THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Case No. 2013-CP-23-03075

Sherman Financial Group, LLC ..... Appellant,

v.

FM FRI Greenville, LLC ..... Respondent.

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# RESPONDENT'S REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL

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Attorneys for Respondent,
FM FRI Greenville, LLC

Pursuant to Rule 240, SCACR, FM FRI Greenville, LLC, Respondent/Landlord, hereby replies to the Return of Appellant/Tenant and re-asserts that the above-captioned appeal of Sherman Financial Group, LLC, the Appellant/Tenant, be dismissed for lack of jurisdiction. The Circuit Court's Orders of November 13, 2013 and December 23, 2013 (the "Orders"), which are the subject of this appeal, are interlocutory orders and are not subject to immediate appeal. As such, this Court lacks jurisdiction. This Court should dismiss this appeal as premature and remand so that the Circuit Court can proceed with the proper administration of this lawsuit.

## FACTUAL BACKGROUND

Appellant/Tenant includes several misstatements in its Factual Background and attaches various exhibits not properly before the Court.[1] Subparagraph 1 at page 6 of the Return indicates that Respondent/Landlord deposited certain funds into a cash reserve account to fund the unapplied tenant allowance. Such is inaccurate. The deposit was made by DD Greenville, LLC, Respondent/Landlord's predecessor. Respondent/Landlord subsequently acquired the building and assumed the rights of DD Greenville, LLC and its successors under the Lease, as provided in certain agreements pertaining to such transactions. Appellant/Tenant also suggests that Respondent/Landlord "converted" the unapplied tenant allowance to its use at Subparagraph 3 on page 6, and "absconded" with cash on page 7. Such is likewise inaccurate, and assumes that Appellant/Tenant had some cognizable interest

[1] Only those documents in the record should be introduced before this Court. Matters raised outside the record may not form the basis for a reversal. Ravan v. Greenville Cnty., 315 S.C. 447, 460, 434 S.E.2d 296, 304 (Ct. App. 1993). An issue may not be raised for the first time on appeal. Id., citing Talley v. S. Carolina Higher Educ. Tuition Grants Comm., 289 S.C. 483, 487, 347 S.E.2d 99, 101 (1986). Based on the foregoing authority, this Court should disregard Appellant/Tenant's Exhibits B, C, and D to its Return. Appellant/Tenant admits that it is attaching documents not available to the Circuit Court at the time the appealed rulings were issued. See Return, p. 6.

in said funds, which it does not. Appellant/Tenant never complied with those conditions precedent[2] in the Lease to even apply for such funds (which will be clear at trial), and now misconstrues and haphazardly mischaracterizes the "facts" outside of the record in an attempt to try its case in the Court of Appeals. Such a brazen gambit does not affect the dispositive legal issue related to the appellate jurisdiction over the Orders in dispute, however. Respondent/Landlord has in any event never disavowed knowledge of the existence of the allowance or of any cash reserve account, but has asserted, *inter alia*, that Appellant/Tenant failed to timely make a valid claim, with backup, for the allowance, and thus has no legal right, contractual or otherwise, to same.

Additionally, in its Procedural Posture, Appellant/Tenant makes the misleading statement that "Appellant/Tenant moved for a temporary restraining order and sought permission to pay rent into court as a means of preserving contested possessory rights to the premises." See Return, p. 7. In actuality, the Appellant/Tenant obtained an *ex parte* temporary restraining order (TRO) on May 31, 2013, and held the premises hostage without paying rent from such date through the end of the Lease and subsequent dissolution of the preliminary injunction by Order dated November 13, 2013. See Exhibit 7 to Motion to Dismiss, p. 53. Appellant/Tenant did not file its motion in the Circuit Court for leave to deposit certain rents with the Circuit Court until June 11, 2013, at which time Appellant/Tenant was already in default under the Lease for failure to pay June rent. Appellant/Tenant's motion indicated that Appellant/Tenant sought leave to deposit with the Circuit Court the amount of its monthly rent obligation until the disputes at issue in the litigation could be resolved. See Exhibit 3 to Motion to Dismiss, pp. 35-36. Finally,

[2] When Appellant/Tenant finally made a demand for the unapplied tenant allowance, it did so through counsel, who appears to have thereby unwisely interjected himself as a fact witness at trial upon remand. See Exhibit E to the Appellant/Tenant's Return, p. 33. Said demand does not comply with the Lease's requirements.

