STATE OF SOUTH CAROLINA COUNTY OF BERKELEY First Citizens Bank and Trust Company, Inc., successor-in-interest to the Federal Deposit Insurance Corporation, receiver of Georgian Bank, Plaintiff, v. Goose Creek II, LLC, James C. Wallace a/k/a James C. Wallace, Sr., John S. Paulson a/k/a John Paulson, Jiri Jilich a/k/a Jiri Jilich, Jr., James K. Price, Eastwood Homes, Inc., Charles Huff, as the Personal Representative of the Estate of Richard P. Huff, Jr., Seamon, Whiteside & Associates, Inc., Monarch Plantation Homeowners' Association, Inc., Defendants.	)	IN THE COURT OF COMMON PLEAS CIVIL ACTION NO.: 2011-CP-08-3412 **ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS DEFENDANT EASTWOOD HOMES, INC.'S COUNTERCLAIMS**

This matter came before the Court upon Plaintiff's Motion to Dismiss Eastwood Construction, LLC, successor by merger to Eastwood Homes, Inc.'s ("Defendant") Counterclaims (the "Motion"). On October 3, 2012, Plaintiff was represented at a duly-noticed hearing on the Motion by Christopher A. Ogiba, Esquire, of Moore & Van Allen PLLC, and Defendant was represented by R. David Chard, Esquire. Having considered the Motion, the supporting memorandum, and the arguments of counsel, this Court GRANTS the Motion.

Background

This case arises out of a loan made by Georgian Bank to Defendant Goose Creek II, LLC ("Goose Creek") to develop a tract of land in Berkeley County, South Carolina (the "Loan"). On or about September 25, 2009, Georgian Bank was closed by the Georgia Department of Banking

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and Finance and placed into receivership, with the Federal Deposit Insurance Corporation (hereinafter, the "FDIC") as receiver. Pursuant to a Purchase and Assumption Agreement entered into by First Citizens Bank and Trust Company, Inc. ("Plaintiff") and the FDIC on September 25, 2009, Plaintiff purchased and assumed certain assets of Georgian Bank from the FDIC, including the loan that is the subject of this action.

Plaintiff has filed suit against Goose Creek and the guarantors of the Loan, James C. Wallace, John S. Paulson, James K. Price, and Jiri Jilich, Jr. (the "Guarantors") to collect the amounts due and owing under the Loan and the personal guaranties and to foreclose on certain real property securing the Loan. Defendant filed an Answer and Counterclaims, asserting claims for equitable estoppel, waiver, and an equitable lien (the "Counterclaims").

Defendant alleges in the Counterclaims that, subsequent to the execution of the Loan, Defendant entered into a contract with a predecessor-in-interest to Goose Creek, wherein Defendant agreed to purchase lots in a subdivision to be developed on the subject property by Goose Creek (the "Contract"). Defendant further alleges that, pursuant to the terms of the Contract, Defendant paid an earnest money deposit that included a cash deposit of Three Hundred Sixty-Two Thousand Five Hundred and 00/100 Dollars ($362,500.00) and recorded a mortgage on the subject property in the amount of this cash deposit (the "Eastwood Mortgage").

Defendant further contends that, at some point after it entered into the Contract with Goose Creek, Georgian Bank provided Defendant with "assurances" that if the bank foreclosed on its mortgage (the "Georgian Bank Mortgage") and took title to the subject property, Georgian Bank would convey lots in the subject property to Defendant pursuant to the terms of the Contract and would provide for the return of Defendant's deposits under the Contract. Defendant alleges that, as a result of these assurances, Plaintiff is estopped from asserting the

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priority of its mortgage vis-à-vis the Eastwood Mortgage, despite the fact that the Eastwood Mortgage was recorded over a year after the Georgian Bank Mortgage was recorded. At no point in its Counterclaims does Defendant allege that any of these "assurances" were in writing, that a document commemorating those assurances was signed by Georgian Bank and Defendant, or that any such writing was contained in the official records of Georgian Bank.

Legal Findings

At the hearing on the Motion, Defendant argued that this Court should continue or forestall its consideration of the Motion until such time as the parties have engaged in discovery and after Plaintiff has filed a motion for summary judgment. This Court finds that Plaintiff's Motion is properly filed and timely, and that the arguments contained in the Motion are ripe for consideration. As such, this Court denies Defendant's request for a continuance or for a denial of the motion on the ground that it is premature.

