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S.C. Supreme Court

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

On Certiorari to the Court of Appeals of South Carolina
Opinion No. 5027 (S.C. Ct. App. filed August 22, 2012)

Regions Bank..... Petitioner,

v.

Richard C. Strawn, Robert K. Borchers, individually and as
Personal Representative of the Estate of Marie Borchers and
Nancy Davidson Borchers..... Respondents.

Appellate Case No.: 2012-213178

Lower Court Case No.: 2006-CP-04-00770

APPENDIX

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No.: 2006-CP-04-770

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The South Carolina Court of Appeals

Regions Bank, Appellant,

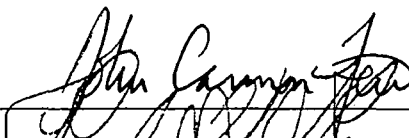
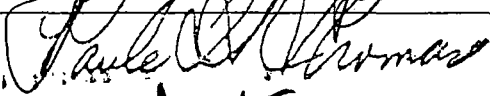
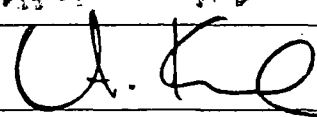
v.

Richard C. Strawn, Robert K. Borchers, individually and
as personal representative of the Estate of Marie
Borchers, and Nancy Davidson Borchers, Respondents.

Appellate Case No. 2010-165066

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

	C.J.
	J.
	J.

Columbia, South Carolina

cc:

Harold P. Threlkeld

Samantha Nelson Murphy

FILED

September 25, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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AUG 29 2012

Case No.: 2006-CP-04-770

SC Court of Appeals

Regions Bank..... Appellant,

v.

Richard C. Strawn, Robert K. Borchers, individually and as
Personal Representative of the Estate of Marie Borchers and
Nancy Davidson Borchers..... Respondents.

APPELLANT'S PETITION FOR REHEARING

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PETITION FOR REHEARING

Appellant, Regions Bank, petitions the South Carolina Court of Appeals pursuant to Rule 221(a), South Carolina Appellate Court Rules for a rehearing on Opinion Number 5027 on the grounds that the court overlooked or misapprehended the evidence and the law on the following points:

I. BECAUSE THE SUBJECT MORTGAGE IS AN OPEN-ENDED MORTGAGE WITHIN THE MEANING OF SECTION 29-3-50 OF THE SOUTH CAROLINA CODE (2007), THE APPELLANT WAS NOT REQUIRED TO CANCEL THE SAME UNLESS THE GRANTOR REQUESTED CANCELLATION.

The mortgage provides in pertinent part that "...[T]his Mortgage shall remain an open mortgage of record to secure future advances in accordance with section 29-3-50, as amended, of South Carolina Code (1976), even in the event all sums secured by this Mortgage may be fully paid at any one time; however, upon request of grantor (emphasis added), Lender will cause this Mortgage to be released and cancelled of record upon full payment of all indebtedness then owing, and upon such cancellation of this Mortgage of record, the Mortgage shall become null and void..."

Section 29-3-50 of the South Carolina Code (1976), provides that an "open-end mortgage" remains viable until the mortgagor requests cancellation (emphasis added)." *Central Production Credit Ass'n v. Page*, 268 S.C. 1, 231 S.E.2d 210 (S.C., 1977). When there is no debt and no commitment for a loan, the mortgagee

must cancel and open-end mortgage when the mortgagor so requests (emphasis added). *Central Production Credit Ass'n v. Page*, *id.*

II. BECAUSE THE GRANTOR NEVER REQUESTED CANCELLATION OF THE MORTGAGE AS PROVIDED IN THE MORTGAGE AND IN SECTION 29-3-50 OF THE SOUTH CAROLINA CODE (2007), THE APPELLANT WAS NEVER REQUIRED BY SECTIONS 29-3-310 AND 320 OF THE SOUTH CAROLINA CODE (2007) TO CANCEL THE MORTGAGE.

There is no evidence in the record that supports any reasonable inference that the Grantor, Richard C. Strawn, directly or indirectly requested the Appellant to cancel, satisfy or release the mortgage.

On the other hand, the evidence shows that the Appellant had a duty to keep the mortgage open until the grantor requested the Appellant to cancel the same. (Plaintiff's Exhibit 1, R. p. 12)

III. BECAUSE THE APPELLANT WAS NEVER REQUIRED TO CANCEL THE MORTGAGE, IT WAS NEVER SUBJECT TO THE PENALTY PURSUANT TO SECTIONS 29-3-310 AND 320 OF THE SOUTH CAROLINA CODE (2007).

Since the grantor never requested the Appellant to satisfy the mortgage, the Appellant had no duty to satisfy the mortgage and sections 29-3-310 and 320 of the South Carolina Code (2007) are inapplicable.

IV. BECAUSE THE RESPONDENT'S ATTORNEY HAD THE AUTHORITY UNDER SECTION 29-3-330(e) OF THE SOUTH CAROLINA CODE (SUPP. 2011) TO TIMELY CANCEL THE MORTGAGE, THE RESPONDENTS

CANNOT CLAIM A VIOLATION BY THE APPELLANT OF SECTIONS 29-3-310 AND 320 OF THE SOUTH CAROLINA CODE (2007).

Respondent's attorney had the authority under section 29-3-330(e) of the South Carolina Code (Supp., 2011) to cancel the mortgage upon payment in full of the amount due. Where the closing attorney had the power to file a cancellation of the mortgage and does not do so, it is inequitable to permit the client of the closing attorney to claim a penalty against the mortgage holder because of the failure of the client's attorney to cancel the mortgage.

The provisions of section 29-3-330(e) of the South Carolina Code (Supp. 2011) empowering a closing attorney to cancel a mortgage was enacted subsequent to the enactment of the penalty provisions of sections 29-3-310 and 320 of the South Carolina Code (2007), therefore, those sections never contemplated the existence of such power.

CONCLUSION

It is undisputed that pursuant to the authority contained in section 29-3-50 of the South Carolina Code (2007), the subject mortgage provided it would remain an open mortgage of record to secure future advances and even though fully paid, would remain open until the grantor requested cancellation of the same. It is also undisputed that the grantor of the mortgage never directly or indirectly requested cancellation of the same. Therefore, the Appellant was never required to cancel the mortgage until the debt thereby secured matured. The mortgage remained an open

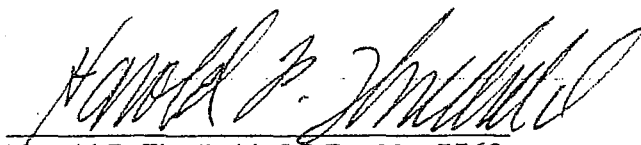
mortgage after the Respondents purchased the property securing payment of the debt.

Since no request was made by the grantor to cancel the mortgage, the Appellant was never required to satisfy or cancel the same.

Since the Appellant was never required to cancel or satisfy the mortgage, the provisions of sections 29-3-310 and 320 of the South Carolina Code (2007) were never applicable to the situation. Since the provisions of sections 29-3-310 and 320 of the South Carolina Code (2007) were never applicable, the penalty or penalties thereby provided were never applicable to this mortgage.

The Appellant is entitled to a rehearing on Opinion No. 5027 and to have the decision of the lower court be reversed.

Respectfully submitted,



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Date: August 27, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No.: 2006-CP-04-770

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SC Court of Appeals

Regions Bank..... Appellant,

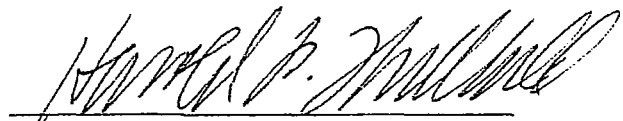
v.

Richard C. Strawn, Robert K. Borchers, individually and as
Personal Representative of the Estate of Marie Borchers and
Nancy Davidson Borchers..... Respondents.

PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing upon Robert K. Borchers, individually and as Personal Representative of Estate of Marie Borchers and Nancy Davidson Borchers, by depositing a copy of it in the United States Mail, postage prepaid, on August 27, 2012, addressed to their attorney of record, Samantha Nelson Murphy, Esquire, Epps, Nelson & Epps, at P.O. Box 2167, Anderson, South Carolina, 29622-2167.

Respectfully submitted,



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August 27, 2012
Anderson, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Regions Bank,

Appellant,

v.

Richard C. Strawn, Robert K.
Borchers, individually and as
personal representative of the
Estate of Marie Borchers, and
Nancy Davidson Borchers,

Respondents.

Appeal From Anderson County
R. Lawton McIntosh, Circuit Court Judge

Opinion No. 5027
Heard January 11, 2012 – Filed August 22, 2012

AFFIRMED

Harold P. Threlkeld, of Anderson, for Appellant.

Samantha Nelson Murphy, of Anderson, for
Respondents.

KONDUROS, J.: Regions Bank (the Bank) appeals the trial court's award of damages to subsequent purchasers of real property (the Property) under section 29-3-320 of the South Carolina Code (2007) for the Bank's failure to mark satisfied a mortgage on the Property. We affirm.

FACTS/PROCEDURAL HISTORY

Richard Strawn owned the Property, which was located in Anderson, South Carolina. He gave the Bank a home equity mortgage (the Mortgage) on the Property to secure a credit line of \$50,000. The mortgage provided that it would be "governed by and interpreted in accordance with federal law and the laws of the State of South Carolina." On December 12, 2001, he deeded the Property to his wife at the time, Cammie Strawn. On October 31, 2003, Marie Borchers purchased the Property from Cammie through a cash sale. On the day of the closing of the sale, James Belk, the closing attorney for the sale, had one of his employees, Cathy Slaton Curtis, hand deliver a trust account check to the Bank for the payoff amount on the Mortgage. The check had the words "Payoff of first Mortgage" typed on the check. The Bank processed the check but did not mark the Mortgage as satisfied. Several weeks later, the Bank issued Strawn a new set of checks for the line of credit. He used the checks, resulting in a debt of \$72,787.95 including interest and penalties.

On December 22, 2005, Belk executed a mortgage lien satisfaction affidavit after the Bank's attorney informed him the Mortgage had not been satisfied. On March 1, 2006, the Bank instituted an action against Strawn for the collection of the debt and a foreclosure action against Robert K. Borchers, individually and as personal representative of the estate of Marie Borchers, and Nancy Davidson Borchers (collectively the Borchers).¹ The Borchers filed an answer and counterclaim against the Bank, a crossclaim against Strawn, and a third-party complaint against Belk. As to the counterclaim against the Bank, the Borchers sought the statutory penalties set forth in section 29-3-320 of the South Carolina Code for failure to satisfy the mortgage within ninety days.

¹ Marie had died since purchasing the Property, and Robert and Nancy were her devisees and succeeded her interest in the Property.

On August 20, 2008, the circuit court granted summary judgment to the Borchers as to the Bank's foreclosure action, finding the Bank was estopped from foreclosing on the Property because the Bank should have processed the check as a payoff instead of a paydown on Strawn's line of credit and should have had the Mortgage satisfied as of record.

In March 2010, a nonjury trial was held on the Borchers' counterclaim against the Bank. At trial, Belk testified that as part of the closing, a transmittal letter was prepared, stating the trust account check was enclosed as final payment of the loan. The letter further stated, "PLEASE FORWARD SATISFIED DOCUMENTS (with a copy of this letter) TO THIS OFFICE TO BE REMOVED OF RECORD." Curtis testified that she was involved in the payoff for this closing. She testified that when she was handling a payoff, she would take the check, the payoff letter, and the payoff statement that comes from the bank and staple all three of them together, so they would not get separated in case there were multiple payoffs at the same bank at one time. She then would go to the bank and give them the packet, and she would get the bottom part of the check once it had been run through the bank's machine to show the date and time the payoff was made and a receipt. Curtis had sworn an affidavit on April 14, 2008, she had taken the letter to Bank.

Pamela H. Harbin, a former employee of the Bank, testified she researched the Bank's records to determine what it received with the payoff check. She testified she had seen no evidence the Bank had received the letter. She also provided that if the Bank had received the letter, it would have followed the instructions in the letter and would have probably contacted Strawn to ask if he wanted the equity line cancelled.

The trial court found the testimony conflicted as to whether or not the Bank received notice of the request to satisfy the Mortgage. It found the Bank's review of its records, which occurred more than two years after the closing date, was remote, making it just as likely the document was lost as it was never received. It noted Belk and Curtis's testimonies were clear that for a local bank, like the Bank, their standard practice was to personally deliver a payoff letter with the payoff check, which specifically requested the

Mortgage be satisfied within three months, and Curtis believed she did so in this instance. The court found that testimony to be credible. The court determined the Bank violated section 29-3-310 of the South Carolina Code, making it subject to the penalty under section 29-3-320 of the South Carolina Code and awarded the Borchers \$25,000 and attorney's fees and costs from the Bank. This appeal followed.

STANDARD OF REVIEW

On appeal of an action at law tried without a jury, we will not disturb the trial court's findings of fact unless no evidence reasonably supports the findings. Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Additionally, the appellate court can correct errors of law. Okatie River, L.L.C. v. Se. Site Prep, L.L.C., 353 S.C. 327, 334, 577 S.E.2d 468, 472 (Ct. App. 2003). The trial court's findings in a law action are equivalent to a jury's findings. Chapman v. Allstate Ins. Co., 263 S.C. 565, 567, 211 S.E.2d 876, 877 (1975). Questions regarding credibility and the weight of the evidence are exclusively for the trial court. Sheek v. Crimestoppers Alarm Sys., 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989). "We may not consider the case based on our view of the preponderance of the evidence, but must construe the evidence presented to the [trial court] so as to support [its] decision wherever reasonably possible." Id. "We must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary." Id.

LAW/ANALYSIS

I. Timely Satisfaction of the Mortgage

The Bank argues because the Mortgage was timely cancelled as required by section 29-3-310 of the South Carolina Code (2007), the trial court erred in ruling the Bank failed to timely satisfy the Mortgage. We disagree.

Section 29-3-310 provides:

Any holder of record of a mortgage who has received full payment or satisfaction or to whom a legal tender has been made of his debts, damages, costs, and charges secured by mortgage of real estate shall, at the request by certified mail or other form of delivery with a proof of delivery of the mortgagor or of his legal representative or any other person being a creditor of the debtor or a purchaser under him or having an interest in any estate bound by the mortgage and on tender of the fees of office for entering satisfaction, within three months after the certified mail, or other form of delivery, with a proof of delivery, request is made, enter satisfaction in the proper office on the mortgage which shall forever thereafter discharge and satisfy the mortgage.

Section 29-3-320 of the South Carolina Code (2007) addresses the liability for failure to enter satisfaction. It states:

Any holder of record of a mortgage having received such payment, satisfaction, or tender as aforesaid who shall not, by himself or his attorney, within three months after such certified mail, or other form of delivery, with a proof of delivery, request and tender of fees of office, repair to the proper office and enter satisfaction as aforesaid shall forfeit and pay to the person aggrieved a sum of money not exceeding one-half of the amount of the debt secured by the mortgage, or twenty-five thousand dollars, whichever is less, plus actual damages, costs, and attorney's fees in the discretion of the court, to be recovered by action in any court of competent jurisdiction within the State. And on judgment being rendered for the plaintiff in any such action, the presiding judge shall order satisfaction to be entered on the judgment or mortgage aforesaid by the clerk, register, or other proper officer whose duty it shall

be, on receiving such order, to record it and to enter satisfaction accordingly.

Notwithstanding any limitations under Sections 37-2-202 and 37-3-202, the holder of record of the mortgage may charge a reasonable fee at the time of the satisfaction not to exceed twenty-five dollars to cover the cost of processing and recording the satisfaction or cancellation. If the mortgagor or his legal representative instructs the holder of record of the mortgage that the mortgagor will be responsible for filing the satisfaction, the holder of the mortgage shall mail or deliver the satisfied mortgage to the mortgagor or his legal representative with no satisfaction fee charged.

Id.

To trigger the penalty and related relief provided in section 29-3-320, section 29-3-310 requires the mortgagor or purchaser under him to establish (1) he has made full payment of his debts, including any applicable damages, costs, and charges; (2) he has made a request by certified mail or other form of delivery with a proof of delivery the mortgage be satisfied of record; (3) he has made a tender of fees of office for entering satisfaction; and (4) the mortgagee has failed to enter satisfaction in the proper office on the mortgage within three months of the request. Dykeman v. Wells Fargo Home Mortg., Inc., 381 S.C. 333, 340, 673 S.E.2d 804, 807 (2009).

"For liability to attach under the applicable statutes, payment of the mortgage is 'only the first step in the mortgage satisfaction process. In order for Bostic to recover the statutory penalty under section 29-3-320, he had to satisfy the condition precedent of making a request for [the mortgagee] to record his mortgage as satisfied.'" Id. at 339, 673 S.E.2d at 807 (alterations by court) (quoting Bostic v. Am. Home Mortg. Servicing, Inc., 375 S.C. 143, 154, 650 S.E.2d 479, 485 (Ct. App. 2007)). "A request, to trigger the statutory penalty, may not be implied or inferred. The request must affirmatively convey to the mortgagee that a recording of the satisfaction is

sought." Id. (citation omitted). However, section 29-3-310 does not mandate a written request. Bostic, 375 S.C. at 155, 650 S.E.2d at 485. The statute is satisfied if the aggrieved party (1) makes a verbal or written request expressing his desire for the mortgagee to satisfy the mortgage and (2) demonstrates that the mortgagee has received or agreed to this request. Id.

In Dykeman, the Dykemans relied exclusively on their compliance with the "borrower's responsibilities" document Wells Fargo furnished as their request for satisfaction, which the court found to be insufficient. 381 S.C. at 339 n.3, 673 S.E.2d at 807 n.3. In Bostic, the court found "Bostic's payoff check sent by certified mail was insufficient to constitute a 'request' within the meaning of the statute." 375 S.C. at 155, 650 S.E.2d at 485. The court determined:

Clearly, the cashier's check without additional correspondence, either verbal or written, did not affirmatively convey to American Home that Bostic expressly desired to have his mortgage recorded as satisfied. By sending the payoff check, Bostic effectively satisfied his mortgage. However, this check was only the first step in the mortgage satisfaction process. In order for Bostic to recover the statutory penalty under section 29-3-320, he had to satisfy the condition precedent of making a "request" for American Home to record his mortgage as satisfied.

Id.

Bostic asserted telephone conversations he alleged to have had with American Home after he mailed the payoff check could be construed as a "request." Id. at 155, 650 S.E.2d at 485. However, the court found the record contained no evidence an American Home representative spoke with Bostic. Id. at 155, 650 S.E.2d at 485-86. The court further determined "[b]ecause this case was presented to the circuit court at the summary judgment stage and there is no definitive evidence that a verbal agreement was reached during these telephone conversations, we cannot find that American Home

was given a sufficient 'request' which obligated it to mark the mortgage satisfied within the statutory time period." Id. at 155-56, 650 S.E.2d at 486.

The Bank seems to argue that it did not have to cancel the Mortgage until the first circuit court issued its order and by that point, the Mortgage had already been cancelled. However, the trial court actually found the Bank failed to timely cancel the Mortgage based on when the closing attorney sent the satisfaction check. In Bostic, the court found Bostic's sending the payoff check and alleged phone calls to the bank did not constitute a request as required by the statute. In the present case, some evidence supports the trial court's finding the closing attorney had requested the Mortgage be marked as satisfied when he sent the check; both Curtis and Belk testified they generated a satisfaction letter as part of standard procedure for a closing, and Belk stated he reviewed the closing packet and the letter was included in it. The trial court found their testimonies credible and found it likely the Bank had misplaced the letter in its records based on the length of time before it checked its records. Because we leave matters of credibility to the trial court, we conclude the record contains evidence supporting the trial court's finding that the Borchers complied with the statute by Curtis's delivering the satisfaction letter with the check.

II. Open-Ended Mortgage

The Bank contends because it had agreed to satisfy the Mortgage only by the request of the grantor and no such request was made, the trial court erred by ruling the Bank failed to satisfy the Mortgage as required by section 29-3-310. We disagree.

"Determining the proper interpretation of a statute is a question of law, and this [c]ourt reviews questions of law de novo." Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). When a statute's language is plain and unambiguous and conveys a clear and definite meaning, the court has no right to impose another meaning. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Id. The best evidence of legislative intent is the text of the statute. Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002). "All

rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Broadhurst v. City of Myrtle Beach Election Comm'n, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998). An appellate court will reject the interpretation of a statute that would lead to an absurd result the legislature could not have intended. Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Def., 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008). When "the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself." Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001). In some cases, legislative history may be probative in determining the legislature's intent. Eagle Container Co. v. Cnty. of Newberry, 366 S.C. 611, 630, 622 S.E.2d 733, 743 (Ct. App. 2005), rev'd on other grounds, 379 S.C. 564, 666 S.E.2d 892 (2008).

Any mortgage or other instrument conveying an interest in or creating a lien on any real estate, securing existing indebtedness or future advances to be made, regardless of whether the advances are to be made at the option of the lender, are valid from the day and hour when recorded so as to affect the rights of subsequent creditors, whether lien creditors or simple contract creditors, or purchasers for valuable consideration without notice to the same extent as if the advances were made as of the date of the execution of the mortgage or other instrument for the total amount of advances made thereunder, together with all other indebtedness and sums secured thereby, the total amount of existing indebtedness and future advances outstanding at any one time may not exceed the maximum principal amount stated therein, plus interest thereon, attorney's fees and court costs.

S.C. Code Ann. § 29-3-50(A) (2007).

The statute clearly sanctions the right of parties to give and to accept open-end mortgages to secure future advances. There is nothing express or implied, in the statute to infer that it was the intent of the legislature that the mortgage be dead once there is no debt momentarily existing. The statute permits the parties to agree that the mortgage live on until the mortgagor requests its cancellation. [Former section 29-3-310] provides for such cancellation. In addition, the parties in the mortgage (as quoted hereinabove) have expressly agreed that the mortgage live on until canceled of record. A holding that an open-end mortgage dies when there is currently no debt for it to secure, would severely limit its beneficial use and defeat the legislative intent. As long as the mortgage is of record, any subsequent lien holder or purchaser takes with notice of the impact of the Code section.

Central Prod. Credit Ass'n v. Page, 268 S.C. 1, 8, 231 S.E.2d 210, 214 (1977).

A plain reading of section 29-3-310 does not specify any special procedures that lessen a bank's obligation when a mortgage is open ended. Because the requirements under the statute are met, the trial court did not err in finding the Bank violated section 29-3-310.

III. Clear and Convincing Evidence

The Bank maintains the trial court erred by ruling it failed to satisfy the Mortgage because the Borchers did not present clear and convincing evidence any request to satisfy the Mortgage was made. We disagree.

As we have noted above, the trial court found the Bank failed to timely cancel the Mortgage based on when the closing attorney sent the satisfaction check. Some evidence supports the trial court's finding the closing attorney

had requested the Mortgage be marked as satisfied when he sent the check; Belk testified he reviewed the documents and Curtis testified she delivered the transmittal letter with the payoff check, which the trial court found more reliable than Harbin's testimony. Accordingly, the record does contain evidence to support the trial court's finding that the Borchers met the requirements of the statute.

IV. Closing Attorney's Ability to Cancel and Satisfy

The Bank argues the trial court erred by ruling it failed to satisfy the Mortgage because the closing attorney had the authority under section 29-3-330(e) of the South Carolina Code (Supp. 2011) to satisfy and cancel the Mortgage. We disagree.

(e) Any licensed attorney admitted to practice in the State of South Carolina who can provide proof of payment of funds by evidence of payment made payable to the mortgagee, holder of record, servicer, or other party entitled to receive payment may record, or cause to be recorded, an affidavit, in writing, duly executed in the presence of two witnesses and acknowledged pursuant to the Uniform Recognition of Acknowledgments Act in Chapter 3, Title 26, which states that full payment of the balance or payoff amount of the mortgage or other instrument securing the payment of money and being a lien upon real property has been made and that evidence of payment from the mortgagee, assignee, or servicer exists. This affidavit, duly recorded in the appropriate county, shall serve as notice of satisfaction of the mortgage and release of the lien upon the real property. The filing of the affidavit shall be sufficient to satisfy, release, or discharge the lien. Upon presentation of the instrument of satisfaction, release, or discharge, the officer or his deputy having charge of the recording of instruments shall record the same. This section may not be construed to require an

attorney to record an affidavit pursuant to this item or to create liability for failure to file such affidavit.

§ 29-3-330(e).

Although section 29-3-330(e) does allow an attorney to enter an affidavit of satisfaction, nothing in section 29-3-310 or our case law suggests that because an attorney has the ability to satisfy a mortgage, the penalty under section 29-3-320 does not apply if a bank does not complete a proper request to satisfy the mortgage. Accordingly, the trial court did not err in finding the Bank violated section 29-3-310.

CONCLUSION

Evidence supports the trial court's finding the Borchers met the requirements under section 29-3-310 of the South Carolina Code to demonstrate the Bank failed to satisfy the Mortgage, thus subjecting it to the penalty under section 29-3-320 of the South Carolina Code. Therefore, the trial court's decision is

AFFIRMED.

THOMAS, J., concurs.

FEW, C.J., dissenting: I would reverse the circuit court's decision to award the Borchers a penalty under sections 29-3-310 and -320 of the South Carolina Code (2007) because there is no evidence in the record the Bank received a cancellation request from Richard C. Strawn—the only person entitled to make that request. Because no request to cancel was made, section 29-3-310 did not require cancellation of the mortgage and the section 29-3-320 penalty does not apply.

This case involves an open-ended mortgage. Section 29-3-50 of the South Carolina Code (2007) provides that an open-ended mortgage survives a sale of the underlying property and is binding on a subsequent purchaser. Our courts have recognized that open-ended mortgages serve a valid purpose and the occasional incidence of a seemingly-unfair result like the one in this

case is justified by the purpose the open-ended mortgage was designed to serve. See Cent. Prod. Credit Ass'n v. Page, 268 S.C. 1, 8, 231 S.E.2d 210, 214 (1977) ("A holding that an open-end mortgage dies when there is currently no debt for it to secure, would severely limit its beneficial use and defeat the legislative intent."). Therefore, the mere fact that the balance of the loan secured by the mortgage is paid off does not require cancellation of the mortgage. Rather, the mortgage may not be cancelled unless the proper person requests it. Under some circumstances, a "person . . . having an interest in any estate bound by the mortgage" may request cancellation. § 29-3-310. Here, however, the terms of the mortgage provided the only person with authority to request cancellation of the mortgage was Richard Strawn. See Cent. Prod. Credit Ass'n, 268 S.C. at 8, 231 S.E.2d at 214 (stating the predecessor to section 29-3-310 "permits the parties to agree that the mortgage live on until the mortgagor requests its cancellation"). This information was filed in the public record of Anderson County, and thus was readily available to the Borchers and their closing attorney. Viewing the evidence in the light most favorable to the Borchers, no person or entity even purporting to speak on behalf of Richard Strawn made any request to have the mortgage cancelled. The October 31, 2003 letter incorrectly states the mortgagor is "Cammie B. Strawn," who had been divorced from Richard Strawn since 2001. Cammie Strawn had no authority to request cancellation of the mortgage. The closing attorney who made the request relied on by the majority did not represent Richard Strawn, who was not a party to the real estate transaction, and therefore the attorney's request was not made on Richard Strawn's behalf. There is no evidence in the record of any other request to cancel the mortgage. Because no evidence exists that a proper request for cancellation was made, there can be no liability under section 29-3-320 for failure to honor the request. The circuit court's award of punitive damages and attorney's fees is dependent on the validity of the statutory penalty. I would reverse and enter judgment for the Bank.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No.: 2006-CP-04-770

Regions Bank..... Appellant,

v.

Richard C. Strawn, Robert K. Borchers, individually and as
Personal Representative of the Estate of Marie Borchers and
Nancy Davidson Borchers..... Respondents.

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

A. Action Brought to Cancel Mortgage Satisfaction.

On December 20, 2005, the Mortgage in question was open on the public records of Anderson County. On December 21, 2005, the attorney for the Respondent filed the Mortgage Lien Satisfaction Affidavit effectively canceling the Mortgage (R.p. 24).

On March 1, 2006, Appellant filed its Complaint against the Respondents, seeking to have the Respondents Mortgage Lien Satisfaction Affidavit rescinded and if rescinded, to foreclose the Mortgage. Attached to the Complaint as Exhibits "1", "2" and "3" were copies of the Equity Assetline Agreement, the Mortgage and the Mortgage Lien Satisfaction Affidavit.

