Federal of SC, FSB • First National Bank of SC • First Reliance Bank • GrandSouth Bank • Greer State Bank • Harbor National Bank • Heritage Community Bank • Home Federal Savings & Loan • Horry County State Bank • Independence National Bank • Kingstree Federal Savings & Loan • Mutual Savings Bank • NBSC • Oconee Federal Savings & Loan • Palmetto Heritage Bank & Trust • Palmetto State Bank • PNC Park Sterling Bank • Pee Dee Federal Savings Bank • Pickens Savings & Loan Association • Pinnacle Bank of SC • Provident Community Bank • Regions Bank • Sandhills Bank • Savannah River Banking Company • SCBT • Security Federal Bank • South Atlantic Bank • South Carolina Community Bank • Southcoast Community Bank • Southern Bank & Trust, a division of Georgia Bank and Trust • Southern First Bank, N.A. • Spratt Savings & Loan • SunTrust • TD Bank, N.A. • The Bank of South Carolina • The Citizens Bank • The Commercial Bank • The Conway National Bank • The Palmetto Bank • The Peoples Bank • Tidelands Bank • VistaBank • Wells Fargo • Woodruff Federal Savings & Loan

South Carolina
Bankers Association

Application for Associate Membership

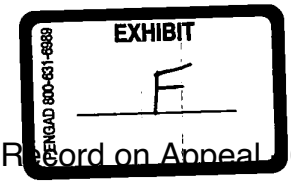


South Carolina Bankers Association
2009 Park Street
Post Office Box 1483
Columbia, South Carolina 29201
Phone: 803-779-0850
Fax: 803-779-0850
www.scbankers.org

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	CASE NO. CASE NO. 2012-CP-18-2119
HARBOR NATIONAL BANK,	)	
	)	
Plaintiff,	)	
	)	**AFFIDAVIT OF PETER SEITZ**
vs.	)	
	)	
ANTHONY M. WHITFIELD	)	
	)	
Defendant.	)	
	)	

Peter Seitz, personally appearing before me, who being duly sworn, states the following:

1. My name is Peter Seitz, I am over the age of eighteen, and have personal knowledge of the facts stated herein.
2. I am the Director of Enterprise Risk with First Bancorp. I hold a B.A. with Distinction from the University of Virginia and a J.D. *cum laude* from the Washington & Lee University School of Law. I have served over twenty years in bank management of four community banks, two of which regularly operated in South Carolina. In performing my responsibilities, I have had the opportunity assist the credit administrative and loan operation with issues similar to those which are the subject of this matter. Based on this banking experience, I prepared to offer several opinions in this matter. To that end, I have reviewed the pleadings, documents,



affidavits, met with Mr. Whitfield, and read certain deposition testimony in this matter.

3. Notwithstanding an attempted disclaimer to the contrary in a document dated June 26, 2012, Harbor National Bank, through its actions, demonstrated a commitment to close on the nine Whitfield loans (the "Whitfield Renewals") on June 28, 2012. Those actions include approving the selection of a closing attorney by Mr. Whitfield, preparing a loan package with specific terms, transmitting the closing package to the approved attorney, and sending a loan officer to the closing on behalf of the bank. Specifically, Harbor National Bank prepared and submitted to the closing attorney a closing package which included nine renewal notes for the borrower to execute secured by pre-existing mortgages covering nine distinct properties. Additionally, the bank coordinated with the closing attorney the preparation of a HUD-1 settlement statement containing the date, place of closing, property descriptions, identity of the borrower, identity of the lender, accrued interest, appraisal fees, closing fees, title search and opinion fees. As such, Harbor National Bank structured the Whitfield Renewals such that each of the Whitfield Renewals could close independently. Additionally, based on the closing documentation prepared, Harbor National Bank did not require any of the mortgages in the Whitfield Renewals to be modified.
4. Harbor National Bank further acknowledges the parties' respective desire to close on the Whitfield Renewals. The bank's own internal upcoming

maturities list documents that two of the loans on the list had been approved by the bank and documented Mr. Whitfield's acceptance of the terms. The second page of the list indicates a closing was scheduled.

5. The July 24, 2007 conveyance (the "Conveyance") of a partial interest in Lot 78, Phase 2, Whispering Marsh, Dunes West, Charleston County ("the Residence") by Mr. Whitfield did not impair the ability of the bank to close on the Whitfield Renewals and maintain the bank's primary lien position on the Residence. The deed into Cindy Whitfield expressly stated that she accepted her interest in the Residence subject to the terms and conditions of the 2007 Mortgage. The 2007 Mortgage defines "secured debt" as including: "The promissory note(s), contract(s), guaranty(ies) or other evidence of debt described below and all extensions, renewals, modifications or substitutions (Evidence of Debt) (e.g., borrower's name, note amount, interest rate, maturity date): One note of even date in the principal amount of $325,000.00 with final payment due 05/03/2012." Under these circumstances, I conclude that it is of no benefit to the bank to require a title endorsement in order to confirm the bank's first lien position post-renewal.
6. Harbor National Bank unreasonably relied on the opinion of its attorney, David Swanson, in reaching a conclusion not to close on the Whitfield Renewals. In particular, Harbor National did not supply its attorney any documentation for him to support his conclusion, including the 2007 loan

documentation financing the purchase of the Residence and the deed evidencing the Conveyance. Notably, Mr. Swanson subsequently conceded the 2007 loan that secured the Residence could have been renewed without the title endorsement despite the Conveyance. (Deposition of David Swanson, P. 28). Finally, Harbor National Bank never advised Mr. Swanson that the closing attorney concluded that the Conveyance had no impact on the bank's primary lien position. Under such circumstances, it would have been customary and reasonable to expect Harbor National Bank to contact bank counsel to seek further clarification of why bank counsel believed that the Conveyance posed a risk to its first lien position on the Residence, particularly given the fact that: 1) Mr. Swanson's opinion was obtained without any opportunity to review the documentation at issue and, 2) the bank had been advised by the title attorney that Cindy Whitfield took title subject to the Harbor National Bank mortgage.

7. Harbor National Bank was aware of the Conveyance prior to the preparation of its June 26 documentation outlining the terms of the deal. Given this timing, it is reasonable to conclude that the bank would have documented an express closing condition based on such a known fact following the advice of counsel recommending that the closing attorney obtain a "title endorsement". Instead, the bank expressly conditioned closing on the existence of a first lien on the Residence post-renewal, but not on the receipt of a title endorsement. The closing attorney confirmed

Harbor National Bank's first lien position. Under such circumstances and given the risk that the borrower would object to the bank's conclusion, it would be have been customary and reasonably expected for the bank to submit to the borrower and/or his closing attorney a written legal opinion supporting its conclusion that the borrower had not met its condition to close.

FURTHER AFFIANT SAYETH NOT.

Peter Seitz

SWORN TO before me this

18th day of June, 2014.

Notary Public for North Carolina

My Commission Expires: 10-12-18

MELISSA T. MCRAE NOTARY PUBLIC MONTGOMERY COUNTY, NC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CASE NO. 2012-CP-10-5887
HARBOR NATIONAL BANK, Plaintiff, vs. ANTHONY WHITFIELD, CINDY WHITFIELD AND DAVID SWANSON Defendants.	)	**AFFIDAVIT OF RICHARD R. GLEISSNER**

PERSONALLY APPEARED before me Richard R. Gleissner, who being duly sworn, does state as follows:

1. My name is Richard R. Gleissner. I am offering this affidavit as an expert witness on behalf of the Defendant, Anthony Whitfield.

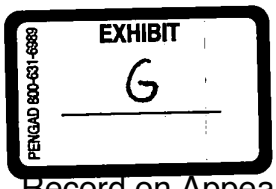
2. My qualifications to give expert testimony include:

   2.1. I am the organizing member of the Gleissner Law Firm, L.L.C. (the "Gleissner Law Firm"). I have been practicing in the state courts of South Carolina, and federal courts and bankruptcy courts of the United States since 1991.

   2.2. In 1998, I was certified by the Supreme Court of South Carolina as a specialist in Bankruptcy and Creditor/Debtor Law. My certification was renewed in this same specialty in 2003, 2008 and 2013. Attached as Exhibit 1 is a true and correct copy of my resume.

   2.3. I taught Commercial Law and Bankruptcy at the Charleston School of Law in 2007 and 2008. I am not now teaching at the Charleston School of Law but am actively involved in teaching Seminars for Continuing Legal Education as can be seen in the listing of publications found on my resume.

   2.4. I have served as counsel for debtors, creditors, trustees, and plan trustees in over a hundred bankruptcies since 1991. I have appeared in the bankruptcy courts of South Carolina, North Carolina, Delaware, Michigan



and New York.

3. In rendering this affidavit, I am mindful that the South Carolina Supreme Court has recognized the relevance and admissibility of the South Carolina Rules of Professional Conduct, Rule 407, SCACR, (hereinafter the "Rules of Professional Conduct") in assessing the legal duty of an attorney in a malpractice action. *Smith v. Haynsworth, Marion, McKay & Geurard,* 322 S.C. 433, 472 S.E.2d 612, 613 (1996). Adopting the position of the Georgia Supreme Court, the *Smith* court declared:

> This is not to say, however, that all of the Bar Rules would necessarily be relevant in every legal malpractice action. In order to relate to the standard of care in a particular case, we hold that a Bar Rule must be intended to protect a person in the plaintiff's position or be addressed to the particular harm.

Id. at 437, 472 S.E.2d at 613 (quoting *Allen v. Lefkoff, Duncan, Grimes Dermer,* 265 Ga. 374, 453 S.E.2d 719, 721-22 (1995)). Thus, while, failure to comply with the Rules of Professional Conduct is not negligence *per se,* it is one circumstance that may be considered along with other facts and circumstances in determining whether an attorney acted with reasonable care. *Id.* at 437 n. 6, 472 S.E.2d at 613 n. 6.

4. My opinion is based on review of the following documents:

   A. The Complaint involved in the above-referenced action.
   B. The Fifth Amended Answer, Crossclaims and Counterclaims in the above-referenced action.
   C. The Deposition of David Swanson, Esquire dated May 13, 2014 including exhibits to the deposition.

5. These factual and legal materials are of the type reasonably relied upon by experts in the field of legal malpractice in forming their opinions.

6. I have been asked to render an opinion as to the application of the theory of equitable subordination to the defense to the claims raised in the cross claim and counterclaims.

7. Based on my experience, education, training, knowledge of the laws of bankruptcy and debtor-creditor relationships, it is my opinion that the theory of equitable subordination does not apply in this case.

8. Equitable subordination is a bankruptcy concept. It comes from Section 510 of

Title 11 of the United States Code of Laws (the "Bankruptcy Code"). Section 510(c) states, in relevant part:

[A]fter notice and a hearing, the court may --

(1) Under the principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or
(2) order that any lien securing such a subordinated claim be transferred to the estate.

11 U.S.C. §510(c). The legislative statements make it clear that the court may "subordinate claims to claims and interests to interests", but you cannot subordinate a claim to an interest. Ms. Whitfield (the "Ex-wife") has a fee interest in the property. The Harbor National Bank (the "Bank") has a claim against the property. The Bank's claim cannot be subordinated to the Ex-wife's interest under the theory of equitable subordination.

9. Further, in South Carolina State Court case law, there is a limited number of discussions of equitable subordination. The first such discussion is in the case of *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 149–51, 425 S.E.2d 764, 774–76 (Ct. App. 1992). In that case the Court of Appeals states as follows:

Finally, ACDG argues the mortgage lien of Peoples should be subordinated to its mortgage lien under the doctrine of equitable subordination. Equitable subordination is a remedy often sought in the bankruptcy court. Under this doctrine, a shareholder's claim as a creditor to property of the bankrupt corporation may be subordinated to the claims of other creditors of the bankrupt when the debt to the shareholder is not a bona fide debt. *Taylor v. Standard Gas and Electric Co.*, 306 U.S. 307, 59 S.Ct. 543, 83 L.Ed. 669 (1939). ACDG claims the loan of Peoples under foreclosure was simply an investment and not a bona fide debt. On the other hand, Peoples asserts the loan was bona fide and it had divested itself of all control and interest in the partnership prior to the time the loan was made. We find ACDG's position to be without merit.

The case of *Pepper v. Litton,* 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281 (1939), states the basis for application of the doctrine:

> [These cases] involve simply the question of order of payment. At times equity has ordered disallowance or subordination by disregarding the corporate entity.

> That is to say, it has treated the debtor-corporation simply as a part of the stockholder's own enterprise, consistently with the course of conduct of the stockholder. But in that situation as well as in the others to which we have referred, a sufficient consideration may be simply the violation of rules of fair play and good conscience by the claimant; a breach of the fiduciary standards of conduct which he owes the corporation, its stockholders and creditors. He who is in such a fiduciary position cannot serve himself first and his cestuis second. He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters. He cannot by the use of the corporate devise avail himself of privileges normally permitted outsiders in a race of creditors. He cannot utilize his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For the power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the cestuis. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation.
> *Id.* at 310, 311, 60 S.Ct. at 246–47, 247.

In *Matter of Multiponics, Inc.,* 622 F.2d 709 (5th Cir.1980), the Fifth Circuit Court of Appeals "re-articulated" the test for determining equitable subordination in the bankruptcy setting: (1) the claimant must have engaged in some type of inequitable conduct; (2) the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and (3) equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act. *Id.* at 713.

The linchpin in the decisions applying the doctrine of equitable subordination is the conviction that insider misconduct caused injury to the creditors of a bankrupt corporation. *See In re American Lumber Co.,* 7 B.R. 519 (Bankr.Minn.1979); 10 S.C.Juris. *Banks and Banking* § 173 (1992). Here, the evidence does not show Peoples was an insider after August 9, 1985. Moreover, ACDG has not convinced us Peoples engaged in any inequitable conduct before or after Aug. 9, 1985, or the activities of Peoples injured ACDG or any other creditor. Thus, even if we were to apply the doctrine in this case, it would be of no avail to ACDG.

Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 149–51, 425 S.E.2d 764, 774–76 (Ct. App. 1992).

10. The second reference to equitable subordination is found in *Advance Int'l, Inc. v. N. Carolina Nat. Bank of S.C.*, 316 S.C. 266, 270, 449 S.E.2d 580, 583 (Ct. App. 1994), aff'd in part, vacated in part, 320 S.C. 532, 466 S.E.2d 367 (1996) where the Court of Appeals states:

> NCNB also argues Advance International's claims constitute the defense of equitable subordination, a defense that would have affected the priority and enforceability of NCNB's note and mortgage. Whatever may be the case elsewhere, South Carolina, to date, has only allowed equitable subordination in bankruptcy proceedings where a creditor's claim is based on a debt that is not bona fide. *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club,* 310 S.C. 132, ----, 425 S.E.2d 764, 775 (Ct.App.1992) (holding that "[t]he linchpin in the decisions applying the doctrine of equitable subordination is the conviction that insider misconduct caused injury to the creditors of a bankrupt corporation."). The instant action is not a bankruptcy proceeding and there is no suggestion here that Court 'N Car's debt to NCNB was not bona fide.

This ruling was subsequently vacated when the Supreme Court stated:

> We granted certiorari to review the Court of Appeals' decision in *Advance Internat'l, Inc., v. North Carolina Nat'l Bank,* 316 S.C. 266, 449 S.E.2d 580 (Ct.App.1994). We affirm that decision to the extent it upholds the circuit court order striking the res judicata and compulsory counterclaim defenses from petitioner's answer. We vacate the opinion, however, to the extent it decides in dicta issues related to the doctrines of unclean hands and equitable subordination.

Advance Int'l, Inc. v. N. Carolina Nat. Bank of S.C., 320 S.C. 532, 533, 466 S.E.2d 367 (1996).

12. Thus, the one South Carolina case discussing equitable subordination requires the party to be subordinated is (a) an insider and (b) engaged in some inequitable conduct.

13. Prior to refusing to close on the loan, I see no evidence of inequitable conduct on the part of the Bank as required by the theory of equitable subordination.

14. Prior to and after refusing to close on the loan, I see no evidence that the Bank was an insider.

15. Simply, equitable subordination does not apply.

16. In Mr. Swanson's deposition, on page 24, he also mentions the possibility of some type of reliance theory. Specifically, Mr. Swanson states:

7 ... You shouldn't have
8 modified that loan to extend the term of it. I
9 relied upon the term as it was, and, therefore,
10 you're prejudice my position in this property.

17. Neither the Bank nor Mr. Whitfield were modifying the mortgage. The mortgage specifically provides that it is given "to secure the Secured Debt". The Secured Debt is defined as:

> 4. Secured Debt Defined. The term "Secured Debt" includes, but is not limited to, the following:
> A. The promissory note(s), contract(s) guaranty(ies) or other evidence of debt described below, and all extensions, renewals, modifications or substitutions (Evidence of Debt) (e.g., borrower's name, note amount, interest rate, maturity date):
> One Note of even date in the principal amount of 325,00.00 with final payment due 05/03/2012.

18. Thus, the mortgage specifically contemplates extensions, renewals, modification and substitutions. The fact that an extension, renewal, modification or substitution was contemplated and should have been executed cannot prejudice anyone.

19. The Mortgage in this case is a form developed by Bankers Systems, Inc. in 1994 and last modified in 2001. It has been around a long time and most attorneys that are involved in this area of the law are familiar with this form. As stated by the closing attorney, Mark Weeks in his affidavit:

> Mr. Swanson based his recommendation upon a theory called "equitable subordination," indicating that Mrs. Whitfield's ½ ownership interest could jeopardize the bank's previous first secured mortgage interest if the loans were to renew without her consent. I have closed over 40,000 real estate loans in my career and have never seen a single instance in which a property owner defeated a bank's claim of lien by deeding a portion of its ownership interest to another person. I do not believe there is law in South Carolina or any State that stands for that proposition. Affidavit of Mark Weeks, ¶9, at page 3.

20. My largest concern in this case is the requirement that an attorney act competently in their representation. Rule 1.1. of the Rule of Professional Conduct requires an attorney to act competently. Specifically this Rule provides that "A lawyer shall provide competent representation to a client. Competent representation requires

the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." In the comments to this section, Comment (5) supplements this general requirement and states, "The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of less complexity and consequences." In this case, there were nine loans and millions of dollars at stake. The consequences to Mr. Whitfield and the Bank have been catastrophic of what appear to be "off the cuff" comments, if actually made by Mr. Swanson.

21. The opinions in this affidavit are given to a reasonable degree of certainty and are specifically based on the evidence listed above. I reserve the right to alter, amend, modify, reduce, or expand these opinions if and when additional information is presented.

FURTHER AFFIANT SAYETH NOT.

Richard R. Gleissner

Sworn to before me this 24th
day of August, 2017

Anissa Tempt

NOTARY PUBLIC OF SOUTH CAROLINA
My Commission Expires: 03-15-2021

EXHIBIT 1

GLEISSNER LAW

Helping Business | Helping People

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Richard R. Gleissner, Esquire
Certified Specialist in Bankruptcy and Debtor-Creditor Law
Rick@GleissnerLaw.com

NARRATIVE RESUME OF RICHARD R. GLEISSNER

Personal Data:

Mr. Gleissner was born in Milwaukee, Wisconsin on January 29, 1956. He is a member of St. Joseph's Catholic Church, in Columbia, South Carolina. He lives at 136 Pinkney Drive, Prosperity, South Carolina 29127.

He was admitted to the South Carolina Bar in 1990, the United States District Court for the District of South Carolina and the United States Court of Appeals for the Fourth Circuit in 1991. In 1998, the State of South Carolina's Supreme Court certified him as specialist in Bankruptcy and Debtor-Creditor Law and continues to be certified in this area of specialization.

Educational Data:

Mr. Gleissner graduated *magna cum laude* with a degree in Government and Internal Studies from the University of South Carolina in 1978 with a grade point ratio of 3.94, received a Masters in Public Administration in 1981, and received his Juris Doctorate *cum laude* in 1990, graduating in the top 5% of his class. As an undergraduate, he was active in the honor societies of Phi Beta Kappa and Phi Eta Sigma. In graduate school, he was active in the American Society for Public Administration, the International Studies Association, the American Society for Political Science, and the Society for Public Administration where he served as the President and Vice President of the Student Chapter. In law school, Mr. Gleissner was active in Phi Alpha Delta and served as the organization's treasurer and Vice-President.

In law school, Mr. Gleissner was awarded membership in the Order of Wig and Robe and the Order of the Coif. Mr. Gleissner served as research editor for the South Carolina Law Review and during law school was the author of *Court Permits Relief From Judgment Obtained Through Fraud Upon the Court*, 41 S.C.L. Rev. 152 (1990), and *Non Disclosure of Certain Negotiations Between Prosecution and Witness Held not Violative of Order Pursuant to Brady motion, Court Defines When Offender Has Murdered as "Agent of Another"* 41 S.C.L. Rev. 50 (1990).

Mr. Gleissner is a member of the American Bar Association, the South Carolina Bar Association, the American Bankruptcy Institute and the South Carolina Bankruptcy Law Association. In 1998, Mr. Gleissner was certified by the Supreme Court of South Carolina as a

specialist in Bankruptcy and Creditor/Debtor Law. His certification was renewed in this same specialty in 2003, 2008, and 2013. Mr. Gleissner was appointed to Board of Advisors for the South Carolina Commission on Continuing Legal Education, Bankruptcy and Debtor-Creditor Law Specialization Section, for 2016 to 2019.

For the Spring Semester 2007, Mr. Gleissner was asked to begin teaching Commercial Law at the Charleston School of Law. This course related to Articles 2, 3 and 4 of South Carolina's adoption of the Uniform Commercial Code. For the Fall Semester 2007, the Charleston School of Law asked Mr. Gleissner to return and again teach the Commercial Law course as well as begin teaching a course on the theory of Bankruptcy. In the Spring Semester 2008, Commercial Law became a core course required by all second year students. Mr. Gleissner taught two classes of commercial law. In the Fall Semester 2008, The Charleston School of Law requested that Mr. Gleissner teach Bankruptcy and Secured Transactions but due to a scheduling conflict, the Bankruptcy Course was dropped from the schedule and the Class in Secured Transactions was taught by another adjunct professor.

Professional Employment History:

After Law School

Upon graduating, Mr. Gleissner served as Judicial Clerk for the Honorable C. Tolbert Goolsby, Jr. of the South Carolina Court of Appeals. In 1991, Mr. Gleissner joined the firm of Finkel, Goldberg, Sheftman & Altman, P.A. He continued with that firm and became a member in 1996. The firm has had several different changes in ownership and is presently the Finkel Law Firm LLC.

During his involvement with the Finkel Firm, Mr. Gleissner was in the litigation and bankruptcy departments. He routinely represented Ralph C. McCullough, II, Esquire, as a Chapter 7 Panel Trustee. Mr. Gleissner was also heavily involved in the HomeGold, Inc. ("HomeGold") bankruptcy in which Mr. McCullough was appointed the liquidating Chapter 11 trustee. One of the articles written by Mr. Gleissner, as seen in the listing of publications, relates to this extremely complex liquidating Chapter 11 bankruptcy. During his time with the Finkel Firm, Mr. Gleissner also routinely represented other Trustees and Chapter 7 Panel Trustees, including W. Ryan Hovis, whom he clerked for during law school.

In August 2007, Mr. Gleissner became of counsel with the Finkel Law firm and founded the Gleissner Law Firm, L.L.C. ("Gleissner Law"). In April 2010, Mr. Gleissner resigned as a member of the Finkel Law Firm and has since devoted his full time to Gleissner Law. As part of Gleissner Law, Mr. Gleissner continues to represent the various Chapter 7 Panel Trustees, Creditors and Debtors in bankruptcy matters.

During Law School

From 1988 to 1990, Mr. Gleissner served as a law clerk with the firm of Berry, Dunbar, Daniel, O'Connor, Jordan and Eslinger, P.A. Mr. Gleissner reported directly to Ms. Victoria E.

Eslinger, Esquire and also assisted W. Ryan Hovis, Esquire who was a Chapter 7 Panel Trustee and also a partner in the firm.

Prior to Law School

From 1979 to 1983, Mr. Gleissner first received a Masters in Public Administration from the University of South Carolina and then completed his course work and successfully passed the comprehensive examination for a doctor of philosophy degree in political science at the University of South Carolina. He did not get his doctor in philosophy because he did not complete the thesis requirement. During this time, he served as an administrative assistant with the Department of Government and International Studies and then the James F. Byrnes International Center under the direction of Dr. James A. Kuhlman.

Before entering law school, from 1983 to 1987, Mr. Gleissner was the office manager for the law firm of Richardson, Plowden, Grier and Howser, P.A. He focused on the administration of the law firm and the modernization of its record and time keeping practices.

Lecturing and Publication Background:

Mr. Gleissner regularly lectures and gives seminars on various aspects of Commercial Law and Bankruptcy Law including the following:

Lender Liability through Deepening Insolvency and Control, presented before the South Carolina Bankruptcy Law Association Annual Seminar 2016 (April 29, 2016 to May 1, 2016).

The Right to a Jury Trial - Carolina First v. Badd LLC, presented before the South Carolina Bar Annual Seminar 2016, Banking, Corporations, Section (January 21-24, 2016).

What Bankruptcy Practitioners Need to Know about Article 9 of the UCC for The South Carolina Bankruptcy Law Association, 2012 Annual Convention.

UCC Article 9 Update Preparing for Pending Changes to Filing and Search Procedures, Lender Due Diligence and More, for Strafford Educational Services January 2012, with replays in March 2012, June 2013 and December 2013.

When a Tenant or Landlord Files Bankruptcy, for Landlord Tenant Law: Beyond the Basics, for Lorman Educational Services, July 2010.