Furthermore, this Court finds that Defendant's Counterclaims are barred under the *D'Oench* doctrine and under 12 U.S.C. § 1823(e) because Defendant failed to allege that those claims are premised on written agreements signed by Georgian Bank and by Defendant, and that such agreements are contained in the official records of Georgian Bank. Furthermore, this Court finds that Defendant's failure to allege that the assurances are in writing and signed by Georgian Bank bars its Counterclaims under the South Carolina Statute of Frauds and the Lender Statute of Frauds. Finally, this Court finds that the Counterclaims include admissions that abrogate Defendant's prayer for relief and contradict its assertions concerning the alleged assurances made by Georgian Bank.

I. DEFENDANT'S COUNTERCLAIMS ARE BARRED BY THE OPERATION OF THE FDIC'S SPECIAL POWERS, TO WHICH PLAINTIFF HAS SUCCEEDED.

Plaintiff, as successor-in-interest to the FDIC on the loan that is the subject of this

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litigation, is afforded certain common and statutory law protections against claims such as those asserted by Defendant. First, the *D'Oench* doctrine, which originated in a United States Supreme Court case in 1942, holds that the FDIC's interest in an asset it acquired from a failed bank cannot be undermined or diminished by alleged side agreements that were not disclosed in the failed bank's records. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 457-59 (1942); *see also, Young v. FDIC*, 103 F.3d 1180, 1187 (4th Cir. 1997) ("The *D'Oench* doctrine...'prohibits claims based upon agreements which are not properly reflected in the official books or records of a failed bank or thrift.") (citations omitted); *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 592 (11th Cir. 1995). The *D'Oench* doctrine applies to protect assignees of the assets that the FDIC has seized from a failed bank. *See First Union Nat. Bank of Florida v. Hall*, 123 F.3d 1374, 1379 n.8 (11th Cir. 1997) ("The *D'Oench, Duhme* doctrine has been expanded to protect entities to whom the FDIC, acting in its capacity as receiver of failed banks, has transferred assets formerly belonging to a failed bank."); *Adair v. Lease Partners, Inc.*, 587 F.3d 238, 243 (5th Cir. 2009) (citations omitted); *In re Earth Structures, Inc.*, 2011 Bankr. LEXIS 4048 at *10 n.9 (Bankr. D.S.C. Oct. 25, 2011). In short, under the *D'Oench* doctrine and as a successor-in-interest to the FDIC in its capacity as receiver for Georgian Bank, Plaintiff cannot be bound to alleged agreements that are not contained in the official records of Georgian Bank.

The Federal Deposit Insurance Act, as amended, provides statutory protections similar to those earlier established in the now co-existing common law *D'Oench* doctrine. Specifically, 12 U.S.C. § 1823(e), provides, in pertinent part:

> No agreement which tends to diminish or defeat the interest of the Corporation [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless the agreement-
> (1) is in writing,

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(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

See also Dunmar Corp., 43 F.3d at 593 ("[C]ases interpreting the common law doctrine as well as its statutory counterpart are applicable precedent."); *accord, Young v. FDIC*, 103 F.3d 1180, 1187 (4th Cir. 1997) ("Thus, although the Fourth Circuit and other courts often construe the *D'Oench* doctrine and section 1823(e) in tandem,...the common-law doctrine and the statute remain separate and independent grounds for decision.") (citations omitted).

The *D'Oench* doctrine and Section 1823(e) serve two essential purposes: (1) they allow bank examiners to rely on a bank's records when evaluating the bank's fiscal soundness; and (2) they "ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure." *Langley v. FDIC*, 484 U.S. 86, 92 (1987); *Young*, 103 F.3d at 1187. Indeed, when the FDIC is considering whether or not to shut down and liquidate a failed bank, "determinations must be made 'with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services.'" *Dunmar Corp.*, 43 F.3d at 593 (citations omitted). As to the failed bank's customers, "where one lends oneself to a scheme or arrangement whereby the banking authority is likely to be misled, that scheme or arrangement should not be the basis for a claim against the banking authority."

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Langley, 484 U.S. at 92; *Dunmar Corp.*, 43 F.3d at 593 (citations omitted).[1] The acquiring bank may avail itself of these defenses even when the borrower is wholly without fault. *See Young*, 103 F.3d at 1188 ("The need for bank examiners to rely on a bank's records in evaluating the bank's fiscal soundness remains unaffected by whether or not the customer acted innocently or negligently. Therefore, we hold that the *D'Oench* doctrine applies even when the customer is completely innocent of any bad faith, recklessness, or negligence.").