The Respondents filed their action on June 1, 2006. There was no open Mortgage at that time or at any time thereafter.

The Court Order of Honorable J.C. Nicholson, Jr. dated August 18, 2008 (R.p. 62) effectively denied the Appellant's cause of action to cancel or rescind the Mortgage Lien Satisfaction Affidavit. That Order was final.

The Respondents' argument that Appellant brought an action to foreclose the Mortgage, despite its knowledge that the Mortgage had been satisfied by Belk, is an incorrect argument. The Appellant could not seek to foreclose the Mortgage unless the Court rescinded or canceled the Mortgage Lien Satisfaction Affidavit (R.p. 24). Since the Court never canceled the Mortgage Lien Satisfaction Affidavit, the cause of

action for foreclosure was never reached.

B. The Mortgage was an open-end mortgage within the meaning of S.C. Code Ann. §29-3-50.

The Mortgage expressly provides that it is an "Open-End" Mortgage within the meaning of S.C. Code Ann. §29-3-50 and that the Mortgage would be canceled only upon request of the grantor thereof, and, contrary to Respondents' assertions, that fact is extremely material to the requirements for satisfaction. Closing procedures involving "Open-End" Mortgages must be altered to comply with the requirements for satisfaction of an Open-End Mortgage in order to assert a claim for penalty under S.C. Code Ann. §29-3-310. The recognized procedure stated in arguments before the trial court (R. p. 93, l. 4-15) is for the closing attorney to submit a letter signed by the grantor (Strawn) directing the bank to cancel the credit line.

Had the closing attorney in this case recognized that the Mortgage was an Open-End Mortgage and had submitted a letter from Strawn to the bank instructing the bank to close and cancel the credit line, it must be presumed the bank would have canceled the credit line, avoided its substantial losses from extending credit to Strawn and this action would not have been commenced.

The Mortgage provided record notice to all concerned that it was an open-end credit line pursuant to S.C. Code Ann. §29-3-50 and that it would be canceled only upon request of the grantor. The Appellant asserts that because the Respondent knew or should have known that the Appellant had a contractual duty to its customer not to cancel or satisfy the Mortgage without a request from the

grantor, the Appellant had no duty to comply with the provisions of S.C. Code Ann. §29-3-310 until such time as the requirements of the Mortgage were fulfilled. Those requirements were never fulfilled.

C. Scope of the Ruling of October 18, 2008 Order.

The scope of the findings and rulings of the Order of Honorable J.C. Nicholson, Jr., dated October 18, 2008 related solely to the issue of the mortgage foreclosure action. It estopped the Appellant from prosecuting the foreclosure action. However, it did not address the penalty issues related to S.C. Code Ann. §29-3-310.

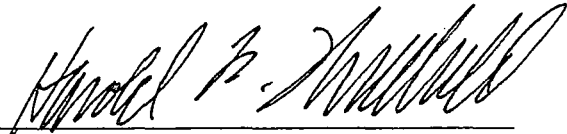
The findings and rulings in the Order of October 18, 2008 were based upon evidentiary and legal standards relating to the right to foreclose a mortgage from the grantor (Strawn) to Appellant and not on the questions of penalty.

The evidentiary and legal standards for exacting a penalty are different and more stringent. Bostic v. American Home Mortg. Servicing, Inc., 375 S.C. 143, 650 S.E.2d 479 (S.C. App., 2007) and Dikeman v. Wells Fargo Home Mortg., Inc., 381 S.C. 333, 673 S.E.2d 804 (2009). It was for that reason that the Court in its Order of March 24, 2010 never incorporated the prior Order and made separate findings and rulings relating to the penalty issues.

CONCLUSION

Under the circumstances, the trial court erred by assessing a penalty against the Appellant pursuant to the provisions of S.C. Code Ann. §29-3-310 and the judgment of the trial court should be reversed, and judgment accordingly entered in favor of Appellant.

Respectfully submitted,



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January 11, 2011
Anderson, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No.: 2006-CP-04-770

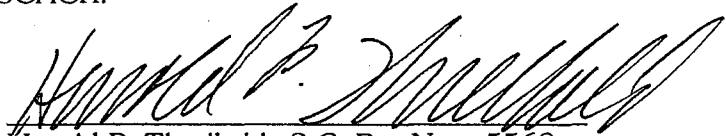
Regions Bank..... Appellant,

v.

Richard C. Strawn, Robert K. Borchers, individually and as
Personal Representative of the Estate of Marie Borchers and
Nancy Davidson Borchers..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this final Reply Brief of Appellant complies with
the requirements of Rule 211(b), SCACR.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No.: 2006-CP-04-770

Regions Bank..... Appellant,

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE MORTGAGEE HAVE A DUTY TO SATISFY OR CANCEL THE MORTGAGE PRIOR TO THE RESOLUTION OF A DISPUTE ABOUT PAYMENT OF THE DEBT SECURED BY THE MORTGAGE?
- II. DID THE MORTGAGEE HAVE THE AUTHORITY OR DUTY TO SATISFY OR CANCEL THE MORTGAGE WITHOUT THE REQUEST OF THE GRANTOR?
- III. WAS THE CLAIM THAT A PROPER REQUEST WAS MADE TO SATISFY OR CANCEL THE MORTGAGE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE?
- IV. IS A MORTGAGEE SUBJECT TO A CLAIM FOR FAILURE TO TIMELY CANCEL A MORTGAGE WHERE CLAIMANT'S ATTORNEY POSSESSED THE STATUTORY AUTHORITY TO CANCEL THE SAME?

STATEMENT OF THE CASE

On March 1, 2006, Regions Bank ("Regions") filed its Complaint against Richard C. Strawn ("Strawn") and Robert Karl Borchers as Personal Representative of the Estate of Marie N. Borchers, Robert Karl Borchers and Nancy Davidson Borchers (together "Borchers") seeking to foreclose a mortgage on real property granted by Strawn to secure payment of an open-end credit line.

On June 1, 2006, Borchers filed their Answer denying the allegations of the Complaint and asserting a counterclaim against Regions for failure to timely satisfy the mortgage and a crossclaim against Strawn for fraud. Borchers also asserted a Third-Party Complaint against James S. Belk, Esquire ("Belk") alleging damages for legal malpractice.

On June 9, 2006, Regions filed its Reply to the Borchers' counterclaim denying the allegations and asserting affirmative defenses.

On October 26, 2006, Belk filed his Answer to the Third-Party Complaint denying the allegations.

Strawn never responded to the Complaint.

On November 9, 2007, Borchers filed their Motion for Summary Judgment against Regions based on grounds Regions should have known the mortgage was paid.

On August 18, 2008, Honorable J. C. Nicholson, Presiding Judge, granted summary judgment against Regions on the grounds that it was equitably estopped from foreclosing the Mortgage.

On September 30, 2008, Regions filed its Motion for Summary Judgment against Borchers on its counterclaim for damages under S.C. Code Ann. §29-3-310.

This matter came before the Court on March 4, 2010 for hearing on Region's Motion for Summary Judgment and in the alternative a bench trial. After hearing arguments on the Motion for Summary Judgment, the Court deferred judgment until testimony was heard on the notice of request to cancel mortgage by Borchers.

The Court by Honorable R. Lawton McIntosh, Presiding Judge, issued its Order on May 26, 2010 granting damages to Borchers against Regions.

On May 28, 2010, Regions filed its motion pursuant to Rules 52(b) and 59(e), South Carolina Rules of Civil Procedure, to reconsider and/or to alter or amend judgment. The Motion to Reconsider and/or to Alter or Amend Judgment was denied by Order of the Court dated June 6, 2010 and filed June 15, 2010.

Regions filed its Notice of Appeal on June 29, 2010.

STATEMENT OF FACTS

The facts in this case are:

1. On October 12, 2001, Defendant, Richard C. Strawn ("Strawn") owned title to the real property ("Property") described in the Mortgage;
2. On October 12, 2001, Strawn entered into an Equity Assetline Agreement ("Credit Line") with Regions in the amount of \$50,000.00;
3. On October 12, 2001, Strawn secured the Credit Line with a mortgage of real property (the "Mortgage") granting Regions an open-end mortgage (see Mortgage R. p. 17) on the Property;
4. On December 12, 2001, Strawn conveyed title to the Property to Cammie B. Strawn ("Cammie");
5. On September 3, 2003, Strawn renewed the Credit Line secured by the Mortgage (Equity Assetline Agreement R. p. 12);
6. On October 31, 2003, Cammie sold the Property to Borchers;
7. The closing of the sale and purchase from Cammie to Borchers was handled by James S. Belk, Esquire ("Belk") of the Anderson Bar;
8. On October 31, 2003, Belk, as closing agent, caused a check to be drawn on his trust account and delivered to Regions for the full amount due on the Strawn Credit Line;
9. No request was made by Strawn, as grantor, to cancel or satisfy the Mortgage;

10. No request was made by or on behalf of Borchers to cancel or satisfy the Mortgage;

11. Neither the Credit Line nor the Mortgage were canceled by Regions as a result of the payment made by Belk on October 31, 2003;

12. After October 31, 2003, Strawn continued to access the Credit Line to the maximum amount of \$50,000.00, plus interest;

13. On December 21, 2005, Belk, as closing agent, made a Mortgage Lien Satisfaction Affidavit pursuant to §29-3-330(e) and filed the same in the Office of Register of Deeds for Anderson County, South Carolina on December 22, 2005 in Records Book 7123 at page 003 (see Mortgage Lien Satisfaction Affidavit, R. p. 24);

14. This action was filed on March 1, 2006, seeking a cancellation of the Mortgage Lien Satisfaction Affidavit filed by Belk and for an Order foreclosing the Mortgage;

15. The December 21, 2005 Mortgage Lien Satisfaction Affidavit was never canceled or rescinded;

16. The Mortgage was canceled effective December 21, 2005, prior to the commencement of this action;

17. The Court held by its Order of August 18, 2008 that Regions was equitably estopped to assert its mortgage lien because it could have determined the intent of the parties was to cancel the Mortgage on October 31, 2003 (see Order R. p. 62);

18. The Mortgage constitutes a revolving lien on the Property pursuant to the provisions of S.C. Code Ann. §29-3-50 (1976, as amended).

ARGUMENTS

I. BECAUSE THE MORTGAGE WAS TIMELY CANCELED AS REQUIRED BY THE PROVISIONS OF S.C. CODE ANN §29-3-310 , THE COURT ERRED BY RULING THE MORTGAGEE FAILED TO TIMELY SATISFY THE MORTGAGE.

Regions contended that after October 31, 2003, the closing date, the Credit Line with Strawn remained open and \$50,000.00 was advanced to Strawn thereunder. The debt remained unpaid on August 18, 2008. On August 18, 2008, Judge J. C. Nicholson, Jr., issued an Order declaring that Regions was equitably estopped from foreclosing the Mortgage to recover the debt due on the Credit Line. (See Order dated August 18, 2008, R. p. 44) Thereafter, on October 9, 2008, Honorable J. Cordell Maddox, Jr. issued an Order granting judgment to Regions against Strawn in the amount of \$72,787.95. (See Order dated October 9, 2008, R. p. 62) On August 18, 2008, the debt securing the Mortgage had not been paid. However, even though the debt secured by the Mortgage had not been paid, the Mortgage had been canceled of record on December 21, 2005, more than two years before the Court adjudicated the dispute. (See Mortgage Lien Satisfaction Affidavit, R. p. 24)

S.C. Code Ann. §29-3-310 (1976, as amended) requires the holder of a mortgage, upon receiving full payment and performance by the requesting party with all other requirements thereof, (emphasis added) to enter satisfaction of the mortgage within three months after a proper request (emphasis added) is made.

The debt created through the Credit Line remained unpaid as evidenced by Order of Honorable J. Cordell Maddox, Jr., issued on October 9, 2008. (See Order dated October 9, 2008) (R. p. 62)

The Order issued by Honorable J. C. Nicholson, Jr., dated August 18, 2008 (R. p. 44) merely estopped Regions from claiming the Mortgage secured the payment of the outstanding indebtedness of the Credit Line. Consequently, as a matter of law, the Bank had no duty to satisfy or cancel the Mortgage because it was equitably estopped to foreclose the same by Judge Nicholson's Order of August 18, 2008. When that Order was issued, the Mortgage had been canceled of record almost three years.

II. BECAUSE THE MORTGAGEE AGREED TO SATISFY THE MORTGAGE ONLY ON REQUEST OF THE GRANTOR AND NO SUCH REQUEST WAS MADE, THE COURT ERRED BY RULING THE MORTGAGEE FAILED TO SATISFY THE MORTGAGE AS REQUIRED BY S.C. CODE ANN. §29-3-310.

The Mortgage provides in pertinent part that (...[T]his Mortgage shall remain an open mortgage of record to secure future advances in accordance with S.C. Code Ann. §29-3-50, as amended, Code of Laws of South Carolina, 1976, even in the event all sums secured by this Mortgage shall be fully paid at any one time; however, upon request of grantor (emphasis added), Lender will cause this Mortgage to be released and canceled of record upon full payment of all indebtedness then owing, and upon such cancellation of this Mortgage of record, this Mortgage shall become null and void..."

S.C. Code Ann. §29-3-50(A) provides in pertinent part that “[A]ny mortgage... creating a lien on any real estate, securing existing indebtedness or future advances to be made, regardless of whether the advances are to be made at the option of the lender, are valid from the day and hour when recorded so as to affect the rights of subsequent creditors, whether lien, contractors or simple contract creditors, or purchasers for valuable consideration without notice to the same extent as if the advances were made as of the date of execution of the Mortgage... for the total amount of advances made thereunder, together with all other indebtedness and sums secured thereby, the total amount of existing indebtedness and future advances outstanding at one time may not exceed the maximum principal amount stated therein, plus interest thereon, attorney’s fees and court costs...”

The foregoing statute provides that an “Open-End Mortgage” remains viable until mortgagor requests cancellation (emphasis added). *Central Production Credit Ass’n v. Page*, 268 S.C. 1, 231 S.E.2d 210 (S.C., 1977). When there is no debt and no commitment for a loan, the mortgagee must cancel an Open-End Mortgage when the mortgagor so requests (emphasis added). *Central Production Credit Ass’n v. Page*, *id.*

The Equity Assetline Agreement between the bank and Strawn dated September 9, 2003 (R. p. 12) provided for a five-year term. The said Equity Assetline Agreement provided for termination only upon certain conditions specified under lender’s rights. The bank contends that it had no right to terminate the Equity Assetline Agreement or satisfy and cancel the same without a request from Strawn as

Grantor. Terminating the Equity Assetline Agreement without the request of the Grantor would violate the bank's duty to the Grantor. Since the Grantor never requested release or cancellation of the Mortgage, the bank was neither obligated to nor authorized to satisfy or cancel the same.

Regions had a right and a duty to keep the Credit Line and the Mortgage open until Strawn requested the Bank to cancel the same as provided for in the Mortgage. If the procedure required by the Mortgage had been followed through the grantor requesting closure of the same, this dispute would not have arisen. Presumably, the reason the procedure was not followed was because the closing attorney failed to recognize the Mortgage as securing an open-end Credit Line (R. p. 110, l. 11-13).

III. BECAUSE THERE WAS NO CLEAR AND CONVINCING EVIDENCE THAT ANY REQUEST TO SATISFY THE MORTGAGE WAS MADE, THE COURT ERRED BY RULING THE MORTGAGEE FAILED TO TIMELY SATISFY THE MORTGAGE.

When all of the evidence supporting the contention that Borchers made a request on Regions to satisfy the Mortgage, together with all reasonable inferences therefrom, is viewed in the light most favorable to Borchers, the evidence would show that it was the practice of the closing agent to deliver a request for satisfaction with each check for payment. However, witnesses did not remember delivering any such request and the Bank denies having any records of receiving such request.

S.C. Code Ann. §29-3-310 provided in pertinent part that: "[A]ny holder of a record mortgage who has received full payment..., at the request by certified mail or

other form of delivery with a proof of delivery of the mortgagor or of his legal representative... within three months after certified mail or other form of delivery, with proof of delivery, request is made, enter satisfaction..."

S.C. Code Ann. §29-3-320 does not mandate a particular format. Bostic v. American Home Mortg. Servicing, Inc., 375 S.C. 143, 650 S.E.2d 479 (S.C. App., 2007). However, the mortgagor must demonstrate that the mortgagee has received the notice or agreed to honor the request. Bostic, Id. In this case there is no evidence that any verbal request was made to the Bank. There is no evidence that any written request was made to Regions. Instead, the mortgagor offered proof to show that it was the practice of the closing agent to make such request. That proof is insufficient to show that a request was made pursuant to the requirements of S.C. Code Ann. §29-3-310.

IV. BECAUSE THE ATTORNEY FOR THE PURCHASER HAD THE AUTHORITY PURSUANT TO S.C. CODE ANN. §29-3-330(e) TO SATISFY AND CANCEL THE MORTGAGE, THE COURT ERRED BY RULING THAT THE MORTGAGEE FAILED TO TIMELY SATISFY THE MORTGAGE.

Borchers' attorney, as the closing attorney, possessed the right and authority to satisfy and cancel the Mortgage pursuant to the provisions of S.C. Code Ann. §29-3-330(e). Borchers' attorney exercised the right to cancel the Mortgage on December 21, 2005. Borchers' attorney possessed the right and authority to cancel the Mortgage prior to the expiration of three months after the closing date. Borchers' attorney made that decision. Where the closing attorney has the right, power and

authority to file a cancellation of the mortgage and does not elect to do so, it is inequitable to permit the client of the closing attorney to claim a penalty against the mortgage holder because of the failure of the client's attorney to timely cancel or satisfy the mortgage.

The provisions of S.C. Code Ann. §29-3-330 authorizing and empowering a closing attorney to cancel and satisfy a paid mortgage were enacted subsequent to the enactment of the penalty provisions provided in S.C. Code Ann. §29-3-310 and 320. Therefore, the provisions of S.C. Code Ann. §29-3-310 and 320 and the cases citing those sections never contemplated the existence of the right and power of the party making payment of a secured debt, through his own attorney, to cancel and satisfy the debt pursuant to the right and authority granted by S.C. Code Ann. §29-3-330(e) to cancel and satisfy the mortgage.

The penalty provisions provided for in S.C. Code Ann. §29-3-310 and 320 for failure to timely satisfy a mortgage on request of an interested person, should not be applied to situations where the interested person has the power and authority through his own attorney to timely cancel or satisfy the mortgage pursuant to the provisions of S.C. Code Ann. §29-3-330(e) prior to the accruing of any penalty thereunder.

CONCLUSION

The holder of the Mortgage had no duty to cancel or satisfy the Mortgage until the dispute over payment had been resolved, and prior to that date the Mortgage had been canceled.

The Mortgage expressly required as a condition to any duty of the holder to satisfy the same that the mortgagor or grantor request cancellation thereof and the grantor or mortgagor never made such request, therefore, the holder had no duty to cancel the same.

The holder of the Mortgage never received any request to cancel or satisfy the Mortgage, therefore, no violation of S.C. Code Ann. §29-3-310 could have occurred.

The closing attorney, acting as agent for the purchaser, was authorized and empowered to cancel or satisfy the Mortgage, therefore, the penalty provisions of S.C. Code Ann. §29-3-310 do not apply.

Respectfully,



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Dated: January 11, 2011
Anderson, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No.: 2006-CP-04-770

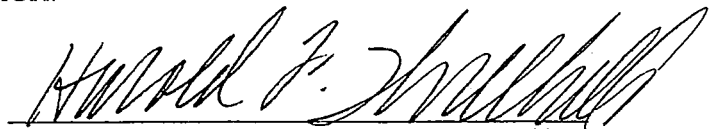
Regions Bank..... Appellant,

v.

Richard C. Strawn, Robert K. Borchers, individually and as
Personal Representative of the Estate of Marie Borchers and
Nancy Davidson Borchers..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this final Brief of Appellant complies with the requirements of Rule 211(b), SCACR.



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January 12, 2011
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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ANDERSON COUNTY

Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2006-CP-04-770

Regions Bank Appellant

Richard C. Stuart, Robert K. Borchers, individually
and as Personal Representative of the Estate of Maria Borchers
and Nancy Davidson Borchers, Respondent

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On March 1, 2006, Regions Bank ("Appellant" or "the Bank") filed its Complaint against Richard C. Strawn ("Strawn") and Robert K. Borchers, individually and as personal representative of the Estate of Marie Borchers and Nancy Davidson Borchers (collectively "the Borchers" or "Respondents") seeking to foreclose a mortgage (against the Borchers) on property formerly owned by Strawn and for enforcement of a promissory note and mortgage (against Strawn).

The Borchers filed an Answer, Counterclaim, Crossclaim and Third Party Complaint on June 1, 2006. Specifically, the Borchers' Counterclaim sought the statutory penalties and damages set forth in § 29-3-320 along with other related relief. The Borchers' Crossclaim against Strawn was, basically, for indemnification and fraud. The Borchers' Third Party Complaint against James Belk, Esquire ("Belk"), was for legal malpractice. Subsequently, by agreement, Belk was dismissed with prejudice.

On November 9, 2007, the Borchers filed a Motion for Summary Judgment on the Bank's Complaint which was heard by the Court on July 9, 2008. An Order granting Summary Judgment and dismissing the Bank's Complaint as to the Borchers was issued on August 20, 2008. This Order held that the Bank was on actual or constructive notice that the mortgage was paid in full upon the October 31, 2003 payment of the balance due on the account and should have been satisfied. This Order was never appealed.

On September 30, 2008, the Bank filed its Motion for Summary to dismiss the Borchers' Counterclaim for damages pursuant to S. C. Code Ann. §29-3-320.

On October 9, 2008, the Court issued an Order granting judgment to the Bank against

Strawn in the amount of \$72,787.95.

On March 4, 2010, this matter was set for a bench trial before the Honorable R. Lawton McIntosh. The Bank's Motion for Summary Judgment was heard immediately before the bench trial. The decision on the Motion was deferred until after testimony was heard on the Borchers' Counterclaim and Crossclaim . After the trial, the Court denied the Bank's Motion for Summary Judgment. This Order was issued on March 4, 2010.

On May 26, 2010, the trial court issued its Order granting damages of \$25,000, which was one-half of the value of the unsatisfied mortgage, plus attorneys fees and costs against the Appellant and for other relief against Strawn.

On May 28, 2010, the Bank filed its Motion to Reconsider and/or Alter or Amend judgment. The Motion to Reconsider was denied. The Bank filed its Notice of Appeal on June 29, 2010. Strawn did not appeal this Order.

FACTS

Strawn gave the Appellant a home equity mortgage on a credit line of \$50,000 on or about October 12, 2001 (R.p. 110, line 11-13, R.p. 155, line 18-22, R.p. 158, line 5-6) when Strawn was still the titled owner of real property located at 105 Park Way in Anderson, South Carolina ("the Property"). Sometime in 2001, Strawn deeded his interest in the Property to his ex-wife, Cammie Strawn (R.p. 155, line 14-17). Cammie Strawn then sold the Property to Marie Borchers for \$136,000 (R.p. 99, line 3-4). Marie Borchers purchased the property for cash and the closing occurred on October 31, 2003. James Belk was the closing attorney. (R.p. 98, line 14-25)

In preparation for the closing on the sale from Cammie B. Strawn to Marie Borchers, Belk requested and received from the Bank a mortgage payoff amount on the home equity mortgage for the day of closing. (R.p. 100, line 2-3 and R.p. 66) On October 31, 2003, immediately after the closing, Cathy Slaton Curtis, one of Belk's employees, hand delivered one of Belk's Trust Account Checks to the Bank for the full payoff amount along with a transmittal letter dated October 31, 2003. This transmittal letter directed, among other things, that the Bank satisfy the mortgage and return it to Belk for filing. (R.p. 104, line 8 - p. 106, line 10 and R.p. 67, R.p. 113, line 7- p. 114, line 25)

The check delivered to the bank was for \$32,256.41; this amount brought the mortgage balance to zero. (R.p. 146, line 1-6) Belk's trust check had the words, "*Payoff of First Mortgage*" typed on its face. (R.p. 68) The Bank admits receiving and processing this check. (R.p. 47-48 and R.p. 146, line 1-6).

Sometime after the closing and the payoff of the mortgage, the Bank mailed a letter and a

new set of checks to Strawn for use on the credit line of \$50,000.00. (R.p. 154, line 4-7 and R.p. 155, line 18 -22) Despite knowing that he no longer owned the property which had secured the mortgage, Strawn accessed the funds in the account up to the credit limit of \$50,000. (R.p. 154, line 8-14) Strawn made payments on the equity line until October of 2005 at which time Strawn made no further payments. (R.p. 7, paragraph 9)

Marie Borchers died testate on December 5, 2005 appointing Robert Borchers as her Personal Representative. Her devisees are Robert Borchers and Nancy Borchers Davidson. (R.p. 3)

Belk testified that it is his standard practice and his specific recollection that he reviewed the documents for this closing, including the payoff statement from the Bank, the transmittal letter demanding that the mortgage be marked satisfied and returned to his office for recording and that the payoff check. (R.p. 104, line 8 - p. 106, line 25, R.p. 66-68) Belk's employee, Cathy Slaton Curtis, also testified as to the office procedures for delivery of documents and the payoff checks as well as her involvement in the delivery of the transmittal letter and the payoff check on the day of the closing. (R.p. 112, line 24 - R.p. 114, line 25, R.p. 64)

Pamela Harbin, testified that as an employee of the Bank, she did not have personal knowledge of the handling of the actual transaction involving the Bank's receipt of closing check (R.p. 137, line 22 - p. 138, line 3 and R.p. 143, line 8 - 16), but that she became familiar with this matter through her position as executive assistant to the bank president (R.p. 136, line 13-14) and subsequent research of the Bank's documents in preparation for this litigation although she could not recall when she did her research. (R.p. 144, line 1 - 19)

Ms. Harbin gave contradictory testimony as to her familiarity with the Bank's policy and

procedure. She testified extensively about the Bank's procedure and testified as to what should have been done if in fact the Bank had received Belk's transmittal letter (a/k/a Defendant's Exhibit 2) as well as to the absence of the transmittal letter from the Bank's records. (R.p. 144, line 20 - p. 145, line 25). Upon cross examination, Ms. Harbin contradicted herself by stating, among other things, that she could not speak to Bank policy because she was not familiar with it in under these circumstances. (R.p. 148, line 15 - p. 149, line 18)

On December 22, 2005, Belk filed a Mortgage Lien Satisfaction affidavit pursuant to §29-3-330 of SC Code of Laws for Book 4413 at Page 319. (R.p. 107, line 13 -20) Despite its knowledge that the mortgage had been satisfied by Belk, the Appellant filed suit against the Respondent's on March 1, 2006 seeking to foreclose on the mortgage executed by Strawn. (R.p. 6)

ARGUMENTS

I. DID THE TRIAL COURT ERR IN FAILING TO FIND THAT THE MORTGAGE WAS
TIMELY CANCELED AS REQUIRED BY THE PROVISIONS OF S. C. CODE ANN
§29-3-310?

S. C. Code Ann. §29-3-310 states as follows:

“Any holder of record of a mortgage who has received full payment or satisfaction or to whom a legal tender has been made of his debts, damages, costs and charges secured by mortgage of real estate shall, at the request by certified mail or other form of delivery with a proof of deliver of the mortgagor or of his legal representative or any other person being a creditor of the debtor or a purchaser under him or having an interest in any estate bound by the mortgage an don tender of the fees of office for entering satisfaction, within **three months** after the certified mail, or other form of delivery, with a proof of delivery, request is made, enter satisfaction in the proper office on the mortgage which shall forever thereafter discharge and satisfy the mortgage.” (emphasis added)

First, the Appellant has never satisfied this mortgage as it is required under S. C. Code Ann. §29-3-310. The mortgage was satisfied by Belk’s mortgage lien affidavit filed in December of 2005, approximately two years after the closing, pursuant to S. C. Code Ann. §29-3-330 (e).

Second, even if Belk’s satisfaction could be determined to satisfy the Appellant’s obligation under S. C. Code Ann. §29-3-310, it was not done within three (3) months of a request to do so as was required by the Statute. The Appellant argues that the three month time period within which the satisfaction is due did not begin on October 31, 2003, when the closing occurred and they received the payoff check and the transmittal letter. The Appellant denies that they were ever under an obligation to satisfy the mortgage and that if this obligation did arise, it did not arise until the Order of August 18, 2008 which found the mortgage to be unenforceable. This argument is slightly absurd in light of the unappealed August 18, 2008 ruling that the

Appellant had actual or constructive notice as of October 31, 2003 that the mortgage was paid in full and should be satisfied. This finding in the unappealed Order effectively proves the Respondent's argument that the three months to satisfy the mortgage began to run on October 31, 2003.