Bankruptcy and its Impact on Foreclosures, Foreclosure and Bankruptcy, for Lorman Education Services, September 2007, September 2008 and September 2009;

Basics of Covering Bankruptcy Procedure for the National Center for Courts and the Media in the National Judicial College, in July 2006;

Fundamentals of Chapter 11 Under BAPCPA with Stanley H. McGuffin, Esquire for Lorman Education Services' Understanding the Bankruptcy Reform Act of 2005 in South Carolina, April 26, 2006; *Bankruptcy Litigation Under BAPCPA*, for Lorman Education Services' Understanding the Bankruptcy Reform Act of 2005 in South Carolina, April 26, 2006;

Business Bankruptcy and Bankruptcy Litigation under the BAPCPA, for HalfMoon, L.L.C.'s Bankruptcy Practice After the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, September 29, 2005;

Defenses to Fraudulent Transfers and Preferential Transfers in South Carolina, for the South Carolina Bankruptcy Law Association Annual Meeting, August 2005;

HomeGold: A Case Study with Janet B. Haigler, Esquire, in *Advanced Bankruptcy Practice*, November 30, 2004;

Internet Resources for Guidance in UCC Transactions and The Impact of Article 9 Changes on Bankruptcy in *Current UCC Developments in South Carolina*, March 2004;

How to Structure and Manage Secured Transactions, for UCC DEVELOPMENTS, WHAT SOUTH CAROLINA PRACTITIONERS NEED TO KNOW, May 2002;

The Impact of Article 9 Changes on Bankruptcy, for UCC DEVELOPMENTS, WHAT SOUTH CAROLINA PRACTITIONERS NEED TO KNOW, May 2002;

Creditors' Rights and Restrictions in Bankruptcy, CREDITORS RIGHTS SEMINAR, March 2002.

Legal Research in South Carolina for S.C. Association of Counties, Clerk of County Council Program, August 2001;

Bankruptcy and Tax Sales from a County Perspective, for S.C. Association of Counties, February 2001;

The Road to War; Preparing for Chapter 11 Case from the Perspective of a Debtor's Counsel, South Carolina Bankruptcy Law Association, March 1999;

Objections to Discharge Under Section 523, for S.C. Bankruptcy Law Association Annual Seminar, August 1998;

Preferences and Fraudulent Conveyances, for S.C. Bankruptcy Law Association Annual Seminar, August 1997; and

Bankruptcy Litigation, South Carolina Bankruptcy Law Association Convention, August 1995.

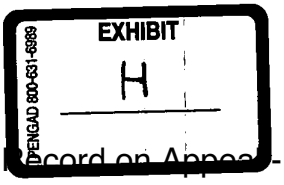
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2012-CP-10-5887
HARBOR NATIONAL BANK,	)	
	)	
Plaintiff,	)	
	)	**SUPPLEMENTAL AFFIDAVIT OF MARK WEEKS**
vs.	)	
	)	
	)	
ANTHONY M. WHITFIELD	)	
	)	
Defendant.	)	
	)	

Mark Weeks, personally appearing before me, who being duly sworn, states the following:

1. My name is Mark Weeks, I am over the age of eighteen, and have personal knowledge of the facts stated herein.

2. Since I gave my first affidavit in this matter and deposition last year, I have had occasion to review the deposition transcript of David Swanson, given in this matter. Notably, Mr. Swanson reviewed no relevant documents (the deed, mortgage, or my title opinion) in rendering his opinions to the bank.

3. First, having reviewed the transcript, I do not believe the bank had a valid or legal reason in relying upon Mr. Swanson's opinion in deciding not to close on Mr. Whitfield's loans. Mr. Swanson's opinions given to the bank were limited to advice rendered concerning the Black Rush property—which had nothing to do with the eight other loans the bank sent to my office to close. For



this reason, there was absolutely no valid or legal reason that these eight loans could not have been closed. It is my opinion that Harbor National Bank had absolutely no valid or legal reason to refuse to close the loan renewal of the Black Rush property, either. There was no new mortgage or no new modification of mortgage provided to my office for Mrs. Whitfield to sign. No one advised my office that a new mortgage or new modification of mortgage was required to be signed in order to renew these loans. Neither was not needed in fact or law to renew the loan, and I did not require either.

4. The Black Rush loan could have been renewed had it not been for the bank's unilateral decision to demand a title endorsement. One was not required, and I could have closed this loan and still ensured the bank maintained its priority interest in the collateral as I had conducted a title search on all of the properties and found there to be good and marketable title to all.

5. Second, it appears Mr. Swanson himself conceded in his deposition that the Black Rush loan could have been closed *without* the title endorsement. In light of this statement I especially believe the bank was not reasonable nor acted in good faith in relying on Mr. Swanson's advice in directing me not to close the Black Rush loan. In fact, I would say the opposite is true: I believe the bank foreclosed on Mr. Whitfield's loans without a valid or legal reason. If Mr. Swanson's opinions were so important to the bank, they should have brought them to my attention, which they never did.

6. I was never told by Mr. Scott Warren (or anyone at the bank) at the closing on June 28, 2012 (or at any point in time) that Mr. Swanson had given

any advice to the bank that it was relying upon in not deciding to close. Furthermore, Mr. Swanson never contacted me at any time to discuss his opinions.

7. Had I been so contacted by Mr. Swanson, or had Mr. Warren indicated his reasons (as supposedly indicated by Mr. Swanson) for not closing the loans on June 28, 2012, I would have advised all parties concerned that all of the loans could have, and should have been, closed that day.

8. If Mr. Swanson's testimony was the basis for the bank's refusal to close the loans, I believe the bank was without excuse in its decision not to close any of the loans. In particular, there was no risk whatsoever to the bank in closing the Black Rush loan based upon Mr. Swanson's hypothetical concern that Mrs. Whitfield would object to the transaction—since Mrs. Whitfield was the main beneficiary of the renewal, as it is my understanding she lives in the home.

9. Furthermore, Mr. Swanson based his recommendation upon a theory called "equitable subordination," indicating that Mrs. Whitfield's ½ ownership interest could jeopardize the bank's previous first secured mortgage interest if the loans were to renew without her consent. I have closed over 40,000 real estate loans in my career and have never seen a single instance in which a property owner defeated a bank's claim of lien by deeding a portion of its ownership interest to another person. I do not believe there is law in South Carolina or any State that stands for that proposition.

[SIGNATURE ON FOLLOWING PAGE]

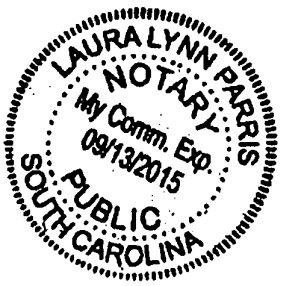
FURTHER AFFIANT SAYETH NOT.

Mark Weeks

SWORN TO before me this
8th day of April, 2015.

Laura Lynn Parris
Notary Public for South Carolina

My Commission Expires: 09-13-15



STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	CASE NO.: 2012-CP-10-5887
Bank of North Carolina,	
Plaintiff,	**DAVID SWANSON'S NOTICE OF MOTION AND MOTION TO BIFURCATE TRIAL, STRIKE JURY DEMAND, AND REFER BIFURCATED TRIAL TO THE MASTER IN EQUITY**
vs.	
Anthony Whitfield and Cindy Whitfield,	
Defendants.	
Anthony Whitfield, Counterclaimant	
vs.	
David Swanson, Counterclaim Defendant	

FILED
2012 MAR -8 PM 12:21
JEAN H. ARMSTRONG
CLERK OF COURT
3/8/12

TO: BRENT S. HALVERSON, ESQ. and DANIEL S. SLOTCHIVER, ESQ., ATTORNEYS FOR DEFENDANT/COUNTERCLAIMANT ANTHONY WHITFIELD:

PLEASE TAKE NOTICE that David Swanson, by and through his undersigned counsel, moves for an Order bifurcating the claim of civil conspiracy brought against him, striking the claimant's jury demand, and referring the trial of the civil conspiracy claim to the master in equity, as the claims brought against Swanson are permissive counterclaims to an action of foreclosure. This Motion is supported by the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and all arguments of counsel made at a hearing on this motion.

BACKGROUND

This action arises out of a longstanding and acrimonious dispute between Defendant Whitfield ("Whitfield") and the Plaintiff, Pinnacle Bank[1] ("Bank") which culminated in the filing of six separate foreclosure lawsuits in the counties of Charleston (one action), Dorchester (three actions), and Berkeley (two actions). As it relates to the overarching factual background relevant to this motion, the facts are largely undisputed.

A. Whitfield's loans and the Bank's request for a title endorsement

In 2007 and 2008, Whitfield took out a series of loans secured by nine properties in Charleston, Dorchester and Berkeley counties. As the 5-year balloon notes began maturing in 2012, Whitfield and the Bank negotiated renewal terms, and a closing was scheduled to take place on June 28, 2012.

One of the loans that was scheduled to close in June 2012 was secured by real property located in Charleston County that is referred to throughout the pleadings as the "Black Rush Property." In 2007, when Whitfield gave the Bank a first mortgage on the Black Rush Property, he owned it in fee simple. The updated title search that was conducted in connection with the 2012 closing revealed that Whitfield had subsequently deeded a one-half interest in the Black Rush Property to his ex-wife, Cindy Whitfield, as part of their divorce decree. Two days prior to closing, Whitfield's closing attorney brought this to the attention of the Bank. The closing attorney's office initially indicated that Cindy Whitfield would need to sign the mortgage on the Black Rush Property, and then asked if the Bank was okay with keeping the existing lender's title insurance policy in place rather than issuing a new policy. (Exhibit A).

---

[1] Plaintiff has been the party of several mergers/acquisitions since initiation of this lawsuit. The original Plaintiff was Harbor National Bank. Recently, Bank of North Carolina was acquired by Pinnacle Bank.

Thereafter, the Bank investigated whether the transfer of interest in the Black Rush Property would impact its collateral in the Black Rush Property. On June 27, 2012, the Bank's representative, Scott Warren, sent an email to the closing attorney's office stating "I called bank council [sic] to get some advice on how to handle it. (a) we need a title endorsement on Black Rush only...We can rely on your title opinion and existing policies for the others." (See, Exhibit B, Warren 6-27-12 email).

As a result of Mrs. Whitfield's 50% ownership interest in the property, and to ensure protection of its security interest in the entirety of the Black Rush Property, the Bank sought either a title endorsement from the title insurer or Mrs. Whitfield's signature on the mortgage as a condition of renewing the loan. Neither a title endorsement nor Mrs. Whitfield's signature was obtained, and ultimately, none of the loans were renewed.

B. This litigation

Subsequently, the Bank initiated foreclosure proceedings against Whitfield. In response, Whitfield counterclaimed against the Bank for various causes of action sounding in fraud and unfair trade practices. As it relates to those allegations relevant to the motion at bar, Whitfield alleged in his third amended answer and counterclaims, filed on August 27, 2014:

> 32. In reliance upon Mr. Warren's June 26, 2012 commitment letter, Mr. Whitfield attended a scheduled closing at attorney Mark Weeks' law office. At the closing, Mr. Warren informed Mr. Whitfield that a signed endorsement from a title company was needed so that Mr. Whitfield's ex-spouse Cindy Whitfield would not be required to sign the loan documents for the Black Rush Property, the home that Cindy Whitfield resided in. At a certain point, Mr. Whitfield was informed by the closing attorney that the endorsement could not be procured, that Mrs. Whitfield was refusing to sign the mortgage to the Black Rush Property, and Mr. Warren proposed that it would only be possible to close two of the subject properties...but that if the Black Rush Property ultimately couldn't be closed, all properties...would have to be foreclosed

upon.

> 33. Despite Harbor National Bank's representations that a title endorsement was required to renew the Black Rush Property, Mr. Whitfield has subsequently learned that no such endorsement was required from the title company. Moreover, Harbor National Bank failed to renew any of the loans listed in the June 26, 2012 commitment letter despite agreeing to do so, willfully breaching their agreements.

(Third Amended Answer and Counterclaims ¶¶32-33).

In response to these allegations in the Third Amended Answer and Counterclaims, the Bank stated:

> Plaintiff admits the Plaintiff attended a scheduled closing at the office of attorney Mark Weeks, that it was discovered that Defendant had transferred an interest in the Black Rush property to his ex-wife, Cindy Whitfield, and that it was required as a condition of the closing either that Mrs. Whitfield sign the new mortgage or that a title endorsement be obtained.

(Plaintiff's Reply to Third Amended Answer ¶14).

C. Bank representative Warren testified that he received advice to obtain a title endorsement via phone call with Swanson.

In connection with the subject foreclosure lawsuits, Scott Warren was deposed on November 13, 2013. Mr. Warren was questioned about the email he sent prior to closing in which he informed the closing attorney's office that he "called bank council [sic] to get some advice on how to handle it. . . We need a title endorsement . . . ." (Exhibit B). Mr. Warren identified David Swanson as the bank counsel he was referring to in the email who he called and who recommended that the Bank obtain a title endorsement on the Black Rush Property. (Exhibit C, Warren Nov. 13, 2013 Dep., 47:22-49:2-5).

D. David Swanson testified that he recommended the Bank obtain a title endorsement.

Whitfield subsequently deposed Mr. Swanson, who testified that he received the call from Scott Warren and recommended that the Bank obtain a title endorsement. Mr. Swanson testified that "[Mr. Warren] asked me my advice as to whether he should do [the loan renewal] without—with or without [an endorsement], I told him he should get a title endorsement." (Exhibit D, Swanson May 13, 2014 Dep. 19:1-9). Mr. Swanson testified that he did not open a file or bill the Bank for this call, which is customary when he receives a generic phone call. (Exhibit E, Swanson Apr. 18, 2017 Dep. pg. 21).

E. Whitfield alleges the Swanson-Warren phone call never occurred.

Following Mr. Swanson's deposition, Whitfield convinced himself that the telephone conversation between Swanson and Warren never occurred. Whitfield instead alleges that Mr. Swanson gave false testimony about the existence of the subject phone call to corroborate Scott Warren's testimony and legitimize the Bank's demand for a title endorsement. In this respect, Whitfield alleges that Mr. Swanson engaged in a civil conspiracy and abuse of process by committing perjury concerning the existence of the subject phone call. In particular, Whitfield alleges:

> 66. Mr. Scott Warren claims he called Mr. David Swanson for the advice to procure a title endorsement to renew the loan for the Black Rush Property.
>
> 67. Mr. Swanson claims that Mr. Scott Warren called him regarding the anticipated closing between Mr. Whitfield and Harbor National Bank, said closing to occur on June 28, 2012.
>
> 68. Despite providing such **sworn testimony** by each Mr. Scott Warren and Mr. David Swanson that this advice was given and received before the June 28, 2012 closing, there is **no evidence of any such phone call** as the phone records from Mr. David Swanson's cell phone and his office line show no records of a phone call from Mr. Scott Warren cell phone or office line in June of 2012.

> 69. Because the telephone records show the phone call never occurred, the sworn testimony that the call was made, when in fact evidence shows it was not made at the time, was given with the ulterior purpose of fabricating a legal defense for the bank's failure to renew its contractual obligations to renew Mr. Whitfield's loans.

(Def's Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims ¶¶66-69)(emphasis in original pleading).

At his deposition, Mr. Whitfield detailed his allegations against Swanson. Whitfield testified that Swanson is "a fool" and he believes Swanson rendered negligent advice to the Bank[2]. Whitfield further testified:

> "The bank-Harbor National Bank—claimed the reason for backing out of the deal a year later, in the lawsuit (Warren depo 11/13/13), to close my nine loan renewals on 6/28/12 was because of advice it got—the bank got—from a 'mystery lawyer,' who never appeared in the pleadings or on a witness list until that time."

(See, Exhibit F, Whitfield June 1, 2017 Dep. 32:21-33:25).

Further clarifying his position, Whitfield testified:

> Q: "Your position is that the phone call between Scott Warren and David Swanson never occurred:
>
> A: "Correct"

(Whitfield June 1, 2017 Dep. 45:14-17)

> Q: "And you believe that they concocted this notion that the phone call occurred after the closing didn't go forward?"
>
> A: "Oh. Yeah. When Harbor National Bank got real concerned, then they had to bring in some other guns, they had to convince somebody to lie for the bank to get them out of the hole they were in, and Mr. Swanson volunteered."

(Whitfield Jun 1, 2017 Dep. 45:24-46:6).

---

[2] Of course, Whitfield cannot pursue a claim against Mr. Swanson for providing the alleged "bad advice" to the Bank because there was no attorney-client relationship between Whitfield and Swanson.

Q: "And is it your testimony as well that Mr. Swanson and the bank conspired sometime after June 28, 2012?"

A: "Yeah, I guess that would be a good way to define it."

(Whitfield June 1, 2017 Dep. 225:7-11).

F. Whitfield sues Swanson for civil conspiracy

As alleged throughout Whitfield's pleadings and described in his deposition testimony, Whitfield's claim against Swanson for civil conspiracy is based on Mr. Swanson's deposition testimony that corroborated the testimony of Scott Warren. Whitfield alleges that the testimony was false, that Swanson conspired with the Bank to offer the false testimony, and that offering the false testimony amounted to a civil conspiracy[3].

In other words, the claim for civil conspiracy against Swanson has no relationship at all to the liability or damages at issue in the Bank's foreclosure action, nor any relationship to Whitfield's attempts to avoid enforcement of the Bank's loans and mortgages. In this respect, the claim against Swanson is unrelated and entirely ancillary to the primary issues in this litigation, i.e. the enforcement of the Bank's note and mortgage, defenses thereto and alleged claims that the bank's note enforcement and foreclosure has caused Whitfield financial damages related to the subject properties.

Accordingly, it would serve the interests of justice and aid in judicial efficiency to hold a separate bench trial as to the limited issue of whether, at some point during this litigation, Mr. Swanson conspired with the Bank to provide false testimony to aid the Bank in defense of Whitfield's counterclaims.

[3] Whitfield also brought a claim against Swanson for Abuse of Process, which was dismissed in an order partially granting Swanson's motion for summary judgment.

ARGUMENT

A. The Civil Conspiracy Claim Should Be Bifurcated

Rule 42(b), SCRCP provides that "the court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State." Bifurcation is proper by the trial court where the issues in the case are complex, and bifurcation helps to clarify or simplify the issues. *Durham v. Vinson*, 360 S.C. 639, 602 S.E.2d 760 (2004).

Here, between the Bank and Whitfield, there will be ten expert witnesses and fifteen to twenty fact witnesses who will testify to issues only relevant to the foreclosure actions, claims regarding enforcement of the note and mortgage, Whitfield's counterclaims against the Bank for alleged unfair lending practices, and Whitfield's claims that he has been financially injured due to Whitfield's properties being tied up in this foreclosure litigation. These witnesses will likely take more than one week of testimony, about highly complex issues, all unrelated to Mr. Swanson or the civil conspiracy action.

To the contrary, as it relates to the civil conspiracy claim against Swanson, there will be at most two expert witnesses and four to five fact witnesses who will testify concerning only one issue—whether the testimony provided by Mr. Swanson and Scott Warren was truthful or fabricated to allegedly bolster the Bank's position in this litigation.

The issues between Whitfield and Swanson are limited, simple and can be concluded in one or two days of trial. The introduction of the claims against Swanson, which are entirely

unrelated the foreclosure, loan enforcement, and lending practices issues between the Bank and Whitfield will only serve to complicate the issues before the jury and cause greater inefficiencies in bringing conclusion to the litigation.

B. Whitfield is not entitled to a jury trial on his Civil Conspiracy counterclaim

"The constitutional declaration that a right to trial by jury shall remain inviolate does not apply to cases within the equitable jurisdiction of the court." *Defender Properties, Inc. v. Doby*, 307 S.C. 336, 338, 415 S.E.2d 383 (1992). "In equity the parties are not entitled, as a matter of right, to a trial by jury." *Williford v. Downs*, 265 S.C. 319, 321, 218 S.E.2d 242 (1975).

A foreclosure action is an action in equity, and a party has no right to trial by jury. *Gardner v. Travis,* 316 S.C. 315, 317, 450 S.E.2d 54, 56 (Ct. App. 1994)("Because a foreclosure action is an action in equity, a party has no right to a jury trial of the issues raised in a foreclosure action.")*Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014)("If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.").

"By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 330-331, 755 S.E.2d 437, 442 (2014)(citing *Wells Fargo Bank, N.A. v. Smith,* 398 S.C. 487, 495, 730 S.E.2d 328, 332–33 (Ct.App.2012)); *see also* Rule 13(a), SCRCP. Claims that arise out of separate transactions or occurrences than the subject matter of the opposing party's claims are, instead, permissive. Rule 13(b), SCRCP.

Under South Carolina law, whether a counterclaim is compulsory or permissive is viewed through the logical relationship test. "Under this test, "the 'logical relationship' determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and

foreclose the mortgage. If the defendant's prevailing on his counterclaim would affect the bank's right to enforce the note and foreclose the mortgage, there is a logical relationship between the counterclaim and the underlying suit, and the counterclaim is therefore compulsory." *Blackburn*, 407 S.C. at fn 7, 755 S.E.2d at fn 7 (internal citations omitted).

Here, it is indisputable that the claim against Swanson for civil conspiracy is wholly separate from the loan agreements that are sought to be enforced by the Bank. Likewise, the counterclaim for civil conspiracy against Swanson will have no impact on the "bank's right to enforce the note and foreclose the mortgage." Indeed, every allegation against Swanson arose out of activity that occurred *after* these foreclosure actions were initiated. Thus, the civil conspiracy counterclaim is a permissive counterclaim to the Foreclosure action filed by the Bank.

Accordingly, Whitfield is not entitled to a jury trial on his permissive counterclaim for civil conspiracy, and the jury trial demand should be struck. Furthermore, as the only claim between Whitfield and Swanson is that related to alleged civil conspiracy arising out of alleged untrue deposition testimony that occurred almost two years after this foreclosure action was initiated, this case should be referred to the Master in Equity pursuant to Rule 53, SCRCP.

Conclusion

For the reasons stated herein, Whitfield's civil conspiracy counterclaim should be bifurcated from the remaining case between the Bank and Whitfield, the jury trial demand should be struck as the counterclaim is permissive, and the civil conspiracy counterclaim should be referred to the Master in Equity for a bench trial.

[SIGNATURE TO FOLLOW]

This 5 day of March, 2019.

Respectfully submitted,

EARHART OVERSTREET, LLC

By: _____

DAVID W. OVERSTREET
State Bar No.: 16965

MICHAEL B. MCCALL
State Bar No.: 73028

STEVEN R. KROPSKI
State Bar No.: 101441

Attorneys for Counterclaim Defendant David Swanson

P.O. Box 22528
Charleston, SC 29413
843-972-9400

STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	) CASE NO.: 2012-CP-10-5887
	)
Harbor National Bank,	)
	)
Plaintiff,	)
	)
vs.	) **CERTIFICATE OF SERVICE**
	)
Anthony Whitfield and Cindy Whitfield	)
Defendants.	)
	)
Anthony Whitfield	)
	)
Counterclaimant	)
	)
vs.	)
	)
David Swanson	)
Counterclaim Defendant	)

FILED
2019 MAR -8 PM 12:23
JULIE J. ARMSTRONG
CLERK OF COURT

I hereby certify that I have this day served a copy of the within and foregoing ***Notice of Motion and Motion To Bifurcate, Strike Jury Demand and Refer to the Master*** upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

Brent S. Halverson, Esq.
Halversen & Associates, LLC
171 Church Street, Suite 330
Charleston, SC 29401

Daniel S. Slotchiver, Esq.
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, SC 29401

Brian C. Duffy, Esq.
Blake A. McKie, Esq.
Duffy & Young, LLC
96 Broad Street

Paul B. Ferrara, III, Esquire
Ferrara Law Firm, PLLC
2300 Otranto Road
N. Charleston, SC 29406

This 6 day of March, 2019.

Legal Assistant to Steven R. Kropski

Exhibit "A"

Teresa Farley

From: Felicia Pringle <fpringle@harborbankgroup.com>
Sent: Tuesday, June 26, 2012 1:03 PM
To: Teresa Farley; Scott Warren
Subject: Anthony Whitfield

I will get with Scott when he returns from lunch.
Scott is working on the commitment letter.
Okay, Scott did mention his ex-wife was on Black Rush.

Felicia Pringle
Loan Specialist
Harbor National Bank
843-852-6424

-----Original Message-----
From: Teresa Farley [mailto:tfarley@weekslawfirm.net]
Sent: Tuesday, June 26, 2012 1:02 PM
To: Felicia Pringle; Scott Warren
Subject: RE: Anthony Whitfield

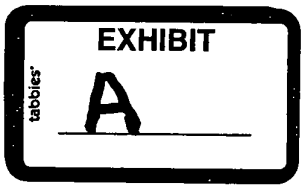
Okay...I have no idea how it is working LOL...I never got any commitment letter...I can do it however you guys want it done...YES, July of 2004 after the mtg was done he deeded Cindy Whitfield a one half interest

****
****
PLEASE NOTE THAT IF YOUR BUYER IS PURCHASING A SHORT SALE PROPERTY..I WILL NEED THE BUYER'S LOAN PACKAGE AT LEAST 48 HOURS PRIOR TO THE CLOSING. This can be reviewed on a case by case basis. I will do my best to accommodate.

ALSO: IF THE SHORT SALE IS A GOVERNMENT BACKED LOAN THEN THE PACKAGE MUST BE RECEIVED FIVE DAYS PRIOR TO CLOSING.

These issues are to help with funding sooner after closing as well as to not have to reclose so many loans on the borrower sides.

Teresa K. Farley
Real Estate Paralegal
WEEKS & IRVINE, LLC
8086-B Rivers Avenue
North Charleston, SC 29406
Phone: (843) 553-9800 ext. 3015
Fax: (843) 553-5847
tfarley@weekslawfirm.net



-----Original Message-----
From: Felicia Pringle [mailto:fpringle@harborbankgroup.com]
Sent: Tuesday, June 26, 2012 12:58 PM
To: Teresa Farley; Scott Warren

Subject: RE: Anthony Whitfield

1. Try 843-744-5584 or 324-2556
2. I didn't think we were doing new mortgages, just referencing the existing mortgage recorded already. Did Mr. Whitfield add Cynthia's name to the deed after the Harbor loan closed April 23, 2007?
3. All fees will be made payable to Harbor National Bank. We will pay the appraiser. Each appraisal is $300.
4. I guess I was under the wrong assumption or Scott forgot to inform me of what we were actually doing on these loans. Loan Amounts will be the principal balance on the payoffs. Interest will be collected at closing. Most likely the late fee will be waived. The loan number will remain the same.
5. I am working on the closing documents.
6. Scott is out to lunch, I need to find out exactly what we are doing on these loans.