Defendant's Counterclaims are based on the allegation that Georgian Bank provided Defendant with assurances that, in the event it foreclosed on its mortgage and took back the subject property, it would convey certain lots to Defendant and would pay back earnest money deposits Defendant made pursuant to its contract with Goose Creek. In the Counterclaims, Defendant does not contend that those assurances were in writing and signed by Georgian Bank and Defendant, nor does it allege that such writings are contained in Georgian Bank's official records. As such, the *D'Oench* doctrine and Section 1823(e) bar those Counterclaims.

Defendant's reliance on its Motion to Amend its Answer and Counterclaims and related amended counterclaims does not alter this Court's ruling.[2] Defendant's amended counterclaims assert additional claims premised, in part, on an August 18, 2009 letter from Georgian Bank to Defendant (the "Letter"). *See* Amended Answer and Counterclaims, at Ex. D. The Letter fails to meet the requirements under Section 1823(e)(2) because it is not signed by Defendant, nor was it

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[1]Whether or not the FDIC had actual or constructive knowledge of the facts allegedly underpinning Defendant's Counterclaims is irrelevant to the analysis under the *D'Oench* doctrine or section 1823(e). *See Langley*, 484 U.S. at 95 ("The short of the matter is that Congress opted for the certainty of the requirements set forth in § 1823(e). An agreement that meets them prevails even if the FDIC did not know of it; and an agreement that does not meet them fails even if the FDIC knew.").

[2] Defendant's Motion to Amend its Answer and Counterclaims was not heard contemporaneously with Plaintiff's Motion, but as Defendant's counsel relied on the Motion to Amend and the amended counterclaims during his oral arguments, this Court takes judicial notice of those filings. Because this Court rules herein that the Counterclaims are dismissed, Defendant's Motion to Amend is rendered moot.

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executed contemporaneously with the Georgian Bank loan to Goose Creek (January 8, 2008). Insofar as the Letter fails to meet the strict statutory requirements set forth in Section 1823(e), neither it, nor the amended counterclaims it supports, alters this Court's ruling dismissing the Counterclaims.

II. THE SOUTH CAROLINA STATUTE OF FRAUDS AND LENDER STATUTE OF FRAUDS BAR DEFENDANT'S COUNTERCLAIMS.

As additional supporting grounds for this Court's dismissal of Defendant's Counterclaims, this Court also finds that the Counterclaims are barred by the South Carolina Statute of Frauds (S.C. CODE ANN. § 37-10-107) and Lender Statute of Frauds (S.C. CODE ANN. § 37-10-107) because they are premised on commitments or assurances related to the loan of money and an interest in real property, but Defendant has failed to plead or allege a sufficient writing.

Under South Carolina law, a contract concerning an interest in land must be in writing in order to be enforceable. *See* S.C. CODE ANN. § 32-3-10 ("No action shall be brought . . . [t]o charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them . . . [u]nless the agreement upon which such action be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith..."). The sole factual allegations supporting the Counterclaims include the contention that "Georgian Bank, at Eastwood's request, provided Eastwood assurances that, among other things, in the event Georgian Bank asserted its rights under the Georgian Bank Mortgage and took title to the Property, Georgian Bank would convey lots in the Subdivision to Eastwood pursuant to the terms of the Contract..." The only Contract referenced in the Counterclaims was entered into by Defendant and Goose Creek. Plaintiff was not a signatory to the Contract. Therefore, pursuant to the allegations contained in the four corners of the Counterclaims,

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Georgian Bank's alleged "assurances" concerning the sale of the subject lots are not contained in any writing signed by Georgian Bank. As such, the South Carolina Statute of Frauds bars the Counterclaims premised on such assurances.

Furthermore, the Lender Statute of Frauds provides:

> (1) 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
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> (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.*
>
> (2) *Failure to comply with subsection (1) precludes an action or defense* based on any of the following legal or equitable theories:
>
> (a) *an implied agreement based on course of dealing or performance or on a fiduciary relationship*;
>
> (b) *promissory or equitable estoppel*;
>
> (c) part performance, except to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement; or
>
> (d) negligent misrepresentation.