The Appellant completely ignores this inconvenient fact. Instead, Appellant appears to argue that Strawn's subsequent fraudulent conduct of incurring another \$50,000 on the line of credit in the subsequent two years insulates the Bank from any duty to satisfy a mortgage because after October 31, 2003, the mortgage no longer was 'paid in full'. This argument is circular and Appellant cites no legal or statutory basis for why it should be allowed to avoid liability when Strawn's fraud was a direct result of the Appellant's own negligence.

Therefore, the trial court did not err in ruling that the Bank failed to timely satisfy the mortgage.

II. DID THE TRIAL COURT ERR BY NOT FINDING THAT ONLY THE GRANTOR OF A MORTGAGE COULD REQUEST THAT A MORTGAGE BE SATISFIED UNDER S. C. CODE ANN §29-3-310?

S. C. Code Ann. §29-3-310 states as follows:

"Any holder of record of a mortgage who has received full payment or satisfaction or to whom a legal tender has been made of his debts, damages, costs and charges secured by mortgage of real estate shall, **at the request** by certified mail or other form of delivery with a proof of delivery **of the mortgagor or of his legal representative or any other person being a creditor of the debtor or a purchaser under him or having an interest in any estate bound by the mortgage** and on tender of the fees of office for entering satisfaction, within three months after the certified mail, or other form of delivery, with a proof of delivery, request is made, enter satisfaction in the proper office on the mortgage which shall forever thereafter discharge and satisfy the mortgage." (emphasis added)

Clearly S. C. Code Ann. §29-3-310 anticipates that the Grantor of a mortgage is not always going to be the only one to request the satisfaction of the mortgage at the sale of property. The way the statute is worded **“at the request . . . of the mortgagor or of his legal representative or any other person being a creditor of the debtor or a purchaser under him or having an interest in any estate bound by the mortgage”** gives leave for another individual to request that the mortgage be satisfied. A closing attorney would appear to meet the definition of a ‘legal representative’ under the statute. In fact, an inherent duty of a closing attorney is to see that legal title transfers and that the property is unencumbered; therefore, a closing attorney should be within his or her authority to, on behalf of the seller, ask that a paid in full mortgage be satisfied. This is one of the purposes of having a closing attorney.

Further, there is no limiting language in the statute that would require that the Appellant only satisfy a mortgage upon request of the only the Mortgagor. The Appellant would have this Court ignore the language of the statute and allow the Appellant to limit its obligations through its mortgage contract. To allow the Appellant to limit its duty and requirements under S. C. Code Ann. §29-3-310 is contrary to public policy. No bank should not be allowed to avoid its statutory obligation under S. C. Code Ann. §29-3-310 by saying its own customer has authorized it to do so.

As for S. C. Code Ann. §29-3-50, this Code section has nothing to do with the instant case or the Appellant’s requirement to satisfy the mortgage under §29-3-310. S. C. Code Ann. §29-3-50 is to prevent a bank from cancelling an open ended credit agreement against its customer’s wishes. These are two completely independent duties; one is an affirmative obligation that a Bank is required to perform (under S. C. Code Ann. §29-3-310) and the other is

to prevent the Bank from arbitrary action in contravention to a Mortgagor's express desire (under S. C. Code Ann. §29-3-50).

Finally, the Respondent would argue that this issue was not argued by the Appellant at the underlying trial. Specifically, neither the Mortgage or the Equity Assetline Agreement that the Appellant relies upon its arguments were ever submitted to the trial court or included in evidence at the trial of this matter. While both of these documents were attached to the Appellant's Motion for Summary Judgment, the Order denying Summary Judgment was issued on March 4, 2010 and was never appealed. Therefore, this issue is not preserved for appeal. It is well settled that an appellant may not raise an argument on appeal that was not brought to the trial court's attention. Madison v. Babcock Ctr., Inc., 371 S.C. 123, 638 S.E.2d 650 (2006) (holding arguments not presented to nor ruled upon by trial court are not preserved for appellate review). As this issue was not raised at trial and ruled upon by the underlying court, it was not preserved for appeal.

III. DID THE TRIAL COURT ERR IN FINDING THAT THERE WAS CLEAR AND CONVINCING EVIDENCE THAT THE BANK HAD RECEIVED NOTICE TO SATISFY THE MORTGAGE?

The Plaintiff should be precluded from arguing that the Bank did not receive a request to satisfy the mortgage because the Order of August 20, 2008 has already made this factual determination in favor of the Respondents finding that the Appellant received actual or constructive notice of the request to cancel the Mortgage as of October 31, 2003 and therefore should have satisfied the mortgage. An unappealed Order becomes the law of the case. Cooper Tire & Rubber Co. v. Perry, 261 S.C. 538, 201 S.E.2d 245 (S.C. 1973).

This matter is therefore res judicata and the Plaintiff should be estopped from making any argument that contradicts the clear findings of the unappealed Order of August 20, 2008.

Even if the Order of August 20, 2008 did not preclude the Appellant from arguing that it did not receive notice to satisfy the mortgage, there was clear and convincing evidence presented at trial that the Bank did receive the transmittal letter. The trial court properly relied upon the more credible evidence in ruling that the Appellant had notice of the request to satisfy the mortgage.

The former bank employee, Pamela Harbin, testified that she was the executive assistant to the Bank President, that she had no personal knowledge of the actual transaction, she could not remember when she did her research and that her only involvement arose out of her research of the Bank records for this litigation. Ms. Harbin stated that her review of the bank records did not reveal a copy of the transmittal letter. On direct examination, Ms. Harbin went into some detail about what would have been proper policy and procedure for a teller that had received a notice to cancel a mortgage. However, on cross examination, she contradicted herself by saying that she was not familiar with the Bank's policy at that time. Since Ms. Harbin had very little personal knowledge about the transaction, she could not remember when she had conducted her records research and she testified she was not familiar with the Bank policy at that time, the trial court properly found this testimony to be unreliable.

On the other hand, Belk testified that he reviewed the documents, all of which were submitted at trial as Defendant's Exhibits 1, 2 and 3, at the closing and Belk's employee testified that she delivered the transmittal letter to the Bank along with the payoff check. The Bank does not dispute receipt of the payoff check, does not dispute the check was for the full amount of the

payoff, admits that the check was marked '*payoff of first mortgage*', admits that Belk had a receipt for the payment and admits that the account balance was brought to zero. The trial court properly found this testimony and evidence to be more reliable.

Further, the trial court specifically found that there was no formal method of delivery of the notice to cancel the mortgage citing Bostic v. American Home Mortg. Servicing, Inc., 375 S.C. 143, 650 S.E.2d 479 (S. C. App. 2007). The trial court found that under Bostic S. C. Code Ann. §29-3-320 there was no specific notice requirement, therefore Belk's delivery of the transmittal letter would satisfy the notice requirement.

The Appellant appears to admit that all the other elements of S. C. Code Ann. §29-3-320 were satisfied by the Respondent as these were not argued on appeal. Under Dykeman v. Wells Fargo Home Mortg., Inc., 673 S.E.2d 804 (2009), for the Respondent's to prevail on the statutory penalty of Section 29-3-320, they must show that (1) full payment of the debts, including applicable damages, costs, and charges was made; (2) that a request that the mortgage be satisfied of record was made to the Bank by certified mail or other form of delivery with proof of service; and (3) that the mortgagee has failed to enter satisfaction in the proper office on the mortgage within three months of the request. In Dykeman, the Court also found that Plaintiff's in that action did not tender fees of office for entering the satisfaction or that if the mortgagor (the recording fee) when the demand was made which was also required by the statute. However, the instant action is different as Section 29-3-320 provides an alternative to the tender of fees which is as follows:

"If the mortgagor or his legal representative instructs the holder of record of the mortgage that the mortgagor will be responsible for filing the satisfaction, the holder of the mortgage shall mail or deliver the satisfied mortgage to the

mortgagor or his legal representative with no satisfaction fee charged.”

As set forth below, Belk’s transmittal letter contained this language.

The Respondent satisfied all of the Dykeman requirements as written demand to satisfy the mortgage was made upon the Appellant by the transmittal letter dated October 31, 2003 which was personally delivered to the Clemson Boulevard Branch by Belk’s employee, Cathy Slaton. S. C. Code Ann. §29-3-320 does not set forth a formal method of delivery. See Bostic at 485.

The next requirement that the mortgage be paid in full was also met. There is no dispute that the payoff check was delivered to the Appellant by Belk and that it brought the mortgage balance to zero.

There was no tender of fees required as Belk’s transmittal letter included in bold, all capital letters the following language:

“PLEASE FORWARD SATISFIED DOCUMENTS (with a copy of this letter) TO THIS OFFICE TO BE REMOVED OF RECORD. PLEASE DO NOT SEND THE ORIGINAL DOCUMENTS DIRECTLY TO THE BORROWERS.” (R.p. 68)

Finally, it is further undisputed that the Appellant failed to satisfy the mortgage within three months as required by the statute. In fact, instead of satisfying the mortgage as it was directed and required to do by law, the Appellant filed suit to foreclose on its mortgage approximately two years after it received the payoff of the mortgage and was directed to satisfy the mortgage.

IV. DID THE TRIAL COURT ERR BY NOT RULING THAT THE MORTGAGEE
TIMELY SATISFIED THE MORTGAGE BECAUSE THE ATTORNEY FOR THE

PURCHASER HAD THE AUTHORITY PURSUANT TO S. C. CODE ANN § 29-3-330
(e) TO SATISFY AND CANCEL THE MORTGAGE?

This argument seems to be that the Appellant can shift its statutory obligation under S. C. Code Ann. §29-3-310 to the closing attorney. There is no statutory or legal authority upon which the Appellant relies upon in support of this conclusion.

If this Court were to accept this argument, then Appellant would have this Court create a duty for the closing attorney to satisfy a mortgage within the three months after the closing date. Taking the Appellant's argument the next logical step, a bank could then argue that a closing attorney is liable to the bank for *choosing to not satisfy* a mortgage under S. C. Code Ann. §29-3-330 (e) within the three months and thereby exposing the bank to liability under S. C. Code Ann. §29-3-320.

Further, the Appellant's discussion of the dates of enactment of the cited statutes have no apparent relevance to the present case. The Appellant had actual or constructive notice as of October 31, 2003 that the mortgage was to be satisfied. S. C. Code Ann. §29-3-310 created an obligation for the Appellant to satisfy the mortgage within three months; it failed to do so. Appellant cites no authority or valid reason it should not be able to shift the obligation created by §29-3-310 to the closing attorney and to avoid liability under §29-3-320.

Despite the redundancy, the Respondent has to point out that the mortgage was not satisfied within the required three month time frame and that Appellant's argument on this issue is devoid of any legal or statutory citation that would support a shifting of the obligation to satisfy the mortgage from the Appellant to the closing attorney.

Finally, the Respondent would again show that this issue was not argued by the Appellant

at the underlying trial. Specifically, at no point was an argument made to the trial court that the closing attorney's own failure to satisfy the mortgage through the method set forth §29-3-330 (e) should shield the Appellant from liability under §29-3-320 or that §29-3-330 (e) somehow shifted the burden to satisfy the mortgage from the Bank to the closing attorney. Therefore, this issue is also not preserved for appeal. It is well settled that an appellant may not raise an argument on appeal that was not brought to the trial court's attention. Madison v. Babcock Ctr., Inc., 371 S.C. 123, 638 S.E.2d 650 (2006) (holding arguments not presented to nor ruled upon by trial court are not preserved for appellate review). As this issue was not raised at trial and ruled upon by the underlying court, it was not preserved for appeal.

CONCLUSION

For the reasons stated herein, this Court should affirm the decision of the trial court.

February 14, 2011

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2006-CP-04-770

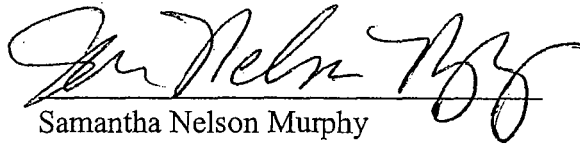
Regions Bank Appellant,

vs.

Richard C. Strawn, Robert K. Borchers, individually
and as Personal Representative of the Estate of Maria Borchers
and Nancy Davidson Borchers Respondent

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b),
SCACR.



Samantha Nelson Murphy
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ATTORNEY FOR THE RESPONDENT

February 14, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No.: 2006-CP-04-770

Regions Bank..... Appellant,

v.

Richard C. Strawn, Robert K. Borchers, individually and as
Personal Representative of the Estate of Marie Borchers and
Nancy Davidson Borchers..... Respondents.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2006CP040770

**Regions Bank v. Richard C. Strawn, Robert Karl Borchers
as Personal Representative of the Estate of Marie N. Borchers, Robert Karl Borchers and
Nancy Davidson Borchers**

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy: ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

IT IS ORDERED AND ADJUDGED:

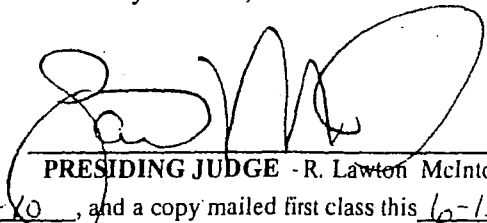
☐ See attached order;

☒ Statement of Judgment by the Court:

Plaintiff's Motion to Reconsider and/or to Alter or Amend Judgment is DENIED.

Dated at Anderson, South Carolina, this 6th day of June, 2010.

Court Reporter:


PRESIDING JUDGE - R. Lawton McIntosh

This judgment was entered on the 6-15-10, and a copy mailed first class this 6-15-10, to attorneys of record or to parties (when appearing pro se) as follows:

Harold Threlkeld
PO Box 1385
Anderson, SC 29622

Samantha Nelson
PO Box 2167
Anderson, SC 29622

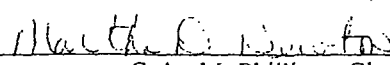
ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRPC APP-24/FORM 4

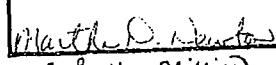
COMMON PLEAS AND
GENERAL SESSIONS

FILED-CLERK'S OFFICE
ANDERSON SC
JUN 15 2010


Cathy M. Phillips - Clerk of Court
Martha D. Newton

A TRUE COPY

JUN 15 2010


Cathy M. Phillips

STATE OF SOUTH CAROLINA

FILED - CLERK'S OFFICE

COUNTY OF ANDERSON

NOV 25 AM 10:30

IN THE COURT OF COMMON PLEAS

Regions Bank,

GENERAL SESSIONS

Plaintiff,

ORDER

-vs-

Richard C. Strawn, Robert K. Borchers,
individually and as personal representative of
the Estate of Marie Borchers and Nancy
Davidson Borchers,

CASE NO.: 2006-CP-04-770

Defendants.

A TRUE COPY

MAY 26 2010

Cathy M. Padden
CLERK OF COURT

This action was commenced on March 1, 2006 by the filing of a Summons and Complaint for foreclosure of real property of a mortgage and seeking a deficiency on same against the Defendant Strawn. The Defendants Robert K. Borchers, individually and as personal representative of the Estate of Marie Borchers and Nancy Davidson Borchers (hereinafter referred to as 'Borchers') filed an Answer and counterclaim against the Plaintiff, a cross claim against the co-Defendant Strawn and a third party claim against James S. Belk. Specifically, the Borchers Counterclaim sought the statutory penalties set forth in section 29-3-320 against the Plaintiff and for damages against Strawn. Subsequently, the Third Party Defendant was dismissed with prejudice. Defendant Strawn also filed responsive pleadings.

An Order granting Summary Judgement was granted to the Defendants Borchers as to the Plaintiff's Complaint. This Order was issued on August 20, 2008. This matter came to be heard before me on March 3, 2010 for a non-jury trial.

Present and before the Court were Harold P. Threlkeld, attorney for the Plaintiff, Samantha P. Nelson, attorney for the Borchers and Richard C. Strawn who represented himself.

At the call of the case, the court heard Plaintiff's motion for summary judgment on Borchers' counterclaim. The Motion was denied.

Based upon the testimony of the parties, the evidence presented and the Clerk of Court's file, I make the following:

FINDINGS OF FACT

1. I find that the Plaintiff is a corporation organized and existing under the laws of one of the states of the United States and is authorized to conduct and is conducting business within the County of Anderson, State of South Carolina. I find that the Defendant

Borchers are all subject to the jurisdiction of this Court by way of their residence or their ownership interest in land situated in Anderson County, South Carolina. I find that the Defendant Strawn resides in Spartanburg County, South Carolina and that he entered into the mortgage that was the original subject of the Plaintiff's complaint in Anderson County for real estate that is situated in Anderson County. Accordingly, I find that this Court has jurisdiction over all parties and matters herein.

2. The testimony and evidence are undisputed as to the following facts:

- A. That Richard C. Strawn ('Strawn') gave Regions Bank ('the Bank') a home equity mortgage securing future advances on a credit line of \$50,000 when Strawn was the titled owner of real property located at _____ in Anderson, South Carolina ('the Property'). In 2001, Strawn deeded the Property to Cammie B. Strawn, his ex-wife, after their divorce. Cammie Strawn then deeded the property to Marie Borchers, who purchased the property in cash and took legal title, at a closing that occurred on October 31, 2003. James Belk was the closing attorney.
- B. Prior to the closing on the sale from Cammie B. Strawn to Marie Borchers, attorney James Belk requested from the Bank a mortgage payoff amount on the credit line for the day of closing. On October 31, 2003, after the closing, Cathy Slaton, one of Mr. Belk's employees, hand delivered a Trust Account check to the Bank for the payoff.
- C. The check delivered to the Bank was for \$32,256.41 which included the payoff amount provided by the Bank and an additional \$15.99. The check had the words "*Payoff of first Mortgage*". The Bank admits receiving and processing this check on October 31, 2003.
- D. Several weeks after the closing and the payoff of the mortgage, the Bank issued a new set of checks to Strawn for use on the credit line of \$50,000. Despite knowing that he no longer owned the property which had secured the mortgage, Strawn accessed the funds in the account up to the limit. Strawn made payments on the equity line until approximately November of 2005 at which time the loan went into default.
- E. Maria Borchers died testate on December 5, 2005 appointing Robert Borchers as her personal representative. Her devisees are the named Defendants, Robert Borchers and Nancy Borchers Davidson.
- F. On December 22, 2005, James S. Belk filed a "Mortgage Lien Satisfaction affidavit pursuant to section 29-3-330 of SC Code of Laws for Book 4413 at Page 319".

3. Based upon the undisputed testimony and evidence recited above, I find that full payment of the debt, including applicable damages, costs, and charges, was made and that the Bank failed to enter satisfaction in the proper office on the mortgage within the requisite

time period.

4. There was a conflict in testimony as to whether or not the bank received notice of the request to satisfy the mortgage. The former bank employee testified that her review of the bank records did not reveal a copy of the transmittal letter; however, I find that this review of the records did not occur until sometime in 2006. This search, more than two years after October 31, 2003, is remote enough in time to make it as likely that it was lost or misplaced as was never received. On the other hand, Mr. Belk and his employee's testimony was quite clear. Both Mr. Belk and his employee testified that it was their standard office policy for every closing to deliver a transmittal letter with the payoff check. The employee testified that if the bank was a local bank, she would personally deliver the payoff check and the transmittal letter instead of mailing it and that she believed she did so in this instance. This transmittal letter specifically requested that the mortgage be satisfied within three months and that it be returned to Mr. Belk to be removed of record. I find this testimony to be credible.
5. I find that Regions Bank violated S. C. Code Ann. §29-3-310 and is subject to the statutory penalty under section 29-3-320 by failing to mark the mortgage satisfied within ninety days of notice of a request to do so. Therefore, I find that the Borchers are entitled to the statutory damages of Twenty Five Thousand (\$25,000) Dollars from the Plaintiff along with the Borchers' reasonable attorneys fees and costs.
6. Counsel for the Borchers submitted an attorneys fee affidavit reflecting costs of \$160.50 and attorneys fees of \$6,225 which is for 24 hours out of court billed at the rate of \$225 per hour and an estimated three hours in court billed at the rate of \$275 per hour. An additional one (1) hour of trial time is added for the actual length of trial at \$275 per hour for a total fee of \$6,500. I find this to be a reasonable amount of attorneys fees and shall require the Plaintiff to pay same pursuant to S. C. Code Ann. §29-3-310.
7. It is undisputed that Strawn fraudulently, recklessly, wilfully and wantonly converted the Borchers' property to his own use or benefit without their permission by accepting the bank checks in November of 2003 and used the Fifty Thousand (\$50,000) Dollars on the line of credit on the real property that he had not owned since 2001. I find that the Borchers' have incurred attorneys' fees and costs in having to defend the foreclosure action. I find that the Borchers' have been damaged in the amount of Sixty Five Hundred (\$6,500) Dollars which is the direct and proximate result of Strawn's fraudulent and wilful conduct.
8. In his testimony, Strawn admitted that he knew what he was doing was wrong when he used the money, that he benefitted from the use of the money, and that he had no ability or intention to pay this money back. I find Strawn's conduct to be reprehensible, that he took the money over a period of two years so it was not an isolated incident, that his tortious conduct evinced an indifference to or a reckless disregard for the rights of others and that the harm was the result of deceit rather than mere accident.
9. Therefore, I find that the Borchers are entitled to punitive damages against Strawn in the

amount of Ten Thousand (\$10,000) Dollars. In reaching this amount, I have considered that actual benefit to Strawn in the money that he wrongfully received, the ratio of less than 2 to 1 in the amount of actual damages to the amount of the punitive award and that this amount adequately vindicates the twin purposes of punishment and deterrence that support the imposition of punitive damages.

Based upon the aforementioned findings of fact, I make the following conclusions of law:

CONCLUSIONS OF LAW

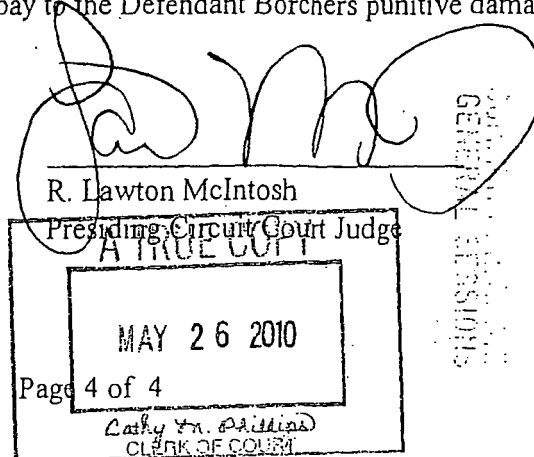
1. I conclude that this Court has jurisdiction over the parties, matters, things and subject matter hereof based upon applicable South Carolina statutory and case law.
2. I conclude that S. C. Code Ann. §§29-3-310 and 320 provide for statutory damages not to exceed one-half of the unsatisfied mortgage and attorneys fees for failure of a mortgagee to satisfy a mortgage under certain conditions.
3. I conclude that punitive damages may properly be imposed to further a state's legitimate interest in punishing unlawful conduct and deterring its repetition provided the procedural and substantive constitutional limitations on these awards are met. Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991).
4. I conclude that an award of attorneys fees must take into consideration the nature, extent and difficulty of services rendered, the time necessarily devoted to the case, counsel's professional standing, contingency of compensation, beneficial results and the customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (S.C. 1991).

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

- A. That the Plaintiff will pay to the Defendant Borchers damages of Twenty Five Thousand (\$25,000) Dollars.
- B. That the Plaintiff and the Defendant Strawn shall be jointly and severally liable to the Borchers for the Defendant Borchers attorneys fees and costs of Six Thousand Five Hundred (\$6,500) Dollars.
- C. That the Defendant Strawn shall pay to the Defendant Borchers punitive damages of Ten Thousand (\$10,000) Dollars.

IT IS SO ORDERED!

May 24, 2010
Anderson, South Carolina



25

STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS
C.A. NO.: 2006-CP-04- 770

Regions Bank,)
)
Plaintiff,)

vs.)

COMPLAINT
NON-JURY ROSTER

Richard C. Strawn, Robert Karl Borchers)
as Personal Representative of the Estate)
of Marie N. Borchers, Robert Karl Borchers)
and Nancy Davidson Borchers,)
)
Defendants.)

FILED-CLERK'S OFFICE
ANDERSON SC
2006 MAR -1 A 9:58
COMMON PLEAS AND
GENERAL SESSIONS

Plaintiff alleges:

FOR A FIRST CAUSE OF ACTION

1. The real property being the subject matter of this action is situate in the County of Anderson, State of South Carolina.

2. This court has jurisdiction of the parties to and subject matter of this action.

3. On September 3, 2003, the Defendant, Richard C. Strawn ("Strawn"), made executed and delivered to the Plaintiff an Equity Asset Line Agreement (the "Note") in the amount of Fifty thousand dollars (\$50,000.00), payable according to the terms thereof, a copy of which is annexed hereto as Exhibit "1" and the terms and provisions of which are made part hereof by this reference.

4. Payment of the Note is secured by a mortgage (the "Mortgage") on real property situate in the County of Anderson, State of South Carolina granted to the Plaintiff by the Defendant Strawn dated October 12, 2001, a copy of which is attached hereto as Exhibit "2" and the terms and provisions of which are incorporated herein by this reference, granting the Plaintiff a mortgage lien on the following described real property:

ALL that certain piece, parcel or lot of land lying and being situate in the State of South Carolina, County of Anderson, Centerville Township, being shown and designated as Lot Number Three (3) on that certain plat prepared by Nu-South Surveying, Inc., Earl B.

O'Brien, RLS, dated December 21, 1994 and of record in the Office of Register of Deeds for Anderson County, South Carolina in Plat Slide 755 at pages 4 & 5, and having the metes and bounds, courses and distances as upon said plat will appear, being incorporated herein and made a part hereof by reference thereto.

This is the same property conveyed unto Marie N. Borchers by deed of Cammie B. Strawn, dated October 31st, 2003 and recorded in the Office of Register of Deeds for Anderson County, South Carolina on November 7th, 2003 in Records Book 5844 at page 130; the said Marie N. Borchers having thereafter died while residing in Anderson County, South Carolina on December 7th, 2005 and her estate is being administered in the Probate Court file no. 2005-ES-04-01233.

TMS No.: 095-16-01-003

Property Address:

5. The Mortgage was duly recorded in the Office of Register of Deeds for Anderson County, South Carolina on October 22, 2001 in Records Book 4413 at pages 00319-00325.

6. The Defendant, Richard C. Strawn, by the Mortgage conveyed and granted to Plaintiff a valid first lien on the real property described in the Mortgage to secure repayment of the debt represented by the Note.

7. Pursuant to the Note, the Plaintiff advanced to the Defendant principal advancements of Forty-nine thousand three hundred sixty-three and 01/100 (\$49,363.01) dollars, together with interest.

8. The Note required the Defendant Strawn to make monthly payments on the debt represented by the Note on the 24th day of each month beginning October 24th, 2003.

9. The Defendant Strawn defaulted in making the monthly payments due on the Note by failing to pay the monthly installment due on November 24th, 2005, and all installments due thereafter.

10. On December 21st, 2005, the amount due on the Note was the principal sum of Forty-nine thousand three hundred sixty-three and 01/100 (\$49,363.01) dollars, plus Nine hundred ten and 62/100 (\$910.62) dollars in interest and Thirty-eight and 46/100 (\$38.36) dollars in late charges.

11. On December 21st, 2005, the Plaintiff made demand upon the Defendant Strawn to pay the amount due of Fifty thousand three hundred twelve and 09/100 (\$50,312.09) dollars, plus accumulated interest, which demand was refused.

12. On December 21st, 2005, the amount due on the Note was the sum of Fifty thousand three hundred twelve and 09/100 (\$50,312.09) dollars, with interest thereafter at the per diem rate of \$12.2798.

13. No part of the amount due on December 21st, 2005 has been paid.

14. On December 12th, 2001, the Defendant Strawn conveyed the real property described in the Mortgage to Cammie B. Strawn by deed dated December 11, 2001 and recorded in the Office of Register of Deeds for Anderson County, South Carolina on December 12, 2001 in Records Book 4497 at page 339, which conveyance was subject to the Plaintiff's Mortgage.