Appellant/Tenant continues in its mischaracterization of Respondent/Landlord's co-counsel, licensed in Florida, as "unlicensed counsel," which, like the foregoing, is pointlessly incendiary and utterly irrelevant to the legal issue presented: Appellant/Tenant's premature appeal of interlocutory orders.

## ARGUMENT AND CITATION OF AUTHORITY

### I. The Orders appealed do not affect "mode of trial," and do not represent a "pre-trial damages award."

Appellant/Tenant suggests that the Circuit Court's declaration that a "pre-trial damages award" is the law of the case is immediately appealable because it deprives Appellant/Tenant of a mode of trial. See Return, p. 8. The cases cited for this proposition have to do with the right to jury trial, which is not implicated in the instant case, in which no party has requested same and the matter has been referred to the Master-in-Equity. See Exhibit 7 to Motion to Dismiss, p. 51. Further, the Orders related to two months' rent are not a "pre-trial damages award:" they are orders to pay rent per the Lease for two months, June and July 2013, during which Appellant/Tenant held forcible possession of the premises, rent-free, and during which Appellant/Tenant admitted (as of the hearing based on its motion for leave to deposit funds) that rent was due.[3] As an aside, during said months, Respondent/Landlord likely could not have effected a Rule to Show Cause[4], as same could have been adjudged to run afoul of the Court's edict in its TRO that Respondent/Landlord

[3] The Orders, while they incorporate and comply with S.C. Code Ann. § 27-37-155, also speak to the exact facts presented herein, in which § 27-37-155(B)(5) provides a conjunctive remedy of ejectment to that entered by the Court: the scenario in which a tenant obtains *ex parte* relief that prevents the issuance of a Rule to Show Cause, prevents possession by a landlord, and attempts to prevent the payment of rent to a landlord. Appellant/Tenant's position that ejectment is Respondent/Landlord's sole remedy ignores the reality that ejectment isn't retroactive – a tenant should pay rent for that period in which it has had the use of its leasehold, as the Court properly determined in its July 31, 2013 Order.

[4] The purpose of a Rule to Show Cause is to accomplish notice. Appellant/Tenant already had notice of the issues in dispute, as is made clear in its Motion for Leave to Deposit Funds with Court. See Exhibit 3 to Motion to Dismiss, pp. 35-36, enumerating issues of abandonment, obligation to pay rent, unapplied tenant allowance, and alleged right of offset.

not "[take] any other action to hinder, harass, and/or interfere with [Appellant/Tenant's] possession or quiet enjoyment of the premises." See May 31, 2013 Order Granting Motion for Temporary Restraining Order and Setting Hearing on Temporary Injunction, attached hereto as **Exhibit 1**. The Preliminary Injunction Order of June 26, 2013 retained the above-quoted language "in full force and effect." See June 26, 2013 Preliminary Injunction Order, attached hereto as **Exhibit 2.** Having obtained the very *ex parte* relief that prevented Respondent/Landlord from issuing a Rule to Show Cause for, *inter alia*, ejectment, and having placed the issues of rent, offset, and ability to satisfy a judgment in dispute, Tenant may not now manufacture an appeal of the results obtained in its prior motions and complain of a lack of issuance of a rule to show cause because it finds such results disagreeable. If any due process rights have been violated, they belong to the Respondent/Landlord, which was deprived of possession of the premises and rent[5] from June 2013 through November 2013.