Felicia Pringle
Loan Specialist
Harbor National Bank
843-852-6424

-----Original Message-----
From: Teresa Farley [mailto:tfarley@weekslawfirm.net]
Sent: Tuesday, June 26, 2012 12:49 PM
To: Scott Warren; Felicia Pringle
Subject: Anthony Whitfield

Hey...I still need the following:

1. Buyer phone number
2. Payoff on Black Rush - PLEASE note that Cindy Whitfield is on this property Deed and will need to sign the Charleston county mortgage
3. $300 appraisal fee for Black Rush - is that payable also to Atlantic Appraisals (Is there a revised invoice)
4. Need loan amount so I can get you the title and prelim docs
5. Closing package

Thanks. Teresa

****

PLEASE NOTE THAT IF YOUR BUYER IS PURCHASING A SHORT SALE PROPERTY..I WILL NEED THE BUYER'S LOAN PACKAGE AT LEAST 48 HOURS PRIOR TO THE CLOSING. This can be reviewed on a case by case basis. I will do my best to accommodate.

ALSO: IF THE SHORT SALE IS A GOVERNMENT BACKED LOAN THEN THE PACKAGE MUST BE RECEIVED FIVE DAYS PRIOR TO CLOSING.

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Phone: (843) 553-9800 ext. 3015
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tfarley@weekslawfirm.net

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This message is intended only for specified recipients. If you are not the intended recipient you are notified that disclosing, copying, distributing, or taking any action in reliance on the contents of this information is strictly prohibited. This communication represents the originator's personal views, which may not reflect those of Harbor National Bank. Security Warning: This message is being sent over an unsecured medium. Recipients should not reply to this message with sensitive or confidential account information. If the need arises to communicate sensitive or confidential account information, customers should visit or contact the nearest branch office.If you received this email in error, please immediately notify websupport@harborbankgroup.com

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Exhibit "B"

From: Teresa Farley
To: Scott Warren; Felicia Pringle
Subject: FW: Lender Title Policy Question - Whitfield / Mod of Mtg
Date: Wednesday, June 27, 2012 12:45:23 PM

See below..

****

PLEASE NOTE THAT IF YOUR BUYER IS PURCHASING A SHORT SALE PROPERTY..I WILL NEED THE BUYER'S LOAN PACKAGE AT LEAST 48 HOURS PRIOR TO THE CLOSING. This can be reviewed on a case by case basis. I will do my best to accommodate.

ALSO: IF THE SHORT SALE IS A GOVERNMENT BACKED LOAN THEN THE PACKAGE MUST BE RECEIVED FIVE DAYS PRIOR TO CLOSING.

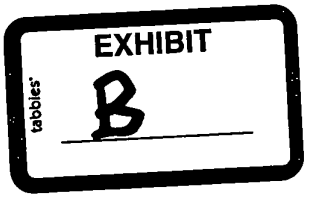
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tfarley@weeksIawfirm.net

-----Original Message-----
From: Barry Sloop [mailto:BSloop@stewart.com]
Sent: Wednesday, June 27, 2012 12:42 PM
To: Teresa Farley
Subject: RE: Lender Title Policy Question - Whitfield / Mod of Mtg

Teresa, I agree that the wife should sign any modification. But, regardless of whether she signs, still subject to the original mortgage.

Barry S. Sloop
Vice President - Counsel
Stewart Title Guaranty Company
Phone: (803) 765-1631 / (800) 327-3596
Fax: (803) 753-9342



-----Original Message-----
From: Teresa Farley [mailto:tfarley@weeksIawfirm.net]
Sent: Wednesday, June 27, 2012 12:16 PM
To: Scott Warren; Felicia Pringle
Cc: Barry Sloop
Subject: RE: Lender Title Policy Question - Whitfield / Mod of Mtg

Okay I think we can handle all this.

The deal with the maturity date is as follows: a mortgage of record is valid for 20 years from the date of the maturity if not satisfied. If you were to record any modification of the mortgage, Cindy would have to sign it since she is now on the Deed but recording to the mortgage rule above your mortgage will still be valid anyways even after the maturity date on the original recorded mortgage has passed.

The deal would be whether or not your bank counsel is okay to not record any new modification of mortgage since the maturity date has changed. TF

BARRY: please respond to my email as to confirm or correct...thanks. TF

****

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Fax: (843) 553-5847
tfarley@weekslawfirm.net

-----Original Message-----
From: Scott Warren [mailto:swarren@harborbankgroup.com]
Sent: Wednesday, June 27, 2012 12:10 PM
To: Teresa Farley; Felicia Pringle
Subject: RE: Lender Title Policy Question - Whitfield / Mod of Mtg

Teresa,

Thank you for your work on this...

I called bank council to get some advice on how to handle it.
(a) We need a title endorsement on Black Rush only... We can rely on your title opinion and existing policies for the others.
The e-mail to Stewart states that the maturity dates are not changing but they are... The maturity date on Black Rush was this past May.

(b) We also need an affidavit from Tony that these properties are owned & pledged for business purpose.

Thanks again. Felicia is getting you the updated payoff for Black Rush & we should be good to close if you can satisfy the two requirements above.

Best regards,

Scott

-----Original Message-----
From: Teresa Farley [mailto:tfarley@weekslawfirm.net]
Sent: Wednesday, June 27, 2012 11:09 AM
To: Scott Warren; Felicia Pringle
Subject: FW: Lender Title Policy Question - Whitfield / Mod of Mtg

See below response...does this work for you?

Teresa

****

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tfarley@weekslawfirm.net

-----Original Message-----
From: Barry Sloop [mailto:BSloop@stewart.com]
Sent: Wednesday, June 27, 2012 11:06 AM
To: Teresa Farley
Subject: RE: Lender Title Policy Question - Whitfield / Mod of Mtg

Hey, T,

Cindy took title subject to the mortgage. She would be named in the foreclosure action as defendant, but they should prevail. Thanks.

Barry S. Sloop
Vice President - Counsel
Stewart Title Guaranty Company
Phone: (803) 765-1631 / (800) 327-3596
Fax: (803) 753-9342

-----Original Message-----
From: Teresa Farley [mailto:tfarley@weekslawfirm.net]
Sent: Wednesday, June 27, 2012 10:52 AM
To: Barry Sloop
Subject: Lender Title Policy Question - Whitfield / Mod of Mtg

Hey...I have a question for one of our bank lenders...Harbor National Bank gave a loan to Mr. Whitfield on 1055 Black Rush. After the mortgage was done, signed and recorded, Mr. Whitfield gave a one half interest to his wife, Cindy Whitfield. So now the Deed is in both of their names and the mortgage is only in his name and Cindy resides at the residence.

We are now doing a modification of the note. There is no modification of mortgage being recorded since the loan amount previously insured is actually less now and the maturity dates are not changing. Where does this leave Harbor National Bank in the event they had to foreclose on the property. Would they foreclose just like normal and just have Cindy served as an additional defendant? How does this affect their title policy?

****

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tfarley@weekslawfirm.net

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Exhibit "C"

Warren Nov. 13, 2013 Dep., 47:22-49:2-5

Thereafter, the Bank investigated whether the transfer of interest in the Black Rush Property would impact its collateral in the Black Rush Property. On June 27, 2012, the Bank's representative, Scott Warren, sent an email to the closing attorney's office stating "I called bank council [sic] to get some advice on how to handle it. (a) we need a title endorsement on Black Rush only...We can rely on your title opinion and existing policies for the others." (See, Exhibit B, Warren 6-27-12 email).

As a result of Mrs. Whitfield's 50% ownership interest in the property, and to ensure protection of its security interest in the entirety of the Black Rush Property, the Bank sought either a title endorsement from the title insurer or Mrs. Whitfield's signature on the mortgage as a condition of renewing the loan. Neither a title endorsement nor Mrs. Whitfield's signature was obtained, and ultimately, none of the loans were renewed.

B. This litigation

Subsequently, the Bank initiated foreclosure proceedings against Whitfield. In response, Whitfield counterclaimed against the Bank for various causes of action sounding in fraud and unfair trade practices. As it relates to those allegations relevant to the motion at bar, Whitfield alleged in his third amended answer and counterclaims, filed on August 27, 2014:

> 32. In reliance upon Mr. Warren's June 26, 2012 commitment letter, Mr. Whitfield attended a scheduled closing at attorney Mark Weeks' law office. At the closing, Mr. Warren informed Mr. Whitfield that a signed endorsement from a title company was needed so that Mr. Whitfield's ex-spouse Cindy Whitfield would not be required to sign the loan documents for the Black Rush Property, the home that Cindy Whitfield resided in. At a certain point, Mr. Whitfield was informed by the closing attorney that the endorsement could not be procured, that Mrs. Whitfield was refusing to sign the mortgage to the Black Rush Property, and Mr. Warren proposed that it would only be possible to close two of the subject properties...but that if the Black Rush Property ultimately couldn't be closed, all properties...would have to be foreclosed

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON NINTH JUDICIAL CIRCUIT

HARBOR NATIONAL BANK,

Plaintiff,

-vs-

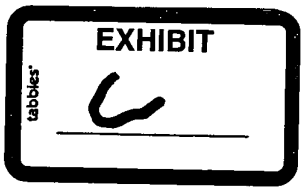
Case No.:
2012-CP-10-5887

ANTHONY M. WHITFIELD,

Defendant.

THE VIDEOTAPE DEPOSITION OF SCOTT WARREN, taken on behalf of the Defendant, on November 13, 2013, commencing at 9:43 a.m., at the Law Offices of Bernstein & Bernstein, 5418 Rivers Avenue, North Charleston, South Carolina, 29406.

Reported by: Douglas K. Liperote
Spectrum Reporting Services



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ALSO PRESENT: Anthony M. Whitfield

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title endorsement on Black Rush only. We can rely on your title opinion and existing policies for the others. The E-mail to Stewart states that the maturity dates are not changing but they are. The maturity date on Black Rush was this past May. (b) We also need an affidavit from Tony that these properties are owned and pledged for business purposes. Thanks again. Felicia is getting you the updated payoff for Black Rush, and we should be good to close if you can satisfy the two requirements above. Best regards, Scott."

Did I read that accurately?

A. Correct.

Q. Now, about this time -- was this the first time that an issue of a title endorsement was being brought up in discussion with the ability to renew these loans, or was it before then?

A. Well, we're talking a matter of days between all these E-mails. As far as is this is the first time, I wouldn't be able to say for sure, but this is approximately the time we became aware of Cindy Whitfield being added to the deed.

Q. Was it your idea that there needed to be a title endorsement, or was it someone else's idea?

A. I consulted bank counsel, and as far as who had the original idea, my recollection is we saw that

Cindy Whitfield was on the deed and how do we maintain title insurance that would be adequate.

Q. Okay. Who is bank counsel?

A. David Swanson.

Q. Who is he?

A. He's with Haynsworth Sinkler Boyd.

Q. And does Harbor National use him for real estate matters, or do you know -- how did you know to contact David Swanson?

A. As far as for opinions -- as far as all the capacities that Harbor National uses him for I can't speak to, but for questions such as this, David Swanson is who I would call.

Q. Okay. So at that point in time, David Swanson told you we need to get a title endorsement on Black Rush and everything you've put in that E-mail, is that accurate?

A. Uh-huh.

Q. Yes?

A. Yes, yes.

Q. Okay. Do you remember your phone conversation with Mr. Swanson?

A. I do not, specific.

Q. Well did you send him a copy of the deed, or did you just explain generally the scenario?

A. I can't recall.

Q. Okay. But he would have been the person that gave you this information that is in this E-mail?

A. As far as bank counsel, I'd say in -- or suggesting that we have the endorsement, yes.

Q. Okay. Did you discuss with any other attorney this issue, or only David Swanson?

A. Well, I believe this is -- we're discussing this with Mark Weeks' office and eventually spoke with Mark directly.

Q. Would that have been -- these discussions were at the closing or before the closing did you have conversations with Mark Weeks about this issue?

A. As far as getting on the phone with Mark Weeks, I can't say specifically before, but through Teresa Farley, who would be communicating with Mark Weeks. Obviously, there was communication. I can say that at the closing table this was something that we were still trying to get resolved.

Q. Okay. We'll get to that. Do you recall as we sit here today telling Mr. Swanson about Barry Sloop's response to Teresa Farley's question in Exhibit 13?

A. Do I remember -- I don't believe that Barry Sloop's name ever came up in any conversations with

Exhibit "D"

Swanson May 13, 2014 Dep. 19:1-9

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON
CASE NO. 2012-CP-10-5887

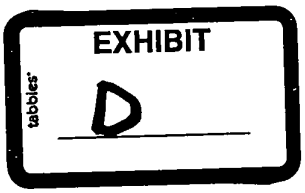
HARBOR NATIONAL BANK,	)	DEPOSITION OF:
	)	DAVID SWANSON
Plaintiff,	)	
	)	
-versus-	)	
	)	
ANTHONY M. WHITFIELD,	)	
	)	
Defendant.	)	
	)	

DATE: Tuesday, May 13, 2014

TIME: 10:14 a.m.

LOCATION: Haynsworth Sinkler Boyd
134 Meeting Street, Third Floor
Charleston, SC 29401

REPORTED BY: JENNIFER M. HUGGINS,
Certified Shorthand Reporter



APPEARANCES

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SWANSON, DAVID (sworn)

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EXHIBITS

(No exhibits were offered or marked for identification.)

(The reading and signing of the deposition by the witness is waived.)

(DAVID SWANSON, having been first duly sworn, testified as follows:)

EXAMINATION

BY MR. HALVERSEN:

Q. Good morning, Mr. Swanson. My name is Brent Halversen. I just introduced myself to you. And we are -- Mr. Whitfield is a defendant in a case that's been filed by Harbor National Bank. And I understand that's a client of this firm; is that accurate?

A. That's correct.

Q. Okay. Have you ever had your deposition taken before?

A. Yes.

Q. Okay. Tell me a little bit about yourself. I know some things about you, but how long have you been at the Haynsworth firm?

A. Well, I started off back in 1980 with a small firm in Charleston called Bailey & Buckley. It's not here anymore. And, about a year into that, year and a half, I was made an offer by one of the predessor firms of Haynsworth, which was Sinkler, Gibbes & Simons. Sinkler, Gibbes & Simons

Q. Okay. Did you tell Mr. Warren that -- that obtaining the title endorsement in this situation was something that was absolutely necessary or advisable, or did you -- did you give any equivocation on -- on getting the title endorsement as a prerequisite to doing this deal?

A. Well, he asked me my advice as to whether he should do it without -- with or without. I told him he should get a title endorsement.

Q. Okay. So, basically, you were telling him to -- don't do it without getting the title endorsement; is that accurate?

A. Well, yes.

Q. Okay.

A. Well, I -- I didn't tell him that. He's got to make his own decision. He's asking me for advice. They can then take that advice and do what they want with it.

Q. Sure. Just like any client?

A. Yeah, that's right.

Q. You --

A. That's right.

Q. You can give them advice --

A. All I can do is tell them pros and cons. And so I think that's what I did. I told

Exhibit "E"

Swanson Apr. 18, 2017 Dep. pg. 21

IN THE COURT OF COMMON PLEAS
FOR THE STATE OF SOUTH CAROLINA
CHARLESTON COUNTY

VIDEOTAPED DEPOSITION OF DAVID M. SWANSON

HARBOR NATIONAL BANK,

Plaintiff,

vs. CASE NO. 2012-CP-10-5887

ANTHONY WHITFIELD, CINDY WHITFIELD AND DAVID SWANSON,

Defendants.

DEPONENT: DAVID M. SWANSON

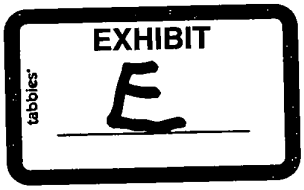
DATE: April 18, 2017

TIME: 2:06 PM

LOCATION: HAYNSWORTH SINKLER BOYD, P.A.
134 Meeting Street
3rd Floor
Charleston, SC 29401

REPORTED BY: NANCY ENNIS TIERNEY, CSR (IL)

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ALSO PRESENT: Anthony M. Whitfield
Doug White - Clearview Legal Video

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place."

But I was curious where you would go in order to confirm when it took place. You are welcome to look at that. I'm just reading it.

A. No, I believe you. No, I don't know where I would look. I haven't looked back -- I don't know.

Q. Do you keep a journal or a document of some sort?

A. No. I don't have -- the only thing I keep is my time, and I already looked at that. There is no time written down. I didn't write down a time because I didn't consider it something that I could bill, so --

Q. Why would it not have been something you could bill?

A. Just because I get phone calls all the time like that, and I don't bill them.

Q. When you are contacted and asked to give advice, do you, in a real estate transaction, do you normally like to look at the documents and the contracts before you give that advice?

A. It all depends on how the phone call goes. You know, if somebody is asking me, well, what do I do about this contract, and here is what the provisions say, no, I don't -- it just depends on what it is and what I'm asked to do, what the fact situation is, what the question is.

Exhibit "F"

Whitfield June 1, 2017 Dep., 32:21-33:25

STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
)
COUNTY OF CHARLESTON) CASE NO. 2012-CP-10-5887

HARBOR NATIONAL BANK,

Plaintiff,

vs.

ANTHONY WHITFIELD and CINDY WHITFIELD,

Defendant.

ANTHONY WHITFIELD

vs.

DAVID SWANSON,

Third-Party Defendant.

* * * * * * * * * * * * * * * * *

DEPOSITION OF: ANTHONY WHITFIELD

DATE TAKEN: Thursday, June 1, 2017

TIME: 10:07 a.m.

PLACE: Halversen & Associates, LLC
171 Church Street, Suite 310
Charleston, South Carolina

REPORTED BY: EVE WILBANKS
Registered Professional Reporter, Certified LiveNote Reporter and Notary Public

* * * * * * * * * * * * * * * * *



Electronically signed by Eve Wilbanks (101-177-349-6970)

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S T I P U L A T I O N S

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that the reading and signing of the transcript is reserved by the Deponent.

MR. OVERSTREET: Mr. Whitfield, you've laid out a number of documents in front of you before the deposition, and I'd just like to ask you, if you would, please, sir, set those documents aside, and I will hand you exhibits over which I will ask you questions. What I'd like for you to do is answer my questions without any documents initially. And if you need a document, I'm happy to hand one to you.

THE WITNESS: I disagree with that.

MR. OVERSTREET: You're not going to let me control the deposition and use the exhibits I see fit to use?

THE WITNESS: I'm going to use what has been filed and which ones are referenced by you to refer to. And I have your letter here somewhere that says what you are going to ask questions about. And I have those documents.

MR. OVERSTREET: Yes, sir. And I'm not going to be asking you about those documents

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ex-wife's attorney -- regarding my renewal closings and any problems that existed or supposed to have existed.

There are no e-mails from any Harbor National Bank officers regarding Swanson's advice not to close any of the renewals or to any of the just named above -- I just named -- individuals and attorneys.

Mr. Swanson has no record of any record or conversation or advice to Warren -- Scott Warren -- or any basis of law in making his opinion of risk, or legal advice, I should say. The level of risk to the bank or any reference to any of the loan documents and the file documents, including the Whitfield Divorce Settlement Agreement, the Black Rush sales contract, deeds, mortgage, commitment letter 6/26/17 (sic). "The fabricated advice given by Swanson and Warren has no support of any law and is refuted by the closing attorney, Weeks."

"Swanson admits in his deposition that he never reviewed any of my loan files, nor conducted any legal research before he concocted the defense of equitable subordination. This is not just negligence by Swanson to the bank, but

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only an attorney who gives legal advice not supported by law or without reviewing all the facts is a fool in my opinion."

Q. Mr. Swanson is a fool?

A. Yes, he's a fool. Or he's very foolish, either way you want to look. A fool is foolish. "Swanson law firm, Haynsworth Sinkler Boyd, has no record of any call around 6/28/12. Furthermore, Swanson stated he has no idea what exact date the call was received, which he clearly fabricated.

"Swanson law firm, Haynsworth Sinkler Boyd, destroyed the phone records it had kept after they were put on notice that the phone call was an issue and even after being served a subpoena for records.

Records from AT&T show no phone call was received from his office line, where Swanson said he received the call.

"The bank -- Harbor National Bank -- claimed the reason for backing out of the deal a year later, in the lawsuit (Warren depo 11/13/13), to close my nine loan renewals on 6/28/12 was because of advice it got" -- the bank got -- "from a 'mystery lawyer,' who never appeared in the pleadings or on a witness list until that time."

Electronically signed by Eve Wilbanks (101-177-349-6970)

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Whitfield June 1, 2017 Dep., 45:14-17 & 45:24-46:6

closing didn't go forward?

A. Oh, yeah. When Harbor National Bank got real concerned, then they had to bring in some other guns, and they had to convince somebody to lie for the bank to get them out of the hole they were in, and Mr. Swanson volunteered.

Q. Do you know, according to your theory, when that happened?

A. I just told you, about the time Mr. Duffy came in the picture -- it's a little strange that Mr. Duffy came in five days after Mr. Warren named your client, Swanson -- David Swanson in his deposition on November 13th. I find that pretty much tied that Mr. Duffy had quite a few conversations with Mr. Swanson before that name came up.

Q. So was a title endorsement -- or getting a title endorsement on Black Rush never an issue before the closing was supposed to go forward?

A. Repeat that question.

Q. Sure. The issue with this title endorsement and whether or not the bank should or needed to get one, was that never brought up before the closing in 2012?

A. There was only mention that it may be

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Whitfield June 1, 2017 Dep., 225:7-11

June 28, 2012?

A. I think it was concocted sometime around the time of Scott Warren's deposition, which is November 13, '13.

Q. So that's a yes to my question?

A. Yes.

Q. And is it your testimony as well that Mr. Swanson and the bank conspired sometime after June 28, 2012?

A. Yeah. I guess that would be a good way to define it.

MR. KROPSKI: That's all I have. Thank you.

MR. SLOTCHIVER: Do you have more?

MR. DUFFY: No.

MR. SLOTCHIVER: Let's you and I talk one second.

(The deposition went off the record.)

EXAMINATION

BY MR. SLOTCHIVER:

Q. Mr. Whitfield, I'm going to ask you just a couple of questions. First, are you familiar that -- are you familiar with the fact that there's a difference in bank council, C-O-U-N-C-I-L, and bank counsel, C-O-U-N-S-E-L?

Electronically signed by Eve Wilbanks (101-177-349-6970) 4f240d08-8de6-4a5c-a194-9a439feae283

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS CASE NO. 2012-CP-10-5887
PINNACLE BANK, as successor in interest to BANK OF NORTH CAROLINA, previous successor in interest to HARBOR NATIONAL BANK, Plaintiff, vs. ANTHONY WHITFIELD, CINDY WHITFIELD AND DAVID SWANSON Defendants.	)	**DEFENDANT ANTHONY WHITFIELD'S MOTION FOR SEPARATE TRIALS**

FILED
2019 OCT 15 PM 12:46
JULIE J. ARMSTRONG
CLERK OF COURT
BY

COMES NOW Defendant Anthony Whitfield and files this motion for separate trials, pursuant to SCRCP 42(b), and states the following as grounds:

1. In 2007 and 2008, Plaintiff made nine loans to Mr. Whitfield, for nine different residential properties. The loans were for five year terms. Beginning in 2012, those loans began coming due. In 2012, Plaintiff initiated five (5) foreclosure lawsuits covering eight of those properties in Berkeley, Dorchester, and Charleston Counties. In March of 2014, another foreclosure lawsuit covering one of the properties was filed in Dorchester County, bringing the total of six (6) foreclosure lawsuits covering nine (9) different properties. All of the properties were single family residential rental properties, except the Charleston County property which was purchased by Mr. Whitfield for his

spouse at the time, Mrs. Cindy Whitfield (hereinafter "Cindy Whitfield") , in order to meet his family court obligations in 2007.

2. In response to the foreclosure lawsuits, Mr. Whitfield counterclaimed in each of the lawsuits claiming, *inter-alia*, that Plaintiff made an agreement to renew all the loans for another five year term, breached that agreement, and caused him damages.

3. Plaintiff has denied that it made a contract to renew the loans, and has defended Mr. Whitfield's claims- that the bank breached an agreement to renew the loans - on the grounds that Mr. Whitfield's ex-wife Cindy Whitfield was required to sign a mortgage to her home in Charleston County in order to renew all of the loans in Charleston, Berkeley, and Dorchester County.

4. Plaintiff named Cindy Whitfield as a defendant in this matter, presumably so the Court could acquire jurisdiction over her in the event the foreclosure was concluded and an eviction would be needed.

5. While Cindy Whitfield either denied or "did not recall" if she was contacted regarding procuring her authorization to renew the loan for the Black Rush Property, at her first deposition on January 26, 2015, Cindy Whitfield changed her testimony at her second deposition on May 4, 2015 and stated that the paralegal in her attorney's office had contacted her and told her "don't do anything" until the attorney was contacted and that she never heard anything back from her attorney.

6. Because of this testimony, Mr. Whitfield had no option but to move to amend his answer to assert a crossclaim against Cindy Whitfield for equitable indemnification, denying that mortgage signature was legally required to renew any of the loans, but

alleging there was credible evidence that Cindy Whitfield was contacted regarding the loan transaction.