15. On October 31st, 2003, Cammie B. Strawn conveyed the mortgaged premises to Marie Borchers by deed dated October 31st, 2003 and recorded in the Office of Register of Deeds for Anderson County, South Carolina on November 7, 2003 in Records Book 5844 at page 130, which conveyance was subject to Plaintiff's first mortgage on the premises.

16. According to records of the Probate Court for Anderson County, South Carolina, Marie N. Borchers died testate while residing in Anderson County, South Carolina on December 7th, 2005 and as evidenced by records of administration of her estate contained in the Probate Court case file number 05-ES-04-01233, the Defendant, Robert Karl Borchers has been appointed Personal Representative of the Decedent's estate and the Decedent's Last Will devised the property being the subject matter of this action to the Defendant, Robert Karl Borchers and Nancy Davidson Borchers.

17. On December 21st, 2005, James S. Belk, Esquire of the Anderson Bar made, executed and filed in the Office of Register of Deeds for Anderson County, South Carolina a Mortgage Lien Satisfaction Affidavit made pursuant to S.C. Code Ann. § 29-3-330 (1976, as amended), which Affidavit was filed in the Office of Register of Deeds for Anderson County, South Carolina on December 22nd, 2005 in Records Book 07123 at page 00003, a copy of which Affidavit is attached hereto as Exhibit "3", and the terms and provisions of which are made part hereof by this reference.

18. The amount of indebtedness secured by the Mortgage on December 21st, 2005 was the sum of Fifty thousand three hundred twelve and 09/100 (\$50,312.09) dollars, with interest thereafter at the per diem rate of \$12.2798, no part of which had been paid or satisfied. The Plaintiff has never received payment or satisfaction of the indebtedness secured by the Mortgage.

19. On December 21st, 2005, the Mortgage secured payment of the indebtedness of the Defendant Strawn under the Note.

20. The Affiant, James S. Belk, Esquire, has not paid the indebtedness secured by the Note and was not entitled or authorized to place the cancellation on the record.

21. The Plaintiff is entitled to an Order of this court canceling the satisfaction attached as Exhibit "3" hereto and restoring the Mortgage.

FOR A SECOND CAUSE OF ACTION

22. The preceding allegations are made part hereof by this reference.

23. Under the terms and conditions of the Note and the Mortgage, the failure to pay any part or all of the principal sum or interest when due constitutes a default therein and at the option of the holder the entire principal sum with interest becomes immediately due and payable.

24. The Note and the Mortgage further provide that in the event the maker fails to pay any sum due according to its terms or violates any covenant thereof and it becomes necessary for the Plaintiff to employ an attorney to exercise its rights thereunder, the Defendant Strawn agreed to pay all costs of collection, including a reasonable amount as attorney's fees for Plaintiff's attorney and for all court costs and expenses of sale.

25. The Note and the Mortgage are in default because the Defendant Strawn failed to pay the monthly installment due on November 24th, 2005 and all installments accruing due thereafter, and the Plaintiff as owner and holder of the documents has notified the Defendant Strawn of its election to call the entire amount of the principal sum with interest immediately due and payable.

26. The balance due on the Note is the principal sum of Forty-nine thousand three hundred sixty-three and 01/100 (49,363.01) dollars, together with accumulated interest and late payment fees of Nine hundred forty-nine and 08/100 (\$949.08) dollars, for a total of Fifty thousand three hundred twelve and 09/100 (\$50,312.09) dollars, with interest after December 21st, 2005 at the per diem rate of \$12.2798, together with all sums which may be expended by the Plaintiff for management and conservation of the premises during the pendency of this action, for payment of ad valorem taxes and insurance premiums with interest to date of payment, together with a reasonable sum as attorney's fees for Plaintiff's attorney and for the costs of this action.

27. The Defendant, Robert Karl Borchers as Personal Representative of the Estate of Marie N. Borchers, is joined as a party defendant to this action because title to the mortgaged premises was vested in the said Marie N. Borchers at the time of her death, subject to the outstanding mortgage in favor of the Plaintiff, and the said Robert Karl Borchers as Personal Representative of the Estate of Marie N. Borchers may claim title to the premises, which claim is subordinate to Plaintiff's first lien on the property.

28. The Defendants, Robert Karl Borchers and Nancy Davidson Borchers, are devisees under the Will of the Decedent, Marie N. Borchers, and may claim some right, title or interest in the property, which right is subordinate to Plaintiff's first lien on the property.

29. Plaintiff is informed and believes that no defendant who is a party to this action is now a member of or is in the military services of the United States of America.

30. The Plaintiff is entitled to have the mortgaged premises foreclosed and the equity of redemption of the Defendants barred and to have the real property described in the Mortgage sold at public sale, pursuant to law, to the highest bidder for cash, with the proceeds of sale to be applied, first, to the costs of this action, including attorney's fees for Plaintiff's attorney, then to ad valorem property taxes, insurance and costs of managing and conserving the premises, then to the principal sum with interest due to Plaintiff.

31. If the proceeds of sale are insufficient to satisfy the judgment, then to have the court enter a deficiency judgment against the Defendant Strawn for the amount of debt unsatisfied from the proceeds of sale.

WHEREFORE, Plaintiff prays:

1. The Mortgage Satisfaction attached as Exhibit "3" be cancelled and the Mortgage restored;

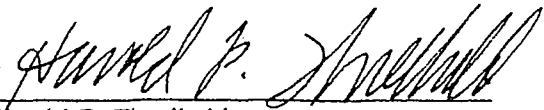
2. Judgment be rendered in favor of the Plaintiff against the Defendant Strawn on the Second Cause of Action in the amount of Fifty thousand three hundred twelve and 09/100 (\$50,312.09) dollars, together with interest after December 20th, 2005 at the per diem rate of \$12.2798, together with all sums which may be expended by the Plaintiff for management and conservation of the premises during the pendency of this action, for payment of ad valorem taxes and insurance premiums with interest to date of payment, together with a reasonable sum as attorney's fees for Plaintiff's attorney, and for the costs of this action;

3. The Mortgage be foreclosed and the equity of redemption of the Defendants and all persons claiming through or under them be forever barred;

4. The proceeds of sale from the premises described in the Mortgage be applied to the costs of this action, then to payment of past due taxes and to the payment of all sums due or which may be advanced by Plaintiff pursuant to the Mortgage, then payment of costs of this action and expenses of sale, including attorney's fees for Plaintiff's attorney and to payment of the principal sum with interest due on the Note;

5. If the proceeds of sale realized from the sale of the real property is insufficient to satisfy the indebtedness represented by the Note, a deficiency judgment be rendered in favor of the Plaintiff against the Defendant Strawn;

6. For other and further relief as to this court may seem just and proper.



Harold P. Threlkeld

P. O. Box 1385

Anderson, SC 29622-1385

Telephone No.: 864.226.1305

Fax No.: 864.226.1685

Attorney for Plaintiff

Anderson, South Carolina

Date: March 1, 2006



DOC88020100002010112297000000

Regions
 Bank

EQUITY ASSETLINE AGREEMENT

 PLAINTIFF'S
 EXHIBIT
 11

Principal \$50,000.00	Loan Date 09-09-2003	Maturity	Loan No.	Call / Coll	Account	Officer	Initials
References in the shaded area are for our use only and do not limit the applicability of this document to any particular loan or item. Any item above containing "*****" has been omitted due to text length limitations.							

Borrower: RICHARD C STRAWN (SSN:)

 Lender: REGIONS BANK
 ANDERSON MAIN OFFICE
 304 NORTH MAIN STREET
 ANDERSON, SC 29821

CREDIT LIMIT: \$50,000.00

DATE OF AGREEMENT: September 8, 2003

Introduction. This Equity AssetLine Agreement ("Agreement") governs your line of credit (the "Credit Line" or the "Credit Line Account") issued through REGIONS BANK. In this Agreement, the words "Borrower," "you," "your," and "Applicant" mean each and every person who signs this Agreement, including all Borrowers named above. The words "we," "us," "our," and "Lender" mean REGIONS BANK. You agree to the following terms and conditions:

Promise to Pay. You promise to pay REGIONS BANK, or order, the total of all credit advances and FINANCE CHARGES, together with all costs and expenses for which you are responsible under this Agreement or under the mortgage or deed of trust which secures your Credit Line. You will pay your Credit Line according to the payment terms set forth below. If there is more than one Borrower, each is jointly and severally liable on this Agreement. This means we can require any Borrower to pay all amounts due under this Agreement, including credit advances made to any Borrower. Each Borrower authorizes any other Borrower, on his or her signature alone, to cancel the Credit Line, to request and receive credit advances, and to do all other things necessary to carry out the terms of this Agreement. We can release any Borrower from responsibility under this Agreement, and the others will remain responsible.

Term. The term of your Credit Line will begin as of the date of this Agreement ("Opening Date") and will continue as follows: five (5) years from the date of your original Equity AssetLine Agreement (except to the extent a Change in Terms Agreement specifically extends the term of your Credit Line). All indebtedness under this Agreement, if not already paid pursuant to the payment provisions below, will be due and payable at the end of this term. The draw period of your Credit Line will begin on a date, after the Opening Date, when the Agreement is accepted by us in the State of South Carolina, following the expiration of the right to cancel, the perfection of the mortgage or deed of trust, the receipt of all required certificates of noncancellation, and the meeting of all of our other conditions and will continue as follows: five (5) years from the date of your original Equity AssetLine Agreement (except to the extent a Change in Terms Agreement specifically extends the term of your Credit Line). You may obtain credit advances during this period ("Draw Period"). You agree that we may renew or extend the period during which you may obtain credit advances or make payments. You further agree that we may renew or extend your Credit Line Account.

Minimum Payment. Your "Regular Payment" will equal the amount of your accrued FINANCE CHARGES. You will make 59 of these payments. You will then be required to pay the entire balance owing in a single balloon payment. If you make only the minimum payments, you may not repay any of the principal balance by the end of this payment stream. Your payments will be due monthly. Your "Minimum Payment" will be the Regular Payment, plus any amount due and all other charges. An increase in the ANNUAL PERCENTAGE RATE may increase the amount of your Regular Payment.

In any event, if your Credit Line balance falls below \$50.00, you agree to pay your balance in full. You agree to pay not less than the Minimum Payment on or before the due date indicated on your periodic billing statement.

Balloon Payment. Your Credit Line Account is payable in full upon termination in a single balloon payment. You must pay the entire outstanding principal, interest and any other charges then due. Unless otherwise required by applicable law, we are under no obligation to refinance the balloon payment at that time. You may be required to make payments out of other assets you own or find a lender, which may be us, willing to lend you the money. If you refinance the balloon, you may have to pay some or all of the closing costs normally associated with a new credit line account, even if you obtain refinancing from us.

How Your Payments Are Applied. Unless otherwise agreed or required by applicable law, payments and other credits will be applied first to Finance Charges; then to any voluntary credit life and disability insurance premiums; then to unpaid principal; and then to late charges and other charges.

Receipt of Payments. All payments must be made by a check, automatic account debit, electronic funds transfer, money order, or other instrument in U.S. dollars and must be received by us at the remittance address shown on your periodic billing statement. Payments received at that address prior to 1:00 P.M. Local Time on any business day will be credited to your Credit Line as of the date received. If we receive payments at other locations, such payments will be credited promptly to your Credit Line, but crediting may be delayed for up to five (5) days after receipt.

Credit Limit. This Agreement covers a revolving line of credit for the principal amount of Fifty Thousand & 00/100 Dollars (\$50,000.00), which will be your "Credit Limit" under this Agreement. During the Draw Period we will honor your request for credit advances subject to the section below on Lender's Rights. You may borrow against the Credit Line, repay any portion of the amount borrowed, and re-borrow up to the amount of the Credit Limit. Your Credit Limit is the maximum amount you may have outstanding at any one time. You agree not to attempt, request, or obtain a credit advance that will make your Credit Line Account balance exceed your Credit Limit. Your Credit Limit will not be increased should you overdraw your Credit Line Account. If you exceed your Credit Limit, you agree to repay immediately the amount by which your Credit Line Account exceeds your Credit Limit, even if we have not yet billed you. Any credit advances in excess of your Credit Limit will not be secured by the mortgage or deed of trust covering your principal dwelling.

Charges to your Credit Line. We may charge your Credit Line to pay other fees and costs that you are obligated to pay under this Agreement, the mortgage or deed of trust or any other document related to your Credit Line. In addition, we may charge your Credit Line for funds required for continuing insurance coverage as described in the paragraph titled "Insurance" below or as described in the mortgage or deed of trust for this transaction. We may also, at our option, charge your Credit Line to pay any costs or expenses to protect or perfect our security interest in your principal dwelling. These costs or expenses include, without limitation, payments to cure defaults under any existing liens on your principal dwelling. If you do not pay your property taxes, we may charge your Credit Line and pay the delinquent taxes. Any amount so charged to your Credit Line will be a credit advance and will decrease the funds available. If any, under the Credit Line. However, we have no obligation to provide any of the credit advances referred to in this paragraph.

Credit Advances. After the Effective Disbursement Date of this Agreement, you may obtain credit advances under your Credit Line as follows:

Credit Line Checks. Writing a preprinted "Equity AssetLine Special Draft" that we will supply to you.

Telephone Request. Requesting a credit advance from your Credit Line to be applied to your designated account by telephone. Except for transactions covered by the federal Electronic Fund Transfers Act and unless otherwise agreed in your deposit account agreement, you acknowledge and you agree that we do not accept responsibility for the authenticity of telephone instructions and that we will not be liable for any loss, expense, or cost arising out of any telephone request, including any fraudulent or unauthorized telephone request, when acting upon such instructions believed to be genuine.

Requests By Mail. Requesting an advance by mail.

Requests in Person. Requesting a credit advance in person at any of our authorized locations.

Other Methods. Online Advances.

If there is more than one person authorized to use this Credit Line Account, you agree not to give us conflicting instructions, such as one of you telling us not to give advances to the other.

Limitations on the Use of Checks. We reserve the right not to honor Equity AssetLine Special Drafts in the following circumstances:
Credit Limit Violation. Your Credit Limit has been or would be exceeded by paying the Equity AssetLine Special Draft.

 GENERAL
 CREDIT ADVANCE
 REQUEST
 2003 MAR 10
 FILED-CLERK'S OFFICE
 ANDERSON SC

EQUITY ASSETLINE AGREEMENT

Loan No:

(Continued)

Page 2

Post-dated Checks. Your Equity AssetLine Special Draft is post-dated. If a post-dated Equity AssetLine Special Draft is paid and as a result any other check is returned or not paid, we are not responsible.

Stolen Checks. Your Equity AssetLine Special Drafts have been reported lost or stolen.

Unauthorized Signatures. Your Equity AssetLine Special Draft is not signed by an "Authorized Signer" as defined below.

Termination or Suspension. Your Credit Line has been terminated or suspended as provided in this Agreement or could be if we paid the Equity AssetLine Special Draft.

Transaction Violation. Your Equity AssetLine Special Draft is less than the minimum amount required by this Agreement or you are in violation of any other transaction requirement or would be if we paid the Equity AssetLine Special Draft.

Other Restriction. Advances may be requested either by the Borrower or the Co-Borrower.

If we pay any Equity AssetLine Special Draft under these conditions, you must repay us, subject to applicable laws, for the amount of the Equity AssetLine Special Draft. The Equity AssetLine Special Draft itself will be evidence of your debt to us together with this Agreement. Our liability, if any, for wrongful dishonor of a check is limited to your actual damages. Dishonor for any reason as provided in this Agreement is not wrongful dishonor. We may choose not to return Equity AssetLine Special Drafts along with your periodic billing statements; however, your use of each Equity AssetLine Special Draft will be reflected on your periodic statement as a credit advance. We do not "certify" Equity AssetLine Special Drafts drawn on your Credit Line.

Transaction Requirements. The following transaction limitations will apply to the use of your Credit Line:

Credit Line Equity AssetLine Special Draft and Request By Mail Limitations. The following transaction limitations will apply to your Credit Line and the writing of Equity AssetLine Special Drafts and requesting an advance by mail.

Minimum Advance Amount. The minimum amount of any credit advance that can be made on your Credit Line is \$100.00. This means any Equity AssetLine Special Draft must be written for at least the minimum advance amount.

Other Transaction Requirements. You may request an Advance by writing and negotiating an Equity AssetLine special draft. Upon our receipt of the draft, we will make an Advance to pay your draft. We will not return to you special drafts we have paid. We will provide copies of any draft you request. You agree to pay our reasonable charge for providing copies of any drafts. You may request an Advance by writing a letter to Regions Bank at the address shown on your monthly statement. You should tell us your Equity AssetLine account number and your deposit account number. We will mail you a deposit slip reflecting the deposit.

Telephone Request and In Person Request Limitations. The following transaction limitations will apply to your Credit Line and requesting an advance by telephone and requesting an advance in person.

Minimum Advance Amount. The minimum amount of any credit advance that can be made on your Credit Line is \$100.00.

Other Transaction Requirements. You may request an Advance by telephoning your loan officer. You must identify yourself to the satisfaction of your loan officer, or some other loan officer who personally knows you. The Advance will be deposited into your deposit account. If you do not know the name of your loan officer, you may call Regions Bank at the number shown on your monthly statement for this information. You are responsible for knowing your loan officer. You may request an Advance in person during normal business hours at any of our facilities which accept personal requests for Advances. You must identify yourself to our satisfaction. The Advance may be deposited into your deposit account.

Other Methods Limitations. The following transaction limitations will apply to your Credit Line and accessing by other methods.

Other Transaction Requirements. If you have enrolled in Regions Online Banking, requesting a credit advance via electronic instructions through Regions Online Banking, subject to the terms of the Regions Online Banking Agreement and Disclosure Statement in effect from time to time. You agree that we do not accept responsibility for the authenticity of electronic instructions received through Regions Online Banking and that we will not be liable for any loss, expense or cost arising out of any electronic instructions or requests received through Regions Online Banking, including any fraudulent or unauthorized instructions or requests, when acting upon such instructions or requests believed to be genuine.

Authorized Signers. The words "Authorized Signer" on Equity AssetLine Special Drafts as used in this Agreement mean and include each person who (a) signs the application for this Credit Line, (b) signs this Agreement, or (c) has executed a separate signature authorization card for the Credit Line Account.

Lost Equity AssetLine Special Drafts. If you lose your Equity AssetLine Special Drafts or if someone is using them without your permission, you agree to let us know immediately. The fastest way to notify us is by calling us at (800) 734-4697. You also can notify us at our address shown at the beginning of this Agreement.

Future Credit Line Services. Your application for this Credit Line also serves as a request to receive any new services (such as access devices) which may be available at some future time as one of our services in connection with this Credit Line. You understand that this request is voluntary and that you may refuse any of these new services at the time they are offered. You further understand that the terms and conditions of this Agreement will govern any transactions made pursuant to any of these new services.

Collateral. You acknowledge this Agreement is secured by a Mortgage from Richard C Strawn to Lender dated 10/12/2001 on Real Property located at 105 Park Way, Anderson, SC 29626.

Insurance. You must obtain insurance on this Property securing this Agreement that is reasonably satisfactory to us. You may obtain property insurance through any company of your choice that is reasonably satisfactory to us. You have the option of providing any insurance required under this Agreement through an existing policy or a policy independently obtained and paid for by you, subject to our right, for reasonable cause before credit is extended, to decline any insurance provided by you. Subject to applicable law, if you fail to obtain or maintain insurance as required in the mortgage or deed of trust, we may purchase insurance to protect our own interest, add the premium to your balance, pursue any other remedies available to us, or do any one or more of these things.

Right of Setoff. To the extent permitted by applicable law, we reserve a right of setoff in all your accounts with us (whether checking, savings, or some other account), including without limitation, all accounts you may open in the future. However, this does not include any IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. You authorize us, to the extent permitted by applicable law, to charge or setoff all sums owing on this Agreement against any and all such accounts.

Periodic Statements. If you have a balance owing on your Credit Line Account or have any account activity, we will send you a periodic statement. It will show, among other things, credit advances, FINANCE CHARGES, other charges, payments made, other credits, your "Previous Balance," and your "New Balance." Your statement also will identify the Minimum Payment you must make for that billing period and the date it is due.

When FINANCE CHARGES Begin to Accrue. Periodic FINANCE CHARGES for credit advances under your Credit Line will begin to accrue on the date credit advances are posted to your Credit Line. There is no "free ride period" which would allow you to avoid a FINANCE CHARGE on your Credit Line credit advances.

Method Used to Determine the Balance on Which the FINANCE CHARGE Will Be Computed. A daily FINANCE CHARGE will be imposed on all credit advances made under your Credit Line imposed from the date of each credit advance based on the "daily balance" method. To get the daily balance, we take the beginning balance of your Credit Line Account each day, add any new advances and subtract any payments or credits and any unpaid FINANCE CHARGES. This gives us the "daily balance."

Method of Determining the Amount of FINANCE CHARGE. Any FINANCE CHARGE is determined by applying the "Periodic Rate" to the balance described herein. Then we add together the periodic FINANCE CHARGES for each day in the billing cycle. This is your FINANCE CHARGE calculated by applying a Periodic Rate.

You also agree to pay FINANCE CHARGES, not calculated by applying a Periodic Rate, as set forth below:

Additional Finance Charges. The following additional FINANCE CHARGES will be charged to your Credit Line or paid in cash:

Flood Certification Fee:	In Cash	\$10.00
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Periodic Rate and Corresponding ANNUAL PERCENTAGE RATE. We will determine the Periodic Rate and the corresponding ANNUAL PERCENTAGE RATE as follows. We start with an independent index which is the "Prime Rate" as published in the "Money Rates" column in The Wall Street Journal on the first business day of the month, which is identified in that column as "The base rate on corporate loans posted by at least 75% of the Nation's largest banks." (the "Index"). We will use the most recent Index value available to us as of the first business day of the month for any ANNUAL PERCENTAGE RATE adjustment. The Index is not necessarily the lowest rate charged by us on our loans. If the Index becomes unavailable during the term of this Credit Line Account, we may designate a substitute Index after notice to you. To determine the Periodic Rate that will apply to your account, we add a margin to the value of the Index, then divide the value by the number of days in a year (daily). To obtain the ANNUAL PERCENTAGE RATE we multiply the Periodic Rate by the number of days in a year (daily). This

EQUITY ASSETLINE AGREEMENT (Continued)

Loan No:

Page 3

result is the ANNUAL PERCENTAGE RATE. The ANNUAL PERCENTAGE RATE includes only interest and no other costs.

The Periodic Rate and the corresponding ANNUAL PERCENTAGE RATE on your Credit Line will increase or decrease as the Index increases or decreases from time to time. Adjustments to the Periodic Rate and the corresponding ANNUAL PERCENTAGE RATE resulting from changes in the Index will take effect monthly, on the first day of your billing cycle. In no event will the corresponding ANNUAL PERCENTAGE RATE be more than the lesser of 18.000% or the maximum rate allowed by applicable law. Today the Index is 4.000% per annum, and therefore the initial Periodic Rate and the corresponding ANNUAL PERCENTAGE RATE on your Credit Line are as stated below:

Current Rates for the First Payment Stream			
Range of Balance or Conditions	Margin Added to Index	ANNUAL PERCENTAGE RATE	Daily Periodic Rate
All Balances	2.080%	6.080%	0.01666%

Notwithstanding any other provision of this Agreement, we will not charge interest on any undistributed loan proceeds, except as may be permitted during any Right of Rescission period.

Conditions Under Which Other Charges May Be Imposed. You agree to pay all the other fees and charges related to your Credit Line as set forth below:

Annual Maintenance Fee. A nonrefundable Annual Maintenance Fee of \$50.00 will be charged to your Credit Line at the following time: On the anniversary of your credit line.

Returned Items. You may be charged \$25.00 if you pay your Credit Line obligations with a check, draft, or other item that is dishonored for any reason, unless applicable law requires a lower charge or prohibits any charge.

Late Charge. Your payment will be late if it is not received by us within 10 days after the "Payment Due Date" shown on your periodic statement. If your payment is late we may charge you 5.000% of the unpaid amount of the payment or \$14.00, whichever is less.

Lender's Rights. Under this Agreement, we have the following rights:

Termination and Acceleration. We can terminate your Credit Line Account and require you to pay us the entire outstanding balance in one payment, and charge you certain fees, if any of the following happen: (1) You commit fraud or make a material misrepresentation at any time in connection with this Credit Agreement. This can include, for example, a false statement about your income, assets, liabilities, or any other aspects of your financial condition. (2) You do not meet the repayment terms of this Credit Agreement. (3) Your action or inaction adversely affects the collateral for the plan or our rights in the collateral. This can include, for example, failure to maintain required insurance, waste or destructive use of the dwelling, failure to pay taxes, death of all persons liable on the account, transfer of title or sale of the dwelling, creation of a senior lien on the dwelling without our permission, foreclosure by the holder of another lien, or the use of funds or the dwelling for prohibited purposes.

Suspension or Reduction. In addition to any other rights we may have, we can suspend additional extensions of credit or reduce your Credit Limit during any period in which any of the following are in effect:

(1) The value of your property declines significantly below the property's appraised value for purposes of this Credit Line Account. This includes, for example, a decline such that the initial difference between the Credit Limit and the available equity is reduced by fifty percent and may include a smaller decline depending on the individual circumstances.

(2) We reasonably believe that you will be unable to fulfill your payment obligations under your Credit Line Account due to a material change in your financial circumstances.

(3) You are in default under any material obligations of this Credit Line Account. We consider all of your obligations to be material. Categories of material obligations include the events described above under Termination and Acceleration; obligations to pay fees and charges; obligations and limitations on the receipt of credit advances; obligations concerning maintenance or use of the property or proceeds; obligations to pay and perform the terms of any other deed of trust, mortgage or lease of the property; obligations to notify us and to provide documents or information to us (such as updated financial information); obligations to comply with applicable laws (such as zoning restrictions); and obligations of any comaker. No default will occur until we mail or deliver a notice of default to you, so you can restore your right to credit advances.

(4) We are precluded by government action from imposing the ANNUAL PERCENTAGE RATE provided for under this Agreement.

(5) The priority of our security interest is adversely affected by government action to the extent that the value of the security interest is less than one hundred twenty percent (120%) of the Credit Limit.

(6) We have been notified by governmental authority that continued advances may constitute an unsafe and unsound business practice.

Change in Terms. We may make changes to the terms of this Agreement if you agree to the change in writing at that time. If the change will unequivocally benefit you throughout the remainder of your Credit Line Account, or if the change is insignificant (such as changes relating to our data processing system), if the index is no longer available, we will choose a new index and margin. The new index will have an historical movement substantially similar to the original index, and the new index and margin will result in an ANNUAL PERCENTAGE RATE that is substantially similar to the rate in effect at the time the original index becomes unavailable. We may prohibit additional extensions of credit or reduce your Credit Limit during any period in which the maximum ANNUAL PERCENTAGE RATE under your Credit Line Account is reached.

Collection Costs. We may hire or pay someone else to help collect this Agreement if you do not pay. You will pay us that amount. This includes our reasonable attorneys' fees in an amount not less than fifteen percent (15%) of the amount owing on this Agreement and our legal expenses whether or not there is a lawsuit, including reasonable attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals. If not prohibited by applicable law, you also will pay any court costs, in addition to all other sums provided by law.

Access Devices. If your Credit Line is suspended or terminated, you must immediately return to us all Equity AssetLine Special Drafts and any other access devices. Any use of Equity AssetLine Special Drafts or other access devices following suspension or termination may be considered fraudulent. You will also remain liable for any further use of Equity AssetLine Special Drafts or other Credit Line access devices not returned to us.

Delay in Enforcement. We may delay or waive the enforcement of any of our rights under this Agreement without losing that right or any other right. If we delay or waive any of our rights, we may enforce that right at any time in the future without advance notice. For example, not terminating your account for non-payment will not be a waiver of our right to terminate your account in the future if you have not paid.

Cancellation by you. If you cancel your right to credit advances under this Agreement, you must notify us and return all Equity AssetLine Special Drafts and any other access devices to us. Despite cancellation, your obligations under this Agreement will remain in full force and effect until you have paid us all amounts due under this Agreement.

Prepayment. You may prepay all or any amount owing under this Credit Line at any time without penalty, except we will be entitled to receive all accrued FINANCE CHARGES, and other charges, if any. Payments in excess of your Minimum Payment will not relieve you of your obligation to continue to make your Minimum Payments. Instead, they will reduce the principal balance owed on the Credit Line. You agree not to send us payments marked "paid in full", "without recourse", or similar language. If you send such a payment, we may accept it without losing any of our rights under this Agreement, and you will remain obligated to pay any further amount owed to us. All written communications concerning disputed amounts, including any check or other payment instrument that indicates that the payment constitutes "payment in full" of the amount owed or that is rendered with other conditions or limitations or as full satisfaction of a disputed amount must be mailed or delivered to: Regions Bank, P.O. Box 4897 Montgomery, AL 36103-4897.