## II. The Orders properly apply a prior order, which in turn properly applied terms of the Lease based on Appellant/Tenant's own motion.

Appellant/Tenant takes the unsupportable position that only matters determined in appealable orders may determine the law of the case. While Respondent/Landlord does not concede the point, it is likewise well-settled that one judge of the same court cannot overrule another. Charleston Cnty. Dep't of Soc. Servs. v. Father, Stepmother, & Mother, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995). A circuit court judge cannot set aside prior rulings of another circuit judge[6], even when the subsequent judge disagrees and proper mode of trial is the concern. Cook v. Taylor, 272 S.C. 536, 538, 252 S.E.2d 923, 924 (1979). The

[5] It is axiomatic in South Carolina that possession of a leasehold means that rent is due. This is the result that obtains statutorily (S.C. Code Ann. § 27-35-140 and § 27-37-155), under the common law, and under the Lease (see Exhibit 1 to Motion to Dismiss, § 4.1, p. 17).

[6] Appellant/Tenant mystifyingly characterizes the Circuit Court's proper and mandatory acknowledgement of prior orders as "blind adherence to a prior decree." See Return, p. 9.

"subsequent judge" rule applies regardless of whether prior orders are appealable, and is grounded in principles of *stare decisis*. Further, Appellant/Tenant's law of the case argument concerns itself with alleged legal error, whereas the procedural issues presented by Respondent/Landlord's motion concern themselves with appellate jurisdiction, which is the sole issue before this Court. Were the Court to substantively review the Orders, which Respondent/Landlord submits would be premature and improper until an appealable Circuit Court order is entered, it could in any event affirm pursuant to Rule 220(c)[7], insofar as the Circuit Court relied on the law of the case doctrine as well as the "subsequent judge" doctrine in enforcing the prior July 31, 2013 Order.

### III. The Orders do not involve a substantial right.

An order affects a substantial right and is immediately appealable when it (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action. S.C. Code Ann. § 14-3-330(2). Pursuant to S.C. Code Ann. § 14-3-330(2), this Court may not review an order that does not prevent a judgment from being rendered in the action, and from which an appellant can seek review in any appeal from the final judgment. An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed. Hagood v. Sommerville, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005).

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[7] At such time as a proper appeal is perfected, this court is authorized to consider any sustaining ground pursuant to Rule 220(c), SCACR. The appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal. Jamison v. Ford Motor Co., 373 S.C. 248, 267-68, 644 S.E.2d 755, 765 (Ct. App. 2007); see also I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment.").

The Orders appealed, by their explicit terms, do not finally determine some substantial matter, do not end the case and will not affect the Appellant/Tenant's ability to put on its case as to the unapplied tenant allowance or any other issues in dispute. The Orders are without prejudice as to all claims, counterclaims, and defenses. The Orders appealed made an award of rent for June and July 2013 based on Appellant/Tenant's possession of the premises during said period, and arose out of the July 31, 2013 Order that applied the express terms of the Lease disallowing offset against rent. The Orders under appeal do not end the case, do not prevent a final judgment, are not tantamount to the striking of a pleading and could in any event be appealed after such time as an appealable order is entered by the Circuit Court.

Appeal may only be taken, as provided by law, from any final judgment, appealable order or decision. See Rule 201(a), SCACR; see also Rule 72, SCRCP. Appellant/Tenant asserts that the Circuit Court's refusal to allow a "factual inquiry" has deprived it of due process and speculates that the Orders will likely have the effect of defeating Appellant/Tenant's underlying claims, although it does not specify how such a result would occur. See Return, p. 12. Appellant/Tenant suggests that findings about two months' rent, based on the unassailable fact that Appellant/Tenant was in possession of the premises per the TRO rent-free, have the potential to foreclose future findings of fact with regard to the unapplied tenant allowance, when the Orders at issue explicitly say otherwise. Appellant/Tenant argues that it "was given no opportunity to present its case before a trier-of-fact." See Return, p. 10. The Orders arising out of the July 31, 2013 Order only exist due to the Appellant/Tenant's motion to deposit rents into court, during which it had the opportunity to present those facts it deemed appropriate. Appellant/Tenant put all of the

issues in dispute itself; it may not now reverse course and complain to this Court of an ill-defined failure of due process.