7. Mr. Whitfield only is alleging the equitable indemnity cause of action in the alternative, in the event his counterclaims fail and the bank were to prevail in its foreclosure. Should Mr. Whitfield prevail on his counterclaims, there should be no indemnity required to the extent he is made whole on his damage claims. The law of equitable indemnification allows recovery of expenses when the act of the wrongdoer involves the innocent defendant in litigation or places him in such relation with others as makes it necessary to incur expenses to protect his interest. *See* Addy v. Bolton, 257 S.C. 28, 183 S.E.2d 708 (1971). In this case, if the bank's defenses (the mortgage signature defense, in particular) are found to be warranted, then Cindy Whitfield should have cooperated in signing a mortgage to renew the loan for the home that she lives in at a time when there is evidence she did not so cooperate. The bank has already gone on record and testified that they were not looking to Cindy Whitfield to underwrite the renewal of the loan transaction or seeking her personal liability on the debt for the property—they claim they required her authorization to perform the transaction by seeking her consent for it. Again, this consent was not a contractual part of the renewal (or required in law), but was first added as a defense by the bank in its Reply to Mr. Whitfield's Second Amended Answer and Counterclaims filed October 16, 2013—nearly a whole year after the bank filed its foreclosure lawsuits against Mr. Whitfield.

A right to indemnity may arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party." Winnsboro v. Wiedeman-Singleton (Winnsboro I), 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App.1990), *aff'd*, 307

S.C. 128, 414 S.E.2d 118 (1992) (Winnsboro II) (citations omitted). In this case, Cindy Whitfield was contractually obligated to cooperate with Mr. Whitfield pursuant to the terms of their divorce that, "each of them shall make, execute and deliver any and all further and other instruments or papers or things as may be reasonably required or desirable for the purposes of giving full effect to this agreement including, but not limited to, deeds, other instruments of title, income tax returns, tax reporting forms, and other documents necessary to effectuate the transfers of property for and necessary to complete the terms and intent of this agreement."[1]

As part of their property and support settlement agreement, Mr. Whitfield was to purchase the Subject Property at 1055 Black Rush Circle (where Cindy Whitfield now resides). The agreement allowed Mr. Whitfield to finance the purchase and convey his remaining interest in the home when the mortgage was paid in full, seven years from the date of the parties divorce. Accordingly, Cindy Whitfield owed Mr. Whitfield a duty to cooperate in facilitating the terms of the separation agreement, which such agreement authorized Mr. Whitfield to finance the acquisition of the Black Rush Property, and ultimately convey full ownership to her. If the finder of fact determines that Cindy Whitfield was required to sign a mortgage (which such requirement is denied by Mr. Whitfield), then Cindy Whitfield breached her duties in failing to cooperate with the terms of the separation agreement by providing her authorization for the transaction.

8. Since Mr. Whitfield's claim against Cindy Whitfield is equitable in nature, the jury has no right to decide the claim. The only issue presently to be determined by the

[1] Page 9, Property and Support Settlement Agreement dated April 5, 2007.

Court is whether the claim can be (and should) be tried after the legal claims are disposed of by the jury. Rule 42(b) states:

> **(b) Separate Trials.** The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State.

9. As it pertains to mortgage foreclosure actions with compulsory counterclaims (as this case has):

If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim unless a valid jury trial waiver exists that encompasses the counterclaim. If such a waiver does not exist, the proper procedure for handling the counterclaims is as follows:

(a) The trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.

(b) If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.

(c) If the claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the equitable claims, but the jury's determination of common factual issues shall be binding upon the court.

Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 330, 755 S.E.2d 437, 441–42 (2014).

10. Mr. Whitfield requests his claim of equitable indemnification, his equitable claim of promissory estoppel, and the bank's claim of mortgage foreclosure (all of which

are equitable claims), be tried after his legal counterclaims, and that this Court order a separate trial for these equitable claims.

11. As it pertains to Mr. Whitfield's equitable indemnification claim against Cindy Whitfield, there are only four witnesses that Mr. Whitfield would plan on calling to establish the claim: Cindy Whitfield, Dena Hardison, Stan Jaskiewcz, and Lauren Felder. None of these witnesses will need to be called by Mr. Whitfield to establish any of his counterclaims, only the equitable indemnification count, should Mr. Whitfield not prevail upon his counterclaims, or not prevail to the extent of his claimed damages.

WHEREFORE, the undersigned counsel request the motion be granted for the reasons cited herein.

Respectfully submitted,

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10/14, 2019.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	
	CASE NO. 2012-CP-10-5887
PINNACLE BANK, as successor in interest to BANK OF NORTH CAROLINA, previous successor in interest to HARBOR NATIONAL BANK,)	**DEFENDANT ANTHONY WHITFIELD'S RULE 52(b) MOTION TO AMEND FINDINGS AND RULE 59 (e) MOTION TO ALTER OR AMEND ORDER ON MOTION TO BIFRUCATE TRIAL, STRIKE JURY TRIAL DEMAND, AND REFER BIFRUCATED TRIAL TO THE MASTER IN EQUITY**
Plaintiff,)	
vs.)	
ANTHONY WHITFIELD, CINDY WHITFIELD AND DAVID SWANSON)	
Defendants.)	

FILED
2019 OCT 18 PM 4:18
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Pursuant to Rule 52(b) and Rule 59(e) of the South Carolina Rules of Civil Procedure, Defendant, Anthony M. Whitfield, respectfully moves the Court to amend its findings and alter or amend the Order filed October 16, 2019 in which the Court granted Mr. David Swanson's Motion to Bifurcate Trial, Strike Jury Trial Demand filed March 8, 2019. Mr. Whitfield respectfully moves the Court for an Order reconsidering and altering or amending its October 16, 2019 Order. The undersigned certifies that consultation with opposing counsel would serve no useful purpose.

GROUNDS FOR MOTION

A party may file a motion to reconsider and alter or amend an order when it believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider

or rule on it. *See* Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). In addition, a party may file a motion with the Court to amend its findings, or make additional findings and to amend the judgment accordingly pursuant to Rule 52, SCRCP.

PROCEDURAL BACKGROUND

In 2007 and 2008, Plaintiff made nine loans to Mr. Whitfield, for nine different residential properties. The loans were for five year terms. Beginning in 2012, those loans began coming due. In 2012, Plaintiff initiated five (5) foreclosure lawsuits covering eight of those properties in Berkeley, Dorchester, and Charleston Counties. In March of 2014, another foreclosure lawsuit covering one of the properties was filed in Dorchester County, bringing the total of six (6) foreclosure lawsuits covering nine (9) different properties. All of the properties were single family residential rental properties, except the Charleston County property which was purchased by Mr. Whitfield for his ex-wife, in order to meet his family court obligations in 2007.

In response to the foreclosure lawsuits, Mr. Whitfield counterclaimed in each of the lawsuits claiming, *inter-alia*, that Plaintiff made an agreement to renew all the loans for another five year term, breached that agreement, and caused him damages. Specifically, Mr. Whitfield met the president of the bank on June 21, 2012 where an agreement was made to renew all nine of Mr. Whitfield's loans for another five year term, at a reduced interest rate of 4.75%. After the meeting, the bank contacted the closing attorney Mark Weeks, Esq. and set up a closing for the following week, on June 28, 2012. Mr. Whitfield attended the

closing for the renewal of all nine (9) loans on June 28, 2012, and the bank refused to close any of the nine (9) loans at the closing.

The bank's **main defense** of Mr. Whitfield's counterclaims is that **the bank sought and relied upon the advice of its counsel, Mr. David Swanson, in deciding not to close any of Mr. Whitfield's renewals at the closing attended by the bank on June 28, 2012**:

> On June 28, 2012, Warren and Whitfield attended an attempted closing of the renewal transactions at the office of Mark Weeks, Esq. On the advice of its counsel, David Swanson, Esq., Harbor refused to close without a title endorsement or co-signature from Cindy Whitfield.[3]

(Plaintiff's Memorandum In Support of Motion for Summary Judgment, filed September 15, 2014, P. 4)

Harbor National Bank through its employee Mr. Scott Warren[1] - who attended the closing- claims to have relied upon the advice of its attorney, Mr. David Swanson, that a title endorsement was needed to renew the loan for the Black Rush Property. Mark Weeks, the closing attorney at the June 28, 2012 closing, testified that no title endorsement was necessary or required for the Black Rush Property and that he could have renewed any of the loans without an endorsement or Ms. Cindy Whitfield's permission and/or authorization to renew the loans. (See Memorandum in Opposition to Summary Judgment, Exhibit "B" filed September

[1] It was not necessary to add Scott Warren as an individual defendant as Harbor National Bank is liable for its employees torts when the employee acts in the course and scope of their employment, even if the acts alleged exceed the bank's authority if the acts done were in furtherance of the master's business. *See* Crittenden v. Thompson-Walker Co., 288 S.C. 112, 115, 341 S.E.2d 385, 387 (Ct. App. 1986)

12, 2014). Mr. Swanson also claims that his advice to procure a "title endorsement" was provided to Harbor National Bank without receiving or reviewing any documents or even knowing the name of the bank customer. Mr. Swanson further testified that he did not perform any legal research, provide any written opinion, and did not charge the bank any fees for the advice. In fact, *there is not a single document at Mr. Swanson's law firm suggesting or confirming that the advice was ever given*. (See Memorandum in Opposition to Swanson Summary Judgment, filed August 25, 2017).

Although Mr. Swanson testified that Mr. Warren called him with a "question on this set of facts," on June 28, 2012, telephone records subpoenaed over objection from each Mr. Warren and Mr. Swanson confirm no calls were received from Mr. Warren's cell phone or office number to Mr. Swanson's cell phone or office number at the time and place claimed: one day before the closing on June 27, 2012.

Additionally, **the bank never raised a legal defense of the title endorsement requirement** until October,2013 *after initially replying to Mr. Whitfield's counterclaims that an agreement was reached* with Mr. Whitfield to renew his loans, and *never making any mention* of the "title endorsement" defense. The bank admitted that it made an agreement to renew Mr. Whitfield's loan in its first Reply to his counterclaims filed with this Court on April 25, 2013. The bank subsequently changed its pleading on this matter and denied it made an agreement to renew Mr. Whitfield's loans in its later filed Replies wherein it asserted the "title endorsement" defense -- based upon Mr. Warren and Mr.

Swanson's testimony that Mr. Warren called Mr. Swanson just before the June 28, 2012 closing. Moreover, the closing attorney Mark Weeks and Mr. Whitfield were never told at the time that the reason the bank decided not to close was because of Mr. Swanson's advice.

The lack of any physical evidence that the advice was given to the bank pre-closing -- in addition to multiple witnesses' testimony that no communications were made with Mr. Swanson at any point in time during the closing or in the months thereafter—is all evidence that the defense was fabricated by Mr. Warren and Mr. Swanson in an attempt to provide a defense for the bank's failure to close the loans.

Because there is substantial evidence that tends to prove that the advice was never given at the time Mr. Warren and Mr. Swanson claim it was given, Mr. Whitfield amended his Answer and Counterclaims to assert a cause of action based upon civil conspiracy, because, **if the finder of fact decides the advice was never given at the time and place claimed, then the bank will not be able to foreclose**. The law regarding what constitutes a civil conspiracy in South Carolina states:

> Conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators and other circumstances. [citations omitted] Civil conspiracy is an act which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence; concert of action, amounting to a conspiracy, may be shown by circumstantial as well as direct evidence. [citations omitted]. And in order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise. Proof showing concert of action in the commission of the unlawful acts, from which the natural or reasonable inferences arise that the acts were in furtherance of the common design of the alleged conspirators, is sufficient; at least to establish a prima facie case of conspiracy. [citations omitted]

Island Car Wash, Inc. v. Norris, 292 S.C. 595, 601-02, 358 S.E.2d 150, 153 (Ct. App. 1987).

On July 28, 2017, David Swanson moved for summary judgment on abuse of process and civil conspiracy counts lodged against him by Mr. Whitfield. Judge Nicholson granted the motion as to abuse of process, but denied the motion as to the civil conspiracy claim, finding an issue of material fact as to the civil conspiracy claim, i.,e., that facts to be decided could make out a civil conspiracy between Mr. Warren and Swanson. (See Judge Nicholson Order filed November 8, 2017). On March 8, 2019, David Swanson filed the motion to bifurcate the claims against Mr. Swanson, strike Mr. Whitfield's jury trial demand, and to refer the civil conspiracy claim to the Master-In-Equity for a bench trial, which this Court granted on October 16, 2019. This motion follows.

Argument

I. Mr. Whitfield's counterclaim of civil conspiracy against the alleged co-conspirators, Mr. Warren and Mr. Swanson, is a legal claim, afforded a trial by jury.

Mr. Whitfield properly sued Mr. Swanson and the bank, alleging them to be co-conspirators who had fabricated a legal defense to Mr. Whitfield's claims based upon events that either never occurred, or did not occur as claimed. Mr. Swanson was added as a party to the civil conspiracy cause of action counterclaim, as specifically allowed under Rule 13(h):

> **(h) Joinder of Additional Parties.** Parties other than those to the original action may be made parties to a counterclaim or cross-claim in accordance with Rules 19 and 20.

13(h), SCRCP.

Specifically with regard to joinder of persons, the law has set forth the following analysis. Rule 19(a)(1) states:

> **(a) Persons to Be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties.

19(a)(1), SCRCP.

The South Carolina Constitution provides **"[t]he right of trial by jury shall be preserved inviolate**." S.C. Const. art. I, § 14. "The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868." Mims Amusement Co. v. S.C. Law Enforcement Div., 366 S.C. 141, 149, 621 S.E.2d 344, 348 (2005) (citation omitted)(Emphasis added). Additionally, Rule 38(b), SCRCP, provides, in pertinent part:

> Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor[e] in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

Mr. Whitfield demanded a jury trial on Page 22 of his Fifth Answer, Affirmative Defenses, and Counterclaims filed on January 8, 2016. "Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). In response to Mr. Whitfield's

civil conspiracy claim, **Mr. Swanson asked for a jury trial**. (See Answer filed February 18, 2016). Swanson should be barred from now asking for a bench trial pursuant to SCRCP 38(d):

> (d) **Waiver**. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. **A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties**, except where an opposing party is in default under Rule 55(a).

As argued at the hearing on the motion, Mr. Whitfield is not in default and never consented to Mr. Swanson's request to waive the demand to a jury trial. On this ground alone, Mr. Swanson should not now be able to waive his demand for a jury trial and seek equitable disposition, two weeks before trial set for October 21, 2019.

II. Mr. Whitfield's claim for civil conspiracy, if established, would prevent the bank from enforcing its note and mortgage and therefore is an indisputably compulsory – not permissive-- -- counterclaim.

A. Mr. Whitfield's civil conspiracy claim is based upon a concert of activity between Mr. Swanson and Mr. Warren **that the Mr. Warren and Mr. Swanson allege occurred before the closing**.

A counterclaim is "compulsory" if it arises out of the transaction or occurrence that is **the subject matter** of the opposing party's claim. See Rule 13(a), SCRCP (Emphasis added). Conversely, a counterclaim is "permissive" if it does not arise out of the transaction or occurrence that is **the subject matter** of the opposing party's claim. See Rule 13(b), SCRCP (Emphasis Added). In this case, **Mr. Whitfield's claim of civil conspiracy *arises out of the renewal of***

his loans on or about June 28, 2012 **(the transaction or occurrence) that is the *subject matter* of the bank's claim of mortgage foreclosure and alleged default**.

In North Carolina Federal Sav. and Loan Ass'n v. DAV Corp., 298 S.C. 514, 381 S.E.2d 903 (1989) the South Carolina Supreme Court held that a defendant asserted compulsory counterclaims in a mortgage foreclosure action when it alleged the Plaintiff bank breached an oral agreement to provide additional financing by modifying the terms of the original financing. **The same fact pattern is true in this case**: Mr. Whitfield alleges on June 21, 2012 he reached an oral agreement[2] with the CEO of the Plaintiff's bank, Mr. Charlie Rivers, to extend the terms of the original loans an additional five years at a reduced interest rate of 4.75%, and went to a closing 7 days later attended by Mr. Warren from the bank. In North Carolina Federal, the Supreme Court adopted the "logical relationship test" in order to determine whether a counterclaim was compulsory or permissive in the context of a mortgage foreclosure case. The Court found that there was a logical relationship, "between the enforceability of the note which is the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note." *Id.* at 518.

The North Carolina Federal Court found that because the borrower relied upon the purported oral agreement in its first five counterclaims of breach of oral

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[2] For purposes of this motion, statute of frauds positions by both parties have not been addressed. Those positions have been thoroughly briefed and addressed by the Court in this Court's motion denying Plaintiff's motion for summary judgment.

contract, breach of fiduciary duty, wrongful dissolution, and violation of unfair trade practices act, "there was a logical relation between the enforceability of the note and the purported oral agreement, which if performed, would have avoided a default." *Id.* Likewise here, Mr. Whitfield alleges the Plaintiff bank made an agreement to renew his loans and breached this agreement without any factual or legal basis, but for the alleged interjection of Mr. Swanson's dubious advice in which Mr. Whitfield has significant evidence was never given to the Plaintiff bank on the date and time claimed:

> (a) No record of the telephone call on the date and times it was claimed was made;
>
> (b) No record at the law firm of any work done or billing entry to corroborate advice was given;
>
> (c) Closing attorney testimony that he was unaware of Swanson's advice not to close at the time of closing;
>
> (d) Mr. Whitfield's testimony that no one told him the basis for the failure to close;
>
> (e) Not a shred of any communication corroborating the involvement of Swanson or between Swanson and the bank at any time in the months that followed when the parties were attempting a work out;
>
> (f) Legal justification of Mr. Swanson's advice has no supportable basis in any caselaw (equitable subordination of lien holder to after acquired equity interest by Mrs. Whitfield); and
>
> (j) bank compliance officer testimony they told Mr. Warren a day after closing to get an attorney involved immediately, suggesting one was never involved before then.

On the authority of *North Carolina Federal,* Mr. Whitfield has stated a compulsory counterclaim because if the jury finds that a conspiracy did exist between Mr. Warren and Mr. Swanson to manufacture a reason not to close,

then necessarily, the bank will not be able to foreclose as Mr. Whitfield will have proved his counterclaim: that the bank made an agreement to renew them and the bank failed to close without any legitimate excuse.

> Mr. Whitfield never alleged in his counterclaim that the factual basis of the civil conspiracy is due to events that occurred solely after the closing, as Mr. Swanson's counsel alleged in the motion and at the hearing, although it is true that further evidence of the conspiracy was learned after the fact at Mr. Swanson's witness deposition.

Mr. Whitfield never made an allegation in his civil conspiracy cause of action (¶¶ 74-79) as to the *timing* of when Mr. Swanson and the bank made an agreement to conspire. "Civil conspiracy is an act which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence." Island Car Wash, Inc., 292 S.C. at 601-02. Indeed, it would be near impossible in any civil conspiracy claim to have such precise information, including here. Essentially, the motion before the Court seeks to use Mr. Whitfield's lack of knowledge as to when the conspiracy crystalized, as a means to argue that the conspiracy occurred after the closing and that the conspiracy claim was therefore a a permissive counterclaim.

By adopting the argument advanced by Mr. Swanson, this Court has, in effect, found that no conspiracy claim can be made against Mr. Swanson or the bank because the Court has determined the conspiracy occurred after the closing. However, it is irrefutable that the bank and Swanson each *claim* they were involved with this transaction- **before** the closing of the loans- not afterwards.

Although Mr. Whitfield, based upon deposition testimony cited in Mr. Swanson's motion, believes there was possibly some additional conspiring done between the parties after the closing -- that does not negate the factual allegation that the parties began conspiring before the closing (¶¶ 66-69 of Civil Conspiracy Counterclaim). Accordingly, the existence of a post-closing conspiracy does not negate Mr. Whitfield's ability to assert the compulsory counterclaim that a conspiracy began before the closing. The elements of civil conspiracy are as follows and are only determined by three factors:

> A civil conspiracy, on the other hand, consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage. [citations omitted] **The gravamen of the tort is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination**. [citation omitted]. A civil conspiracy may, of course, be furthered by an unlawful act.

Lee v. Chesterfield Gen. Hosp., Inc., 289 S.C. 6, 10–11, 344 S.E.2d 379, 382 (Ct. App. 1986)

It is entirely possible that Mr. Warren conspired with Mr. Swanson to manufacture the bank's excuse not to close before the date of the closing on June 28, 2012. It is also entirely possible that Mr. Swanson's deposition testimony after the closing, where it appears he testified to events that never occurred, was an unlawful act, furthering the conspiracy. The lynchpin of Mr. Swanson's argument that Mr. Whitfield's counterclaim is permissive is the contention that the alleged conspiring was temporally done after the closing:

> Here, the civil conspiracy counterclaim has no logical relationship to Pinnacle Bank's right to enforce the note and foreclose the mortgage. The alleged facts supporting the civil conspiracy

> counterclaim--that Swanson and Harbor National Bank conspired to give false testimony for the purpose of providing an *after-the-fact* justification for Harbor National Bank's request for a title endorsement--relate to activity that occurred after Mr. Whitfield's loans were not renewed.

Judge Goodstein Order, dated October 16, 2019, P.6

As stated above, Mr. Whitfield has no knowledge of when the conspiracy agreement between the bank and Mr. Swanson was reached- but he has marshalled evidence contradicting Mr. Warren and Mr. Swanson's testimony that the advice *did not occur at the time and place which they claimed*, and that it was in Mr. Warren and Mr. Swanson's mutual self-interest to fabricate the defense. *Exactly* when Mr. Warren and Mr. Swanson formed their conspiracy is **ultimately a question for the jury**- not to be decided in motion practice- and certainly not to form the predicate to strip Mr. Whitfield's right to a trial by jury.

III. In addition to conditioning the renewal of the loans on a title endorsement, the bank also expressly conditioned the renewal of the loans on Mr. Whitfield signing a fraudulent affidavit that the properties were owned and pledged for a business purpose- including Black Rush-the property undisputedly known at the time to be the residential home of Cindy Whitfield, as opposed to a rental. This demand came from David Swanson per bank testimony. This is evidence that has previously been presented to the Court, in the Court record.

Mr. Swanson's only documentary evidence of giving the advice to obtain a title endorsement before closing (on June 28, 2012) is in the form of an email the day before closing from Mr. Scott Warren to Teresa Farley, a paralegal in Mark Weeks office, discussing the fact that Mr. Whitfield's ex-wife Cindy Whitfield was on title. The email states:

Teresa,

Thank you for your work on this. . .

I called **bank council** to get some advice on how to handle it.

(a) We need a title endorsement on Black Rush only. . . We can rely on your title opinion and existing policies for the others.
The e-mail to Stewart states that the maturity dates are not changing but they are. . . The maturity date on Black Rush was this past May.

(b) We also need an affidavit from Tony that these properties are owned and pledged for business purpose.

Thanks again. Felecia is getting you the updated payoff for Black Rush & **we should be good to close if you can satisfy the two requirements above**.

Best regards,

Scott

Email from Scott Warren to Teresa Farley and Felicia Pringle dated June 27, 2012, attached as Exhibit 13 to Dep. of S. Warren taken on November 13, 2013. (Emphasis added).

Mr. Warren was questioned in his deposition about where the advice for a business purpose affidavit came from:

Q. [a]nd then you respond and say, "Thank you for your work on this. I called bank counsel to get some advice on how to handle it." And then you say, (a) need to get a title endorsement on Black Rush, da, da, da. And then you say, (b) "We also need an affidavit from Tony that these properties are owned & pledged for business purpose." Do you recall -- I'm assuming that that was part and parcel of your discussion with Mr. Swanson since the way you have the E-mail laid out, but it may not be, and that's all I was trying to figure out.

A. That -- I can -- you know, we're going off recollections, you know, prior conversations, and as far as what I can say with certainty, I remember a lot about the discussions as far as title endorsements, and I remember less about the business purpose affidavit. And if that was -- **it makes sense that it was discussed**

with Swanson. I can't give you any specifics on that conversation. My recollection is not good enough.

Q. Okay. Let me ask you this then and I hear what you're saying: Is there somebody else that would have put that in as a demand about the business -- the affidavit signed for -- that the properties are owned and pledged for business purpose other than Mr. Swanson?

A. Is there somebody that would have put it in as a demand? You know, as you can see, group effort, third parties within the bank come up with the best closing package specific to this situation and, **yes, it's possible somebody else came up with that as a way to do it**.

Q. Because if it's not somebody else and this is an instruction coming from you to them, that we need (a) and (b), and all I want to know is, did the idea for (b) come from just you or did it come from somebody else, or maybe it came from Mr. Swanson, but you really don't remember?

A. Again, at this time, I don't remember enough to speak to that. I can go back through the E-mails and try to -- or prior conversations, whatever I can do to clarify it, but I cannot speak to that right now as far as where the idea came from.

Q. Okay.

A. And that's what's being asked I believe.

Q. Correct. And I think you're not sure if that was your idea --

A. Correct.

Q. -- given what you're telling me?

A. Correct.

Dep. of S. Warren, P. 80, L. 6 – P. 82, L. 4)

Mr. Swanson, for his part, knew at deposition that the issue of asking Mr. Whitfield to sign an affidavit that his properties were owned and pledged for a business purpose was a hot potato, as the bank undeniably knew at this time that the Black Rush loan was a consumer loan in order to fulfill Mr. Whitfield's family court obligations. Harbor National Bank's "demand" that Mr. Whitfield swear out

an affidavit that Black Rush was for a "business purpose" as a condition of their renewing the Black Rush loan was asking Mr. Whitfield to lie about who was living in the property and why. Presumably, that is why Mr. Swanson was emphatic that he did not give advice to Mr. Warren regarding procuring a business purpose affidavit (subsection (b) of the email):

> Q. Okay. Did you advise Mr. Warren that -- that he needed to procure an affidavit from the borrower, that the property was to be pledged for business purposes?
>
> A. **No. I didn't get into that. I read about that in that -- I guess his deposition, but he didn't ask me about that particular issue**.
>
> Q. Okay. So that wasn't advice you gave him?
>
> A. **No.**
>
> Q. Okay. If Mr. Warren said that, would you disagree with him?
>
> A. If he said what?
>
> Q. If he suggested that -- or stated that you told him to get a business- purpose affidavit from Mr. Whitfield for the house that the ex-spouse was living in? If he said that, would you disagree with him?
>
> A. **Yeah. I think I would disagree with that.**

(Dep. of D. Swanson, P. 43, L. 16 – P. 44, L. 10)(emphasis added).