Notices. All notices will be sent to your address as shown in this Agreement. Notices will be mailed to you at a different address if you give us written notice of a different address. You agree to advise us promptly if you change your mailing address.

Annual Review. You agree that you will provide us with a current financial statement, a new credit application, or both, annually, on forms provided by us. Based upon this information we will conduct an annual review of your Credit Line Account. You also agree we may obtain credit reports on you at any time, at our sole option and expense, for any reason, including but not limited to determining whether there has been an adverse change in your financial condition. We may require a new appraisal of the Property which secures your Credit Line at any time, including an internal inspection, at our sole option and expense. You authorize us to release information about you to third parties as described in our privacy policy and our Fair Credit Reporting Act notice, provided you did not opt out of the applicable policy, or as permitted by law.

Transfer or Assignment. Without prior notice or approval from you, we reserve the right to sell or transfer your Credit Line Account and our rights and obligations under this Agreement to another lender, entity, or person, and to assign our rights under the mortgage or deed of trust.

EQUITY ASSETLINE AGREEMENT (Continued)

Loan No.:

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Your rights under this Agreement belong to you only and may not be transferred or assigned. Your obligations, however, are binding on your heirs and legal representatives. Upon any such sale or transfer, we will have no further obligation to provide you with credit advances or to perform any other obligation under this Agreement.

Tax Consequences. You understand that neither we, nor any of our employees or agents, make any representation or warranty whatsoever concerning the tax consequences of your establishing and using your Credit Line, including the deductibility of interest, and that neither we nor our employees or agents will be liable in the event interest on your Credit Line is not deductible. You should consult your own tax advisor for guidance on this subject.

Jury Waiver. We and you hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by either us or you against the other.

Requests for Special Services. In general, there are no borrower-paid fees associated with the routine servicing of a loan or line of credit. Borrower, however, may occasionally find it necessary to request services for which there is a charge. The services that fall outside of routine servicing include, without limitation, providing the following documents upon request: amortization schedule, duplicate year-end statements, copies of loan documents or periodic statements, payment histories, and replacement coupon books. Borrower agrees to pay the fees imposed by Lender in connection with providing the requested services, as in effect from time to time. Borrower also agrees to pay facsimile or other fees imposed by Lender if these services are requested on an expedited basis. All such fees shall be fully earned and non-refundable, and shall be paid upon Lender's demand (provided, that Lender, in its discretion, may add the fees to the principal indebtedness due, and accrue interest thereon, and the same shall be due, if not sooner demanded by Lender, upon the maturity of the indebtedness without further demand). The fees shall not be deemed to be interest or charges for the use of money. If Borrower requests services or documents as part of Lender's procedures for resolving a billing error on a line of credit, Lender will not impose, or will reverse, the fee.

Finance Charges / Fees Paid in Cash. All finance charges and/or fees denoted as "paid in cash" will be paid by Regions Bank.

Governing Law. This Agreement will be governed by and interpreted in accordance with federal law and the laws of the State of South Carolina. This Agreement has been accepted by us in the State of South Carolina.

Caption Headings. Caption headings in this Agreement are for convenience purposes only and are not to be used to interpret or define the provisions of this Agreement.

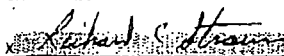
Interpretation. You agree that this Agreement, together with the mortgage or deed of trust, is the best evidence of your agreements with us. If we go to court for any reason, we can use a copy, filmed or electronic, of any periodic statement, this Agreement, the mortgage or deed of trust or any other document to prove what you owe us or that a transaction has taken place. The copy, microfilm, microfiche, or optical image will have the same validity as the original. You agree that, except to the extent you can show there is a billing error, your most current periodic statement is the best evidence of your obligation to pay.

Severability. If a court finds that any provision of this Agreement is not valid or should not be enforced, that fact by itself will not mean that the rest of this Agreement will not be valid or enforced. Therefore, a court will enforce the rest of the provisions of this Agreement even if a provision of this Agreement may be found to be invalid or unenforceable.

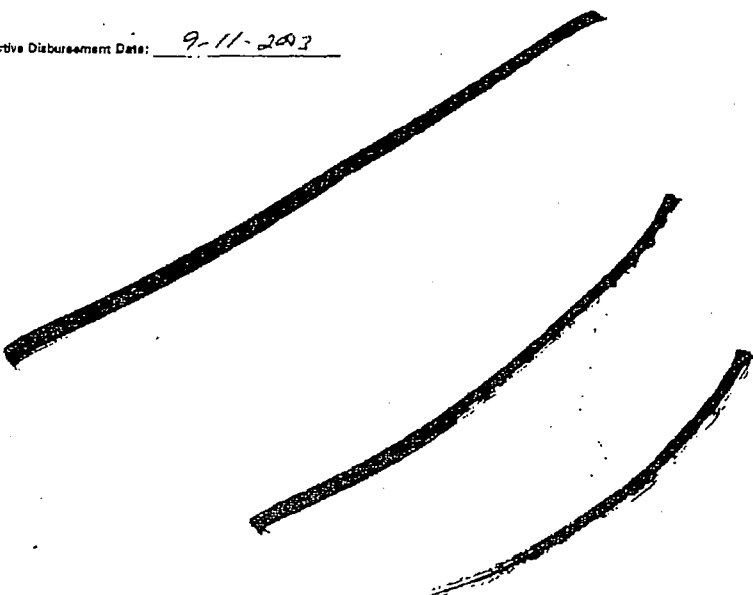
Arbitration. You and we agree that all disputes, claims and controversies between us whether individual, joint, or class in nature, arising from this Agreement or otherwise, including without limitation contract and tort disputes, shall be arbitrated pursuant to the Rules of the American Arbitration Association in effect at the time the claim is filed, upon request of either party. No act to take or dispose of any Property shall constitute a waiver of this arbitration agreement or be prohibited by this arbitration agreement. This includes, without limitation, obtaining injunctive relief or a temporary restraining order; invoking a power of sale under any deed of trust or mortgage; obtaining a writ of attachment or imposition of a receiver; or exercising any rights relating to personal property, including taking or disposing of such property with or without judicial process pursuant to Article 9 of the Uniform Commercial Code. Any disputes, claims, or controversies concerning the lawfulness or reasonableness of any act, or exercise of any right, concerning any Property, including any claim to rescind, reform, or otherwise modify any agreement relating to the Property, shall also be arbitrated, provided however that no arbitrator shall have the right or the power to enjoin or restrain any act of any party. Judgment upon any award rendered by any arbitrator may be entered in any court having jurisdiction. Nothing in this Agreement shall preclude any party from seeking equitable relief from a court of competent jurisdiction. The statute of limitations, a statute of waiver, laches, and similar doctrines which would otherwise be applicable in an action brought by a party shall be applicable in any arbitration proceeding, and the commencement of an arbitration proceeding shall be deemed the commencement of an action for these purposes. The Federal Arbitration Act shall apply to the construction, interpretation, and enforcement of this arbitration provision.

Acknowledgment. You understand and agree to the terms and conditions in this Agreement. By signing this Agreement, you acknowledge that you have read this Agreement. You also acknowledge receipt of a completed copy of this Agreement, including the Fair Credit Billing Notice and the early home equity line of credit application disclosure, in addition to the handbook entitled "When Your Home Is On the Line: What You Should Know About Home Equity Lines of Credit," given with the application.

CIT SIGNERS:


RICHARD C STRAWN

Effective Disbursement Date: 9-11-2003



Loan No:

EQUITY ASSETLINE AGREEMENT
(Continued)

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BILLING ERROR RIGHTS

YOUR BILLING RIGHTS

KEEP THIS NOTICE FOR FUTURE USE

This notice contains important information about your rights and our responsibilities under the Fair Credit Billing Act.

Notify us in case of errors or questions about your bill.

If you think your bill is wrong, or if you need more information about a transaction on your bill, write us on a separate sheet at

Regions Bank
P.O. Box 4897
Montgomery, AL 36103-4897

or at the address listed on your bill. Write to us as soon as possible. We must hear from you no later than sixty (60) days after we sent you the first bill on which the error or problem appeared. You can telephone us, but doing so will not preserve your rights.

In your letter, give us the following information:

Your name and account number.

The dollar amount of the suspected error.

Describe the error and explain, if you can, why you believe there is an error. If you need more information, describe the item you are not sure about.

If you have authorized us to pay your bill automatically from your savings or checking account, you can stop the payment on any amount you think is wrong. To stop the payment, your letter must reach us three (3) business days before the automatic payment is scheduled to occur.

Your rights and our responsibilities after we receive your written notice.

We must acknowledge your letter within thirty (30) days, unless we have corrected the error by then. Within ninety (90) days, we must either correct the error or explain why we believe the bill was correct.

After we receive your letter, we cannot try to collect any amount you question, or report you as delinquent. We can continue to bill you for the amount you question, including finance charges, and we can apply any unpaid amount against your Credit Limit. You do not have to pay any questioned amount while we are investigating, but you are still obligated to pay the parts of your bill that are not in question.

If we find that we made a mistake on your bill, you will not have to pay any finance charges related to any questioned amount. If we didn't make a mistake, you may have to pay finance charges, and you will have to make up any missed payments on the questioned amount. In either case, we will send you a statement of the amount you owe and the date on which it is due.

If you fail to pay the amount that we think you owe, we may report you as delinquent. However, if our explanation does not satisfy you and you write to us within ten (10) days telling us that you still refuse to pay, we must tell anyone we report you to that you have a question about your bill. And, we must tell you the name of anyone we reported you to. We must tell anyone we report you to that the matter has been settled between us when it finally is.

If we don't follow these rules, we can't collect the first \$50 of the questioned amount, even if your bill was correct.

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PLAINTIFF'S
EXHIBIT
"2"

010035711-10/22/2001 B04413 P00319

WHEN RECORDED MAIL TO:
REGIONS BANK
ANDERSON MAIN OFFICE
304 NORTH MAIN STREET
ANDERSON, SC 29621

SPACE ABOVE THIS LINE IS FOR RECORDER'S USE ONLY

Regions
Bank



00C4850000000201011211000000

MORTGAGE

MAXIMUM LIEN. The amount of indebtedness secured by this Mortgage, including the outstanding amount of the Credit Agreement and all future advances shall at no time exceed the principal amount of \$ 50,000.00, plus interest, reasonable attorneys' fees, court costs and the expenses to preserve and protect the Property. Interest under the Credit Agreement will be deferred, accrued or capitalized, but Lender shall not be required to defer, accrue or capitalize any interest except as provided in the Credit Agreement.

THIS MORTGAGE dated October 12, 2001, is made and executed between RICHARD C STRAWN, whose address is 105 Park Way, Anderson, SC 29625 (referred to below as "Grantor") and REGIONS BANK, whose address is 304 NORTH MAIN STREET, ANDERSON, SC 29621 (referred to below as "Lender").

GRANT OF MORTGAGE. For valuable consideration, Grantor mortgages, grants, and conveys to Lender all of Grantor's right, title, and interest in and to the following described real property, together with all existing or subsequently erected or affixed buildings, improvements and fixtures; all easements, rights of way, and appurtenances; all water, water rights, watercourses and ditch rights (including stock in utilities with ditch or irrigation rights); and all other rights, royalties, and profits relating to the real property, including without limitation all minerals, oil, gas, geothermal and similar matters, (the "Real Property") located in Anderson County, State of South Carolina:

See Exhibit "A", which is attached to this Mortgage and made a part of this Mortgage as if fully set forth herein.

The Real Property or its address is commonly known as 105 Park Way, Anderson, SC 29625.

REVOLVING LINE OF CREDIT. Specifically, in addition to the amounts specified in the indebtedness definition, and without limitation, this Mortgage secures a revolving line of credit, which obligates Lender to make advances to Grantor up to a maximum principal amount of \$50,000.00 so long as Grantor complies with all the terms of the Credit Agreement. Such advances may be made, repaid, and remade from time to time, subject to the limitation that the total outstanding balance owing at any one time, not including finance charges on such balance at a fixed or variable rate or sum as provided in the Credit Agreement, any temporary overages, other charges, and any amounts expended or advanced as provided in either the indebtedness paragraph or this paragraph, shall not exceed the Credit Limit as provided in the Credit Agreement. It is the intention of Grantor and Lender that this Mortgage secures the balance outstanding under the Credit Agreement from time to time from zero up to the Credit Limit as provided in this Mortgage and any intermediate balances. This Mortgage shall remain an open mortgage of record to secure future advances in accordance with Section 29-3-50, as amended, Code of Laws of South Carolina (1976) even in the event all sums secured by this Mortgage may be fully paid at any one time; however, upon request of Grantor, Lender will cause this Mortgage to be released and cancelled of record upon full payment of all indebtedness then owing, and upon such cancellation of this Mortgage of record, this Mortgage shall become null and void. Such release shall be without charge to Grantor; however, Grantor shall pay all costs of recordation, if any, and all documentary stamps due on the Credit Agreement evidencing future advances secured by this Mortgage.

Grantor presently assigns to Lender all of Grantor's right, title, and interest in and to all present and future leases of the Property and all Rents from the Property. In addition, Grantor grants to Lender a Uniform Commercial Code security interest in the Personal Property and Rents.

THIS MORTGAGE, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF EACH OF GRANTOR'S AGREEMENTS AND OBLIGATIONS UNDER THE CREDIT AGREEMENT, THE RELATED DOCUMENTS, AND THIS MORTGAGE. THIS MORTGAGE IS GIVEN AND ACCEPTED ON THE FOLLOWING TERMS:

PAYMENT AND PERFORMANCE. Except as otherwise provided in this Mortgage, Grantor shall pay to Lender all amounts secured by this Mortgage as they become due and shall strictly perform all of Grantor's obligations under this Mortgage.

POSSESSION AND MAINTENANCE OF THE PROPERTY. Grantor agrees that Grantor's possession and use of the Property shall be governed by the following provisions:

Possession and Use. Until the occurrence of an Event of Default, Grantor may: (1) remain in possession and control of the Property; (2) use, operate or manage the Property; and (3) collect the Rents from the Property.

Duty to Maintain. Grantor shall maintain the Property in good condition and promptly perform all repairs, replacements, and maintenance necessary to preserve its value.

Compliance With Environmental Laws. Grantor represents and warrants to Lender that: (1) During the period of Grantor's ownership of the Property, there has been no use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substance by any person on, under, about or from the Property; (2) Grantor has no knowledge of, or reason to believe that there has been, except as previously disclosed to and acknowledged by Lender in writing, (a) any breach or violation of any Environmental Laws, (b) any use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substance on, under, about or from the Property by any prior owners or occupants of the Property, or (c) any actual or threatened litigation or claims of any kind by any person relating to such matters; and (3) Except as previously disclosed to and acknowledged by Lender in writing, (a) neither Grantor nor any tenant, contractor, agent or other authorized user of the Property shall use, generate, manufacture, store, treat, dispose of or release any Hazardous Substance on, under, about or from the Property; and (b) any such activity shall be conducted in compliance with all applicable federal, state, and local laws, regulations and ordinances, including without limitation all Environmental Laws. Grantor authorizes Lender and its agents to enter upon the Property to make such inspections and tests, at Grantor's expense, as Lender may deem appropriate to determine compliance of the Property with this section of the Mortgage. Any inspections or tests made by Lender shall be for Lender's purposes only and shall not be construed to create any responsibility or liability on the part of Lender to Grantor or to any other person. The representations and warranties contained herein are based on Grantor's due diligence in investigating the Property for

COMMON PLEAS AND
GENERAL SESSIONS

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FILED-CLERK'S OFFICE
ANDERSON SC

010035711 10/22/2001 B04413 P00320

**MORTGAGE
(Continued)**

Loan No:

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Hazardous Substances. Grantor hereby (1) releases and waives any future claims against Lender for indemnity or contribution in the event Grantor becomes liable for cleanup or other costs under any such laws; and (2) agrees to indemnify and hold harmless Lender against any and all claims, losses, liabilities, damages, penalties, and expenses which Lender may directly or indirectly sustain or suffer resulting from a breach of this section of the Mortgage or as a consequence of any use, generation, manufacture, storage, disposal, release or threatened release occurring prior to Grantor's ownership or interest in the Property, whether or not the same was or should have been known to Grantor. The provisions of this section of the Mortgage, including the obligation to indemnify, shall survive the payment of the indebtedness and the satisfaction and reconveyance of the lien of this Mortgage and shall not be affected by Lender's acquisition of any interest in the Property, whether by foreclosure or otherwise.

Nuisance, Waste. Grantor shall not cause, conduct or permit any nuisance nor commit, permit, or suffer any stripping of or waste on or to the Property or any portion of the Property. Without limiting the generality of the foregoing, Grantor will not remove, or grant to any other party the right to remove, any timber, minerals (including oil and gas), coal, clay, scoria, soil, gravel or rock products without Lender's prior written consent.

Removal of Improvements. Grantor shall not demolish or remove any improvements from the Real Property without Lender's prior written consent. As a condition to the removal of any improvements, Lender may require Grantor to make arrangements satisfactory to Lender to replace such improvements with improvements of at least equal value.

Lender's Right to Enter. Lender and Lender's agents and representatives may enter upon the Real Property at all reasonable times to attend to Lender's interests and to inspect the Real Property for purposes of Grantor's compliance with the terms and conditions of this Mortgage.

Compliance with Governmental Requirements. Grantor shall promptly comply with all laws, ordinances, and regulations, now or hereafter in effect, of all governmental authorities applicable to the use or occupancy of the Property. Grantor may contest in good faith any such law, ordinance, or regulation and withhold compliance during any proceeding, including appropriate appeals, so long as Grantor has notified Lender in writing prior to doing so and so long as, in Lender's sole opinion, Lender's interests in the Property are not jeopardized. Lender may require Grantor to post adequate security or a surety bond, reasonably satisfactory to Lender, to protect Lender's interest.

Duty to Protect. Grantor agrees neither to abandon nor leave unattended the Property. Grantor shall do all other acts, in addition to those acts set forth above in this section, which from the character and use of the Property are reasonably necessary to protect and preserve the Property.

DUE ON SALE - CONSENT BY LENDER. Lender may, at Lender's option, declare immediately due and payable all sums secured by this Mortgage upon the sale or transfer, without Lender's prior written consent, of all or any part of the Real Property, or any interest in the Real Property. A "sale or transfer" means the conveyance of Real Property or any right, title or interest in the Real Property; whether legal, beneficial or equitable; whether voluntary or involuntary; whether by outright sale, deed, installment sale contract, land contract, contract for deed, leasehold interest with a term greater than three (3) years, lease-option contract, or by sale, assignment, or transfer of any beneficial interest in or to any land trust holding title to the Real Property, or by any other method of conveyance of an interest in the Real Property. However, this option shall not be exercised by Lender if such exercise is prohibited by federal law or by South Carolina law.

TAXES AND LIENS. The following provisions relating to the taxes and liens on the Property are part of this Mortgage:

Payment. Grantor shall pay when due (and in all events prior to delinquency) all taxes, payroll taxes, special taxes, assessments, water charges and sewer service charges levied against or on account of the Property, and shall pay when due all claims for work done on or for services rendered or material furnished to the Property. Grantor shall maintain the Property free of any liens having priority over or equal to the interest of Lender under this Mortgage, except for those liens specifically agreed to in writing by Lender, and except for the lien of taxes and assessments not due as further specified in the Right to Contest paragraph.

Right to Contest. Grantor may withhold payment of any tax, assessment, or claim in connection with a good faith dispute over the obligation to pay, so long as Lender's interest in the Property is not jeopardized. If a lien arises or is filed as a result of nonpayment, Grantor shall within fifteen (15) days after the lien arises or, if a lien is filed, within fifteen (15) days after Grantor has notice of the filing, secure the discharge of the lien, or if requested by Lender, deposit with Lender cash or a sufficient corporate surety bond or other security satisfactory to Lender in an amount sufficient to discharge the lien plus any costs and reasonable attorneys' fees, or other charges that could accrue as a result of a foreclosure or sale under the lien. In any contest, Grantor shall defend itself and Lender and shall satisfy any adverse judgment before enforcement against the Property. Grantor shall name Lender as an additional obligee under any surety bond furnished in the contest proceedings.

Evidence of Payment. Grantor shall upon demand furnish to Lender satisfactory evidence of payment of the taxes or assessments and shall authorize the appropriate governmental official to deliver to Lender at any time a written statement of the taxes and assessments against the Property.

Notice of Construction. Grantor shall notify Lender at least fifteen (15) days before any work is commenced, any services are furnished, or any materials are supplied to the Property, if any mechanic's lien, materialman's lien, or other lien could be asserted on account of the work, services, or materials. Grantor will upon request of Lender furnish to Lender advance assurances satisfactory to Lender that Grantor can and will pay the cost of such improvements.

PROPERTY DAMAGE INSURANCE. The following provisions relating to insuring the Property are a part of this Mortgage:

Maintenance of Insurance. Grantor shall procure and maintain policies of fire insurance with standard extended coverage endorsements on a replacement basis for the full insurable value covering all improvements on the Real Property in an amount sufficient to avoid application of any coinsurance clause, and with a standard mortgage clause in favor of Lender. Policies shall be written by such insurance companies and in such form as may be reasonably acceptable to Lender. Grantor shall deliver to Lender certificates of coverage from each insurer containing a stipulation that coverage will not be cancelled or diminished without a minimum of ten (10) days' prior written notice to Lender and not containing any disclaimer of the insurer's liability for failure to give such notice. Each insurance policy also shall include an endorsement providing that coverage in favor of Lender will not be impaired in any way by any act, omission or default of Grantor or any other person. Should the Real Property be located in an area designated by the Director of the Federal Emergency Management Agency as a special flood hazard area, Grantor agrees to obtain and maintain Federal Flood Insurance, if available, within 45 days after notice is given by Lender that the Property is located in a special flood hazard area, for the full unpaid principal balance of the loan and any prior liens on the property securing the loan, up to the maximum policy limits set under the National Flood Insurance Program, or as otherwise required by Lender, and to maintain such insurance for the term of the loan.

Application of Proceeds. Grantor shall promptly notify Lender of any loss or damage to the Property. Lender may make proof of loss if Grantor fails to do so within fifteen (15) days of the casualty. Whether or not Lender's security is impaired, Lender may, at Lender's election, receive and retain the proceeds of any insurance and apply the proceeds to the reduction of the indebtedness, payment of any lien affecting the Property, or the restoration and repair of the Property. If Lender elects to apply the proceeds to restoration and repair, Grantor shall repair or replace the damaged or destroyed improvements in a manner satisfactory to Lender. Lender shall, upon satisfactory proof of such expenditure, pay or reimburse Grantor from the proceeds for the reasonable cost of repair or restoration if Grantor is not in default under this Mortgage. Any proceeds which have not been disbursed within 180 days after their receipt and which Lender has not committed to the repair or restoration of the Property shall be used first to pay any amount owing to Lender under this Mortgage, then to pay accrued interest, and the remainder, if any, shall be applied to the principal balance of the indebtedness. If Lender holds any proceeds after payment in full of the indebtedness, such proceeds shall be paid to Grantor as Grantor's interests may appear.

Unexpired Insurance at Sale. Any unexpired insurance shall inure to the benefit of, and pass to, the purchaser of the Property covered by this Mortgage at any trustee's sale or other sale held under the provisions of this Mortgage, or at any foreclosure sale of such Property.

LENDER'S EXPENDITURES. If Grantor fails (A) to keep the Property free of all taxes, liens, security interests, encumbrances, and other claims, (B) to provide any required insurance on the Property, or (C) to make repairs to the Property then Lender may do so. If any action or proceeding is commenced that would materially affect Lender's interests in the Property, then Lender on Grantor's behalf may, but is not required to, take any action that Lender believes to be appropriate to protect Lender's interests. All expenses incurred or paid by Lender for such purposes will then bear interest at the rate charged under the Credit Agreement from the date incurred or paid by Lender to the date of repayment by Grantor. All such expenses will become a part of the indebtedness and, at Lender's option, will (A) be payable on demand; (B) be added to the balance of the Credit Agreement and be apportioned among and be payable with any installment payments to become due during either (1) the term of any applicable insurance policy; or (2) the remaining term of the Credit Agreement; or (C) be treated as a balloon payment which will be due and payable at the Credit Agreement's maturity. The Mortgage also will secure payment of these amounts. The rights provided for in this paragraph shall be in addition to any other rights or any remedies to which Lender may be entitled on account of any default. Any such action by Lender shall not be construed as curing the default so as to bar Lender from any remedy that it otherwise would have had.

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All that certain piece, parcel or lot of land lying and being situate in the State of South Carolina, County of Anderson, Centerville Township, being shown and designated as Lot Number Three (3) on that certain plat prepared by Nu-South Surveying, Inc., Earl B. O'Brien, RLS dated December 21, 1994 and of record in the Office of the Register of Deeds for Anderson County, South Carolina in Plat Slide 755 at Pages 4 & 5, and having the metes and bounds, courses and distances as upon said plat will appear, being incorporated herein and made a part hereof by reference thereto.

This being the same property conveyed unto Mortgagor herein by deed of J. Howard Construction Company recorded May 14, 2001 in the Office of the Register of Deeds for Anderson County, South Carolina in Book 4174 a Page 91.

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WARRANTY; DEFENSE OF TITLE. The following provisions relating to ownership of the Property are a part of this Mortgage:

Title. Grantor warrants that: (a) Grantor holds good and marketable title of record to the Property in fee simple, free and clear of all liens and encumbrances other than those set forth in the Real Property description or in any life insurance policy, title report, or final title opinion issued in favor of, and accepted by, Lender in connection with this Mortgage, and (b) Grantor has the full right, power, and authority to execute and deliver this Mortgage to Lender.

Defense of Title. Subject to the exception in the paragraph above, Grantor warrants and will forever defend the title to the Property against the lawful claims of all persons. In the event any action or proceeding is commenced that questions Grantor's title or the interest of Lender under this Mortgage, Grantor shall defend the action at Grantor's expense. Grantor may be the nominal party in such proceeding, but Lender shall be entitled to participate in the proceeding and to be represented in the proceeding by counsel of Lender's own choice, and Grantor will deliver, or cause to be delivered, to Lender such instruments as Lender may request from time to time to permit such participation.

Compliance With Laws. Grantor warrants that the Property and Grantor's use of the Property complies with all existing applicable laws, ordinances, and regulations of governmental authorities.

Survival of Promises. All promises, agreements, and statements Grantor has made in this Mortgage shall survive the execution and delivery of this Mortgage, shall be continuing in nature and shall remain in full force and effect until such time as Grantor's indebtedness is paid in full.

CONDEMNATION. The following provisions relating to condemnation proceedings are a part of this Mortgage:

Proceedings. If any proceeding in condemnation is filed, Grantor shall promptly notify Lender in writing, and Grantor shall promptly take such steps as may be necessary to defend the action and obtain the award. Grantor may be the nominal party in such proceeding, but Lender shall be entitled to participate in the proceeding and to be represented in the proceeding by counsel of its own choice, and Grantor will deliver or cause to be delivered to Lender such instruments and documentation as may be requested by Lender from time to time to permit such participation.

Application of Net Proceeds. If all or any part of the Property is condemned by eminent domain proceedings or by any proceeding or purchase in lieu of condemnation, Lender may at its election require that all or any portion of the net proceeds of the award be applied to the indebtedness or the repair or restoration of the Property. The net proceeds of the award shall mean the award after payment of all reasonable costs, expenses, and attorneys' fees incurred by Lender in connection with the condemnation.

IMPOSITION OF TAXES, FEES AND CHARGES BY GOVERNMENTAL AUTHORITIES. The following provisions relating to governmental taxes, fees and charges are a part of this Mortgage:

Current Taxes, Fees and Charges. Upon request by Lender, Grantor shall execute such documents in addition to this Mortgage and take whatever other action is requested by Lender to perfect and continue Lender's lien on the Real Property. Grantor shall reimburse Lender for all taxes, as described below, together with all expenses incurred in recording, perfecting or continuing this Mortgage, including without limitation all taxes, fees, documentary stamps, and other charges for recording or registering this Mortgage.