## IV. The Orders make no findings as to contempt.

Appellant/Tenant makes the unsupportable argument that the Orders "ascrib[e] contempt to Appellant/Tenant's refused payment" and are therefore immediately appealable contempt orders. The Orders themselves resolve such issue, and demonstrate that Appellant/Tenant has taken a position that completely mischaracterizes the Orders.

The Circuit Court ruled that Appellant/Tenant was required to make payment of June and July rent to Respondent/Landlord in the amount of $313,757.86 on or before November 15, 2013. See Exhibit 7 to Motion to Dismiss, p. 53. The Circuit Court expressly held that "**[a]ll other issues related to [Respondent/Landlord's] motion for contempt and sanctions**, including [Respondent/Landlord's] alleged right to additional months' rent, **are held in abeyance and preserved.**" Id., emphasis added. As the Circuit Court expressly noted in its December 23, 2013 Order, "...**there is no contempt issue before the Court at this time nor has there been a finding of contempt by the Court relative to [Appellant/Tenant's] continued nonpayment of rent** as directed by Judge Stilwell in his Order filed July 31, 2013. Rather, [Appellant/Tenant] argues the Court exceeded its authority by stating that it could be held in contempt for failure to comply with orders of the Court. Such is simply not the law." See Exhibit 8 to Motion to Dismiss, p. 58, emphasis added. An appellant must actually have been held in contempt before he has the right to appeal. Ex parte Whetstone, 289 S.C. 580, 581, 347 S.E.2d 881, 882 (1986)(dismissing appeal). Appellant/Tenant has not yet been held in contempt. The black-letter language of the Orders makes clear that the instant appeal is premature.

## V. Dismissal and remand will prevent a piecemeal and inefficient appeal by Appellant/Tenant.

Appellant/Tenant's Return does not even attempt to address the grievous judicial economy concerns presented by its premature appeal. The future order that the Circuit Court has stated it will likely enter in this case based on Respondent/Landlord's January 9, 2014 Motion will be a civil contempt order, which will likely result in an appeal. See Exhibit 10 to Motion to Dismiss ("...we understand that ... you are also presently inclined to find Sherman in contempt...".).

Appellant/Tenant appears to have appealed to protect itself against a waiver argument. See Return, p. 9 ("The rulings...must be appealed; otherwise, Appellant/Tenant would be deemed to forego any contest of these damages...".) Appellant/Tenant may rest easy on such point, as our Supreme Court has established that the Appellant/Tenant will, in fact, have an adequate remedy of appeal when and if Appellant/Tenant is actually held in contempt by the Circuit Court for failure to comply with prior orders. A party may comply with an order of the Circuit Court, or refuse to comply with the order and appeal after the party is held in contempt for its failure to comply. See Ex parte Whetstone, 289 S.C. 580, 580, 347 S.E.2d 881, 881-82 (1986). Since an order actually holding a party in contempt is final in nature, it is appealable. Tucker v. Honda of S.C. Mfg., Inc., 354 S.C. 574, 577, 582 S.E.2d 405, 406-07 (2003) (citing Ex parte Whetstone). Respondent/Landlord respectfully requests that the Court dismiss the appeal and remand so as to allow this case to proceed in the ordinary course.

## CONCLUSION

The Circuit Court's November 13, 2013 and December 23, 2013 Orders arise out of Appellant/Tenant's own prior motions and are not immediately appealable. The Respondent/Landlord respectfully requests that this Court dismiss the appeal and remand so that the Circuit Court may proceed with the proper administration of this case.