Curiously, Mr. Warren later in 2015 (nearly three years into the lawsuit) testified that Mr. Swanson was incorrect, and that they definitely discussed the issue of procuring a business purpose affidavit:

> Q: Regarding the second page of Exhibit 5, your E-mail that starts, "I called bank counsel," I believe I asked this of you in your individual deposition. Subparagraph (b) where it says, "We also need an affidavit from Tony that these properties are

owned and pledged for business purpose." You've had a chance to review Mr. Swanson's testimony ?

A. Correct.

Q. Mr. Swanson said that that demand did not come from him?

A. Correct. It said that.

Q. And do you agree with that?

A. **No, I don't agree with it.**

Q. Okay. You're pretty sure he said you better get a business purpose affidavit, or something to that effect?

A. **Yes. It was discussed and, yes.**

(Dep. of S. Warren taken March 24, 2015, P. 42, L. 22 - P. 43, L. 3 - 14)(emphasis added)

According to Mr. Warren, a business purpose affidavit was discussed with Mr. Swanson and demanded by Mr. Swanson, and then Mr. Warren incorporated the title endorsement and business purpose affidavit demands into his June 27, 2012 email as conditions to close. In this scenario, both the bank and its lawyer were asking Mr. Whitfield to suborn perjury that Black Rush was a commercial loan versus a consumer loan by signing the business purpose affidavit. The business purpose affidavit was actually drafted by Mark Weeks law office per Mr. Warren's request, and was produced in response to a document subpoena served upon them. (See Business Purpose Affidavit, attached as Exhibit "D" to Mr. Whitfield's Memorandum In Opposition to Summary Judgment filed August 25, 2017).

According to Mr. Swanson's testimony, a business purpose affidavit was never discussed when he was consulted. If this is believed, Mr. Warren's

representation that a business purpose affidavit was discussed with the closing agent and incorporated into the bank's condition to close is false and fraudulent. Either way, the conflicting testimonies surrounding the June 27, 2012 email are evidence that at the very least, some of the advice offered in the June 27, 2012 email as a condition to close was not given- which is evidence of fabrication. One need look no further than Mr. Warren and Mr. Swanson's respective testimony that one is not telling the truth for this determination. This is de facto proof that the "advice" for both subsections (A) and (B) contained in the e-mail is unreliable and fabricated, was established as conditions to close, and evidence that Mr. Whitfield's claims against Mr. Swanson affect the bank's ability to foreclose-- and are compulsory counterclaims.

IV. Mr. Whitfield's legal claims, including civil conspiracy, must be tried before the bank's equitable claim of foreclosure.

Where a defendant in an equitable action asserts a compulsory counterclaim that alleges actions at law, both the plaintiff and the defendant have a right to have a jury trial on the issues raised by the compulsory legal counterclaim. Gardner v. Travis, 316 S.C. 315, 317-318, 450 S.E.2d 54, 56 (Ct. App.1994). **If there are factual issues common to both the legal and equitable claims, the legal claim, "absent the most imperative circumstances," must be tried, that is, disposed of, first**. Id (Emphasis Added). In determining whether to order separate trials or a single proceeding, "caution should be taken" by the trial court "to assure that, under the circumstances of the case, a joint trial will not deprive a party of his right to a full

jury trial of legal issues. Id. This law was later set forth in a mortgage foreclosure case where there was no jury trial waiver (as is the case here):

> "(4) If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim unless a valid jury trial waiver exists that encompasses the counterclaim. If such a waiver does not exist, the proper procedure for handling the counterclaims is as follows:
>
> (a) The trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.
>
> (b) If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.
>
> (c) If the claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the equitable claims, but the jury's determination of common factual issues shall be binding upon the court."

Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 330, 755 S.E.2d 437, 441–42 (2014).

In this case, there do not exist "the most imperative circumstances" to warrant separate trials or the equitable claims being tried first as there are factual issues that are shared with Mr. Whitfield's non-conspiracy claims: nearly all of Mr. Whitfield's claims are grounded in the bank's failure to renew the loans, the defense to which is Mr. Swanson's allegation that he rendered advice.

V. Swanson's request for bifurcation to promote judicial economy--does the exact opposite in this matter.

SCRCP 42(b) states:

> (b) **Separate Trials.** The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, **always preserving inviolate the right of trial by jury** as declared by the Constitution or as given by a statute of the State.

(Emphasis Added).

Mr. Swanson's alleged advice is the only reason that Mr. Warren based his decision not to close Mr. Whitfield's renewal loans. (*See* Dep. of S. Warren filed September 10, 2014). That decision sparked the claimed default and ensuing foreclosure actions, and Mr. Whitfield's attendant counterclaims. Indeed, the alleged advice forms the same factual basis to be litigated in the civil conspiracy claim: whether it happened, why it happened, how it happened -- and if it happened as claimed. If the trials were bifurcated, **Mr. Whitfield will still be using the same witness testimony to prosecute the bifurcated legal counterclaims against the bank (Breach of Contract, Breach of Contract Accompanied by Fraudulent Act, Negligent Misrepresentation, Fraud in the Inducement, Unfair Trade Practices, Tortious Interference with Prospective Contractual Relations) as he would in the civil conspiracy claim**. When the bank promotes its defense that loans were not renewed on the basis of Mr. Swanson's advice (*The bank has named David Swanson as Witness in its own case and based its defense not to close on Mr. Swanson's advice in its Pre-Trial Brief and Witness List*, attached hereto as Exhibit "A"), Mr. Whitfield will refute the testimony that the advice was given at the time and place claimed as stated

above. Not only was the advice unreliable, it was also fraudulent, untrustworthy and based upon unlawful acts: ***the very same nexus of factual events that belie the claim for civil conspiracy***.

VI. The Order should be amended because it makes findings that are not supported by the evidence.

Page 5 of the Order states:

> As is clear from the factual allegations supporting the civil conspiracy counterclaim, the civil conspiracy claim does not arise out of the underlying loans or prospective loan renewals, but rather, out of activity that took place after the alleged loan renewals did not close.

Page 6 of the Order states:

> Here, the civil conspiracy counterclaim has no logical relationship to Pinnacle Bank's right to enforce the note and foreclose the mortgage. The alleged facts supporting the civil conspiracy counterclaim--that Swanson and Harbor National Bank conspired to give false testimony for the purpose of providing an *after-the-fact* justification for Harbor National Bank's request for a title endorsement--relate to activity that occurred after Mr. Whitfield's loans were not renewed.

As stated above and herein, there is evidence (from Mr. Warren and Mr. Swanson themselves) that they were in communication before closing regarding the very transaction that is the subject of Mr. Whitfield's counterclaims. As Swanson's Notice of Motion and Motion incorporated "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, and all arguments of counsel made at [the] hearing on this motion," all of it is subject to review and consideration by this Court in rendering the present Order.

Page 8-9 of the Order states:

> ORDERED, that this Order shall apply only to the civil conspiracy counterclaim asserted by Defendant Anthony Whitfield and shall not affect any of the remaining claims, counterclaims, or crossclaims asserted between the parties to this litigation, the trial of which is set to begin October 21, 2019 and shall proceed.

The focus of Plaintiff's motion and argument at hearing, and disposition thereof in the Court's Order was that Mr. Whitfield's civil conspiracy claim was a permissive and not compulsory counterclaim. Indeed, that was the claimed basis for striking the jury trial, the bifurcation, and referral to the Master-In-Equity. The parties never actually pled nor litigated the issue of whether or not Mr. Whitfield's other counterclaims would be affected by the Court's Order or whether the trial would or would not be proceeding on October 21, 2019 in light of the ruling. The first and only time this matter was raised was wherein counsel for Plaintiff submitted that this language be added to the proposed Order. The Court never addressed this matter. Accordingly, it should be removed from the Order.

Conclusion

The Court's ruling, if allowed to stand, removes Mr. Whitfield's right to a jury trial on the civil conspiracy claim-- and it necessitates the conclusion *that even if a civil conspiracy existed and was demonstrated* between the bank and Mr. Swanson in order to refute Mr. Whitfield's claims of loan renewal-- *Mr. Whitfield would still be in default and the bank could still foreclose in spite of that same conspiracy*. This would be an anathema and a paradoxical result.

Certainly justice would not be served if the trial judge, in a bifurcated trial, found a civil conspiracy existed between the bank and Mr. Swanson concerning advice not to close the transaction, but yet that same determination would not be related to Mr. Whitfield's other counterclaims of non-renewal.

Rather than shielding Mr. Swanson from a jury of his peers to sit in judgment of his actions in a bifurcated trial, the jury should hear the bank's excuses for failing to close (as they will be anyway, even in a bifurcated trial as contemplated by this Court's Order), and then also decide whether the bank and Mr. Swanson engaged in a civil conspiracy to create an out for the bank. If the bank and Mr. Swanson convince the trier of fact that Mr. Swanson gave legal advice before the closing, and it was reasonable for the bank to rely on the advice, then the bank will have successfully defended all of Mr. Whitfield's counterclaims- including the civil conspiracy claim. Conversely, if Mr. Whitfield convinces the trier of fact that Mr. Swanson's legal advice was not given before the closing, and that Mr. Swanson and the bank manufactured the existence of such event- then Mr. Whitfield will have prevailed on his counterclaims, and the trier of fact may rightfully decide the bank and Mr. Swanson did engage in a civil conspiracy.

The only damages Mr. Whitfield has sought from Mr. Swanson are his attorney's fees and costs expended in refuting that Mr. Swanson gave the bank advice as claimed. If the conspiracy is established, then Mr. Whitfield should never have incurred over a million dollars in litigation costs in refuting the bank's claims of default- all predicated on advice that either never occurred or never

occurred as claimed. For these reasons, the Court must fully reconsider its Order to Strike and Bifurcate, and amend the Order to allow all claims to proceed to a jury. The existence of the alleged legal advice is common to **all claims and defenses.** A determination as to whether the bank and Mr. Swanson conspired with each other will determine the bank's ability to foreclose, one way or another.

Respectfully submitted,

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10/18, 2019.

CERTIFICATE OF SERVICE

I certify that I served the foregoing Motion to Alter or Amend upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to the counsel's last known address on this 18th day of October, 2019.

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10/18, 2019.
Mount Pleasant, South Carolina

FILED
2019 OCT 18 PM 4:14
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2012-CP-10-5887

PINNACLE BANK, as successor in interest to BANK OF NORTH CAROLINA, previous successor in interest to HARBOR NATIONAL BANK,

Plaintiff,

v.

ANTHONY M. WHITFIELD and CINDY WHITFIELD,

Defendants.

PRE-TRIAL BRIEF

COMES NOW Plaintiff, Pinnacle Bank (hereinafter "Plaintiff"), and submits this Pre-trial Brief, in accordance with Rule 16(c) of the South Carolina Rules of Civil Procedure.

This matter is one of several foreclosure proceedings brought by Plaintiff against Anthony M. Whitfield (hereinafter "Defendant") in 2012 in connection with a series of loans taken out by Defendant and secured by nine properties located in Charleston, Berkeley, and Dorchester counties. These loans have now been in default for over seven years. Not only has the Defendant refused to pay back the approximate total principal of $1,300,000, he has also filed numerous counterclaims sounding in fraud and unfair trade practices to prevent foreclosure, and accused the bank and its officers of conspiracy, forgery, and causing him heart failure. Plaintiff contends that these counterclaims should be dismissed as a matter of law.

EXHIBIT

A

This case has moved forward first among the group of cases and the lone action in Charleston County. After seven years and multiple efforts by Plaintiff to get to trial in this action, the case has been set for a date certain trial beginning on October 21, 2019.

(1) A concise, non-argumentative statement of the facts of the case.

The bank and Whitfield began a commercial relationship in 2007 when Harbor National Bank agreed to provide a guidance line of credit of up to $1,500,000 for Whitfield's business of buying, renting, and selling residential properties. Under the guidance line, Whitfield could secure individual loans for a particular property presuming all requirements were met for each. The bank provided nine loans to Anthony Whitfield secured by nine separate residential mortgages. All nine loans matured long ago and remain outstanding. All nine mortgages have been in default for at least seven years, and are the subject of foreclosure actions in Dorchester, Berkeley, and Charleston Counties. One of the mortgaged properties is the subject of the present Charleston case.

The nine loans in question were originated in 2007 and 2008, pursuant to the guidance line of credit. Each loan was the subject of its own note, mortgage, and assignment of leases and rents, all of which had five-year terms, thirty-year amortizations, and fixed interest rates specified in the loan documents. Whitfield made regular monthly payments on all the loans for the five-year loan period of each.

Upon the maturity of the first three loans in 2012, including the loan at issue here, Plaintiff and Defendant Whitfield had difficulty coming to terms for their renewal. By the time the 2012 renewals were due, Mr. Whitfield was a poor credit risk and had failed to provide Plaintiff with financial information when requested. Whitfield also sought to avoid requirements the bank set for the loan renewals.

Despite these difficulties, Charlie Rivers, the president of Plaintiff's predecessor Harbor National Bank at the time, agreed to meet with Whitfield on June 21, 2012 in an effort to identify terms on which the loans could be renewed. After their conversation, Rivers instructed Scott Warren, a loan officer at Harbor National Bank, to prepare a term sheet based on the general terms agreed to in the June 21 meeting and move the loans toward a closing.

On its face, the resulting Term Sheet was a preliminary "agreement to agree." Among the statements in the Term Sheet making this point clear are:

- that "[t]he following is not a commitment to lend, but is our proposal for the general terms and conditions of the subject loans if the transactions were to close on June 28, 2012," Term Sheet at 1 (emphasis added);
- that "the Bank will require a minimum of title updates & new title opinion(s), but additional services and documentation may be required," id. at 2 ¶ A(6);
- that the "proposed renewals/modifications will be closed under the supervision of the borrower's attorney," id. ¶ B(2) (emphasis added); and
- that "[u]pon reaching an agreement on these general terms, we can proceed to a formal commitment very quickly," id. at 3 (emphasis added).

Whitfield received the Term Sheet from Scott Warren at a meeting on June 27, 2012. Shortly before that meeting, Harbor had become aware of a potential title defect in its collateral for the Charleston loan. Unknown to Harbor, Whitfield had conveyed a one-half interest in the subject property to his ex-wife, Cindy Whitfield. Whitfield does not dispute that Warren told him at their meeting that a title endorsement might be required to address this problem.

On June 28, 2012, Warren and Whitfield attended an attempted closing of the renewal transactions at the office of Mark Weeks, Esq. On the advice of its counsel, David Swanson, Esq.,

Harbor refused to close without either a title endorsement or a co-signature from the now co-owner Cindy Whitfield. When contacted during the attempted closing, Cindy Whitfield's counsel advised the parties that she would not sign. Harbor did not close the loans that day as a result, and after further unsuccessful attempts to address the outstanding loans, this litigation followed.

(2) An objective statement of the facts in controversy.

- Whether Mr. Whitfield has a legal obligation to repay the loans made to him, with interest.
- Whether, notwithstanding the requirement of a closing and the language of the only writing at issue, Plaintiff ever made a legally enforceable promise to renew Mr. Whitfield's loans irrespective of title work on the collateral.
- If Mr. Whitfield has any viable claim, whether his failure to mitigate his damages by substituting available, unencumbered collateral to secure the renewal of his loans precludes any recovery.
- If Mr. Whitfield has any viable claim, whether Mr. Whitfield incurred any damages as a result of Plaintiff's refusal to renew his loans without adequate security.

(3) The legal issues involved.

Plaintiff anticipates a robust directed verdict motion that will address the following issues and deficiencies in Whitfield's claims, among others:

(i) Whether the June 26, 2012 Term Sheet constitutes or reflects the terms of a binding contract between the parties.

South Carolina precedent is controlling as to Whitfield's contention that the June 26, 2012 Term Sheet is a binding contract. "[W]here the language of a purported contract clearly expresses the intent to be non-binding, the analysis is limited to the four corners of the document." Stevens and Wilkinson of South Carolina, Inc. v. City of Columbia, 409 S.C. 568, 578 (2014). "The preliminary negotiations leading up to execution of a contract must be distinguished from the

contract itself. There is no meeting of the minds of the parties while they are merely negotiating as to the terms of an agreement to be entered into." McLaurin v. Hamer, 165 S.C. 411 (1932) (emphasis in original) (quoting 13 Corpus Juris ¶ 100).

(ii) Whether the lender statute of frauds, S.C. Code § 37-10-107 and/or statute of frauds, S.C. Code § 32-3-10, applies to bar Mr. Whitfield's claims.

S.C. Code § 37-10-107 states in pertinent part that:

> No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:
>
> (a) to lend or borrow money;
> (b) to defer or forbear in the repayment of money; or
> (c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.

S.C. Code § 37-10-107(1). Under South Carolina law, for a writing to be a memorandum sufficient to take a writing out of the statute of frauds, it must "sufficiently indicate a contract has been made between the parties." Player v. Chandler, 299 S.C. 101, 106 (1989) (emphasis added); accord Smith v. McClam, 289 S.C. 452, 456 (1986). Alleged oral assurances may not be used to alter the requirement for a writing. Sea Cove Development, LLC v. Harbourside Community Bank, 387 S.C. 95, 106 (2010). These rules of law prevent Mr. Whitfield from claiming that any oral representations by Harbor National Bank created a contractual obligation for it to lend.

Further, the statute of frauds precludes Whitfield from seeking to enforce any contract for an interest in real property unless the agreement was reduced to "writing and signed by the party to be charged." S.C. Code Ann. § 32-3-10. To avoid the Statute of Frauds, the writing "must identify the subject matter of the contract, sufficiently indicate a contract had been made between the parties, and state with reasonable certainty the essential terms of the agreement." Player 299

S.C. at 105. The failure to express "every essential element . . . in the writing" renders the purported contract void. Id.

It makes no difference for purposes of the statute of frauds that this case involves the purported extension or modification of an existing mortgage, rather than the execution of an entirely new agreement. The statute of frauds applies equally to a purported modification of an agreement. Player, 299 S.C. at 105. Thus, the modification of a contract must follow the same requirements as the original contract, including compliance with the statute of frauds. Sterling Dev. Co. v. Collins, 309 S.C. 237, 241 (1992). Whitfield's alleged agreement to change the existing mortgage interest must independently satisfy the statute of frauds' requirements that the modification appear in a writing, signed by the party to be charged, and state the essential terms with reasonable certainty. Windham v. Honeycutt, 279 S.C. 109, 302 S.E.2d 856 (1983) (holding that the oral modification of a contract affecting an interest in land violates the Statute of Frauds).

(iii) Whether part performance applies to prevent application of the statute of frauds.

To qualify as a part performance preventing application of the statute of frauds, the performance at issue must "clearly and unequivocally" relate to the agreement to be taken out of the operation of the statute of frauds and must be "exclusive of any other relation between parties touching such an agreement." Player, 299 S.C. at 105-06. The lender statute of frauds contains language producing the same result: it only permits part performance to apply "to the extent that the part performance may be explained only by reference to the promise, undertaking, accepted offer, commitment, or agreement [that is, the qualifying writing.]" S.C. Code § 37-10-107(2)(c) (emphasis added). In the present case, the alleged part performance is Plaintiff's acceptance of payments on loans which were existing obligations between the parties, which still persist today

and remain unpaid, and which exist independent of whether there was a contractual obligation to renew the loans.

(iv) Whether Mr. Whitfield can establish fraud in the inducement, negligent misrepresentation, and related claims as a matter of law.

To establish his claim for fraud in the inducement, Whitfield must prove twelve different elements. The first nine are the elements of common-law fraud in South Carolina:

> (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.

Moseley v. All Things Possible, Inc., 388 S.C. 31, 35-36 (Ct. App. 2010). To establish fraud in the inducement, a plaintiff must also establish three additional elements: "(1) that the alleged fraudfeasor made a false representation relating to a present or preexisting fact; (2) that the alleged fraudfeasor intended to deceive him; and (3) that he had a right to rely on the representation made to him." Id. Thus, a forward-looking statement cannot be the subject of an action for fraud in the inducement, because the misrepresentation must relate to a present or preexisting fact. Fraud must be proved by clear and convincing evidence. Id. at 35.

Plaintiff will argue at trial that Mr. Whitfield cannot establish, as a matter of law, sufficient evidence of (1) the falsity of any of Plaintiff's statements regarding a present or preexisting fact; (2) Plaintiff's intent that Mr. Whitfield rely on the Term Sheet; (3) that any such reliance by Mr. Whitfield was justifiable; (4) that Plaintiff intended to deceive Mr. Whitfield; and (5) that Mr. Whitfield had a right to rely on the Term Sheet. Any one of these five defects is sufficient to support a directed verdict for the Plaintiff.

The elements of false representation, justifiable reliance, and right to rely are also elements of a claim for negligent misrepresentation. Brown v. Stewart, 348 S.C. 33, 42 (2001). A fraudulent

act accompanying a breach of a contract, which must also be proved by clear and convincing evidence, is required for a claim for breach of contract accompanied by a fraudulent act. Vann v. Nationwide Ins. Co., 257 S.C. 217, 220 (1971). A right to rely is also an element of a claim for promissory estoppel. Powers Construction Co., Inc. v. Salem Carpets, Inc., 283 S.C. 302, 306 (Ct. App. 1984) (promissory estoppel). Harbor is therefore also entitled to a directed verdict on those claims.

(v) Whether Mr. Whitfield can establish any conduct by Plaintiff which affects the public interest.

In order to constitute violation of the South Carolina Unfair Trade Practices Act, a party's conduct must affect the public interest. Glob. Prot. Corp. v. Halbersberg, 332 S.C. 149, 156 (Ct. App. 1998) ("To be actionable under the UTPA, the unfair or deceptive act or practice must have an impact upon the public interest."). The South Carolina Supreme Court recently held that if conduct only affects the parties to a transaction, it does not affect the public interest, and is thus beyond the scope of the Act. Woodson v. DLI Properties, 406 S.C. 517, 530-31 (2014). Mr. Whitfield cannot establish any conduct of Plaintiff that affects the public interest, and thus lacks a cause of action under the Act as a matter of law. Further, Harbor National Bank is no longer in business after its acquisition and thus these alleged unfair trade practices are not capable of repetition.

(vi) Whether Mr. Whitfield can establish promissory estoppel by clear and convincing evidence.

The equitable claim of promissory estoppel requires (1) a promise unambiguous in its terms; (2) reasonable reliance on the promise by Whitfield; (3) reliance expected and foreseeable by Harbor; and (4) injury in reliance on the promise. Powers Construction Co., Inc. v. Salem Carpets, Inc., 283 S.C. 302, 306 (Ct. App. 1984). In cases involving real property, such as this one, the burden of proof for a promissory estoppel claim is clear and convincing evidence. Satcher

v. Satcher, 351 S.C. 477, 483 (Ct. App. 2002). In addition to the lack of evidence of reasonable reliance and the application of the lender statute of frauds discussed above, Mr. Whitfield's claim also suffers from a lack of evidence of any injury caused by his reliance.

(vii) Whether Mr. Whitfield can establish tortious interference with a specific prospective contract.

To establish tortious interference with a prospective contract, Whitfield must provide evidence of a specific prospective contract with which Harbor intentionally interfered, for an improper purpose or by improper methods, and which caused him injury. United Educational Distributors, LLC v. Educational Testing Service, 350 S.C. 7, 14 (Ct. App. 2002). "There can be no intentional interference with prospective contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its own contractual rights with a third party." Id. Mr. Whitfield cannot identify any particular contract to rent or sell any of his properties with which Plaintiff intentionally interfered, rendering this claim fit for directed verdict.

(viii) Whether Mr. Whitfield can establish abuse of process.

There are two essential elements required for an abuse of process action: (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings. Food Lion, Inc. v. United Food & Commercial Workers Intern. Union, 351 S.C. 65, 71 (2002). "An ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process." Id. As to the "willful act" element, our supreme court has stated that "[s]ome definite act . . . not authorized by the process or aimed at an object not legitimate in the use of the process is required." Id. Mr. Whitfield has come forward with no evidence of any such abuse of process by Plaintiff or by Defendant Swanson, making this claim a proper one for directed verdict.

(ix) Whether Mr. Whitfield can establish a civil conspiracy.

The gravamen of a civil conspiracy claim is the special damages resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se. Pye v. Estate of Fox, 369 S.C. 555, 567-68 (2006). The damages alleged must go beyond the damages alleged in other causes of action. Id. Civil conspiracy cannot be an "embellishment" of a breach of contract action and cannot simply incorporate or demonstrate other allegations to prove a conspiracy. Vaught v. Waites, 300 S.C. 201, 208-09 (Ct. App. 1989).

To prove special damages, a plaintiff must show that the acts in furtherance of the conspiracy were separate and independent from other wrongful acts alleged in complaint. AJG Holdings LLC v. Dunn, 392 S.C. 160, 167-68 (Ct. App. 2011). Mr. Whitfield has failed to demonstrate any special damages arising from a conspiracy in addition to those damages alleged in his other causes of action.

(x) Whether the statute of limitations applies to bar Mr. Whitfield's claims as to conduct by Plaintiff at the time of the initial loan in 2007.

Under S.C. Code § 15-3-530, the statute of limitations for Mr. Whitfield's claims in this action is three years. Some of Mr. Whitfield's claims appear to be based on events which took place at the time of the initial loans in 2007 but were not brought until he answered this lawsuit in 2012. Whitfield had copies of all the closing documents and made regular monthly payments based on them over the ensuing five-year period; he cannot, therefore, claim a lack of knowledge of the existence of such claims. All such claims arising from the circumstances of the initial 2007 loans are therefore time-barred.

(4) A listing of exhibits, indicating those to which there is disagreement and a listing of witnesses who may be called and, if available, their address and phone number.

Plaintiff is submitting its Exhibit List and Witness List contemporaneously with this Pre-Trial Brief.

Plaintiff reserves the right to introduce other documents produced in discovery in this action but inadvertently left off the preceding list, and to introduce other documents for impeachment or other similar purposes.

(5) Any unusual problems relating to evidence.