Taxes. The following shall constitute taxes to which this section applies: (1) a specific tax upon this type of Mortgage or upon all or any part of the indebtedness secured by this Mortgage; (2) a specific tax on Grantor which Grantor is authorized or required to deduct from payments on the indebtedness secured by this type of Mortgage; (3) a tax on this type of Mortgage chargeable against the Lender or the holder of the Credit Agreement; and (4) a specific tax on all or any portion of the indebtedness or on payments of principal and interest made by Grantor.

Subsequent Taxes. If any tax to which this section applies is enacted subsequent to the date of this Mortgage, this event shall have the same effect as an Event of Default, and Lender may exercise any or all of its available remedies for an Event of Default as provided below unless Grantor either: (1) pays the tax before it becomes delinquent, or (2) contests the tax as provided above in the Taxes and Liens section and deposits with Lender cash or a sufficient corporate surety bond or other security satisfactory to Lender.

SECURITY AGREEMENT; FINANCING STATEMENTS. The following provisions relating to this Mortgage as a security agreement are a part of this Mortgage:

Security Agreement. This instrument shall constitute a Security Agreement to the extent any of the Property constitutes fixtures, and Lender shall have all of the rights of a secured party under the Uniform Commercial Code as amended from time to time.

Security Interest. Upon request by Lender, Grantor shall execute financing statements and take whatever other action is requested by Lender to perfect and continue Lender's security interest in the Personal Property. In addition to recording this Mortgage in the real property records, Lender may, at any time and without further authorization from Grantor, file executed counterparts, copies or reproductions of this Mortgage as a financing statement. Grantor shall reimburse Lender for all expenses incurred in perfecting or continuing this security interest. Upon default, Grantor shall not remove, sever or detach the Personal Property from the Property. Upon default, Grantor shall assemble any Personal Property not affixed to the Property in a manner and at a place reasonably convenient to Grantor and Lender and make it available to Lender within three (3) days after receipt of written demand from Lender to the extent permitted by applicable law.

Addressees. The mailing addresses of Grantor (debtor) and Lender (secured party) from which information concerning the security interest granted by this Mortgage may be obtained (such as required by the Uniform Commercial Code) are as stated on the first page of this Mortgage.

FURTHER ASSURANCES; ATTORNEY-IN-FACT. The following provisions relating to further assurances and attorney-in-fact are a part of this Mortgage:

Further Assurances. At any time, and from time to time, upon request of Lender, Grantor will make, execute and deliver, or will cause to be made, executed or delivered, to Lender or to Lender's designee, and when requested by Lender, cause to be filed, recorded, refiled, or re-recorded, as the case may be, at such times and in such offices and places as Lender may deem appropriate, any and all such mortgages, deeds of trust, security deeds, security agreements, financing statements, continuation statements, instruments of further assurance, certificates, and other documents as may, in the sole opinion of Lender, be necessary or desirable in order to effectuate, complete, perfect, continue, or preserve (1) Grantor's obligations under the Credit Agreement, this Mortgage, and the Related Documents, and (2) the liens and security interests created by this Mortgage as first and prior liens on the Property, whether now owned or hereafter acquired by Grantor. Unless prohibited by law or Lender agrees to the contrary in writing, Grantor shall reimburse Lender for all costs and expenses incurred in connection with the matters referred to in this paragraph.

Attorney-in-Fact. If Grantor fails to do any of the things referred to in the preceding paragraph, Lender may do so for and in the name of Grantor and at Grantor's expense. For such purposes, Grantor hereby irrevocably appoints Lender as Grantor's attorney-in-fact for the purpose of making, executing, delivering, filing, recording, and doing all other things as may be necessary or desirable, in Lender's sole opinion, to accomplish the matters referred to in the preceding paragraph.

FULL PERFORMANCE. If Grantor pays all the indebtedness when due, terminates the credit line account, and otherwise performs all the obligations imposed upon Grantor under this Mortgage, Lender shall execute and deliver to Grantor a suitable satisfaction of this Mortgage and suitable statements of termination of any financing statement on file evidencing Lender's security interest in the Real Property and the Personal Property. Grantor will pay, if permitted by applicable law, any reasonable termination fee as determined by Lender from time to time.

EVENTS OF DEFAULT. Grantor will be in default under this Mortgage if any of the following happen: (A) Grantor commits fraud or makes a material misrepresentation at any time in connection with the Credit Agreement. This can include, for example, a false statement about Grantor's income, assets, liabilities, or any other aspects of Grantor's financial condition. (B) Grantor does not meet the repayment terms of the Credit Agreement. (C) Grantor's action or inaction adversely affects the collateral or Lender's rights in the collateral. This can include, for example, failure to maintain required insurance, waste or destructive use of the dwelling, failure to pay taxes, death of all persons liable on the account, transfer of title or sale of the dwelling, creation of a senior lien on the dwelling without Lender's permission, foreclosure by the holder of another lien, or the use of funds or the dwelling for prohibited purposes.

RIGHTS AND REMEDIES ON DEFAULT. Upon the occurrence of an Event of Default and at any time thereafter, Lender, at Lender's option, may exercise any one or more of the following rights and remedies, in addition to any other rights or remedies provided by law:

Accelerate Indebtedness. Lender shall have the right at its option without notice to Grantor to declare the entire indebtedness immediately due and payable, including any prepayment penalty which Grantor would be required to pay.

UCC Remedies. With respect to all or any part of the Personal Property, Lender shall have all the rights and remedies of a secured party

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under the Uniform Commercial Code.

Collect Rents. Lender shall have the right, without notice to Grantor, to take possession of the Property and, as mortgagee-in-possession, collect the Rents, including amounts past due and unpaid, and apply the net proceeds, over and above Lender's costs, against the Indebtedness. In furtherance of this right, Lender may require any tenant or other user of the Property to make payments of rent or use fees directly to Lender. If the Rents are collected by Lender, then Grantor irrevocably designates Lender as Grantor's attorney-in-fact to endorse instruments received in payment thereof in the name of Grantor and to negotiate the same and collect the proceeds. Payments by tenants or other users to Lender in response to Lender's demand shall satisfy the obligations for which the payments are made, whether or not any proper grounds for the demand existed. Lender may exercise its rights under this subparagraph either in person, by agent, or through a receiver.

Appoint Receiver. Lender shall have the right to have a receiver appointed to take possession of all or any part of the Property, with the power to protect and preserve the Property, to operate the Property preceding foreclosure or sale, and to collect the Rents from the Property and apply the proceeds, over and above the cost of the receivership, against the Indebtedness. The receiver may serve without bond if permitted by law. Lender's right to the appointment of a receiver shall exist whether or not the apparent value of the Property exceeds the Indebtedness by a substantial amount. Employment by Lender shall not disqualify a person from serving as a receiver.

Judicial Foreclosure. Lender may obtain a judicial decree foreclosing Grantor's interest in all or any part of the Property.

Nonjudicial Sale. If permitted by applicable law, Lender may foreclose Grantor's interest in all or in any part of the Personal Property or the Real Property by non-judicial sale.

Deficiency Judgment. If permitted by applicable law, Lender may obtain a judgment for any deficiency remaining in the Indebtedness due to Lender after application of all amounts received from the exercise of the rights provided in this section.

Appraisal. Grantor hereby waives the right to assert any statute providing appraisal rights which may reduce any deficiency judgment obtained by Lender against Grantor in the event of foreclosure under this Mortgage.

Tenancy at Sufferance. If Grantor remains in possession of the Property after the Property is sold as provided above or Lender otherwise becomes entitled to possession of the Property upon default of Grantor, Grantor shall become a tenant at sufferance of Lender or the purchaser of the Property and shall, at Lender's option, either (1) pay a reasonable rental for the use of the Property, or (2) vacate the Property immediately upon the demand of Lender.

Other Remedies. Lender shall have all other rights and remedies provided in this Mortgage or the Credit Agreement or available at law or in equity.

Sale of the Property. To the extent permitted by applicable law, Grantor hereby waives any and all right to have the Property marshalled. In exercising its rights and remedies, Lender shall be free to sell all or any part of the Property together or separately, in one sale or by separate sales. Lender shall be entitled to bid at any public sale on all or any portion of the Property.

Notice of Sale. Lender will give Grantor reasonable notice of the time and place of any public sale of the Personal Property or of the time after which any private sale or other intended disposition of the Personal Property is to be made. Reasonable notice shall mean notice given at least ten (10) days before the time of the sale or disposition.

Election of Remedies. All of Lender's rights and remedies will be cumulative and may be exercised alone or together. An election by Lender to choose any one remedy will not bar Lender from using any other remedy. If Lender decides to spend money or to perform any of Grantor's obligations under this Mortgage, after Grantor's failure to do so, that decision by Lender will not affect Lender's right to declare Grantor in default and to exercise Lender's remedies.

Attorneys' Fees; Expenses. If Lender institutes any suit or action to enforce any of the terms of this Mortgage, Lender shall be entitled to recover such sum as the court may adjudge reasonable as attorneys' fees at trial and upon any appeal. Whether or not any court action is involved, and to the extent not prohibited by law, all reasonable expenses Lender incurs that in Lender's opinion are necessary at any time for the protection of its interest or the enforcement of its rights shall become a part of the Indebtedness payable on demand and shall bear interest at the Credit Agreement rate from the date of the expenditure until repaid. Expenses covered by this paragraph include, without limitation, however subject to any limits under applicable law, Lender's reasonable attorneys' fees in an amount not less than fifteen percent (15%) of the amount owing on the Indebtedness and Lender's legal expenses whether or not there is a lawsuit, including reasonable attorneys' fees and expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services, the cost of searching records, obtaining title reports (including foreclosure reports), surveyors' reports, and appraisal fees and title insurance, to the extent permitted by applicable law. Grantor also will pay any court costs, in addition to all other sums provided by law.

NOTICES. Any notice required to be given under this Mortgage, including without limitation any notice of default and any notice of sale shall be given in writing, and shall be effective when actually delivered, when actually received by telefacsimile (unless otherwise required by law), when deposited with a nationally recognized overnight courier, or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addresses shown near the beginning of this Mortgage. All copies of notices of foreclosure from the holder of any lien which has priority over this Mortgage shall be sent to Lender's address, as shown near the beginning of this Mortgage. Any person may change his or her address for notices under this Mortgage by giving formal written notice to the other person or persons, specifying that the purpose of the notice is to change the person's address. For notice purposes, Grantor agrees to keep Lender informed at all times of Grantor's current address. Unless otherwise provided or required by law, if there is more than one Grantor, any notice given by Lender to any Grantor is deemed to be notice given to all Grantors. It will be Grantor's responsibility to tell the others of the notice from Lender.

MISCELLANEOUS PROVISIONS. The following miscellaneous provisions are a part of this Mortgage:

Amendments. What is written in this Mortgage and in the Related Documents is Grantor's entire agreement with Lender concerning the matters covered by this Mortgage. To be effective, any change or amendment to this Mortgage must be in writing and must be signed by whoever will be bound or obligated by the change or amendment.

Arbitration. Grantor and Lender agree that all disputes, claims and controversies between us whether individual, joint, or class in nature, arising from this Mortgage or otherwise, including without limitation contract and tort disputes, shall be arbitrated pursuant to the Rules of the American Arbitration Association in effect at the time the claim is filed, upon request of either party. No act to take or dispose of any Property shall constitute a waiver of this arbitration agreement or be prohibited by this arbitration agreement. This includes, without limitation, obtaining injunctive relief or a temporary restraining order; invoking a power of sale under any deed of trust or mortgage; obtaining a writ of attachment or imposition of a receiver; or exercising any rights relating to personal property, including taking or disposing of such property with or without judicial process pursuant to Article 9 of the Uniform Commercial Code. Any disputes, claims, or controversies concerning the lawfulness or reasonableness of any act, or exercise of any right, concerning any Property, including any claim to rescind, reform, or otherwise modify any agreement relating to the Property, shall also be arbitrated, provided however that no arbitrator shall have the right or the power to enjoin or restrain any act of any party. Judgment upon any award rendered by any arbitrator may be entered in any court having jurisdiction. Nothing in this Mortgage shall preclude any party from seeking equitable relief from a court of competent jurisdiction. The statute of limitations, estoppel, waiver, laches, and similar doctrines which would otherwise be applicable in an action brought by a party shall be applicable in any arbitration proceeding, and the commencement of an arbitration proceeding shall be deemed the commencement of an action for these purposes. The Federal Arbitration Act shall apply to the construction, interpretation, and enforcement of this arbitration provision.

Caption Headings. Caption headings in this Mortgage are for convenience purposes only and are not to be used to interpret or define the provisions of this Mortgage.

Governing Law. This Mortgage will be governed by and interpreted in accordance with federal law and the laws of the State of South Carolina. This Mortgage has been accepted by Lender in the State of South Carolina.

No Waiver by Lender. Grantor understands Lender will not give up, any of Lender's rights under this Mortgage unless Lender does so in writing. The fact that Lender delays or omits to exercise any right will not mean that Lender has given up that right. If Lender does agree in writing to give up one of Lender's rights, that does not mean Grantor will not have to comply with the other provisions of this Mortgage. Grantor also understands that if Lender does consent to a request, that does not mean that Grantor will not have to get Lender's consent again if the situation happens again. Grantor further understands that just because Lender consents to one or more of Grantor's requests, that does not mean Lender will be required to consent to any of Grantor's future requests. Grantor waives presentment, demand for payment, protest, and notice of dishonor. Grantor waives all rights of exemption from execution or similar law in the Property (including without limitation, the homestead exemption), and Grantor agrees that the rights of Lender in the Property under this Mortgage are prior to Grantor's rights while this Mortgage remains in effect.

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Severability. If a court finds that any provision of this Mortgage is not valid or should not be enforced, that fact by itself will not mean that the rest of this Mortgage will not be valid or enforced. Therefore, a court will enforce the rest of the provisions of this Mortgage even if a provision of this Mortgage may be found to be invalid or unenforceable.

Merger. There shall be no merger of the interest or estate created by this Mortgage with any other interest or estate in the Property at any time held by or for the benefit of Lender in any capacity, without the written consent of Lender.

Successors and Assigns. Subject to any limitations stated in this Mortgage on transfer of Grantor's interest, this Mortgage shall be binding upon and inure to the benefit of the parties, their successors and assigns. If ownership of the Property becomes vested in a person other than Grantor, Lender, without notice to Grantor, may deal with Grantor's successors with reference to this Mortgage and the indebtedness by way of forbearance or extension without releasing Grantor from the obligations of this Mortgage or liability under the Indebtedness.

Time is of the Essence. Time is of the essence in the performance of this Mortgage.

Waive Jury. All parties to this Mortgage hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by any party against any other party.

Waiver of Homestead Exemption. Grantor hereby releases and waives all rights and benefits of the homestead exemption laws of the State of South Carolina as to all indebtedness secured by this Mortgage.

DEFINITIONS. The following words shall have the following meanings when used in this Mortgage:

Borrower. The word "Borrower" means RICHARD C STRAWN, and all other persons and entities signing the Credit Agreement.

Credit Agreement. The words "Credit Agreement" mean the credit agreement dated October 12, 2001, with credit limit of \$50,000.00 from Grantor to Lender, together with all renewals, extensions, modifications of, refinancings of, consolidations of, and substitutions for the promissory note or agreement. The maturity date of this Mortgage is.

Environmental Laws. The words "Environmental Laws" mean any and all state, federal and local statutes, regulations and ordinances relating to the protection of human health or the environment, including without limitation the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq. ("CERCLA"), the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 ("SARA"), the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq., the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901, et seq., or other applicable state or federal laws, rules, or regulations adopted pursuant thereto.

Event of Default. The words "Event of Default" mean any of the events of default set forth in this Mortgage in the events of default section of this Mortgage.

Grantor. The word "Grantor" means RICHARD C STRAWN.

Hazardous Substances. The words "Hazardous Substances" mean materials that, because of their quantity, concentration or physical, chemical or infectious characteristics, may cause or pose a present or potential hazard to human health or the environment when improperly used, treated, stored, disposed of, generated, manufactured, transported or otherwise handled. The words "Hazardous Substances" are used in their very broadest sense and include without limitation any and all hazardous or toxic substances, materials or waste as defined by or listed under the Environmental Laws. The term "Hazardous Substances" also includes, without limitation, petroleum and petroleum by-products or any fraction thereof and asbestos.

Improvements. The word "Improvements" means all existing and future improvements, buildings, structures, mobile homes affixed on the Real Property, facilities, additions, replacements and other construction on the Real Property.

Indebtedness. The word "Indebtedness" means all principal, earned interest, and other amounts, costs and expenses payable under the Credit Agreement or Related Documents, together with all renewals of, extensions of, modifications of, consolidations of and substitutions for the Credit Agreement or Related Documents and any amounts expended or advanced by Lender to discharge Grantor's obligations or expenses incurred by Lender to enforce Grantor's obligations under this Mortgage, together with interest on such amounts as provided in this Mortgage.

Lender. The word "Lender" means REGIONS BANK, its successors and assigns. The words "successors or assigns" mean any person or company that acquires any interest in the Credit Agreement.

Mortgage. The word "Mortgage" means this Mortgage between Grantor and Lender.

Personal Property. The words "Personal Property" mean all equipment, fixtures, and other articles of personal property now or hereafter owned by Grantor, and now or hereafter attached or affixed to the Real Property; together with all accessories, parts, and additions to, all replacements of, and all substitutions for, any of such property; and together with all proceeds (including without limitation all insurance proceeds and refunds of premiums) from any sale or other disposition of the Property.

Property. The word "Property" means collectively the Real Property and the Personal Property.

Real Property. The words "Real Property" mean the real property, interests and rights, as further described in this Mortgage.

Related Documents. The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, environmental agreements, guarantees, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness.

Rents. The word "Rents" means all present and future rents, revenues, income, issues, royalties, profits, and other benefits derived from the Property.

GRANTOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS MORTGAGE, AND GRANTOR AGREES TO ITS TERMS.

GRANTOR:

Richard C Strawn
x RICHARD C STRAWN, Individually

Signed, acknowledged and delivered in the presence of:

x *Witness*
x Witness
Witness

010035711 10/22/2001 B04413 P00325

Loan No: **MORTGAGE (Continued)** Page 8

INDIVIDUAL ACKNOWLEDGMENT

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

185

PERSONALLY appeared before me and made oath that he or she saw the within-named Grantor(s) sign, seal, and, as his or her act and deed, deliver the within-written Mortgage for the uses and purposes therein mentioned, and that he or she with the other witness subscribed above witnessed the execution thereof.

SWORN to before me this 12th

day of October, A.D. 2001

[Signature] (Seal)
Notary Public

My Commission expires: 10/7/2004

[Signature]
(Witness)

LOAN AND LENDING, INC. 13701 DE CAY, HANCOCK COUNTY, SOUTH CAROLINA 29523-1000. ALL RIGHTS RESERVED. © 2001. ALL RIGHTS RESERVED. THE REGISTER OF DEEDS, ANDERSON CO., SC

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Bk:04413 Pg:00313 Pages:7
Rec Fee:13.00 St Fee:0.00
Co Fee:0.00
REGISTER OF DEEDS, ANDERSON CO., SC
Shirley McElhannon

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

MORTGAGE LIEN
SATISFACTION AFFIDAVIT
PURSUANT TO SECTION 29-3-330
OF SC CODE LAWS
FOR BOOK 4413 AT PAGE 319



CANCELLED OF RECORD

The undersigned on oath, being first duly sworn, hereby certifies as follows:

1. The undersigned is a licensed attorney admitted to practice in the State of South Carolina.
2. That with respect to the mortgage given by Richard C. Strawn to REGIONS BANK dated October 12, 2001 in the amount of \$50,000.00, recorded in the Office of the Register of Deeds in Book 4413 at Page 319.
 - a. (x) That the undersigned was given written payoff information and made such payoff and is in possession of a canceled check to the mortgagee, holder of record, or representative servicer;
 - b. () That the undersigned was given written payoff information and made such payoff by wire transfer or other electronic means to the mortgagee, holder of record, or representative servicer and has confirmation from the undersigned's bank of the transfer to the account provided by the mortgagee, holder of record, or representative servicer.

Under penalties of perjury, I declare that I have examined this affidavit this 21st day of December, 2005 and, to the best of my knowledge and belief, it is true, correct, and complete.

Cathy Slaton
(Witness)

[Signature]
(Signature)

[Signature]
(Witness)

JAMES S. BELK
(Name- Please Print)

000626
(Attorney's S.C. Bar Number)

SUBSCRIBED AND SWORN TO
before me this 21st day

1202 N. MAIN STREET
(Street Address)

of December, 2005

ANDERSON, SC 29621
(City, State, Zip)

Cathy Slaton
Notary Public for South Carolina
Commission Expires: 10/23/2013

COMMON PLEAS AND
GENERAL SESSIONS

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ANDERSON SC

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Rec Fee: 5.00 St Fee:
Co Fee:
REGISTER OF DEEDS, ANDERSON CO, SC
Shirley McElhannon

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS

Regions Bank,

Plaintiff,

-vs-

Richard C. Strawn, Robert K. Borchers,
individually and as personal representative of
the Estate of Marie Borchers and Nancy
Davidson Borchers,

Defendants.

ANSWER OF DEFENDANT ROBERT
BORCHER, INDIVIDUALLY AND AS
PERSONAL REPRESENTATIVE OF THE
ESTATE OF MARIE BORCHERS AND
NANCY BORCHERS, CROSSCLAIM AND
THIRD PARTY ACTION

CASE NO.:2006-CP-04-770

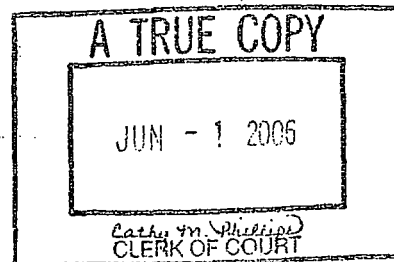
Robert Borchers, individually and as personal
representative of the Estate of Marie Borchers
and Nancy Borchers,

Third Party Plaintiffs,

-vs-

James Belk,

Third Party Defendant.



TO: PLAINTIFF AND ITS ATTORNEY HAROLD P. THRELKELD:

Defendants Robert Borchers, individually and as personal representative of the Estate of Marie Borchers, and Nancy Borchers answering Plaintiff's complaint and by way of cross claim and counterclaim, would respectfully show unto this Court as follows:

FOR A FIRST DEFENSE

1. Except as otherwise admitted, explained, or modified herein, Defendant denies each allegation of Plaintiff's Complaint and demands strict proof thereof.

FOR A SECOND DEFENSE

2. All prior defenses and allegations are incorporated herein by reference. Your Defendant admits the allegations contained in Paragraphs 1 and 2 of the Plaintiff's Complaint.
3. Your Defendant lacks sufficient information to admit or deny the allegations contained in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of the Plaintiff's Complaint and therefore denies same and demands strict proof thereof.
4. Upon information and belief, your Defendant admits the allegations contained in paragraph 14 of the Plaintiff's Complaint.
5. Your Defendant admits the allegations contained in paragraphs 15 and 16 of the Plaintiff's Complaint.
6. Upon information and belief, your Defendant admits the allegations contained in paragraph 17 of the Plaintiff's Complaint.
7. Your Defendant is without sufficient information to admit or deny the allegations contained in paragraphs 18, 19, 20 and 21 of the Plaintiff's Complaint and therefore denies same and demands strict proof thereof.
8. No response is required to paragraph 22.
9. Your Defendant is without sufficient information to admit or deny the allegations contained in paragraphs 22, 23, 24, 25, 26, 27 and 28, and therefore deny same and demand strict proof thereof.
10. Upon information and belief, your Defendant admits the allegations contained in paragraph 29 fo the Plaintiff's complaint.
11. Your Defendant is without sufficient information to admit or deny the allegations contained in paragraphs 30 and 31 of the Plaintiff's Complaint and demands strict proof

thereof.

FOR A THIRD DEFENSE

12. All prior defenses and allegations are incorporated herein by reference. The Complaint fails to state facts sufficient to constitute a cause of action for which relief may be granted against this Defendant.

FOR A FOURTH DEFENSE

13. All prior defenses and allegations are incorporated herein by reference. At all time relevant herein, Marie Borchers was a bona fide purchaser in good faith for value of the subject property. Accordingly, this Defendant is entitled to the ownership, possession and enjoyment of the subject property.

FOR A FIFTH DEFENSE

14. All prior defenses and allegations are incorporated herein by reference. At all times, your Defendant acted in good faith, exercised reasonable care, breached no duty or obligation owed to Plaintiff and made no false or misleading representation to Plaintiff.

FOR A SIXTH DEFENSE

15. All prior defenses and allegations are incorporated herein by reference. To the extent that Plaintiff seeks relief for actions taking place more than three years prior to the filing of this Complaint, such claims are barred by the applicable statute of limitations.

FOR A SEVENTH DEFENSE

16. All prior defenses and allegations are incorporated herein by reference. Plaintiff's damages were solely and proximately caused by the conduct of others over whom your Defendant had no control and for whose unforeseeable actions your Defendant is not liable.

FOR AN EIGHTH DEFENSE

17. All prior defenses and allegations are incorporated herein by reference. Plaintiff's damages were solely and proximately caused by the negligent careless, willful, wanton, reckless and/or grossly negligent conduct of one or more person over whom Defendants had no control and for whose unforeseeable actions these Defendants are not liable. As such, the Plaintiff is barred from recovery from your Defendant.

FOR A NINTH DEFENSE AND BY WAY OF COUNTERCLAIM

18. Your Defendant reiterates and incorporates the allegations of all prior defenses and makes them a part herein by reference.
19. Your Defendant is informed and believes that the Plaintiff is a corporation licensed to do business in the County of Anderson, State of South Carolina and that this court has jurisdiction over all parties and matters herein.
20. Your Defendant are informed and believe that the Plaintiff held a mortgage of record by Richard Strawn and /or Cammie Strawn. This mortgage was satisfied in full by payment of legal tender made on or about October 31, 2003 despite request to do so. The Plaintiff has an obligation to do same under South Carolina Code of Laws §29-3-310. The Plaintiff failed to mark this mortgage satisfied within the requisite time period.
21. Your Defendant is informed and believes that the Plaintiff negligently, wantonly and wilfully failed to satisfy this mortgage upon payment of same as required by statute. The Plaintiff knew or should have known that their negligent, wilful and wanton conduct in failing to satisfy this mortgage as required by statute could cause your Defendant to be damaged. Your Defendant has been damaged in actual damages, consequential damages, out of pocket expenses, costs to defend this action and attorneys fees, in an amount to be

determined at the trial of this case. Further, the Defendant is entitled to damages provided for by South Carolina law, as set forth in South Carolina Code of Laws §29-3-320.

FOR A TENTH DEFENSE AND BY WAY OF CROSSCLAIM
against the co-Defendant Richard Strawn

21. All prior defenses and allegations are incorporated herein by reference.
22. Your Defendant is informed and believes the co-Defendant Strawn is a citizen and resident of the State of South Carolina; his present whereabouts are unknown. The real property subject of this action is located in Anderson County, South Carolina. Therefore, all parties, matters and things herein are within the jurisdiction of this court.
23. Your Defendant is informed and believes that the co-Defendant Strawn did fraudulently, recklessly, wilfully and wantonly convert property owned by the Defendants to his own use or benefit without the plaintiff's permission. Your Defendants have been damaged by the by the value of the property converted along with all consequential damages, including, but not limited to attorneys and costs incurred as a result of this litigation.
24. Your Defendants would show that they are entitled to punitive damages based upon the Defendant Strawn's reckless conduct and conscious indifference to their rights in an amount to be determined at the trial of this case.

FOR A ELEVENTH DEFENSE AND BY WAY OF CROSSCLAIM
against the co-Defendant Richard Strawn

25. All prior defenses and allegations are incorporated herein by reference.
26. Your Defendants would show that the co-Defendant Strawn committed fraud by incurring additional debt on the equity line referenced by the Plaintiff's Complaint after he knew or should have known that he no longer was entitled to do so and by failing to notify the

Plaintiff that he no longer was a legal owner of the property securing this equity line.

27. Your Defendant is informed and believes that the co-Defendant Strawn did knowingly and intentionally make numerous representations to the Plaintiff that he was still a legal owner of the real property securing the line of equity in his name, despite knowing this representation to be false. Your Defendant is informed and believes that this statement was material to the Plaintiff's conduct in allowing additional monies to be lent and that it was the intent of the co-Defendant Strawn for the representation to be relied upon.
28. For purposes of this crossclaim, your Defendant alleges that the Plaintiff did not know this to be false and relied upon the truth of the statements.
29. As a direct and proximate result of the co-Defendant Strawn's fraudulent conduct, your Defendant's have been damaged by the mortgage that is a subject of this action in an amount to be determined at the trial of this case.