Respectfully Submitted,

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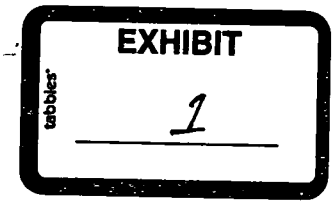
Attorneys for Respondent,
FM FRI Greenville, LLC

February 28, 2014
Greenville, South Carolina

# EXHIBIT 1




STATE OF SOUTH CAROLINA )
)
COUNTY OF GREENVILLE )

IN THE COURT OF COMMON PLEAS



Sherman Financial Group, LLC, )
)
Plaintiff, )
)
-vs- )
)
FM FRI Greenville, LLC, )
)
Defendant. )

**ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER AND SETTING HEARING ON TEMPORARY INJUNCTION**

C.A. No. 2013-CP-23-03075

This matter came before the Court by motion of Plaintiff Sherman Financial Group, LLC ("Plaintiff" or "Tenant") requesting that this Court issue a Temporary Restraining Order against Defendant FM FRI Greenville, LLC ("Defendant" or "Landlord"), to be followed by a hearing on its request for a Temporary Injunction, pursuant to Rule 65, SCRCP. This Court conducted a hearing on the Motion on Friday, May 31, 2013, without notice to Defendant pursuant to Rule 65(b), SCRCP.

For the following reasons, based upon the allegations in the Verified Complaint and the argument of counsel, the request for the Temporary Restraining Order is hereby granted.

**Background and Factual Showings**

Tenant entered into a lease agreement with Landlord whereby Tenant agreed to pay Landlord rent and, in exchange, Landlord agreed to lease to Tenant premises located within part of the building now known as the Wells Fargo Building, and formerly known as Wachovia Place, and having a building address of 15 South Main Street, Greenville, South Carolina ("Premises"). The lease term does not end until November 2013, and Tenant is current on rent payments to Landlord.

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On May 15, 2013, Tenant notified Landlord that Tenant is entitled to over one million dollars in an unpaid allowance under the lease. In response, on May 24, 2013, Landlord pronounced Tenant in default, alleging Tenant had "abandoned" the Premises. Landlord further informed Tenant that on or about June 1, 2013, Landlord would enter the Premises and commence demolition in order to prepare it to be leased to prospective tenants. Landlord also threatened to dispose of Tenant's personal property. Tenant claims it is not in default, as it has not abandoned the Premises, but rather continues to use and possess the Premises for legitimate business purposes. Tenant seeks to enjoin Landlord from entering the Premises to demolish Tenant's space or to dispose of Tenant's personal property.

**Standard for Injunctive Relief**

For a preliminary injunction to be granted, Plaintiff must establish that it: 1) will suffer irreparable harm if the injunction is not granted; 2) will likely succeed on the merits of the litigation; and 3) has no adequate remedy at law. Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc., 361 S.C. 117, 603 S.E.2d 905 (2004); Rule 65, SCRCP. A temporary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam).

This standard is heightened when a party seeks relief ex parte, for then the rule expressly provides that "[n]o temporary restraining order shall be granted without notice ... unless it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon." Rule 65(b), SCRCP (emphasis added).

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## ORDER

I find that Plaintiff satisfies all the elements for a temporary restraining order based upon the facts shown by Verified Complaint. Plaintiff is likely to succeed on the merits, has no adequate remedy at law, and the pending demolition of its property satisfies the element of irreparable harm.