None anticipated. Plaintiff notes that the loan agreement provides for fees and costs associated with enforcement. Plaintiff requests that the Court accept submission of an affidavit of fees and costs following a verdict in favor of Plaintiff, which would entitle such recovery. If the Court prefers a different process, please advise counsel so that we may comply.

The parties have agreed to the authenticity of documents exchanged in discovery. Accordingly, the parties need not call records custodians of third parties to establish the authenticity of records that have been produced and served in this litigation.

(6) Any unusual question or matter which should be brought to the attention of the court.

This action involves equitable determinations for the Court. Plaintiff has brought claims for action on a note and for foreclosure and requests a non-jury trial as to these claims. Additionally, Whitfield has asserted a promissory estoppel/detrimental reliance counterclaim that is ripe for an equitable determination by the Court. Accordingly, Plaintiff anticipates that, following the presentation of all evidence and the jury's determination of the legal claims, the Court will then issue judgment on the remaining equitable claims.

(7) A statement that settlement negotiations were attempted before the date of the pre-trial hearing and the status of settlement negotiations.

The parties have conducted several mediations and have attempted to negotiate a settlement but remain far apart in their efforts to resolve the matter.

This 14th day of October, 2019 at Charleston, South Carolina.

Respectfully submitted,

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Counsel for Plaintiff Pinnacle Bank

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PLAINTIFF'S PRE-TRIAL BRIEF** has been served upon each of the parties to this action by depositing same in the United States mail, postage prepaid, in an envelope(s) addressed as follows:

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This 14th day of October, 2019.

Duffy & Young, LLC

Record on Appeal - 0418

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2012-CP-10-5887

PINNACLE BANK, as successor in interest to BANK OF NORTH CAROLINA, previous successor in interest to HARBOR NATIONAL BANK,

Plaintiff,

v.

ANTHONY M. WHITFIELD and CINDY WHITFIELD,

Defendants.

PLAINTIFF'S WITNESS LIST

Plaintiff Pinnacle Bank expects to call the following witnesses:

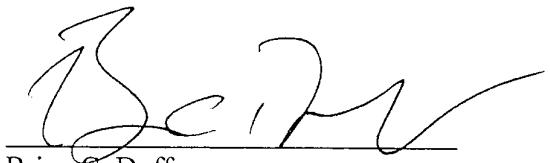
1. Stan Ashburne
2. William Barksdale
3. Angela Bell
4. Ryan Griffin
5. Felicia Howard
6. Charlie Rivers
7. Willard Stout
8. David Swanson
9. Scott Warren
10. Ryan Werking
11. Anthony Whitfield

12. Cindy Whitfield

13. Teresa Farley

14. Blake Irwin

Plaintiff reserves the right to call any witness identified by any party to this action if the need arises and to call additional witnesses in rebuttal. Plaintiff further reserves the right to supplement this list should additional facts or information become available between the date of service and the time of trial.



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October 14, 2019
Charleston, South Carolina

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2012-CP-10-5887
	)	
Pinnacle Bank,	)	
	)	
Plaintiff,	)	
	)	**DAVID SWANSON'S MEMORANDUM IN OPPOSITION TO DEFENDANT WHITFIELD'S RULES 52(b) and 59(e) MOTION**
vs.	)	
	)	
Anthony Whitfield and Cindy Whitfield,	)	
	)	
Defendants.	)	
	)	
Anthony Whitfield, Counterclaimant	)	
	)	
	)	
	)	
vs.	)	
	)	
David Swanson, Counterclaim Defendant	)	
	)	

TO: BRENT S. HALVERSON, ESQ. and DANIEL S. SLOTCHIVER, ESQ., ATTORNEYS FOR DEFENDANT/COUNTERCLAIMANT ANTHONY WHITFIELD:

Preliminary Statement

By order entered October 16, 2019, this Court granted Counterclaim Defendant David Swanson's motion to strike the jury demand and bifurcate the civil conspiracy counterclaim asserted by Anthony Whitfield against David Swanson and Plaintiff, Pinnacle Bank (the "Bank")[1]. The grounds for the motion were that (1) the civil conspiracy counterclaim is a permissive counterclaim; and (2) the civil conspiracy counterclaim (the only claim alleged against Mr. Swanson) has no connection to the alleged compulsory counterclaims asserted by Whitfield.

In his motion to reconsider, Mr. Whitfield does not identify an issue of fact or law that was

[1] Pinnacle Bank is the Plaintiff as successor in interest to Bank of North Carolina who was prior successor in interest to Harbor National Bank.

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overlooked by the Court. Instead, Whitfield suggests, without factual or evidentiary support, that the outcome of the civil conspiracy counterclaim could render Plaintiff's note and mortgage (which was signed in 2007) unenforceable. This argument is without merit.

It is indisputable that the civil conspiracy counterclaim is separate and distinct from the enforceability of the note and mortgage, and thus, was a permissive counterclaim that should be bifurcated from the jury trial of Whitfield's compulsory counterclaims. The undisputed underlying facts show:

- Whitfield entered into a loan with Plaintiff's predecessor in 2007, which matured on May 3, 2012.
- Whitfield did not pay off the loan by May 3, 2012 but did enter into discussions with the Bank about loan renewals.
- The Bank and Whitfield were scheduled to renew the loans on June 28, 2012. Prior to the closing, a representative of the bank informed Whitfield that the loan could not close without a title endorsement or the signature of Whitfield's ex-wife on the mortgage for the property referred to as Black Rush.
- A title endorsement could not be procured, and the loan renewals did not close, resulting in this foreclosure action.
- Following initiation of the foreclosure, Whitfield filed multiple counterclaims against the Bank.
- *After* Whitfield's alleged compulsory counterclaims were asserted, a Bank representative, Scott Warren, was deposed and testified it was David Swanson who advised the Bank to obtain a title endorsement.
- *After* Scott Warren's deposition testimony, Swanson also testified that he advised the Bank to get a title endorsement.
- Over two years after filing his alleged compulsory counterclaims, Whitfield asserted an additional counterclaim against the Bank and a new party to the action, David Swanson, alleging a civil conspiracy to testify falsely in a deposition "with the ulterior purpose of fabricating a legal defense for the bank's failure to renew its contractual obligations to renew Mr. Whitfield's loans." (Def's Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims ¶¶66-69).

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As an initial matter, Mr. Swanson is not a representative of the Bank; is not and has never been the holder of the debt; and was not added to this case until over two years after the filing of Whitfield's alleged compulsory counterclaims. Thus, it is unclear how the civil conspiracy counterclaim asserted against Swanson could affect the Bank's ability to foreclose on the note and mortgage.

Moreover, the civil conspiracy counterclaim alleges that the Bank and Swanson conspired *after the loan renewals did not close* to fabricate a legal justification for the Bank's decision not to renew the loans without a title endorsement. These facts inherently allege a conspiracy that arose after the loans were initially made, and after the loans were not renewed.

Accordingly, the civil conspiracy counterclaim has no impact on the merits of the foreclosure action or Mr. Whitfield's compulsory counterclaims and Whitfield's Rule 52(b) and 59(e) motion should be denied.

Factual Background

The factual background relevant to this motion is succinctly stated in this Court's October 16, 2019 order. For purposes of efficiency, Counterclaim Defendant Swanson will not reiterate the same facts.

Argument

I. The civil conspiracy counterclaim claim is permissive and not entitled to a jury trial.

a. The alleged civil conspiracy is not logically related to enforcement of the note and mortgage

In his first ground for reconsideration, Whitfield alleges that because a civil conspiracy claim is *generally* a legal, not equitable, claim, that he is entitled to a jury trial. Whitfield misses the point.

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The action at bar is an equitable claim of foreclosure. It was Mr. Whitfield who asserted the civil conspiracy cause of action as a counterclaim to this equitable foreclosure action where it was not compulsory. Thus, Whitfield waived his right to a jury trial on the civil conspiracy counterclaim. This holding is well established under South Carolina law.

Under South Carolina law, whether a counterclaim is compulsory or permissive is viewed through the logical relationship test. "Under this test, "the 'logical relationship' determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage. If the defendant's prevailing on his counterclaim would affect the bank's right to enforce the note and foreclose the mortgage, there is a logical relationship between the counterclaim and the underlying suit, and the counterclaim is therefore compulsory." *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321 at fn 7, 755 S.E.2d 437 at fn 7 (internal citations omitted).

Here, it is indisputable that the claim against Swanson for civil conspiracy is separate from the loan agreements that the Bank seeks to enforce. The civil conspiracy counterclaim against Swanson has no impact on the "bank's right to enforce the note and foreclose the mortgage," and every allegation against Swanson arose out of activity that occurred *after* this foreclosure action was initiated. Thus, the civil conspiracy counterclaim is permissive.[2]

[2] This position is further supported by the damages Whitfield seeks in his civil conspiracy counterclaim. Whitfield seeks recovery of the attorney's fees that he has incurred attempting to rebut the allegedly fabricated "advice of counsel" defense—not damages associated with the underlying loans. (Exhibit A).

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b. Whitfield's argument that prevailing on the civil conspiracy counterclaim would prevent foreclosure is without merit and contrary to Whitfield's prior admissions to the Court

In support of his motion, Whitfield suggests (without factual support) that "the civil conspiracy claim, if established, would prevent the bank from enforcing its note and mortgage." This suggestion, however, ignores the undisputed facts, including those alleged in his own counterclaim. Likewise, it is contrary to prior arguments made to the Court by Whitfield.

It is undisputed that the Bank did not renew Whitfield's loans due to the inability to obtain a title endorsement for the Black Rush Property. (Defs. 5th Am. Ans., Aff. Def., Crossclaim and Counterclaims ¶¶32, 37). This fact remains whether or not Mr. Swanson was involved in an attempt to fabricate an after-the-fact justification for the title endorsement request. Indeed, Whitfield previously acknowledged to this Court that the civil conspiracy claim was not connected to the enforceability of the underlying loans.

In a prior motion hearing in front of this Court, Swanson challenged the sufficiency of Whitfield's response to requests to admit which sought to pinpoint the timing that the alleged conspiracy took place. The exchange at a prior motion hearing went as follows:

> The Court: But other than being a witness to the –and a participant in the coverup and all of the problems that that would then create for this attorney, okay, is he then responsible for the underlying damages of Mr. Whitfield with regards to the failure of the bank to fund the loans?
>
> Whitfield's Counsel: I got you. I understand your question, Your Honor. The answer is no.

(Exhibit A, 3-21-18 Transcript, pg. 18 lns. 4-13; see also Id. at pgs. 15-20).

Similarly, although a transcript is not yet available, at oral arguments on the motion giving rise to this motion to reconsider, counsel for Whitfield again conceded that the civil conspiracy claim is not connected to the foreclosure action.

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Accordingly, it is and has been undisputed that the civil conspiracy counterclaim does not affect the enforceability of the note and mortgage. Whitfield cannot now argue a contrary position.

c. Whitfield's argument that the civil conspiracy occurred prior to the failed loan closing is circular, self-serving, and also rebutted by Whitfield's prior arguments in Court.

Equally unavailing is Whitfield's allegation, made for the first time in opposition to Swanson's motion to strike the jury demand, that the alleged conspiracy is no longer a conspiracy to testify falsely about the existence of a phone call for "the ulterior purpose of fabricating a legal defense for the bank's failure to renew its contractual obligations to renew Mr. Whitfield's loans," but rather, was a conspiracy between the Bank and its lawyer to pre-emptively fabricate an "advice of counsel" legal defense for the Bank's decision not to renew the subject loan.

As an initial matter, this new argument contradicts Whitfield's prior arguments in Court. In a hearing on March 21, 2018, this Court heard a discovery dispute over requests to admit served for the purpose of clarifying the timing of the alleged civil conspiracy. At that hearing, counsel for Whitfield confirmed that the civil conspiracy arose *after* the loan renewals did not close.

> We sued for a civil conspiracy action saying they fabricated the defense *after the fact* because we never heard about David Swanson for a year into the litigation.

(Id. at pg. 9 lns. 11-14)(emphasis added).

Likewise, in the same responses to Swanson's requests to admit, Whitfield admitted that the alleged conspiracy to fabricate the phone call occurred *after* June 28, 2012. Swanson's seventh request to admit (inadvertently identified as his second request to admit no. 6) requested that Whitfield "Admit that all damages you seek to recover against Swanson arise out of acts by Swanson that took place after initiation of this foreclosure lawsuit on September 7, 2012." (Exhibit B, Mtn. to Deem Requests Admitted at Ex. A).

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Whitfield denied the request and in a clarifying interrogatory, Whitfield stated:

> "As stated above in Answer to Request No. 6, it is not known precisely when Mr. Swanson fabricated his communications with Mr. Warren, however, they had to have occurred after June 28, 2012 and before November 13, 2013, the date Mr. Swanson's name was first injected into this lawsuit by the bank."

(Exhibit B, Mtn. to Deem Requests Admitted at Ex. B).

Accordingly, it is undisputed that *prior* to the failure of the June 28, 2012 loan renewal closing, the Bank did in fact request a title endorsement. In his civil conspiracy counterclaim, Whitfield merely alleges that he thinks the Bank and Swanson conspired sometime *after* June 28, 2012 in order to justify the Bank's request for a title endorsement, i.e. that the title endorsement was requested on "advice of counsel." This allegation has no impact on the enforceability of the Bank's note and mortgage.

Simply put, Whitfield's new position is inconsistent with the positions he previously argued in Court, admitted in requests to admit, and that he alleged in his "5th Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims." Whitfield cannot now argue a contrary position when his prior position is inconvenient for him.

More importantly, however, this circular argument defeats Whitfield's entire claim against Swanson. By suggesting that Swanson and Warren came up with an alleged scheme not renew Whitfield's loans prior to June 28, 2012, Whitfield concedes that Swanson *did* give the advice to procure a title endorsement prior to the failed loan closing. This would render the civil conspiracy claim (alleging that an "advice of counsel" defense was fabricated as part of a conspiracy to justify the bank's decision not to close) moot.

Whitfield cannot both (1) allege that Swanson gave the Bank allegedly bad legal advice to require a title endorsement prior to closing; and (2) allege that the Bank and Swanson conspired

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to falsely testify that that the advice to obtain a title endorsement was given when in fact Whitfield alleged it was not. These arguments contradict one another in full[3].

Accordingly, success on the civil conspiracy counterclaim will not relieve Whitfield of his obligations under the note and mortgage. Therefore, the civil conspiracy counterclaim is permissive and Whitfield's motion to reconsider should be denied.

II. Whitfield's allegations concerning a "business purpose affidavit" are unconnected to the civil conspiracy counterclaim.

In additional grounds argued in support of his motion to reconsider, Whitfield alleges that the Bank fraudulently required a "business purpose affidavit" in connection with the contemplated loan renewal, even though Whitfield alleges that the subject loan was a consumer loan[4]. Whitfield alleges that this was part of a fraudulent attempt to characterize the loan as commercial as opposed to a consumer loan.

Whitfield contends that Scott Warren testified that Swanson advised him to obtain a "business purpose affidavit." Swanson testified he did not discuss a "business purpose affidavit" with Warren. Whitfield suggests that the conflicting testimony of Warren and Swanson concerning whether or not they discussed a "business purpose affidavit" somehow impacts the enforceability of the note and mortgage. This argument is without merit.

Conflicting testimony between Swanson and Warren concerning a request for a "business purpose affidavit" has no relationship to the Bank's ability to foreclose. It is likewise unclear how

[3] Notwithstanding this contradiction, neither argument would impact the enforceability of the note and mortgage.

[4] Whitfield alleges that because his ex-wife was living in the Black Rush Property, the subject loan was a consumer loan. The Bank disputes this characterization. These allegation, however, have nothing to do with the civil conspiracy claim against Swanson.

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this conflicting testimony has any relationship to the alleged reason the Bank did not renew the loans—the inability to obtain a title endorsement.

The outcome of Whitfield's compulsory counterclaims hinges on whether the Bank breached an alleged oral agreement to renew Whitfield's loans, and if the note and mortgage was valid in the first place. The outcome of the civil conspiracy counterclaim hinges only on whether or not Swanson and the Bank conspired to testify falsely about the phone call that they say occurred prior to June 28, 2012 for "the ulterior purpose of fabricating a legal defense for the bank's failure to renew its contractual obligations to renew Mr. Whitfield's loans." (Def's 5th Am Ans, Aff. Def., Crossclaim and Counterclaims ¶¶74-79). In other words, it is inherent in the conspiracy itself, as alleged by Whitfield, that the conspiracy was an *after the fact* attempt to give the Bank cover for its decision not to renew Whitfield's loans. This is wholly separate from an alleged "business purpose affidavit" associated with loans that never closed.

Accordingly, Whitfield's allegations concerning the propriety of the Bank's request for a "business purpose affidavit" are unrelated to the civil conspiracy counterclaim against Swanson and do not provide grounds for reversal of this Court's October 16, 2019 order.

III. This Court's October 16, 2019 Order does not affect any of the remaining claims between the parties

Whitfield argues in his motion to reconsider that the Court erred in bifurcating the civil conspiracy counterclaim and suggests that it should be tried before the foreclosure proceeding at the same time as his compulsory counterclaims. This argument is also without merit.

The South Carolina Supreme Court has repeatedly held that where litigation contains a combination of equitable and legal claims, there is a standard process dictating the order of trial. *Blackburn*, 407 S.C. at 329-330, 755 S.E.2d at 441-442.

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As is discussed at length herein, the civil conspiracy counterclaim against Swanson has no impact on the Bank's right to foreclose the note and mortgage. Accordingly, the counterclaim is clearly permissive. Thus, the civil conspiracy counterclaim is to be tried non-jury and should not be tried together with the compulsory counterclaims[5].

IV. Bifurcation of the civil conspiracy counterclaim is proper

Rule 42(b), SCRCP provides that "the court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State." Bifurcation is proper by the trial court where the issues in the case are complex, and bifurcation helps to clarify or simplify the issues. *Durham v. Vinson*, 360 S.C. 639, 602 S.E.2d 760 (2004).

In his motion to reconsider, Whitfield alleges that the exact opposite will happen because, according to Whitfield, "Swanson's advice is the only reason that Mr. Warren based his decision not to close Mr. Whitfield's renewal loans." (Whitfield 10-18-19 Rule 59(e) motion, pg. 20). This statement alone highlights precisely the confusion that will result if the civil conspiracy counterclaim is not bifurcated.

In this passage, Mr. Whitfield alleges that Swanson *did* in fact advise the Bank to obtain a title endorsement, and this was the reason that Bank did not renew the loans. Yet, the civil

[5] Whitfield suggests, without merit, that this Court's order will somehow interfere with a trial of the compulsory counterclaims before the equitable foreclosure action is tried. It does not. Nowhere in this Court's order does it purport to change the order in which the remaining claims should be tried. Indeed, this Court's order expressly states that it does not affect the other claims between the parties.

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conspiracy counterclaim hinges entirely on Whitfield's allegation that Swanson *did not* give the Bank the advice to obtain a title endorsement and that Swanson and Warren later falsely testified that Swanson provided this advice in order to manufacture a justification for the Bank's decision not renew Whitfield's loans.

As discussed herein, Whitfield seeks to both (1) argue that Swanson's advice to the Bank is the reason the Bank did not renew Whitfield's loans; while at the same time (2) argue that Swanson never actually gave the advice. Whitfield cannot have it both ways. If he wishes to argue that Swanson's advice was the cause of the failure by the Bank to renew the loans, then he must dismiss the civil conspiracy claim[6].

Furthermore, the civil conspiracy counterclaim is a nominal and limited portion of what is a lengthy and complex dispute between Whitfield and the Bank. Between the Bank and Whitfield, there will be ten expert witnesses and fifteen to twenty fact witnesses who will testify to issues only relevant to the claims regarding enforcement of the note and mortgage, Whitfield's counterclaims against the Bank for fraud, unfair lending practices, breach of contract and Whitfield's claims that he has been financially injured due to Whitfield's properties being tied up in this foreclosure litigation. These witnesses will likely need two weeks of testimony, regarding complex issues unrelated to Mr. Swanson or the civil conspiracy counterclaim.

To the contrary, the civil conspiracy claim against Swanson, involves simply whether Swanson and Warren actually had a phone call wherein Swanson advised the Bank to obtain a title endorsement.

[6] Whitfield cannot sue Swanson for allegedly providing incorrect legal advice (which is disputed), i.e. legal malpractice, as Swanson did not represent Whitfield.

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The issues between Whitfield and Swanson are limited, simple and can be concluded in one or two days of trial. The introduction of the claims against Swanson, which are entirely unrelated the foreclosure, loan enforcement, and lending practices issues between the Bank and Whitfield will only serve to complicate the issues before the jury and cause greater inefficiencies in bringing conclusion to the litigation.

Conclusion

For the reasons stated herein, Whitfield's motion to reconsider should be denied.

This 6th day of November, 2019.

Respectfully submitted,

EARHART OVERSTREET, LLC

By: s/Steven R. Kropski
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STATE OF SOUTH CAROLINA — COURT OF COMMON PLEAS

COUNTY OF CHARLESTON — 2012-CP-10-05887

HARBOR NATIONAL BANK,

PLAINTIFF,

vs.

ANTHONY M. WHITFIELD, et al.,

DEFENDANTS.

TRANSCRIPT OF RECORD

MARCH 21, 2018
CHARLESTON, SC

B E F O R E:

HONORABLE DIANE GOODSTEIN, JUDGE

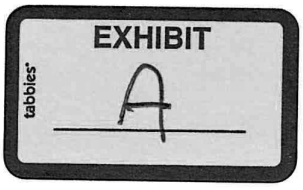
A P P E A R A N C E S:

BRENT HALVERSEN, ESQUIRE
DANIEL SLOTCHIVER, ESQUIRE
Attorneys for Defendant Whitfield

STEVE KROPSKI, ESQUIRE
Attorney for Defendant Swanson

* *

Ruth C. Weese, RDR
Official Court Reporter
Ninth Judicial Circuit



(The following proceedings were held March 21, 2018, Charleston County, South Carolina, @ 10:36 a.m.)

THE COURT: On position No. 45 we have additional motions and it is Harbor National Bank versus Anthony Whitfield and we have several motions. Have any of them been resolved other than the Defendant's motion to alter and amend the order that I show has been completed. Any other resolution?

MR. KROPSKI: Your Honor, Steve Kropski for David Swanson. We had a motion to compel some damages information. That was our motion to compel. I believe that we have resolved this. Mr. Halversen agrees, what we talked about before.

THE COURT: So that is --

MR. KROPSKI: That is a motion to compel. We also have a motion to deem requests to have been admitted and respond to interrogatories in a more complete way. So we had essentially two discovery motions. One of them is resolved.

THE COURT: Okay. Got it. It the Defendant's motion so let's go to the request to admit.

MR. KROPSKI: Your Honor, we are -- we

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represent David Swanson. He is an attorney with Haynsworth Sinkler Boyd here. I'm not sure if Your Honor remembers, I believe you're a bit familiar with this case. There are six foreclosure actions pending against Mr. Whitfield, three in Dorchester, two in Berkeley, one in Charleston. The Defendant, Mr. Whitfield, brought a number of counter-claims against the bank and later added Mr. Swanson into the case also under abuse of process and civil conspiracy cause of action.

Judge Nicholson granted summary judgment on abuse of process so all we have left is civil conspiracy against Mr. Swanson. If the Court recalls, the allegations against Mr. Swanson are that about a year and-a-half ago foreclosures began. There was a deposition of a bank individual who said I called our counsel, our attorney said that we needed to get a title endorsement for a piece of property that's in Charleston County and that they couldn't get a title endorsement and all of the loans ended up not being renewed and the foreclosure resulted out of that.

Mr. Swanson testified later yes, he called me. I told him that they needed to get a title endorsement. It was about a ten-minute call.

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That was what I said. I didn't know anything about the case. I didn't know anything -- that was what I said to them.

The causes of action allege that there are no records of this phone call and that Mr. Warren, the bank's representative, and Mr. Swanson got together and decided they were going to formulate false deposition testimony in order to create a defense to Mr. Whitfield's counter-claims under a theory of advice of counsel. So those are the allegations in the claims against Mr. Swanson.

One of the difficulties that we have had, and this has been pending for about two years, is a moving target of what the actual theory of liability against Mr. Swanson is.

My understanding is that the claims against Mr. Swanson or damages against -- for Mr. Whitfield against Mr. Swanson would arise out of whatever harm has come from defending against an advice of counsel defense. If the conspiracy was to create an advice of counsel defense, my understanding is that the damages would be whatever he has incurred to Defendant's advice of counsel defense. It has not been entirely clear to us throughout this entire process whether or not this

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is some sort of attempt to back door any illegal malpractice claim against Mr. Swanson even though Mr. Whitfield was not Mr. Swanson's client.

So we asked in the request to admit -- the date that the loans were supposed to close or be renewed was June 28th, 2012. So we asked admit that the damages that you seek against Mr. Swanson occurred on or before June 28th, 2012. That was one of our requests to admit. The other one was admit that the damages that you seek against Mr. Swanson arose on or after June 28th, 2012, and Mr. Whitfield did not respond to either of those with an admit or deny. The answers are evasive. And it appears to us that one of those would have to be admitted or denied given the allegations in this case.

There is a number of different instances in these requests to admit where the same type of thing applies. We have asked request to admit that the allegations of improper conduct by Mr. Swanson all occurred after the foreclosures began or they occurred before the foreclosures. Again these weren't answered. In our opinion one of them would have to be true. One of them would have been false since they are completely

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contradicting requests to admit.

We have tried to resolve this. We have tried to have them answer these I guess in a more accurate or complete way. For most of the requests to admit we also had supplemental interrogatories after that said if you are denying this please explain what you're denying. We are here requesting that request to admit four, five, six and seven be deemed admitted or in the alternative an order requiring them to answer them more accurately.