FOR A TWELFTH DEFENSE AND BY WAY OF CROSSCLAIM
against the co-Defendant Richard Strawn

30. All prior defenses and allegations are incorporated herein by reference.
31. Your Defendant is informed and believes that the co-Defendant Strawn has been unjustly enriched by his wilful, wanton and reckless conduct of borrowing against an equity line that is secured by property legally owned by your Defendants. Your Defendants would show that the co-Defendant Strawn has actually received a benefit by this conduct in that he has received monies close to \$50,000.00 for which your Defendant's are being held responsible and that it is unjust for the co-Defendant Strawn to retain these monies.
32. Your Defendants would ask that the co-Defendant Strawn be required to repay these monies immediately.

FOR A FIRST CAUSE OF ACTION AGAINST A THIRD PARTY

33. All prior defenses and allegations are incorporated herein by reference.
34. Your Third Party Plaintiffs would show unto the Court that James S. Belk, attorney at law, is an attorney licensed to practice law in the State of South Carolina. Mr. Belk's maintains a practice in the County of Anderson and, therefore, all parties, matters and things herein are within the jurisdiction of this Court.
35. Your Third Party Plaintiffs are informed and believes that Mr. Belk was retained by Marie Borchers to perform a closing for her to occur on or about October 31, 2003. Pursuant to their agreement, Mr. Belk was to perform all acts necessary to transfer this property from the Seller, Cammie B. Strawn, to the Buyer, Marie Borchers, in accordance with normal closing practices, including, but not limited to, accepting the cash proceeds from Ms. Borchers, paying off all applicable mortgages, liens, taxes and settlement charges out of these proceeds prior to disbursing the remaining funds to the seller and to warrant clear title of this property to the buyer.
36. Your Third Party Plaintiffs are informed and believe that the mortgage to Regions Bank, which is the subject of this action, was not properly satisfied by Mr. Belk. Your Third Party Plaintiffs would show that Mr. Belk breached his fiduciary duty by negligently failing to properly satisfy this mortgage from the proceeds of the closing.
37. As the direct and proximate result of Mr. Belk's breach of his duty, your Third Party Plaintiffs have been damaged in the amount of the mortgage that is alleged to be in existence on their property and for attorneys fees and costs in defending this action.

FOR A SECOND CAUSE OF ACTION AGAINST A THIRD PARTY

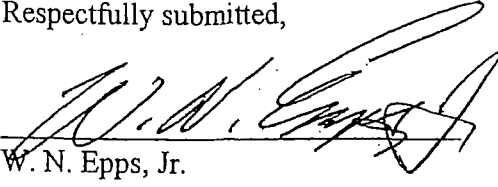
38. All prior defenses and allegations are incorporated herein by reference.

39. Your Third Party Plaintiffs are informed and believes that they are entitled to be indemnified from the Third Party Defendant for any damages that are awarded to the Plaintiff in this action. Your Third Party Plaintiffs are informed and believe that but for the Third Party Defendant's negligent conduct, they would not have been subject this action and damaged by the co-Defendant Strauss' fraudulent conduct. As a direct and proximate result of the Third Party Defendant's negligent conduct, they have been damaged in an amount to be determined at the trial of this case and would ask that the Third Party Defendant indemnify them for these damages.

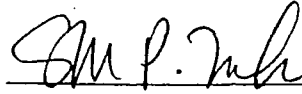
WHEREFORE, your Defendants/Third Party Plaintiffs pray:

- A. That the mortgage satisfaction recorded at Book 7123 Page 3 in the Anderson County Register of Deeds office remain in place and that this mortgage remain satisfied.
- B. That the Plaintiff's action be dismissed with costs.
- C. That the Plaintiff be required to pay your Defendants those damages set forth in §29-3-320.
- D. That the co-Defendant Strauss be required to pay any monies demanded by the Plaintiff and to pay your Defendants consequential damages, including attorneys fees and costs for having to defend this action.
- E. That the Third Party Defendant be required to pay any monies demanded by the Plaintiff, to indemnify the Third Party Plaintiffs and to reimburse the Third Party Defendants for all attorneys fees and costs and consequential damages incurred by them in defending/pursuing this action.
- F. For other and furtehr relief as to this court may seem just and proper.

Respectfully submitted,



W. N. Epps, Jr.



Samantha Nelson
230 W. Whitner Street
Anderson, SC 29621
(864) 224-2111

May 30, 2006
Anderson, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS
C.A. NO.: 2006-CP-04-770

Regions Bank,

Plaintiff,

vs.

Richard C. Strawn, Robert Karl Borchers
as Personal Representative of the Estate
of Marie N. Borchers, Robert Karl Borchers
and Nancy Davidson Borchers,

Defendants.

PLAINTIFF'S REPLY TO ANSWER,
COUNTERCLAIM, CROSSCLAIM AND
THIRD-PARTY COMPLAINT OF
DEFENDANTS, ROBERT BORCHERS,
INDIVIDUALLY AND AS PERSONAL
REPRESENTATIVE OF ESTATE OF
MARIE BORCHERS AND NANCY
DAVIDSON BORCHERS

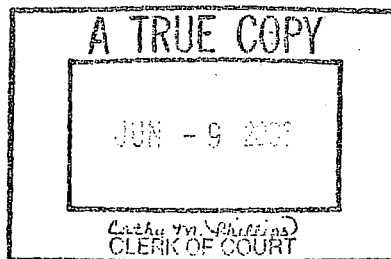
Robert Borchers, individually and as
Personal Representative of the Estate
of Marie Borchers and Nancy Borchers,

Third-Party Plaintiffs,

vs.

James Belk,

Third-Party Defendant,



Replying to Answer, Counterclaim, Crossclaim and Third-Party Complaint of
Defendants, Robert Borchers, individually and as Personal Representative of Estate of Marie
Borchers and Nancy Borchers, Plaintiff alleges:

FOR A FIRST DEFENSE

1. Plaintiff denies each and every allegation of the Answer, Counterclaim,
Crossclaim and Third-Party Complaint of the Defendants, Robert Borchers, individually and
as Personal Representative of Marie Borchers, and Nancy Davidson Borchers not
hereinafter specifically admitted, qualified or explained.

2. Plaintiff denies the allegations of paragraph 1 of the First Defense.

3. Plaintiff denies the allegations of paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the Second Defense.

4. Plaintiff denies the allegations of paragraph 12 of the Third Defense.

5. Plaintiff denies the allegations of paragraph 13 of the Fourth Defense.

6. Plaintiff denies the allegations of paragraph 14 of the Fifth Defense.

7. Plaintiff denies the allegations of paragraph 15 of the Sixth Defense.

8. Plaintiff denies the allegations of paragraph 16 of the Seventh Defense.

9. Plaintiff denies the allegations of paragraph 17 of the Eighth Defense.

10. Plaintiff denies the allegations of paragraph 18 of the Ninth Defense and Counterclaim.

11. Plaintiff admits so much of the allegations of paragraph 19 of the Ninth Defense and Counterclaim as admits that the Plaintiff is a banking association organized under the laws of the State of South Carolina and is authorized to do business in the County of Anderson, State of South Carolina and that this court has jurisdiction of the parties to and subject matter of this action and venue thereof is set in Anderson County, South Carolina. The remaining allegations of paragraph 19 are denied.

12. Plaintiff denies the allegations of paragraph 20 of the Ninth Defense and Counterclaim.

13. The Plaintiff denies the allegations of paragraph 21 of the Ninth Defense and Counterclaim.

14. The Plaintiff denies the remaining allegations of the Ninth Defense and Counterclaim.

15. The Plaintiff denies the allegations of paragraph 21 of the Tenth Defense and Crossclaim.

16. Plaintiff admits so much of the allegations of paragraph 22 of the Tenth Defense and Crossclaim as alleges jurisdiction of all parties to and subject matter of this action is conferred upon this court and venue is set in Anderson County, South Carolina, but Plaintiff lacks sufficient knowledge and information with which to form an opinion or belief concerning the remaining allegations of paragraph 22, therefore, denies the same.

17. Plaintiff lacks sufficient knowledge and information with which to form an opinion or belief concerning the allegations of paragraph 23 of the Tenth Defense and Crossclaim, therefore, denies the same.

18. Plaintiff lacks sufficient knowledge and information with which to form an opinion or belief concerning the allegations of paragraph 24 of the Tenth Defense and Crossclaim, therefore, denies the same.

19. Plaintiff denies the allegations of paragraph 25 of the Eleventh Defense and Counterclaim.

20. Plaintiff lacks sufficient knowledge and information with which to form an opinion or belief concerning the allegations of paragraph 26, 27, 28 and 29 of the Eleventh Defense and Counterclaim, therefore, denies the same.

21. Plaintiff denies the allegations of paragraph 30 of the Twelfth Defense and Crossclaim.

22. Plaintiff admits all allegations of paragraphs 31 and 32 of the Twelfth Defense and Crossclaim as alleges the Defendant, Richard C. Strawn, is indebted to the Plaintiff, but lacks sufficient knowledge and information with which to form an opinion or belief concerning the remaining allegations thereof, therefore, denies the same.

23. Plaintiff denies the allegations of paragraph 33 of the Crossclaim.

24. Plaintiff lacks sufficient knowledge and information with which to form an opinion or belief concerning the allegations of paragraphs 34, 35, 36 and 37 of the First Cause of Action of the Third-Party Complaint, therefore, denies the same.

25. Plaintiff denies the allegations of paragraph 38 of the Second Cause of Action on the Defendant's Crossclaim.

26. Plaintiff lacks sufficient knowledge and information with which to form an opinion or belief concerning the allegations of paragraph 39 of the Second Cause of Action of the Third-Party Complaint, therefore, denies the same.

FOR A SECOND DEFENSE

27. The preceding allegations are made part hereof by this reference.

28. The Answer, Counterclaim, Cross-Complaint and Third-Party Complaint of the Defendants fail to state facts sufficient to constitute a cause of action against the Plaintiff.

FOR A THIRD DEFENSE

29. The preceding allegations are made part hereof by this reference.

30. The obligations being the subject matter of this action relate to an interest in real estate and any claim made by the Defendants against this Plaintiff are required to be in writing and signed by the Plaintiff.

31. The claims made by the Defendants are subject to the applicable statute of frauds.

FOR A FOURTH DEFENSE

32. The preceding allegations are made part hereof by this reference.

33. The competing rights, claims and defenses of the parties to this action rest on the priorities established by the recording act codified in S.C. Code Ann. § 30-7-10 et seq.

34. The claims made by the Defendants in their Answer, Counterclaim, Crossclaim and Third-Party Complaint are subject to the provisions of the aforesaid recording act.

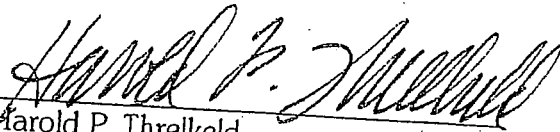
FOR A FIFTH DEFENSE

35. The preceding allegations are made a part hereof by this reference.

36. The remedies of the Plaintiff and all claims made by the Defendants in their Answer, Counterclaim, Crossclaim and Third-Party Complaint are subject to the provisions of S.C. Code Ann. § 29-3-50 et seq. permitting open-ended mortgages to remain viable until the maker of the mortgage requests cancellation.

37. The Defendants' claims are subject to the provisions of S.C. Code Ann. § 29-3-50 et seq.

WHEREFORE, Plaintiff having fully replied, prays that the Answer, Counterclaim, Crossclaim and Third-Party Complaint be dismissed and for other and further relief as to this court may seem just and proper.



Harold P. Threlkeld
P. O. Box 1385
Anderson, SC 29622-1385
Telephone No.: 864.226.1305
Fax No.: 864.226.1685
Attorney for Plaintiff

Anderson, South Carolina
Date: June 7, 2006

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS
C.A. NO.: 2006-CP-04-770

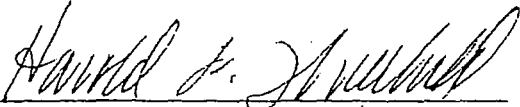
Regions Bank,)
)
Plaintiff,)
)
vs.)
)
Richard C. Strawn, Robert Karl Borchers)
as Personal Representative of the Estate)
of Marie N. Borchers, Robert Karl Borchers))
and Nancy Davidson Borchers,)
)
Defendants.)

PLAINTIFF'S NOTICE AND MOTION
FOR SUMMARY JUDGMENT ON
COUNTERCLAIMS OF DEFENDANTS,
ROBERT KARL BORCHERS AS
PERSONAL REPRESENTATIVE OF
THE ESTATE OF MARIE BORCHERS,
ROBERT KARL BORCHERS AND
NANCY DAVIDSON BORCHERS

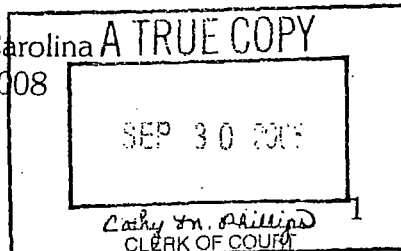
TO: William N. Epps, Jr., Esquire and Samantha P. Nelson, Esquire, Epps & Nelson,
P. O. Box 2167, Anderson, South Carolina, Attorneys for Defendants, Robert
Karl Borchers as Personal Representative of Estate of Marie Borchers, Robert
Karl Borchers and Nancy Davidson Borchers

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, by and through its undersigned attorney, will move before the court at a date, time and place to be set, notice of which will be given to you, pursuant to Rule 56, South Carolina Rules of Civil Procedure, for an Order of Summary Judgment in favor of the Plaintiff on the counterclaims of the Defendants, Robert Karl Borchers as Personal Representative of the Estate of Marie Borchers, Robert Karl Borchers and Nancy Davidson Borchers, on the grounds that no genuine issue of a material fact exists and the Plaintiff is entitled to judgment as a matter of law.

This motion will be supported by the pleadings, affidavits, depositions and such other memoranda of law or authority as may be presented prior to the motion.


Harold P. Threlkeld
P. O. Box 1385
Anderson, SC 29622-1385
Telephone No.: 864.226.1305
Fax No.: 864.226.1685
Attorney for Plaintiff, Regions Bank

Anderson, South Carolina
September 10, 2008



STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS
C.A. NO.: 2006-CP-04-770

Regions Bank,)
)
Plaintiff,)

vs.)

AFFIDAVIT OF PAMELA HARBIN

Richard C. Strawn, Robert Karl Borchers)
as Personal Representative of the Estate)
of Marie N. Borchers, Robert Karl Borchers)
and Nancy Davidson Borchers,)
)
Defendants.)

Robert Borchers, individually and as)
Personal Representative of the Estate)
of Marie Borchers and Nancy Borchers,)

Third-Party Plaintiffs,)

vs.)

James Belk,)
)
Third-Party Defendant,)

A TRUE COPY

JUL 1 2008

Cathy M. Phillips
CLERK OF COURT

PERSONALLY appeared before me Pamela Harbin (sometimes the "Affiant"), who first being duly sworn, deposes and says that:

1. This Affidavit is made in opposition to the Motion for Summary Judgment made by or on behalf of the Defendant, Robert K. Borchers, individually and as Personal Representative of the Estate of Marie Borchers, and Nancy Davidson Borchers, which Motion was supported by Affidavit of Cathy Slaton with three exhibits attached thereto;

2. Affiant is a citizen and resident of the County of Anderson, State of South Carolina;

3. For more than ten years, she has been employed by banks and lending institutions in positions where she has been involved in the extension, payment and satisfaction of real estate mortgages, which includes "Open-Ended" real estate mortgages and credit lines (collectively sometimes hereinafter referred to as "Credit Lines");
4. Affiant is currently employed by Regions Bank ("Bank") by whom she has been employed since 2003;
5. Affiant currently holds the position of Commercial Loan Support Specialist;
6. Affiant's current position includes working on transactions involving extension, payment and satisfaction of "Open-Ended" Credit Lines;
7. Affiant is familiar with the procedures now used by the Bank and those employed by the Bank in October, 2003 for the payment, satisfaction and cancellation of Open-Ended Credit Lines;
8. Once established, an Open-Ended Credit Line remains open for use and benefit of the customer until either maturity, default or instructions from the mortgagor to cancel the same;
9. Even though the balance due on an Open-Ended Credit Line is paid in full and the balance thereon is "zero", the Bank cannot cancel the Open-Ended Credit Line until either maturity, default or instructions of the customer or mortgagor;
10. If a customer desires to cancel his or her Credit Line, the proper procedure is for the customer to deliver payment of the balance due on the Credit Line to the mortgage loan department of the Bank with instructions to cancel the Credit Line;
11. If a closing agent desires to pay in full and cancel a Credit Line, the proper procedure is to deliver to the mortgage loan department of the Bank collectible funds to pay the Open-Ended Credit Line in full together with written instructions of the customer directing the Bank to cancel the Credit Line;
12. The Bank has a contractual duty to its customer not to cancel the Credit Line without the customer's instructions;
13. In the event the mortgage loan department of the Bank receives full payment of the balance due on an Open-Ended Credit Line accompanied by written instructions that sufficiently explicit to notify the Bank of the customer's intent to cancel the Credit Line, the Bank customarily seeks the authority of the customer to cancel the Credit Line;

14. The Bank routinely receives payment for the full amount due on an Open-Ended Credit Line and credits the account with the payment bringing the balance to zero without canceling the Credit Line;

15. Unless the Bank is reasonably notified of the mortgagor's intent to cancel the Credit Line, it has no reason to verify the mortgagor's intent to cancel the Credit Line;

16. The Affiant is informed and believes based on procedures employed by the Bank that if a closing agent delivers a check to a teller of the Bank for the full amount due thereon, without accompanying instructions that are sufficiently explicit to expressly state the mortgagor's intent to cancel the Credit Line, the teller would simply credit the payment to the Credit Line without further action to cancel the Credit Line;

17. The Affiant is informed and believes that, according to procedures employed by the Bank, that if a closing agent delivers payment in full of a Credit Line to a teller of the Bank accompanied by written instructions that are sufficiently explicit to expressly state an intent of the mortgagor to cancel the Credit Line, the teller following procedures would forward the check and accompanying instructions to the mortgage loan department for processing by obtaining authority of the mortgagor to cancel the Credit Line;

18. The Affiant is informed and believes, according to the procedures employed by the Bank, that if full payment of a Credit Line has been made to a teller of the Bank accompanied by instructions that are sufficiently explicit to indicate a desire of the mortgagor to cancel the Credit Line, those instructions and the accompanying check would have been forwarded to the mortgage loan department and all instructions received would have been maintained with the records of the Bank;

19. The Affiant has researched the records of the Bank relating to the Credit Line of Richard C. Strawn and is unable to find any instructions from the closing agent other than the check of the closing agent accompanied by the payoff quote issued by the Bank dated October 31, 2003, a copy of which is attached hereto as Exhibit "1";

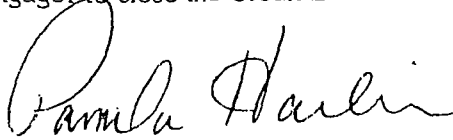
20. The Affiant is informed and believes that after a careful review of the records maintained by the Bank, the payment made by the closing agent was not accompanied by the letter of the closing agent attached as Exhibit "3" to the Affidavit of Cathy Slaton;

21. The Affiant is informed and believes that payment made by the closing agent was delivered to a teller accompanied only by the payoff statement issued by the Bank on October 31, 2003 and the teller processed the same by crediting the payment to the mortgagor's account without having any notice there may be any intent to cancel the Credit Line;

22. The Affiant is informed and believes that if the payment made by the closing agent was accompanied by the letter of the closing agent attached as Exhibit "3" to Affidavit

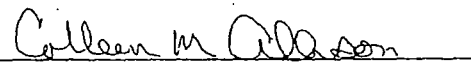
of Cathy Slaton, the teller, following established procedures, would have forwarded the letter and payoff to the mortgage loan department of the Bank which would have notice of intent to cancel the Credit Line and the Mortgage. Loan Department would have contacted the mortgagor to obtain authority to cancel the same; and,

23. The Affiant is informed and believes that no instructions accompanied payment of the balance due on the Credit Line that would have enabled the Bank to readily determine that it was the intent of the mortgagor to close the Credit Line.



Pamela Harbin

SWORN to before me this
5th day of June, 2008.


Notary Public for South Carolina
My Commission Expires: Feb. 12, 2017

OCT-31-2003 FRI 09:07 AM MORGAN KLEGAN ANDERSON SC 0642312953

P. 01

AMAI

10/31/03

ACCOUNT INQUIRY

08:22:10

PC

CTL2 039 CTL3 201 CTL4 0000 ACCT
CTL2 039 CTL3 000 CTL4 0000 CUST

EFF DATE 10/31/03

ACTIVE ACCOUNT

SIMPLE INT - VAR RATE

PAYOFF 32240.42

***** RATES *****

AUTO OR N

LINE AMOUNT 50000.00

CURR RATE 6.0800000

PFOD TYPE LEVI

AVAILABLE AMT 17995.05

ORIG RATE 6.0800000

EFIN OFFICER 5431

LT CHG DUE 0.00

PER DIEM 5.3312355

GL PAY 01 039 203

FEES DUE 0.00

***** DATES *****

CALL CODE 0101

CURRENT PRIN 32004.95

CONTRACT DATE 09/09/03

***** REPAYMENTS *****

CURRENT INT 235.47

CURR MATURITY 09/24/08

CURR TERM 60

CLOSED DATE

PYMTS MADE 0

REG PYMT AMT 107.68

NEXT DUE DATE 11/24/03

PYMTS REM 0

NEXT DUE AMT 159.77

PAST DUE DATE 10/24/03

MONTHS EXTD 000 REF N

PAST DUE AMT 107.68

LAST MAINT DT 09/15/03

YTD INT COLL 0.00

LST BAL CHG DT 10/08/03

INT COLL PREV 0.00

RICHARD C STRAWN

***** CREDIT HIST *****

010 015 030 060 090 120

000 000 000 000 000 000

COLLATERAL

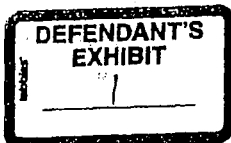
ANDERSON

SC 29625-1976 CODE: 3170

PH (864) 261-3365

DESC: REAL PROPERTY LOCATED AT 105 F

PF3-ADDL INFO



JAMES S. BELK -TRUST ACCOUNT

1813

**** REAL ESTATE CLOSING ****

Buyer/Borrower: Borchers
Seller: Strawn
Lender:
Property:
Settlement Date: October 31, 2003
Disbursement Date: October 31, 2003
Check Amount: \$32,256.41
Pay To: Regions Bank
For:
Payoff of first Mortgage

10/31/03 11:22:17

REGIONS BANK

Law Offices
James S. Belk
Attorney and Counselor at Law
1202 N Main Street
Anderson, South Carolina 29621
Phone: 864-224-8123 Fax: 864-260-9038

October 31, 2003

Regions Bank

Attention: Mortgage Loan Payoff Department

Re: Mortgagor(s): Cammie B. Strawn
Address:
Anderson, SC 29625

Loan No.:
Our File Number: BORCHERS, MARIE

Dear Sir/Madam:

In connection with the above referenced property, enclosed is our trust account check, dated October 31, 2003, in the amount of \$32,256.41, representing the final payment for the above loan number and Mortgagor (s).

PLEASE FORWARD SATISFIED DOCUMENTS (with a copy of this letter) TO THIS OFFICE TO BE REMOVED OF RECORD. PLEASE DO NOT SEND THE ORIGINAL DOCUMENTS DIRECTLY TO THE BORROWERS.

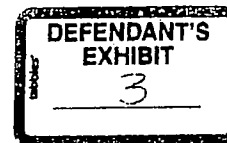
*Please be advised that South Carolina Code Ann. Section 29-3-310 provides in part that any person receiving full payment of a mortgage, within 3 months after the payment has been made, shall enter satisfaction in the proper office for removal from record. South Carolina Code Ann. 29-3-320 provides in part, that if the satisfaction is not entered on record, the aggrieved party shall receive a sum of money not to exceed **ONE-HALF OF THE DEBT** secured by the mortgage to be recovered by action in any court of jurisdiction within the State of South Carolina.*

We appreciate your assistance in this matter and, should you have any questions, please do not hesitate to contact us.

Sincerely,

James S. Belk, Attorney at Law

Enclosures
cc: File



STATE OF SOUTH CAROLINA)

COUNTY OF ANDERSON)

Regions Bank,)

Plaintiff,)

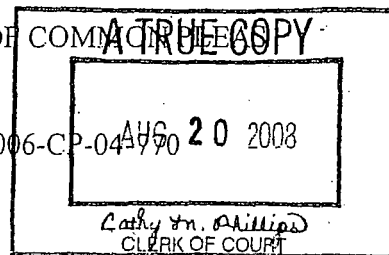
vs.)

Richard C. Strawn, Robert K.
Borchers, individually and as
Personal Representative of the
Estate of Marie Borchers and
Nancy Davidson Borchers,)

Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No.: 2006-CP-043770



ORDER

FILED - CLERK'S OFFICE
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GENERAL SESSIONS

This matter came before me on motion of the Defendants Robert K. Borchers, individually and as Personal Representative of the Estate of Marie Borchers and Nancy Davidson Borchers for summary judgment. They were represented by Matthew H. Henrikson and Samantha P. Nelson. Regions Bank was represented by Harold P. Threlkeld. The Defendant Richard Strawn, pro se, was given notice of the hearing but did not appear.

This case arises out of a home equity mortgage given by Richard C. Strawn (Strawn) to Regions Bank (the Bank) securing future advances with a credit line of \$50,000 at a time when Strawn owned the real property at 105 Park Way in Anderson, South Carolina (the Property). Strawn subsequently deeded that property to his wife, Cammie B. Strawn on December 12, 2001. Cammie B. Strawn then deeded the property to Marie Borchers on October 31, 2003. Ms. Borchers purchased the property in cash and took legal title. Prior to the closing on the sale from Cammie B. Strawn to Marie Borchers, attorney James Belk requested from the Bank a mortgage payoff amount for that day and after the closing had one of his employees hand deliver a Trust Account check to the Bank for the exact payoff amount provided by the Bank earlier in the day. The check had the words "Payoff of first Mortgage" typed on the check over the numerical amount of the check. The

Bank admits receiving and processing the check. Several weeks after the closing and the payoff of the mortgage, the Bank issued a new set of home equity line checks to Richard Strawn for use on the credit line of \$50,000. At that time, the public records reflected that Strawn had not owned an interest in the property for nearly two years. Despite knowing that he no longer owned the real property which had secured the mortgage, Strawn accessed the funds in the account up to the limit. Thereafter the Bank instituted the present action against Strawn for collection of the advanced amount and a foreclosure action against Robert K. Borchers, individually and as Personal Representative of the Estate of Marie Borchers and Nancy Davidson Borchers (Borchers), who had succeeded their mother, Marie Borchers, in interest in the Property.

“A trial court should grant a motion for summary judgment 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.’” Regions Bank v. Shmauch, 354 S.C. 648, 659, 582 S.E.2d 432 (Ct.App. 2003), quoting Rule 56(c), SCRPC. “The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder.” George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. See Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 130, 558 S.E.2d 271, 273 (Ct.App.2001). “Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial.” Regions Bank, supra, citing SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990).

A purchaser may assert a plea in equity of a bona fide purchaser for value, without notice of defect in his title, by showing (1) he has actually paid in full the purchase money (giving

security for the payment is not sufficient, nor is past indebtedness a sufficient consideration); (2) he purchased and acquired the legal title, or the best right to it; and (3) he purchased bona fide, i.e., in good faith and with integrity of dealing, without notice of a lien or defect. The bona fide purchaser must show all three conditions-actual payment, acquiring of legal title, and bona fide purchase-occurred before he had notice of a title defect or other adverse claim, lien, or interest in the property.” *Spence v. Spence* 628 S.E. 2nd 869, 368 S.C. 106 (2006) citing: *S.C. Tax Commn. v. Belk*, 266 S.C. 539, 543, 225 S.E.2d 177, 179 (1976); *Jones v. Eichholz*, 212 S.C. 411, 422, 48 S.E.2d 21, 25-26 (1948); *Kirton v. Howard*, 137 S.C. 11, 36, 134 S.E. 859, 868 (1926); *Black v. Childs*, 14 S.C. 312, 318 (1880).