Furthermore, it is appropriate under Rule 65, SCRCP, that this Order issue without notice to Defendant. For the foregoing reasons, it is hereby adjudged, ordered, and decreed that a Temporary Restraining Order shall issue, as of May 31, 2013, at 10:45 AM, enjoining Defendant, its officers, employees, agents, as well as anyone acting for or on its behalf from:

a. **Entering the Premises to commence demolition of the Premises;**

b. **Entering the Premises to remove, dispose, and/or handle any of Tenant's property, including but not limited to Tenant's personal property and/or fixtures; and**

c. **Entering the Premises or taking any other action to hinder, harass, and/or interfere with Tenant's possession or quiet enjoyment of the Premises.**

This Temporary Restraining Order will remain in full force and effect for ten (10) days unless extended or modified by this Court. Plaintiff is instructed to serve this Order, which hereby provides notice of the hearing for a temporary injunction scheduled for **June 6, 2013, at 9:30 A.M. before Judge D. Garrison Hill at the Greenville County Court of Common Pleas, located at 305 East North Street Greenville, South Carolina, 29601.**

As bond for this order Plaintiff will pay a cash bond in the amount of One Hundred Fifty-Two Thousand One Hundred Thirty-Seven and 76/100 ($152,137.76) Dollars (such amount specifically being the rental payment which becomes due from Plaintiff to Defendant on June 1, 2013) within three business days of the date of this Order, pursuant to Rule 65(c). This amount shall be returned to Plaintiff upon the conclusion of this case absent a showing that Defendant

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was wrongfully enjoined or restrained or is otherwise entitled to the amount in light of Plaintiff's allegations relating to the Unpaid Allowance.

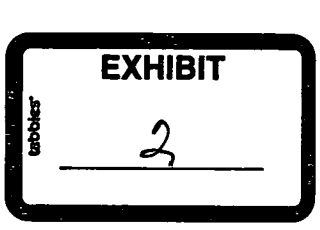
AND IT IS SO ORDERED.

Judge, Thirteenth Judicial Circuit

Dated: 5.31.13

A Certified Copy
Paul B. Wilkerson
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated 5/31/13

# EXHIBIT 2




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

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2013 JUN 26 P 2:32

Sherman Financial Group, LLC,

Plaintiff,

-vs-

FM FRI Greenville, LLC,

Defendant.

**PRELIMINARY INJUNCTION ORDER**

C.A. No. 2013-CP-23-03075

The TRO is modified to allow Defendants access to the premises to the extent authorized by the lease;

The TRO is otherwise in full force and effect, and this Court adopts and incorporates the TRO language (where not inconsistent with this Order) into this Preliminary Injunction Order;

This Order shall stay in effect until the mediation is completed. If the mediation proves unsuccessful either party may move to modify the injunction or the bond.

IT IS SO ORDERED!

D. Garrison Hill
Circuit Judge

June 24, 2013
Greenville, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Case No. 2013-CP-23-03075

Sherman Financial Group, LLC ..... Appellant,

v.

FM FRI Greenville, LLC ..... Respondent.

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PROOF OF SERVICE

---

This is to certify that *Respondent FM FRI Greenville's Reply in Support of Motion to Dismiss Appeal* with Exhibits 1and 2 were served in the above-referenced case by placing copies of said documents in the United States Mail on this the 28th day of February, 2014, addressed as follows:

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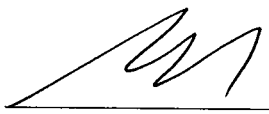

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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ATTORNEYS AT LAW

**R. Patrick Smith**
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February 28, 2014

Jenny Abbott Kitchings, Clerk
The South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Sherman Financial v. FM FRI Greenville
Appellate Case No. 2014-000086

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter please find an original and seven (7) copies of Respondent FM FRI Greenville, LLC's Reply in Support of Motion to Dismiss Appeal, and Exhibits 1-2, paginated per Rule 240(c), SCACR. In addition, please find an original and one copy of a Proof of Service. Please file same and return the clocked copy to me by way of the enclosed, self-addressed, stamped envelope. Should anything further be necessary from me in order to accomplish the filing of these documents, please do not hesitate to contact me at your convenience.

Sincerely,

HARPER, LAMBERT & BROWN, P.A.

R. Patrick Smith

RPS:bb
Enclosures
cc: Steven E. Farrar (w/enc.)
William B. Swent (w/enc.)
Jason D. Maertens (w/enc.)