And supplemental interrogatories one, two and three which correspond with those requests to admit, an order compelling them to respond more fully to those interrogatories. I can go through very quickly the requests to admit that are four, five, six and seven. The request to admit four is admit that you are not seeking to hold Swanson liable for advising Harbor National Bank to obtain a title endorsement of the Black Rush Property on or before June 28th, 2012. Five is admit that your civil conspiracy claim against Swanson fails if Swanson testified truthfully about his conversation with Scott Warren that is the subject of the allegations in paragraph 65 through 82 of your

amended answer and defense's cross-claims/counter-claims filed on January 8th, 2016. No answer was given to those. We did not receive a complete answer and what is in the response is a repeating of the allegations in the answer and counter-claims. That's not within the rule and it seems to be an answer to this. If it's a denial it's a denial.

THE COURT: Okay.

MR. KROPSKI: Six and seven, six is admit that you did not seek to hold Swanson liable for any act or omission that occurred on or before June 28th, 2012, and seven is admit that you do not seek to hold him liable for anything after. These are what I discussed before. Conceivably one of them would have to be true, one of them would have to be false.

So our request is those be deemed admitted or they have to respond to them in an accurate way instead of evasive.

THE COURT: Got it. Yes. Thanks.

MR. HALVERSEN: Your Honor, Brent Halversen on behalf of Anthony Whitfield. They served request to admissions on November 18th, 2017. We timely answered the request for admission

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on December 1st, 2017. We admitted or denied each request for admission. Mr. Kropski does not like our answers apparently or thinks they are somehow internally inconsistent. That's his position. We believe we have stated fully why we believe the answers are denied or admitted. He is welcome to publish these requests for admissions to the jury. They don't go to the jury, but case law says they can be published to the jury. And I would also cite the case of Commerce Center of Greenville versus Powers McElveen, that's 347 S.C. 1545. And it says the efficacy of admissions is akin to the doctrine of judicial estoppel; an admission precludes the admitting party from arguing the facts at trial contrary to its responses in request to admit.

Admissions under Rule 36 are treated as admissions and pleadings in form and substance. A response to request to admit is comparable to admission and pleadings or stipulation of fact. So essentially, Your Honor, he is saying an allegation in this request for admission, we have done a denial or admitted it and given an explanation. He thinks it's internally inconsistent. We do not. We don't know when this advice was given. The bank

has raised an advice of counsel defense as to why it did what it did. So they said we relied on Swanson. And Swanson says yeah, I said this happened before June 26th, 2012. We have subpoenaed the law firm. There is no documents there about any advice of counsel given. Not a shred over a million dollar plus transaction. We subpoenaed the phone records. There's no evidence that the phone call they claim took place at the time took place. So we have evidence it didn't happen. We sued for a civil conspiracy action saying they fabricated the defense after the fact because we never even heard about David Swanson for a year into the litigation. Never identified as a witness, never set forth as a basis for foreclosure ever, anything, tried to work it out on the basis of this supposed advice.

So we had evidence it didn't happen. We moved to amend, just assert two causes of action. Judge Nicholson said no, that's not an abuse of process. We don't disagree with him on his ruling. We haven't appealed. There is a civil conspiracy action. He did find that there is evidence of some evidence to support that cause of action.

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So, Your Honor, we answered it. We answered it timely. We admitted or denied it. And we gave our explanations. There's nothing more we can do. He's welcome to raise the issues at trial and argue them as best he sees fit, but a motion to deem a request for admitted would be only proper if you didn't answer them and even then you can actually amend them under case law if you show there is lack of prejudice.

So, Your Honor, we have answered them and we believe that his motion should be denied.

THE COURT: Okay.

MR. KROPSKI: Your Honor, very briefly to respond to Mr. Halversen. This is exactly the reason why we are bringing this motion. If the advice didn't happen which is alleged, then they can admit that they are not trying to seek to hold Swanson liable for anything that occurred before June 20th, 2012. They won't do that. So what we are faced with, we are defending against an action that said you lied under oath in a deposition. Now we are also facing the prospect that at trial it might come in where there's argument that this advice was bad, that you actually did give the advice and that you screwed up all these

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transactions.

The point is it's either one or the other. One of them has to be admitted and one of them has to be denied and they are both denied. And it either happened before June 28th, 2012, and it was advice that actually occurred or as they allege it's advice that never happened and it was all created after June 28th, 2012. That's why the motion is being brought, it's evasive the way they have answered it. They haven't answered these. One of them is right and one of them is wrong.

THE COURT: Let me ask you this question. It is -- it's the defense's position that the advice occurred on the 28th of June?

MR. KROPSKI: Your Honor, our position is that Mr. Swanson and Mr. Warren had a phone call and Mr. Swanson on the 28th did say go get a title endorsement to protect yourself.

THE COURT: That's -- let me just -- here's the problem. They don't want to give you that. They don't want to give you the 28th because they are maintaining that the 28th does not exist. So I can tell what the problem is. The problem is is that they are concerned, I have a sneaking suspicion that they are concerned that if they

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respond to the request to admit then they are allowing an implicit admission that call occurred on the 28th of June. I have a sneaking suspicion that's actually what is occurring. So that's why they want to deny giving you an explanation, right?

MR. KROPSKI: Your Honor, I completely agree and I understand. The point is Mr. Whitfield can't sue Mr. Swanson for bad advice that he gave to the bank. That's why they don't want to admit it because that would be grounds for dispositive motion. So we need to know one or the other because we might have a dispositive motion if they are actually trying to sue Mr. Swanson for bad advice that he gave to the bank or allegedly bad advice he gave to the bank. That's the point behind this. We don't know if we are defending a legal malpractice claim that doesn't have standing or we are defending a false deposition testimony case. That's why we need to know these.

And I understand why they don't want to do it, but I don't think it is proper under the rule because we have to know what we are defending against.

THE COURT: Okay.

MR. HALVERSEN: Your Honor, you are

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correct in your perception. We don't know when this advice occurred. We don't believe it happened when it was claimed to have occurred. He's essentially arguing that we are arguing the facts over the case right now which would be in a summary judgment context, it should be made at trial. Bottom line is we have answered the request for admissions. He thinks they're internally inconsistent and we do not. And the motion should be denied.

THE COURT: You think that it's internally inconsistent because your -- just on a -- this is called reflective listening, make sure that I have the point. It is your position that you cannot admit or deny it because implicitly then you are agreeing that there was a phone call. You do not believe there was a phone call.

MR. HALVERSEN: We don't know when the phone call occurred. He is trying to corner us into saying when it occurred. And we don't know when it occurred. So I can't say. I legitimately cannot say.

THE COURT: Isn't it your position that it did not occur?

MR. HALVERSEN: We don't believe it

ever occurred. We don't know if they tried to talk to each other. We believe that has been fabricated because there's evidence it never happened.

THE COURT: Right.

MR. HALVERSEN: And he's trying to say admit it happened here. I can't. I don't believe it happened there. I don't even know if it ever happened when it happened because we have evidence it never happened. So I don't know what more we can do, Your Honor.

THE COURT: Okay.

MR. KROPSKI: One more thing. The reason we are trying to establish this is because the loans fell apart on June 28th, 2012. If Mr. Swanson did all this bad stuff after June 28th, 2012, he is not responsible for the loans falling apart. We don't think he should be anyway.

This is an important thing to establish and should be very clear. If all of your allegations are that you guys made up a phone call then it should be easy to admit that we are not expecting to hold you liable for anything that actually happened before.

THE COURT: I understand what you are saying exactly. I gather -- the position as I

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understand it of the Defendant is that if there was a phone call that's a problem because there has been testimony that there was a phone call. So that's a problem. But as I understand the Defendant's position it is a different problem than any responsibility for the failure of these loans.

MR. HALVERSEN: The responsibility lies in the civil conspiracy cause of action which alleges that they made an agreement at some point in time. We don't know when, but at some point in time there was an agreement that this advice happened. This was the whole reason they decided not to close these loans.

THE COURT: Right.

MR. HALVERSEN: So we have evidence it never happened, Your Honor. We have ample evidence, tons of evidence it never happened.

THE COURT: Right. So if it didn't happen, let me chase that one with you. Assume it didn't happen. Mr. Swanson, he was deposed, correct?

MR. KROPSKI: Your Honor, twice.

THE COURT: So that's perjury. It's a criminal violation. It backs up your civil conspiracy and it's a civil conspiracy to create a

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defense. I mean there are all kind of problems arguendo that occur. But if the advice did not occur then vis-a-vis Mr. Swanson, while he may have problems, tell me how you connect the dots between the alleged untrue statement, the conspiracy which goes a long way to make out your civil conspiracy action, what is the connection between that and the bank vis-a-vis the foreclosure. Because it seems to me that while certainly the Defendant Mr. Whitfield could certainly call out to the jury coverup, et cetera, et cetera, aside from the other allegations that the loan was improperly denied, that then becomes evidence I would think you would argue of a coverup, right?

MR. HALVERSEN: Correct, Your Honor.

THE COURT: Now, but isolate for me Mr. Swanson because that's where this is coming from. Isolate Mr. Swanson. How then does Mr. Swanson, not the bank, Mr. Swanson, how does he then become responsible for the failure of the bank to fund the commitment? I gather you would maintain it's a commitment.

MR. HALVERSEN: Yes, Your Honor. We don't have any -- as you correctly pointed out, we don't have any relationship with Mr. Swanson in

terms of any legal malpractice that the bank could assert or might assert.

THE COURT: You don't care about that.

MR. HALVERSEN: Right. So what we have alleged though is that but for that advice there was absolutely no defense, they didn't close on any of these loans so that the bank benefitted by going forward with his foreclosure and --

THE COURT: That's the bank.

MR. HALVERSEN: Right.

THE COURT: All that is the bank. I'm not saying -- I'm isolating the bank because obviously if you are correct and you are successful on your underlying cause of action that the bank should have funded these projects, these loans, that's on the bank. Right?

MR. HALVERSEN: Right.

THE COURT: Mr. Swanson's involvement would be if you will a coverup, yes?

MR. HALVERSEN: Yes.

THE COURT: Yes. And would have been a player in if you full the coverup based on your theory.

MR. HALVERSEN: Yes.

THE COURT: So depending on your causes

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of action maybe that goes to punitive damages, maybe that goes to other causes of action, right?

MR. HALVERSEN: Yes.

THE COURT: But other than being a witness to the -- and a participant in the coverup and all of the problems that that would then create for this attorney, okay, is he then responsible for the underlying damages of Mr. Whitfield with regards to the failure of the bank to fund the loans?

MR. HALVERSEN: I got you. I understand your question, Your Honor. The answer is no. The damages that stem from our claims against the bank are separate and distinct and the case law under civil conspiracy is that you cannot claim same causes of action that you're claiming for the other actions and we are not. The underlying damage as to the civil conspiracy is we have alleged our damages, solely our attorney fees and cost incurred in defending that defense which should never have happened. That is the element of damages that's --

THE COURT: Vis-a-vis Mr. Swanson.

MR. HALVERSEN: Correct.

THE COURT: Because with regard to the

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bank it's a different situation.

MR. HALVERSEN: The damages claimed against the bank are different.

THE COURT: Right. Assuming that that occurred.

MR. HALVERSEN: Correct.

THE COURT: All right. Now, back to the request to admit with that information.

MR. KROPSKI: Yes, Your Honor. And we would be satisfied if they denied the request to admit and appreciate the exchange between counsel and Your Honor there. And to supplement that to explain, we are not holding Swanson liable for the failure of all of these loans. That's what we are trying to establish. If there is a way to work it out where they can supplement and explain why they are denying it, they don't know if the call did or did not occur, but we are not holding him responsible for these loans, that's sufficient for us too. But we need some way to be able to establish that in the record.

THE COURT: You just got it. You just got it. You get the transcript you just got it. That was a represent -- with all due respect, that's a better representation made to you than a

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Harbor National Bank,

☐ Plaintiff,

vs.

Anthony Whitfield and Cindy Whitfield,

☐ Defendants,

Anthony Whitfield

☐ Third Party Plaintiff

v.

David Swanson

■ Third Party Defendant.

CASE NO.: 2012-CP-10-5887

MOTION INFORMATION FORM AND COVER SHEET

Check box above indicating submitting party.

Third Party Plaintiff's Counsel	Attorneys for Third Party Defendant
Brent S Halverson, Esq. Halverson & Associates, LLC 171 Church Street, Suite 300 Charleston, SC 29401 Daniel S. Slotchiver, Esq. Slotchiver & Slotchiver, LLP 44 State Street Charleston, SC 29401	David W. Overstreet, Esq. State Bar No.: 16965 Michael B. McCall, Esq. State Bar No.: 73028 Steven R. Kropski, Esq. State Bar No.: 101441 Earhart Overstreet LLC P.O. Box 22528 Charleston, SC 29413 (843) 972-9400

■ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Deem Requests to Admit Admitted or require Amended Answers
Estimated Time Needed: 30 mins Court Reporter Needed: yes

SECTION II: Motion Type

■ Written motion attached
☐ Form Motion

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for Third Party Defendant — Date: 11/6/18

SECTION III: Motion Fee

■ PAID - AMOUNT: $25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE
CODE: _____ Date: _____

CLERK'S VERIFICATION

DATE FILED

Collected by: _____
(print name)
☐ MOTION FEE COLLECTED: _____
☐ CONTESTED - AMOUNT DUE: _____

EXHIBIT B

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STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	CASE NO.: 2012-CP-10-5887
Harbor National Bank,	
Plaintiff,	**COUNTERCLAIM DEFENDANT DAVID SWANSON'S MOTION TO DEEM REQUESTS TO ADMIT ADMITTED OR REQUIRE AMENDED ANSWERS**
vs.	
Anthony Whitfield and Cindy Whitfield	
Defendants.	
Anthony Whitfield	
Third Party Plaintiff	
vs.	
David Swanson	
Third Party Defendant	

2018 JAN 18 PM 4:36

TO: BRENT S. HALVERSON, ESQ. AND DANIEL S. SLOTCHIVER, ESQ., ATTORNEY FOR DEFENDANT:

PLEASE TAKE NOTICE that Counterclaim Defendant David Swanson, by and through his undersigned counsel, moves for an order pursuant to SCRCP, Rule 36(a) deeming Swanson's requests for admission admitted by Counterclaimant Whitfield or requiring amended answers that respond directly to the requests for admission. The background of the current motion are as follows:

1. On November 9, 2017, Swanson served requests for admission and supplemental interrogatories on Whitfield. (Exhibit A)
2. On December 1, 2017, Whitfield served responses to the above referenced requests for admission and supplemental interrogatories. (Exhibit B).

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3. As is detailed on the letter attached hereto as Exhibit C, Whitfield's answers are evasive, non-responsive and do not comply with the requirements of Rule 36.
4. In response to the letter from Swanson's counsel, counsel for Whitfield represented that they would not provide complete and direct answers to the requests for admission or the supplemental interrogatories. (Exhibit D).
5. Accordingly, Swanson is entitled to an order deeming the requests for admission admitted, or in the alternative, an order requiring Whitfield to directly respond to the requests for admission and supplemental interrogatories.

WHEREFORE, Counterclaim Defendant Swanson hereby requests that this Court enter an order deeming requests for admission #4, 5, 6, and 7 admitted, or in the alternative, an order requiring Whitfield to directly respond to the requests for admission and provide complete answers to supplemental interrogatories #1, 2, and 3.

This 11 day of January, 2018.

Respectfully submitted,

EARHART OVERSTREET, LLC

By: _____
DAVID W. OVERSTREET
State Bar No.: 16965

MICHAEL B. MCCALL
State Bar No.: 73028

STEVEN R. KROPSKI
State Bar No.: 101441

Attorneys for Counterclaim Defendant David Swanson

P.O. Box 22528
Charleston, SC 29413
843-972-9400

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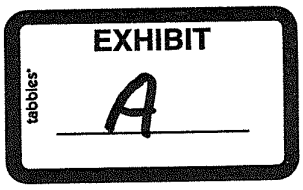
STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Pinnacle Bank, Plaintiff, vs. Anthony Whitfield and Cindy Whitfield Defendants. Anthony Whitfield Counterclaimant vs. David Swanson Counterclaim Defendant	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2012-CP-10-5887 **COUNTERCLAIM DEFENDANT DAVID SWANSON'S REQUESTS FOR ADMISSION AND SUPPLEMENTAL INTERROGATORIES TO DEFENDANT ANTHONY WHITFIELD**

TO: BRENT S. HALVERSON, ESQ. and DANIEL S. SLOTCHIVER, ESQ., ATTORNEYS FOR DEFENDANT ANTHONY WHITFIELD:

Pursuant to Rules 33 and 36 of the South Carolina Rules of Civil Procedure, Counterclaim Defendant David Swanson (hereinafter referred to as "Swanson"), hereby requests that Defendant Anthony Whitfield serve upon Swanson's counsel within thirty (30) days of service hereby, written answers under oath to the following Requests for Admission and Supplemental Interrogatories:

Request to Admit No. 1: Admit that Swanson advised Harbor National Bank to obtain a title endorsement on the Black Rush Property on or before the June 28, 2012.

Request to Admit No. 2: Admit that Swanson did not advise Harbor National Bank to obtain a title endorsement on the Black Rush Property on or before June 28, 2012.



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Request to Admit No. 3: Admit that you are seeking to hold Swanson liable for advising Harbor National Bank to obtain a title endorsement on the Black Rush Property on or before June 28, 2012.

Request to Admit No. 4: Admit that you are not seeking to hold Swanson liable for advising Harbor National Bank to obtain a title endorsement on the Black Rush Property on or before June 28, 2012.

Request to Admit No. 5: Admit that your civil conspiracy claim against Swanson fails if Swanson testified truthfully about his conversation with Scott Warren that is the subject of the allegations in Paragraphs 65 through 82 of your Fifth Amended Answer Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims filed on January 8, 2016.

Request to Admit No. 6: Admit that you do not seek to hold Swanson liable for any act or omission that occurred on or before June 28, 2012.

Supplemental Interrogatory No. 1: For each act and omission that occurred on or before June 28, 2012 that you seek to hold Swanson liable for, set forth a description of the act or omission in sufficient detail to provide meaningful notice of your claim and identify all direct and circumstantial evidence that supports your response.

Request to Admit No. 6: Admit that all damages you seek to recover against Swanson arise out of acts by Swanson that took place after initiation of this foreclosure lawsuit on September 7, 2012.

Supplemental Interrogatory No. 2: If you denied Request to Admit Number 6, state in specific detail all actions by Swanson prior to initiation of this foreclosure action for which you seek damages.

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Request to Admit No. 7: Admit that you have no evidence of an agreement between Swanson and Harbor National Bank to testify falsely under oath to fabricate an "advice of counsel" defense.

Supplemental Interrogatory No. 3: If you denied Request to Admit Number 7, state in specific detail the time and place of such agreement, the medium used to communicate this agreement, the specific persons involved in the subject agreement, and identify each document, communications, affidavit, deposition passage and all other evidence supporting your response.

Request to Admit No. 8: Admit that you cannot sue Swanson for legal advice he provided to Harbor National Bank in the course and scope of representing Harbor National Bank.

Supplemental Interrogatory No. 4: If you denied Request to Admit Number 8, state in specific detail the basis for your denial and identify all evidence supporting your reason for denying Request to Admit Number 8.

Request to Admit No. 9: Admit that you have no special damages resulting from any acts or omissions by Swanson.

Supplemental Interrogatory No. 5: If you denied Request to Admit Number 9, state in specific detail each and every component of special damages that you have incurred as a result of any act or omission by Swanson and the specific date of each identified act or omission.

Request to Admit No. 10: Admit that you filed or caused to be filed the summons, complaint and attached exhibits in the related lawsuit captioned *Anthony Whitfield v. David Swanson, et al.*, Case No. 2015-CP-10-3611.

[SIGNATURE PAGE TO FOLLOW]

This 3 day of November, 2017.

Respectfully submitted,

EARHART OVERSTREET, LLC

By: _____

DAVID W. OVERSTREET
State Bar No.: 16965

MICHAEL B. MCCALL
State Bar No.: 73028

STEVEN R. KROPSKI
State Bar No.: 101441

Attorneys for Counterclaim Defendant David Swanson

P.O. Box 22528
Charleston, SC 29413
843-972-9400

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STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	) CASE NO.: 2012-CP-10-5887
	)
Pinnacle Bank,	)
	)
Plaintiff,	)
	)
vs.	) **CERTIFICATE OF SERVICE**
	)
Anthony Whitfield and Cindy Whitfield	)
Defendants.	)
	)
Anthony Whitfield	)
	)
Counterclaimant	)
	)
vs.	)
	)
David Swanson	)
Counterclaim Defendant	)

I hereby certify that I have this day served a copy of the within and foregoing ***Requests to Admit and Supplemental Interrogatories*** upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

Brent S. Halverson, Esq.
Halversen & Associates, LLC
171 Church Street, Suite 330
Charleston, SC 29401

Daniel S. Slotchiver, Esq.
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, SC 29401

Brian C. Duffy, Esq.
Blake A. McKie, Esq.
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401

Paul B. Ferrara, III, Esquire
Ferrara Law Firm, PLLC
2300 Otranto Road
N. Charleston, SC 29406

This 2nd day of November, 2017.

Legal Assistant to Steven R. Kropski

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This 9 day of November, 2017.

Respectfully submitted,

EARHART OVERSTREET, LLC

By: _____
DAVID W. OVERSTREET
State Bar No.: 10965

MICHAEL B. MCCALL
State Bar No.: 73028

STEVEN R. KROPSKI
State Bar No.: 101441

Attorneys for Counterclaim Defendant David Swanson

P.O. Box 22528
Charleston, SC 29413
843-972-9400

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2012-CP-10-5887
	)	
Pinnacle Bank,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CERTIFICATE OF SERVICE**
	)	
Anthony Whitfield and Cindy Whitfield	)	
	)	
Defendants.	)	
	)	
Anthony Whitfield	)	
	)	
Counterclaimant	)	
	)	
vs.	)	
	)	
David Swanson	)	
Counterclaim Defendant	)	

I hereby certify that I have this day served a copy of the within and foregoing ***Requests to Admit and Supplemental Interrogatories*** upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

Brent S. Halverson, Esq.
Halversen & Associates, LLC
171 Church Street, Suite 330
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96 Broad Street
Charleston, SC 29401

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Paul B. Ferrara, III, Esquire
Ferrara Law Firm, PLLC
2300 Otranto Road
N. Charleston, SC 29406

This 8th day of November, 2017.

Legal Assistant to Steven R. Kropski

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2012-CP-10-5887
HARBOR NATIONAL BANK,	)	
	)	
Plaintiff,	)	
	)	**ANTHONY WHITFIELD'S ANSWERS**
vs.	)	**TO DAVID SWANSON'S REQUESTS**
	)	**FOR ADMISSION AND**
	)	**SUPPLEMENTAL INTERROGATORIES**
ANTHONY M. WHITFIELD	)	
	)	
Defendant.	)	
	)	

TO: STEVEN KROPSKI, ATTORNEY FOR DAVID SWANSON

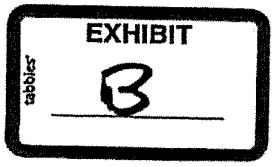
Pursuant to Rule 33 and 36 of the South Carolina Rules of Civil Procedure, Defendant Anthony M. Whitfield hereby serves this his Answers to David Swanson's Requests for Admission and Supplemental Interrogatories served on November 10, 2017 to Defendant Anthony Whitfield as follows:

GENERAL OBJECTIONS

1. Defendant objects to the Interrogatories to the extent that they are vague, ambiguous, overly broad, unduly burdensome, and not relevant to the subject matter involved in the pending action.

2. Defendant objects to the Interrogatories to the extent that they seek documents protected from discovery by the attorney-client privilege, work-product doctrine, or any other privilege or exemption from discovery permitted under law.

3. Defendant objects to the Interrogatories to the extent that the information requested is known to David Swanson, to the extent that the Interrogatories require the identification or production of documents, writing,



records, or publications in the public domain or information that is equally available to or already in the possession of David Swanson or that seek information that can be obtained from third parties with less burden and expense than obtaining them from Defendant.

4. Defendant objects to the Interrogatories to the extent that they call for or require disclosure of information that is not in Defendant's possession, custody, or control.

5. Defendant objects to the Interrogatories to the extent they seek proprietary or other confidential business and/or commercial information.

6. Defendant reserves the right to take appropriate measures to protect the privacy of individuals or parties not involved in this litigation.

7. Defendant is continuing their investigation and reserve the right to rely on any facts, documents, or other evidence it may develop or that may come to its attention at a later time. Defendant's answers to these Interrogatories are based on information known at this time. Defendant specifically reserves the right to supplement or amend its answers to the Interrogatories at any time before trial.

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Answers to Requests for Admission No. 1 through No.6

1. Denied.
2. Admit.
3. Denied. As alleged in Mr. Whitfield's Fifth Amended Answer and briefed thoroughly in Mr. Whitfield's Memorandum Opposing David Swanson's Motion for Summary Judgment, Mr. Whitfield is seeking to hold Mr. Swanson liable for conspiracy with his client for falsifying that he had advised Harbor National Bank to obtain a title endorsement on the Black Rush Property on or before June 28, 2012 because there is ample evidence he did not advise of them at the time and place claimed.
4. Denied. As alleged in Mr. Whitfield's Fifth Amended Answer and briefed thoroughly in Mr. Whitfield's Memorandum Opposing David Swanson's Motion for Summary Judgment, Mr. Whitfield is seeking to hold Mr. Swanson liable for conspiracy with his client for falsifying that he had advised Harbor National Bank to obtain a title endorsement on the Black Rush Property on or before June 28, 2012 because there is ample evidence he did not advise of them at the time and place claimed.
5. Objection to the extent the Request for Admission is calling for a legal conclusion. Without waiving said objection, the request is, Denied. As alleged in Mr. Whitfield's Fifth Amended Answer and briefed thoroughly in Mr. Whitfield's Memorandum Opposing David

Swanson's Motion for Summary Judgment, Mr. Whitfield is seeking to hold Mr. Swanson liable for conspiracy with his client for falsifying that he had advised Harbor National Bank to obtain a title endorsement on the Black Rush Property on or before June 28, 2012 because there is ample evidence he did not advise of them at the time and place claimed.