S.C. CODE ANN. § 37-10-107 (emphasis added). As noted by the South Carolina Supreme Court, the purpose of the Lender Statute of Frauds is to "prohibit[] certain legal and equitable actions arising out of the loan of money where there is not writing evidencing the parties' alleged

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agreement." *Sea Cove Development, LLC v. Harbourside Community Bank*, 387 S.C. 95, 97 (2010).

Defendant's Counterclaims are further premised on an alleged assurance by Georgian Bank that "in the event Georgian Bank asserted its rights under the Georgian Bank Mortgage and took title to the Property...Georgian Bank would...provide for the return of Eastwood's deposits under the Contract." In short, pursuant to its allegations, Defendant claims that it agreed to forbear in the repayment of its deposits based on the purported assurances of Georgian Bank. Pursuant to the terms of the Lender Statute of Frauds, this alleged agreement to "defer or forbear in the repayment of money" must be in writing to be enforceable. S.C. CODE ANN. § 37-10-107(1)(b). Defendant has failed to allege any writing containing the relevant terms of this agreement to forbear or the terms of the alleged assurances made by Georgian Bank. As such, its Counterclaims are also barred by the Lender Statute of Frauds.

III. THE COUNTERCLAIMS THEMSELVES CONTRAVENE DEFENDANT'S REQUESTED REMEDY.

The remedy that Defendant seeks for each of its equitable counterclaims is for the Court to impose an equitable lien on the subject property in order to grant the Eastwood Mortgage priority over the Georgian Bank Mortgage despite the fact that the Georgian Mortgage was recorded first. In short, Defendant seeks that its mortgage be declared a first mortgage on the subject property and that Plaintiff's mortgage be relegated to a secondary priority.

However, in support of its Counterclaims, Defendant attached and incorporated a Term Sheet executed by Defendant and Goose Creek on or about January 14, 2009 as part of a settlement of litigation between those parties. The Term Sheet operated as an amendment to the Contract upon which Defendant bases its Counterclaims.

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Paragraph 4 of the Term Sheet specifically references the Eastwood Mortgage as a "Second Mortgage" and imposes that mortgage on the subject property as security and consideration for Defendant's "release[]" of the deposit for which it seeks repayment in the present action. To wit: "The earnest money deposit of $362,500 shall be released to the Seller [Goose Creek] as of the first business day after January 1, 2009, so long as there is a contemporaneous delivery and recordation of a Second Mortgage satisfactory to Eastwood and Seller on the "Phase One" property..." This contractual commitment by Defendant, which was entered into over a year after the recordation of the Georgian Bank Mortgage and well after the purported assurances alleged by Defendant in its Counterclaims, undermines Defendant's Counterclaims on two grounds: (1) it recognizes and commits to the fact that Defendant's "second" mortgage is inferior in priority to Plaintiff's first mortgage on the subject property; and (2) it operates as a release of the deposits that Defendant now seeks to have repaid.

This Court finds that the Term Sheet that is incorporated into Defendant's Counterclaims operates as an admission as to the relative priority of the two mortgages at issue in this matter and contradicts both Defendant's allegations and its prayer for relief in this matter. This Court finds that this contradiction acts as an independent ground for the dismissal of the Counterclaims.

THEREFORE, IT IS ORDERED THAT Plaintiff's Motion to Dismiss Defendant Eastwood Construction, LLC, successor by merger to Eastwood Homes, Inc.'s Counterclaims is hereby granted.

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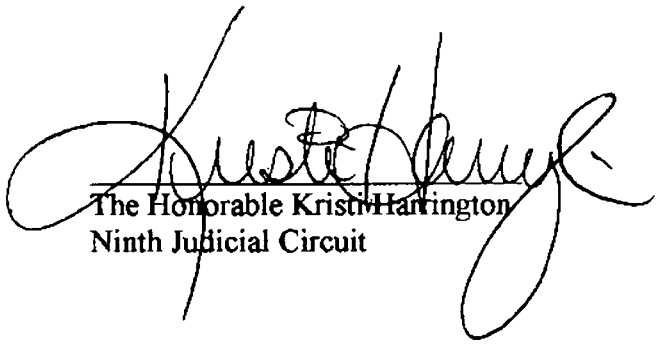
AND IT IS SO ORDERED.



The Honorable Kristi Harrington
Ninth Judicial Circuit

Charleston, South Carolina
Nov 7, 2012