6. Denied. This request is nearly identical to Request for Admission No. 4. Mr. Whitfield is seeking damages from Mr. Swanson for acts that Mr. Swanson claimed occurred before June 28, 2012. It is not specifically known when Mr. Swanson fabricated his communications with Mr. Warren, presumably this information is within the Defendant's own possession.

Answer to Supplemental Interrogatory No. 1

1. Mr. Whitfield is seeking to Mr. Swanson liable for an act that Mr. Swanson claims occurred before June 28, 2012. As stated repeatedly in this litigation, Mr. Whitfield asserts that Mr. Swanson did not provide the advice at the time and place claimed. This allegation is based upon the inconsistent testimony of Mr. Swanson, the lack of billing and law firm records and the lack of proof of the phone call between Mr. Swanson and Mr. Warren, as alleged in Mr. Whitfield's Fifth Amended Answer and briefed thoroughly in Mr. Whitfield's Memorandum Opposing David Swanson's Motion for Summary Judgment.

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Answer to Request for Admission No. 7

7. Denied. See Answer to Supplemental Interrogatory No. 1 above.

Answer to Supplemental Interrogatory No. 2

2. As stated above in Answer to Request for Admission No. 6, it is not known precisely when Mr. Swanson fabricated his communications with Mr. Warren, however, they had to have occurred after June 28, 2012 and before November 13, 2013, the date Mr. Swanson's name was first injected into this lawsuit by the bank.

Answer to Request for Admission No. 8

8. Denied. See Answer to Supplemental Interrogatory Number 1 above.

Answer to Supplemental Interrogatory No. 3

3. See Answer to Supplemental Interrogatory No. 2 above. See also General Objections No. 3 and 4.

Answer to Request for Admission No. 9

9. Objection, the request is asking for a legal conclusion and is not requesting an admission on statements or opinions of facts, or the application of law to a fact. Notwithstanding and without waiving said objection, the request is Denied. Mr. Whitfield did not allege that Mr. Swanson was acting in the course and scope of his law firm's representation of Harbor National Bank. As alleged in the Counterclaim, Mr. David Swanson's actions were made for his own personal interest as they were performed outside the scope of his

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law firm's representation of Harbor National Bank. Moreover, Mr. Whitfield denies the advice was given at time and place claimed, as stated in Mr. Whitfield's Fifth Amended Answer and briefed thoroughly in Mr. Whitfield's Memorandum Opposing David Swanson's Motion for Summary Judgment.

Answer to Supplemental Interrogatory No. 4

4. Objection; The request appears to have a scrivener's error as it is asking a question regarding two different Requests for Admission: Requests for Admission No. 9 and Request for Admission No. 8. For purposes of responding to this interrogatory, Defendant will assume the propounder meant for both to read Request for Admission "No. 9," instead of one No. 9 and one No. 8. Assuming that is the case, the explanation for the denial of Request for Admission No. 9 is given in response to that request. See above.

Answer to Request for Admission No. 10

10. Denied.

Answer to Supplemental Interrogatory No. 5

5. Mr. Whitfield is claiming attorney's fees and costs incurred as a result of the conspiracy. As stated above and herein, it is not known precisely when Mr. Swanson fabricated his communications with Mr. Warren, however, they had to have occurred after June 28, 2012 and before November 13, 2013, the date Mr. Swanson's name was first

injected into this lawsuit by the bank. This is information that is presumably within Mr. Swanson's own possession.

Answer to Request for Admission No. 11

11. Admit.

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CERTIFICATE OF SERVICE

I certify that I served the foregoing Answer to David Swanson's Set of Requests for Admission and Supplemental Interrogatories upon counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to the parties and counsel's last known address on this 1 day of December, 2017.

HALVERSEN & ASSOCIATES, LLC

By: _____

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December 1, 2017
Charleston, SC

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December 8, 2017

VIA E-MAIL ONLY
Brent S. Halversen, Esq.
Halversen & Associates, LLC
171 Church Street, Suite 330
Charleston, South Carolina 29401
brent@halversenlaw.com

Re: Harbor National Bank v. Whitfield, *et al.* v. Swanson
Case No.: 2012-CP-10-5887
EO File No.: 130-0163

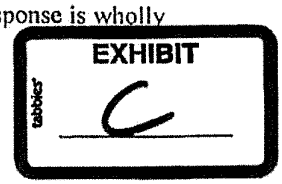
Dear Brent:

We recently received your responses to our requests for admissions with supplemental interrogatories. Unfortunately, most of the responses are either non-responsive or assert improper objections. In particular:

A. Request to Admit No. 3 requests that you admit you are seeking to hold Swanson liable for advising HNB to obtain a title endorsement on the Black Rush Property on or before June 28, 2012, while Request to Admit No. 4 asks you to admit that you *are not* seeking to hold Swanson liable for advising HNB to obtain a title endorsement on the Black Rush Property on or before June 28, 2012. Simply put, one of these requests must be admitted while one of these requests must be denied. However, you denied both. It is unclear how they could both be false. We are, to this day, unsure of exactly what Mr. Whitfield seeks to hold Swanson liable for beyond the generic, vague conjecture in the Fifth Amended Answer. I interpret your response to confirm that you do not seek damages from Swanson arising out of HNB's request for a title endorsement of the Black Rush Property. If this is incorrect, please advise us by 12:00pm on December 15th, 2017 and provide a detailed explanation of why you contend Mr. Swanson is liable for damages arising out of HNB's request for a title endorsement of the Black Rush Property.

B. Request to Admit No. 5 asks you to admit that your civil conspiracy claim fails if it is proven that Swanson and Warren's testimony concerning the subject phone call is true. You denied the request and then provided a non-responsive qualification. Please describe in detail an application of the law to the facts of this case that satisfy the elements of civil conspiracy. To date, the only fact identified in support of your civil conspiracy claim is the alleged agreement between HNB and Swanson to testify falsely about the existence of the June 28, 2012 phone call. It is unclear how this request can be denied in good faith.

C. Request to Admit No. 6 asks you to admit that you do not seek to hold Swanson liable for any act or omission that occurred on or before June 28, 2012. Your response is wholly



non-responsive as this request is *not* identical to Request to Admit No. 4. Request No. 4 references the subject telephone call, while Request No. 6 applies to "any act or omission." If there are any acts or omissions that occurred on or before June 28, 2012 for which you seek to hold Swanson liable, they must be identified. With respect to the subject phone call, it is impossible that a conspiracy to lie about the existence of a phone call on June 28, 2012 could somehow pre-date the alleged date of the phone call. As your Answer does not respond to this request, please provide a responsive Answer with a responsive Answer to Supplemental Interrogatory No. 1.

D. Request to Admit No. 7 asks that you admit that all damages you seek against Swanson arise out of acts by Swanson that took place after initiation of this foreclosure lawsuit on September 7, 2012. In response, you directed us to the response to Request No. 1. It is unclear how the response to Request No. 1 is in any way responsive to Request No. 7. If you have any evidence at all that the alleged conspiracy pre-dates the initiation of these foreclosure proceedings, you must identify that evidence. If you have no evidence at all showing that the conspiracy pre-dates the foreclosure lawsuit, the request should be admitted. Similar to the above deficiency, it appears impossible to us that a conspiracy to fabricate a defense to Mr. Whitfield's counterclaims could pre-date the actual counterclaims. As your Answer is again non-responsive to the request, please provide a responsive Answer with a responsive Answer to Supplemental Interrogatory No. 2.

E. Supplemental Interrogatory No. 3 requests all evidence of "an agreement between Swanson and Harbor National Bank to testify falsely under oath to fabricate an "advice of counsel" defense." You directed us to your response to Supplemental Interrogatory No. 2. It is unclear how the response to Supplemental Interrogatory No. 2 identifies any information responsive to Supplemental Interrogatory No. 3 as it does not identify any evidence validating your denial of Request to Admit No. 8. It is not sufficient to allege that the evidence exists but that you cannot identify it. Please either provide a complete response to this Interrogatory or admit Request to Admit No. 8.

As the above identified Answers are either insufficient or non-responsive, if we do not receive complete and unqualified responses to the Requests to Admit and complete responses to the corresponding Supplemental Interrogatories on or before 12:00 pm on December 15, 2017, we will move to deem the relevant requests Admitted and for an order requiring complete responses to the Supplemental Interrogatories.

Thank you for your consideration, and please do not hesitate to contact me if you would like to discuss these issues further. With kind regards, I am

Sincerely,

STEVEN R. KROPSKI

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cc: Andrew J. McCumber, Esq. (via e-mail only; andrew@slotchiverlaw.com)
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STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	) CASE NO.: 2012-CP-10-5887
	)
Harbor National Bank,	)
	)
Plaintiff,	)
	)
vs.	) **CERTIFICATE OF SERVICE**
	)
Anthony Whitfield and Cindy Whitfield	)
	)
Defendants.	)
	)
Anthony Whitfield	)
	)
Third Party Plaintiff	)
	)
vs.	)
	)
David Swanson	)
Third Party Defendant	)

2019 JAN 16 PM 4:36

I hereby certify that I have this day served a copy of the within and foregoing ***Motion to Deem Requests to Admit Admitted and Compel responses to Supplemental Interrogatories*** upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

Brent S. Halverson, Esq.
Halversen & Associates, LLC
171 Church Street, Suite 330
Charleston, SC 29401

Daniel S. Slotchiver, Esq.
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Brian C. Duffy, Esq.
Blake A. McKie, Esq.

Paul B. Ferrara, III, Esquire
Ferrara Law Firm, PLLC
2300 Otranto Road
N. Charleston, SC 29406

This 11 day of January, 2018.

Legal Assistant to Steven R. Kropski

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ELECTRONICALLY FILED - 2020 Jun 09 1:57 PM - CHARLESTON - COMMON PLEAS - CASE#2012CP1005887

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2012-CP-10-5887

PINNACLE BANK, as successor in interest to BANK OF NORTH CAROLINA, as previous successor in interest to HABOR NATIONAL BANK,

Plaintiff,

v.

ANTHONY M. WHITFIELD,

Defendant.

STIPULATION OF VOLUNTARY DISMISSAL WITH PREJUDICE (Does Not End Case)

By and through the undersigned counsel and pursuant to Rule 41(a)(1)(B) of the South Carolina Rules of Civil Procedure, Plaintiff Pinnacle Bank and Defendant Anthony M. Whitfield voluntarily dismiss their respective claims against each other with prejudice. The Parties agree to bear their own costs, expenses, and attorneys' fees.

This 9th day of June, 2020 at Charleston, South Carolina.

s/Brian C. Duffy
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Blake A. McKie
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Attorney for Anthony M. Whitfield

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON NINTH JUDICIAL CIRCUIT

HARBOR NATIONAL BANK,

Plaintiff,

-vs- Case No.: 2012-CP-10-5887

ANTHONY M. WHITFIELD,

Defendant.

THE VIDEOTAPE DEPOSITION OF SCOTT WARREN, taken on behalf of the Defendant, on November 13, 2013, commencing at 9:43 a.m., at the Law Offices of Bernstein & Bernstein, 5418 Rivers Avenue, North Charleston, South Carolina, 29406.

Reported by: Douglas K. Liperote
Spectrum Reporting Services

A P P E A R A N C E S

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ALSO PRESENT: Anthony M. Whitfield

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STEVEN ROGERS, having been first duly sworn, testified as hereinafter set forth.

DIRECT EXAMINATION

BY MR. HALVERSEN:

Q. Good morning, Mr. Warren. I introduced myself to you when you came in. My name is Brent Halversen. I represent Anthony Whitfield in a lawsuit that's between Harbor National Bank, your employer, and Mr. Whitfield.

Have you ever had your deposition taken before?

A. Yes.

Q. When did you have your deposition taken?

A. I believe it was -- I can't remember the exact date.

Q. Just once?

A. Just once.

Q. What was the matter involving?

A. It was a mortgage.

Q. A mortgage. A dispute between a borrower and the bank?

A. Yes.

Q. Do you remember the nature of the dispute?

A. Yes.

Q. Could you tell me about the nature of the

dispute?

A. It was a dispute where the borrower had not paid or was not current, and it was a collection.

Q. Okay. It was a collection lawsuit?

MR. BERNSTEIN: Mr. Warren, could I ask that you speak up? Some people including myself are hard of hearing, so it's necessary to speak up so we can hear your answers. Thank you.

Q. Was it a collections lawsuit?

A. Yes.

Q. Was Mr. Bernstein the attorney for that matter?

A. No. No.

Q. Do you know who the attorney was?

A. Rob Kerr.

Q. Rob Kerr. Is that the only time you've had your deposition taken?

A. No.

Q. Okay. When else have you had your deposition taken?

A. It was when I was in college.

Q. Okay. What was that regarding?

A. It was a situation where somebody had been beat up at the college I was at, and they were asking for my deposition regarding that.

Q. Because you were a witness to it?

A. Not directly. Just knew some of the people involved.

Q. Okay. And I'm asking that in part to find out what other matters you were deposed in, but also just to let you know about how this works this morning. I'm going to ask you a bunch of questions. As you can tell, you're being videotaped as well. But try to wait until the end of my question before responding. A lot of times in normal conversation you'll be able to anticipate what I'm going to say halfway through my sentence. But try to be patient. Wait until the end of my question, and then tell me your response. And that's just so we can hear and record what the question is and what you're saying.

If you -- sometimes you'll just start into normal conversation, and you'll start talking over the question, and I'll just politely tell you just to try to wait until the end of my question. And I'm not being rude. I'm just saying try to wait until the end of the question so we can all know what you're talking about.

So, if I ask you a question, I'll assume that you understood the question and your response. If you don't understand a question, just ask me to

rephrase it. I'm not here to argue with you, I'm not here to debate anything. You've taken an oath to swear to tell the truth, and I'm just asking you questions about what happened regarding this matter, and that's it. Do you understand?

A. I do.

Q. Okay. Could you please state your full name for the record?

A. Scott Nicholas Warren.

Q. And your date of birth?

A. 8/28/1975.

Q. And your place of birth?

A. New Orleans.

Q. And where did you go to high school?

A. One year at Bishop England, three years at James Island High School.

Q. Okay. So you didn't -- how long did you live in New Orleans for?

A. A month.

Q. Okay. And then relocated to Charleston?

A. Summerville.

Q. Summerville, okay. Where did you go to college?

A. Graduated College of Charleston.

Q. And what year?

A. 1998.
Q. And what did you major in?
A. Psychology.
Q. Did you go to any post-graduate school after college?
A. No, no formal -- not like a master's.
Q. Okay. You didn't take any advanced course work after college?
A. No.
Q. I don't want to get into real detail, but just give me an idea about your employment history. What did you start doing after you graduated from the College of Charleston? Just kind of take me through your first job and how long that lasted and to the present.
A. Graduated December of '98. Went to work for SunTrust Bank in Atlanta in April, I believe it was April or around that time period of '99.
Q. Okay. What did you do for SunTrust Bank?
A. I was a -- started as a customer service representative and was assistant manager -- branch manager when I left.
Q. Was that at a local branch in Atlanta?
A. It was in Atlanta.
Q. Right. But was your job at a local branch

bank or were you at one of the corporate offices?

A. It was in-store location.

Q. Okay. And then how long did you stay at that location?

A. At that particular location I started off in the training program. I can't tell you exactly when I was placed at Dunwoody Place, which was the first branch, and then moved to Gwinnett. I can't tell you the exact date on when that move took place.

Q. Okay. How long did you stay at SunTrust Bank?

A. Until September of 2001.

Q. And then where did you start working after that?

A. Carolina First Bank.

Q. Where is that branch at?

A. That particular branch -- I managed three branches at separate times on Broad Street, East Bay and West Ashley, in that order.

Q. And how long did you stay with Carolina First Bank?

A. Approximately two years.

Q. Okay. Until about 2003?

A. I believe that's correct.

Q. And why did you leave Carolina First Bank?

A. To take an opportunity with SunTrust -- or SouthTrust Bank.

Q. And what year was that in?

A. It would be 2003, back-to-back employment.

Q. Okay. And then what was your position at SouthTrust?

A. Business banker.

Q. Is that like a commercial loan officer or is that different?

A. It is. It focused on small business.

Q. Okay. And how long were you at SouthTrust?

A. I stayed through a merger with Wachovia until, I believe it was 2006.

Q. Okay. And then in 2006 where did you go?

A. I went to First National Bank of the South.

Q. Okay. Which location?

A. That would be -- I had an office on Daniel Island, and eventually I moved to the Mt. Pleasant location, Mt. Pleasant branch -- or, actually, no. I moved from Daniel Island to the branch on East Bay Street and then to the Mt. Pleasant branch.

Q. Okay. And then were you at that bank until they were brought in receivership?

A. Yes.

Q. What year was that?

A. I believe that was -- it was 2010 or 2011. I would have to go back.

Q. What was your position at First National Bank of the South?

A. Commercial lender and then commercial banking executive.

Q. Did you perform any administrative duties at the First National Bank of the South, or were you only doing commercial lending?

A. Define administrative duties.

Q. Well, like back office work or were you, you know, more dealing with prospective borrowers?

A. Primarily dealing with prospective borrowers.

Q. Okay. Who were your supervisors at First National Bank of the South?

A. Initially, it was Rudy Gill, then Bob Whittemore, then Jerry Calvert, then Rick Manley.

Q. Okay. And then when did you go to work for Harbor National?

A. It was approximately two years ago.

Q. Okay. And who hired you?

A. Willard Stout.

Q. And how did you know Mr. Stout?

A. We had worked together at SouthTrust and at

Wachovia for a brief period.

Q. So he hired you to come to Harbor National?

A. Yes.

Q. And what position did he hire you for?

A. Commercial lender.

Q. Is that the same position you hold today?

A. It is.

Q. Okay. And as a commercial lender, are most of your -- well, describe for me what are your typical customers or borrowers?

A. Typical would be -- it's a wide range. Typically, the loan has to do with an operating company or investment.

Q. Okay. And operating would be to facilitate a business' ongoing operations and investment would be -- describe for me what would investment be?

A. An example?

Q. Yes.

A. Real estate, commercial real estate, rental.

Q. Okay. And non-residential?

A. Correct.

Q. And when I say that, I mean not a borrower's primary residence?

A. Correct.

Q. Okay. Are you still currently the loan officer for the Whitfield accounts?

A. Yes.

Q. Okay. And the status of those loans presently is what?

A. Well, define "status".

Q. Are they being held in a certain category, or are they -- have they been charged off or are they on non-accrual?

A. Non-accrual.

Q. Do you know how long they've been on non-accrual?

A. I can't give you an exact date.

Q. They're still on non-accrual as of today?

A. Yes.

Q. What does non-accrual mean?

A. Non-accrual is a classification. It's an accounting practice is my understanding.

Q. Does that mean they're not bearing interest?

A. No. I wouldn't be the one to define non-accrual as far as how it relates to accounting. That would be more of a management --

Q. Okay. Who would know more about those matters than you at the bank?

A. Ryan Werking.
Q. Okay. Do you remember when, back in 2012, you first became the loan officer for these loans?
A. Yes.
Q. Tell me about that.
A. I was assigned the account just prior to the renewal --
Q. Okay.
A. -- or attempted renewal.
Q. Who assigned the loans to you?
A. Willard Stout.
Q. We've requested E-mails from Harbor National, and I've got a compilation of E-mails, and I think the easiest way would be to just go chronologically. I'm going to review some of these E-mails with you and ask you questions about them.
This is an E-mail which I'd like you to identify, which is from Ryan Griffin to you. And Ryan Griffin, I believe works in the credit department?
A. Yes.
Q. And it's dated Wednesday June 20, 2012. And the subject is "Whitfield," and it contains various attachments, and I'd like you to identify those attachments for me.
A. The attachments are listed as "Whitfield

Master Worksheet.xls, 2012-05-01 NAR - Anthony Whitfield.doc, 2012-05-16 Annual Status Memo -Tony Whitfield.doc, 2012-05-31 COR - Tony Whitfield.xls."

Q. Would that have been about the time that Mr. Stout assigned you to be the loan officer for these loans?

A. Yes.

Q. Do you remember any conversations you had with Mr. Stout about becoming the loan officer and what you were stepping into?

A. Yes.

Q. What did he tell you?

A. That there were matured loans and we were working on getting those loans renewed, as well as the entire relationship.

Q. At that point in time had the loans been renewed -- or had the loans been approved for renewal, or was it still in the process of being approved?

A. The loans had been approved.

Q. Okay. These attachments on this E-mail I believe are -- the NAR is for a Credit Narrative. There's an Annual Status Memo and a COR, is that Credit Offering Report?

A. COR stands for Credit Offering Report.

Q. Okay. Would you have reviewed those

documents at or around, or after you got that E-mail?

A. Yes.

Q. Okay. Do you specifically recall reviewing them as we sit here today, or is that something you just assume you probably would have done?

A. I assume I would have done that.

Q. Okay. Let me identify for you what I believe is the Credit Narrative, which would have been attached to that E-mail. Just take a look and see if that's a document that would have been attached to that E-mail.

MR. HALVERSEN: Let's mark this as Defendant's 1 to this deposition.

(Whereupon, Exhibit 1 was marked for identification.)

BY MR. HALVERSEN:

Q. Are you done reviewing that?

A. Yes.

Q. Do you think this was the COR that was attached to this E-mail?

A. No.

Q. Okay. Do you remember -- I'm sorry, not COR, Credit Narrative?

A. Yes.

Q. Was there a different Credit Narrative that

was attached to that?

A. Is that the attachment?

Q. That's what I'm asking, or are you not sure?

A. Without having opening the E-mail directly, I would have to say I'm not sure, but I'd be speculating.

Q. Okay. Do you know if there's another Credit Narrative about this time that might have been attached to that E-mail?

A. No, I do not know.

Q. Okay. Do you remember ever seeing this Credit Narrative that I've just shown you?

A. Yes.

Q. Okay. Do you know if you reviewed this before the attempted closing on June 28, 2012? Is this something you would have seen?

A. Yes.

Q. Okay. Did you -- at this point in time after reviewing it, were you aware that Mrs. Whitfield, who is Mr. Whitfield's ex-wife, was living in the Black Rush property?

A. Yes.

Q. Okay. At that point in time, whenever you looked at this narrative, it does mention a divorce

decree on the second page, does it not?

A. Yes.

Q. Did you ever request to see a copy of the decree before the closing?

A. I cannot recall, no.

Q. Do you know who would have prepared this narrative?

A. Yes.

Q. Who?

A. I believe --

Q. I'll just submit to you it doesn't have a name on it, but do you know probably who would have prepared it if you're not sure who prepared it?

A. Speculate on who would --

Q. I'm not asking you to speculate. I'm just asking you if you have an educated guess as to who would have prepared it if you do not know who actually prepared it?

A. Educated guess would be credit.

Q. Someone from the credit department?

A. Uh-huh.

Q. Okay. Do you see that there's -- under Roman Numeral I, there's a heading that says "Closing Contingencies"?

A. Yes.

Q. And is it blank?
A. Yes.
MR. HALVERSEN: We'll mark that as 2. The next E-mail we'll mark as Exhibit 3.
(Whereupon, Exhibits 2 and 3 were marked for identification.)
BY MR. HALVERSEN:
Q. Take a minute just to review that. It purports to be an E-mail from you to Mark Weeks' E-mail address dated Thursday June 21, the week before the closing, and just take a look at that E-mail and let me know if that is an E-mail that you sent to Mr. Weeks?
A. Yes.
Q. Do you recall sending that E-mail to him?
A. Yes.
Q. Did you talk to Mr. Weeks before you sent him this E-mail, do you recall?
A. I do not recall if it was before or after.
Q. Did you talk to him at some point before going to his office on June 28?
A. Yes.
Q. Okay. Let's just talk about this E-mail for a moment. You informed him that the bank is renewing all nine properties, is that correct?
A. Yes, attempting to.

Q. Right. And you're planning on closing next Thursday, which would have been a week from the day you sent the E-mail, correct?

A. Yes.

Q. You state, "I want to communicate with him on any potential obstacles and close quickly. Thanks for making this happen." And "him" you're referring to Mr. Whitfield, I believe?

A. Yes.

Q. When did you talk to Mr. Weeks on the phone before going to the closing?

A. Around the time I sent that E-mail.

Q. Okay. Did he call you or did you call him, or?

A. I called him.

Q. And what did you tell him? What was the gist of the conversation?

A. The gist of the conversation was that we had some loans that we were attempting to renew for Mr. Whitfield, and Mr. Whitfield had selected him as the attorney, and wanted to get an idea of closing costs and could it be -- could a closing date be achieved as I've asked for that following week.

Q. Did you know Mark Weeks before you made that call to him?

A. Yes.
Q. Okay. You dealt with him in other closings?
A. Yes.
Q. Okay. Do you know how many closings you've had with Mark?
A. No.
Q. I mean, a lot?
A. As far as a lot, I guess that would be --
Q. I mean, a handful, or?
A. At least a handful.
Q. Okay. Do you remember anything else from that conversation?
A. No.
Q. And keep in mind for the questions I'm asking you this morning, this is over a year ago, so some things you may not remember, and if you don't, that's fine. Just tell me that you don't remember, okay?
A. Okay.
Q. So, you had that conversation with Mr. Weeks. Let's just go forward in time. This is what looks like an E-mail from Alysia Ward, who I believe is in loan operations at the bank?
A. Yes.

Q. And Felicia -- I'm sorry, it looks like an E-mail from Felicia Pringle, who I believe is also in loan operations, or she's a loan processor?

A. Processor, yes.

Q. To Alysia Ward CCing you and Willard Stout. Subject line: "Whitfield all open loans." And it looks like it's on the day after the last E-mail on Friday, the 22nd?

A. Yes.

Q. And it indicates Felicia is asking for payoffs on all the loans for the effective date of the closing, is that true?

A. Yes.

Q. Okay. And something regarding interest, right?

A. Yes.

MR. HALVERSEN: We'll mark that as 4.

(Whereupon, Exhibit 4 was marked for identification.)

BY MR. HALVERSEN:

Q. Going forward in time, this is an E-mail which is the 25th, which would have been Monday, the week of the closing. And it's an E-mail that's -- it looks like it was sent on a secured E-mail platform,