Marie Borchers was a bona fide purchaser for value because she thought that the home equity mortgage had been satisfied the day of the closing. The Bank argues that the mere existence of the mortgage at the time of closing renders Borchers ineligible to ever be a bona fide purchaser for value of that property. This argument is without merit. The Court in *Spence* held that the purchaser must show all of the required conditions “before he had notice of a title defect or other adverse claim, lien, or interest in the property” (*supra*). The “title defect or other adverse claim, lien, or interest in the property” in the case at bar (i.e. the continued existence of the mortgage on the record following the closing to Borchers and the payoff) did not become noticeable until three months after the closing, when the mortgage *still* had not been marked as satisfied in the R.M.C. office for Anderson County. Thus, because the mortgage was paid off, but was not satisfied of record in due course as allowed by §29-3-320, the defect did not even exist until three months after Marie Borchers paid cash for good title to the Property. S.C. Code §29-3-320 provides that mortgage lenders have three months within which to enter record satisfaction after which they become liable for one half of the secured debt. Real estate closings occur every day and many involve the paying off of a first mortgage. Purchasers of real estate do not take subject to the first mortgage if the mortgage is at the time of the closing paid off in full, even

though the mortgage is not instantaneously satisfied of record. While the mortgage was on the record at the time of the closing, it did not constitute a "defect or lien" within the meaning of the bona fide purchaser concept because she paid the mortgage off in full the day of the closing. By paying off the mortgage in full, the "defect" was cured for notice purposes, and she met each of the three *Spence* conditions to qualify as a bona fide purchaser under South Carolina law.

Additionally, there is no genuine issue of material fact regarding whether or not there was a "payoff" of the first mortgage. The Bank processed the payoff as a paydown by receiving the exact amount for a payoff but only bringing Strawn's credit line balance to zero and leaving the account open and leaving the mortgage on the record. The check received by the bank had the words "Payoff of First Mortgage" typed on the check. The Bank, through its employee and loan officer, Brent Bull, admitted that the mere presence of the word "Payoff" on the check was enough to have put the Bank, by its own policies, on notice that the payment was a payoff as opposed to a paydown. The Bank further admits that the teller who processed the payoff did so improperly by ignoring or misunderstanding the import of the words "Payoff of First Mortgage" and by not involving the loan department, whose policy it was with that language on the payoff check to verify that the payoff was in connection with the sale of the secured property.

- Q. And if the check has "payoff" on it, I mean, is -- let me ask you this, is the reason that you have loan officers do this is because they're more experienced and a teller might not perceive that and a loan officer would?
- A. Yes. Yeah.
- Q. And if the check has the word, "payoff" on it, is that something that ordinarily would put the bank on notice that this is a payoff and not a pay down?
- A. It should, yeah.
- Q. And had you seen or some other loan officer seen a check with "payoff" on it, then you would have known to verify whether the property was being sold; correct?
- A. Correct, yeah.
- Q. And the fact that the teller did it and just misunderstood or didn't see or didn't notice the import of the word, "payoff," then that was just something that happened?
- A. Right.

(Deposition of Brent Bull at page 43 line 25- page 44 line 19)

Regarding payoff check provided to the bank, Mr. Bull identified the check stub as indicating that the check was for a "payoff".

- Q. The bottom part of this appears to be – what does it appear to be?
A. It looks like a check stub.
Q. And it appears to be for the loan, is that Mr. Strawn's loan?
A. Yes.
Q. And does that indicate payoff for first mortgage?
A. Yes.

(Bull deposition, page 49 lines 7-14)

- Q. If the teller took a "payoff" marked check and processed it as a pay down instead of a payoff, I mean, was it fair to say that that would have been improperly processed?
A. If – if she had clear instructions it was as payoff; yes.
Q. We, if she had ---
A. It say "payoff" on it, yes. (sic)

(Bull deposition, page 51 lines 9-16)

Q. And so when you get a request for a payoff and then a payoff is made, and I understood you to say that when the – when the check has the word "payoff" on it, that even the teller, with the word "payoff" on it should have processed it as payoff instead of pay down. That's my understanding of your testimony before. Is that – is that what you told me before?

A. Right. Yeah. That's right.

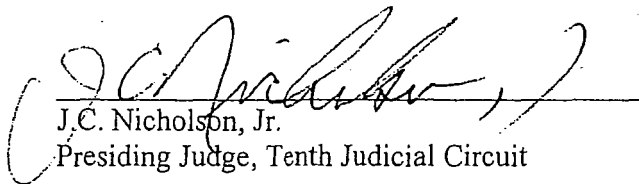
(Bull deposition, page 65 line 12- 20)

With these admissions by the Bank it is clear that the closing day payoff should have been processed as a payoff instead of a paydown and that the bank should have had the mortgage satisfied of record. As a matter of equity, the Bank should be estopped from foreclosing on the property as it was the Bank which failed to satisfy the mortgage after receiving notice of the payoff.

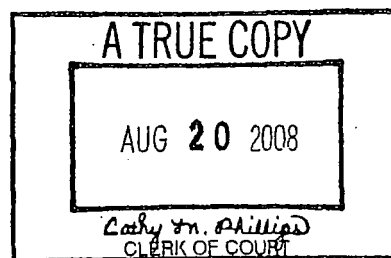
Marie Borchers was a bona fide purchaser for value of the subject property. Advances made erroneously by the Bank to a former owner of the property despite actual and constructive notice to the Bank that the mortgage had been paid off and was to be satisfied.

There is no genuine issue of material fact upon which a jury could find in favor of Regions Bank,
and accordingly the Borchers' motion for summary judgment is hereby granted.

AND IT IS SO ORDERED!


J.C. Nicholson, Jr.
Presiding Judge, Tenth Judicial Circuit

August 18, 2008
Anderson, South Carolina



FILED-CLERK'S OFFICE
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GENERAL PLEAS AND
GENERAL SESSIONS

MOTION FEE PAID
COPY

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON) IN THE COURT OF COMMON PLEAS
C.A. NO.: 2006-CP-04-770

Regions Bank,

Plaintiff,

vs.

MOTION TO RECONSIDER AND/OR
TO ALTER OR AMEND JUDGMENT

Richard C. Strawn, Robert Karl Borchers)
as Personal Representative of the Estate)
of Marie N. Borchers, Robert Karl Borchers)
and Nancy Davidson Borchers,

Defendants.

TO: Honorable R. Lawton McIntosh, Presiding Judge, Tenth Judicial Circuit,
Anderson County Courthouse, P.O. Box 8002, Anderson, SC 29622-8002

TO: Samantha P. Nelson, Esquire, Epps, Nelson & Epps, P.O. Box 2167,
Anderson, SC 29622-2167, Attorney for Robert Karl Borchers as Personal
Representative of the Estate of Marie N. Borchers, Robert Karl Borchers and
Nancy Davidson Borchers

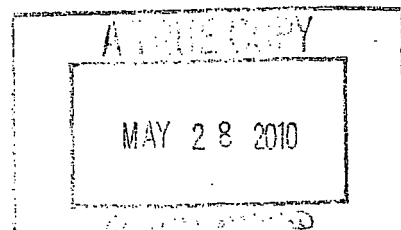
I. MOTION

PLEASE TAKE NOTICE that Plaintiff, by and through its undersigned attorney, hereby moves the Court pursuant to Rules 52(b) and 59(e), South Carolina Rules of Civil Procedure, for an Order altering or amending its judgment rendered in that certain Order issued by the Court dated May 24th, 2010 and filed with the Clerk of Court for Anderson County, South Carolina on May 26th, 2010 and received by attorney for Plaintiff on May 28th, 2010 because the Court erred in its findings, conclusions, holdings and rulings in the particulars set forth in paragraph III hereinafter.

II. DEFINITIONS AND MEANINGS

In addition to any other terms whose definitions are fixed and defined by this Motion, each of the following terms when used in this Motion with an initial capital letter shall have the meaning ascribed thereto in this paragraph II:

2.1 "Bank" means the Plaintiff, Regions Bank.



2.2 "Borchers" means collectively the Defendants, Robert Karl Borchers as Personal Representative of the Estate of Marie N. Borchers, Robert Karl Borchers and Nancy Davidson Borchers.

2.3 "Grantor" means the Defendant, Richard C. Strawn.

2.4 "Motion" means this Motion to Reconsider and/or to Alter or Amend Judgment, together with any and all exhibits attached hereto.

2.5 "Mortgage" means that certain mortgage of real estate attached as Exhibit "2" to the Plaintiff's Complaint made by Strawn to the Bank dated October 12th, 2001 and recorded in the Office of Register of Deeds for Anderson County, South Carolina on October 22nd, 2001 in Records Book 4413 at page 319.

2.6 "Open-End Mortgage" means a mortgage of real estate made and granted pursuant to the provisions of S.C. Code Ann. §29-3-50 (1976, as amended).

2.7 "Order" means the Order of Honorable R. Lawton McIntosh, Presiding Judge, Court of Common Pleas, Anderson County, South Carolina, dated May 24th, 2010.

2.8 "Penalty" means a penalty levied pursuant to the provisions of S.C. Code Ann. §29-3-320 (1976, as amended).

2.9 "Request" means a request for entry of satisfaction of a mortgage of real estate made pursuant to the strict requirements of S.C. Code Ann. §29-3-310 (1976, as amended).

2.10 "Strawn" means the Defendant and Grantor of the Mortgage, Richard C. Strawn.

III. SPECIFICATION OF ERRORS

The Court erred in failing to rule upon and make findings of fact, conclusions of law and rulings and in making findings of fact, conclusions of law and rulings in the following particulars:

3.1 The Court erred in failing to find, conclude, hold and rule that the Mortgage was an Open-End Mortgage; the error being, the Mortgage expressly states on its face that it was made pursuant to the provisions of S.C. Code Ann. §29-3-50 (1976, as amended) and applicable case law defines it as an Open-End Mortgage.

3.2 The Court erred in failing to find, conclude, hold and rule that Strawn was the Grantor of the Mortgage; the error being, the Mortgage shows on its face that Strawn was the Grantor thereof.

3.3 The Court erred in failing to find, conclude, hold and rule that the Grantor never made a Request to the Bank to cancel the Mortgage or to enter satisfaction upon the same; the error being, there is no evidence that Strawn made a Request to cancel or enter satisfaction upon the Mortgage.

3.4 The Court erred in failing to find, conclude, hold and rule that unless the Grantor made a Request upon the Bank to cancel or enter satisfaction of the Mortgage, the Bank was without authority to cancel the same; the error being, the Mortgage expressly states that the Bank will cancel the Mortgage upon the Request of the Grantor.

3.5 The Court erred in failing to find, conclude, hold and rule that unless the Grantor made a request upon the Bank to cancel or enter satisfaction of the Mortgage, the Bank was without authority to cancel the same; the error being, applicable South Carolina case law provides that the Bank is required to cancel the Mortgage only upon Request of the Grantor.

3.6 The Court erred in its findings, conclusions, holdings and rulings that the Bank was obligated to cancel and enter satisfaction upon the Mortgage upon the Request of Borchers or upon Request of the agent of Borchers; the error being, the Mortgage expressly states that the Bank will cancel the Mortgage upon Request of the Grantor.

3.7 The Court erred in its findings, conclusions, holdings and rulings that the Bank was obligated to cancel and enter satisfaction upon the Mortgage upon the Request of Borchers or upon Request of the agent of Borchers; the error being, applicable South Carolina case law construes S.C. Code Ann. §29-3-50 to require the Bank to cancel and enter satisfaction upon the Mortgage upon request of the Grantor.

3.8 The Court erred in failing to find, conclude, hold and rule that no violation of §29-3-310 can occur by the Bank without a Request from the Grantor to cancel and enter satisfaction of the Mortgage; the error being, the Mortgage expressly states that the Bank will cancel and enter satisfaction upon the Mortgage upon a Request made by the Grantor.

3.9 The Court erred in failing to find, conclude, hold and rule that no violation of §29-3-310 can occur by the Bank without a Request from the Grantor to cancel and enter satisfaction of the Mortgage; the error being, applicable South Carolina case law construes S.C. Code Ann. §29-3-50 to require the Bank to cancel and enter satisfaction upon the Mortgage only upon Request of the Grantor.

3.10 The Court erred in finding, concluding, holding and ruling that failure of the Bank to cancel or enter satisfaction upon the Mortgage where no Request was made by the Grantor violated S.C. Code Ann. §29-3-310; the error being, the Mortgage expressly provides the Bank shall cancel and enter satisfaction upon the Mortgage upon the Request of the Grantor.

3.11 The Court erred in finding, concluding, holding and ruling that failure of the Bank to enter satisfaction upon the Mortgage where no Request was made by the Grantor violated S.C. Code Ann. §29-3-310; the error being, applicable South Carolina case law construes the provisions of S.C. Code Ann. §29-3-50 to require the Grantor to make a Request to cancel or enter satisfaction of the Mortgage.

3.12 The Court erred in finding, concluding and ruling that the Bank was authorized to cancel or enter satisfaction upon the Mortgage solely upon the Request of Borchers or Borchers' attorney; the error being, the Mortgage expressly states that the Bank was authorized to cancel or enter satisfaction upon the Mortgage upon the Request of the Grantor.

3.13 The Court erred in finding, concluding and ruling that the Bank was authorized to cancel or enter satisfaction upon the Mortgage solely upon the Request of Borchers or Borchers' attorney; the error being, applicable South Carolina case law provides the Bank was authorized to cancel or enter satisfaction upon the Mortgage only upon the Request of the Grantor.

3.14 The Court erred in failing to find, conclude, hold and rule that the Bank was not authorized or required to cancel or enter satisfaction upon the Mortgage solely upon the Request of Borchers or Borchers' attorney; the error being, the Mortgage expressly provides the Bank is authorized to cancel or enter satisfaction upon the Mortgage upon the Request of the Grantor.

3.15 The Court erred in failing to find, conclude, hold and rule that the Bank was not authorized or required to cancel or enter satisfaction upon the Mortgage solely upon the Request of Borchers or Borchers' attorney; the error being, applicable South Carolina case law construes S.C. Code Ann. §29-3-50 to authorize the Bank to cancel or enter satisfaction upon the Mortgage solely upon the Request of the Grantor.

3.16 The Court erred in failing to find, conclude, hold and rule that the attorney for Borchers upon payment of the amount due on the debt was authorized by S.C. Code Ann. §29-3-330(e) (1999, as amended) to satisfy the Mortgage; the error being, S.C. Code Ann. §29-3-330(e) (1999, as amended) expressly provides an attorney who pays the mortgagee the amount of the debt is entitled to record or cause to be recorded an affidavit satisfying and canceling the Mortgage.

3.17 The Court erred in failing to find, conclude, hold and rule that Borchers' attorney entered satisfaction of the Mortgage pursuant to S.C. Code Ann. §29-3-330(e); the error being, Borchers' attorney entered a Mortgage Lien Satisfaction Affidavit pursuant to §29-3-330 and recorded in Records Book 7123 at page 3 satisfying the record Mortgage on December 22nd, 2005.

3.18 The Court erred in failing to find, conclude, hold and rule that Borchers' attorney was authorized to satisfy the Mortgage by a Mortgage Lien Satisfaction Affidavit within the time requirements of S.C. Code Ann. §29-3-310; the error being, S.C. Code Ann. §29-3-330(e) authorizes an attorney paying the debt to satisfy a mortgage by filing a Mortgage Lien Satisfaction Affidavit upon confirmation of payment of the debt.

3.19 The Court erred in failing to find, conclude, hold and rule that Borchers' attorney could have entered satisfaction of the Mortgage so as to prevent any violation of S.C. Code Ann. §29-3-310; the error being, Borchers' attorney paid in full the amount due on the Mortgage on the closing date.

3.20 The Court erred in failing to find, conclude, hold and rule that Borchers' attorney could have entered satisfaction of the Mortgage so as to prevent any violation of S.C. Code Ann. §29-3-310; the error being, Borchers' attorney was authorized by S.C. Code Ann. §29-3-330(e) to enter a Mortgage Lien Satisfaction Affidavit upon payment of the indebtedness in full.

3.21 The Court erred in failing to find, conclude, hold and rule that when an attorney for a purchaser or other person having an interest in any estate bound by the Mortgage has the authority to execute and file a Mortgage Lien Satisfaction Affidavit upon payment of the debt, the provisions of S.C. Code Ann. §29-3-310 and the penalty provided for in S.C. Code Ann. §29-3-320 are unavailable to the payor of the debt; the error being, the intent and purpose of S.C. Code Ann. §29-3-310 and 29-3-320 is to penalize a mortgagee who fails to timely satisfy a mortgage that could not be canceled or satisfied by the paying party.

3.22 The Court erred in failing to find, conclude, hold and rule that when an attorney for a purchaser or other person having an interest in any estate bound by the Mortgage has the authority to execute and file a Mortgage Lien Satisfaction Affidavit upon payment of the debt, the provisions of S.C. Code Ann. §29-3-310 and the penalty provided for in S.C. Code Ann. §29-3-320 are unavailable to the payor of the debt; the error being, the purchaser or other person having an interest in the estate bound by the Mortgage had the authority to satisfy the Mortgage prior to the expiration of the time provided in S.C. Code Ann. §29-3-310.

3.23 The Court erred in finding, concluding, holding and ruling that failure of the Bank to timely satisfy the Mortgage violated the provisions of S.C. Code Ann. §29-3-310; the error being, Borchers' attorney was expressly authorized to satisfy the Mortgage pursuant to the provisions of S.C. Code Ann. §29-3-330(e) prior to the time limitation provided in S.C. Code Ann. §29-3-310.

3.24 The Court erred in failing to find, conclude, hold and rule that when an attorney for a purchaser or other person having an interest in any estate bound by the Mortgage has the authority to satisfy the Mortgage by filing a Mortgage Lien Satisfaction

Affidavit upon payment of the debt, the provisions of S.C. Code Ann. §29-3-310 and the penalty provided for in S.C. Code Ann. §29-3-320 are unavailable to the payor of the debt; the error being, the paying party could create a claim for a penalty through the payor's inaction in failing to satisfy the Mortgage.

3.25 The Court erred in finding, concluding, holding and ruling that Borchers made any Request upon the Bank to cancel the Mortgage in compliance with the requirements of S.C. Code Ann. §29-3-310; the error being, the evidence fails to support any reasonable inference that a Request was made by the Borchers to the Bank to cancel or satisfy the Mortgage.

3.26 The Court erred in failing to find, conclude, hold and rule that the Bank commenced this action by asserting a claim that the Mortgage secured the payment of a debt owed by Strawn to the Bank; the error being, the Bank's Complaint states a cause of action to establish that the Mortgage constituted a lien on the premises described in the Mortgage to secure payment of the debt owed by Strawn.

3.27 The Court erred in failing to find, conclude, hold and rule that a valid dispute existed as to the viability of the lien of the Mortgage until such time as the Court ruled in the matter; the error being, that when the Bank's action was commenced, a genuine issue existed as to whether or not the Mortgage secured payment of the undisputed debt owed by Strawn to the Bank.

3.28 The Court erred in failing to find, conclude, hold and rule that no violation of S.C. Code Ann. §29-3-310 and no penalty under §29-3-320 can occur or result so long as a dispute exists as to the requirement for cancellation or satisfaction thereof; the error being, the clear intent and purpose of S.C. Code Ann. §29-3-310 and §29-3-320 is to apply to a mortgage where no dispute exists as to the requirement for satisfaction thereof.

3.29 The Court erred in failing to find, conclude, hold and rule that until such time as a final adjudication was made about the viability of the Mortgage, there could be no violation of S.C. Code Ann. §29-3-310 and no penalty exacted pursuant to §29-3-320; the error being, that until an adjudication was made, a dispute existed about the requirement for satisfaction of the Mortgage.

3.30 The Court erred in failing to find, conclude, hold and rule that no determination was made about the requirement for satisfaction of the Mortgage until August 18th, 2008 when the Court ruled on the dispute; the error being, the Court ruled for the first time on August 18th, 2008 that the Bank was estopped to assert a lien on the mortgaged premises.

3.31 The Court erred in failing to find, conclude, hold and rule that the Mortgage was satisfied prior to the ruling of the Court on August 18th, 2008; the error being, the Mortgage was satisfied by Borchers' attorney on December 22nd, 2005.

3.32 The Court erred in failing to find, conclude and hold that when the adjudication was made on August 18th, 2008 that the Bank was estopped to assert a lien on the mortgaged premises, no open mortgage existed; the error being, the Mortgage was cancelled by Mortgage Lien Satisfaction Affidavit on December 22nd, 2005.

3.33 The Court erred in failing to find, conclude, hold and rule that the burden was on Borchers to prove by clear and convincing evidence that Borchers made request for satisfaction of the Mortgage; the error being, S.C. Code Ann. §29-3-310 and §29-3-320 clearly require that a Request to satisfy the Mortgage be made by clear and convincing evidence.

3.34 The Court erred in failing to find, conclude, hold and rule that Borchers failed to prove by clear and convincing evidence that a Request for Mortgage satisfaction was made; the error being, the evidence does not support the standard of clear and convincing evidence.

IV. UNDISPUTED MATERIAL FACTS

Based upon the pleadings, affidavits, depositions and testimony in this matter, the undisputed material facts are:

4.1 On October 12th, 2001, the Defendant Strawn owned the real property described in paragraph 4 of the Plaintiff's Complaint ("Property").

4.2 On October 12th, 2001, Strawn delivered to Plaintiff his note ("Note") in the amount of \$50,000.00;

4.3 On October 12th, 2001, Strawn made, executed and delivered the Mortgage;

4.4 The Mortgage constituted a lien on the Property pursuant to the provisions of S.C. Code Ann. §29-3-50 (1976, as amended);

4.5 On December 12th, 2001, Strawn conveyed the Property described in the Mortgage to Cammie B. Strawn;

4.6 On September 3rd, 2003, Strawn renewed his credit line with the Bank secured by the first lien of the Mortgage;

4.7 On October 31st, 2003, Cammie B. Strawn conveyed the Property to Borchers;

4.8 James S. Belk, Esquire was the closing agent for the sale and conveyance by Cammie B. Strawn to Borchers;

4.9 On October 31st, 2003, James S. Belk, Esquire, closing agent, paid to the Bank the full amount of the indebtedness due on the Note securing the Mortgage;

4.10 No Request was made by Strawn, as grantor, to cancel or satisfy the Mortgage;

4.11 On December 21st, 2005, James S. Belk, Esquire, as the closing agent, made, executed and filed in the Office of Register of Deeds for Anderson County, South Carolina a Mortgage Lien Satisfaction Affidavit pursuant to S.C. Code Ann. §29-3-330(e) (2005), which satisfaction was filed in the Office of Register of Deeds for Anderson County, South Carolina on December 22nd, 2005 in Records Book 07123 at page 0003;

4.12 This action was filed by the Bank on March 1st, 2006 seeking a cancellation of the satisfaction of the Mortgage and foreclosure thereof;

4.13 The December 21st, 2005 Mortgage Satisfaction was never cancelled; and,

4.14 This Court ruled by Honorable J.C. Nicholson, Jr. on August 18th, 2008 that the Bank was estopped to assert a lien against the mortgaged premises.

V. ISSUES

5.1 Was the Bank obligated to cancel the Mortgage without a request of the Grantor to cancel the same?

5.2 Was the Mortgage duly satisfied within the time mandated by S.C. Code Ann. §29-3-310?

5.3 Can a violation of S.C. Code Ann. §29-3-310-320 occur when the attorney for the requesting party has the authority to cancel pursuant to S.C. Code Ann. §29-3-330(e)?

5.4 Does the evidence support a claim that a Request to cancel the Mortgage was made by or on behalf of the Borchers?

VI. LAW/ANALYSIS

6.1 Was the Bank obligated to cancel the Mortgage without a request of the Grantor to cancel the same?

The Mortgage provided in pertinent part that "...[T]his Mortgage shall remain an open Mortgage of record to secure future advances in accordance with §29-3-50, as amended, Code of Laws of S.C. (1976) even in the event all sums secured by this Mortgage may be fully paid at any one; however, upon the request of grantor (emphasis added), lender will cause this Mortgage to be

released and canceled of record upon full payment of all indebtedness then owing, and upon such cancellation of this Mortgage of record, this Mortgage shall become null and void..."

S.C. Code Ann §29-3-50(A) provides in pertinent part that "[A]ny Mortgage... creating a lien on any real estate, securing existing indebtedness or future advances to be made, regardless of whether the advances are to be made at the option of the lender, are valid from the day and hour when recorded so as to affect the rights of subsequent creditors, whether lien, contractors or simple contract creditors, or purchasers for valuable consideration without notice to the same extent as if the advances were made as of the date of execution of the Mortgage... for the total amount of advances made thereunder, together with all other indebtedness and sums secured thereby, the total amount of existing indebtedness and future advances outstanding at any one time may not exceed the maximum principal amount stated therein, plus interest thereon, attorney's fees and court costs..."

The foregoing statute provides that an "Open-End Mortgage" remains viable until the mortgagor requests cancellation. Central Production Credit Ass'n v. Page, 268 S.C. 1, 231 S.E.2d 210 (S.C., 1977). When there is no debt and no commitment for a loan, the mortgagee must cancel an Open-End Mortgage when the mortgagor so requests. Central Production Credit Ass'n v. Page *Id.*

The Equity Asset Line Agreement between the Bank and Strawn dated September 9th, 2003 and attached as Plaintiff's Exhibit "1" to the Complaint provides for a five-year term. The said Equity Asset Line Agreement provided for termination only upon certain conditions specified under lender's rights. The Bank contends it had no right to terminate the Equity Asset Line Agreement or satisfy and cancel the Mortgage without a Request from Strawn, as grantor. Terminating the Equity Asset Line Agreement without Request of the grantor would violate the Bank's duty to the grantor. Since the grantor never requested release or cancellation of the Mortgage, the Bank was neither obligated to nor authorized to satisfy or cancel the same.

6.2 Was the Mortgage duly satisfied within the time mandated by S.C. Code Ann. §29-3-310?

S.C. Code Ann. §29-3-310 provides the holder of a Mortgage is required to satisfy and cancel a Mortgage within three months after the mortgage holder has received full payment of the indebtedness secured by the Mortgage. It is undisputed the Bank has never received full payment. The Bank commenced action to foreclose its Mortgage on March 1st, 2006. In response to the Bank's claim, this Court ruled on August 18th, 2008 that the Bank should have known Borchers intended to have the Mortgage satisfied, therefore, the Bank was estopped to claim a lien against the Property. That ruling was made on August 18, 2008 to end a strongly contested dispute between the parties. August 18th, 2008 is the first date the Bank knew or should have known the debt was satisfied. Therefore, the Bank had until November 18th, 2008 to satisfy the Mortgage. When the Bank had the duty to satisfy the Mortgage, it had been satisfied almost three years by the Mortgage Lien Satisfaction Affidavit filed on December 21st, 2005.

Clearly, the Bank never failed to satisfy the Mortgage as required by S.C. Code Ann. §29-3-310.

6.3 Can a violation of S.C. Code Ann. §29-3-310-320 occur when the attorney for the requesting party has the authority to cancel pursuant to S.C. Code Ann. §29-3-330(e)?

The Defendant Borchers and the closing agent knew or should have known prior to three months after the Closing that the Mortgage had not been satisfied or canceled of record. The closing agent had the authority to execute and file a Mortgage Lien Satisfaction Affidavit prior to the expiration of three months after closing date. It would be inequitable to permit one having the authority to satisfy and cancel the Mortgage to refrain from exercising that power and authority so as to effect and assert a penalty against the mortgage holder.

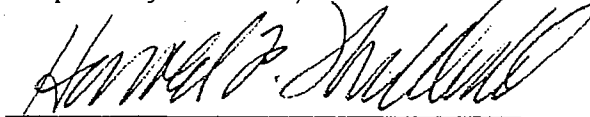
6.4 Does the evidence support a claim that a Request to cancel the Mortgage was made by or on behalf of the Borchers?

S.C. Code Ann. §29-3-310 provides in pertinent part that: "[A]ny holder of a record mortgage who has received full payment..., at the request by certified mail or other form of delivery with a proof of delivery of the mortgagor or of his legal representative... within three months after certified mail or other form of delivery, with a proof of delivery, request is made, enter satisfaction..."

S.C. Code Ann. §29-3-320 does not mandate a particular format. Bostic v. American Home Mortg. Servicing, Inc., 375 S.C. 143, 650 S.E.2d 479 (S.C. App., 2007). However, the statute does require proof of delivery that is reliable and appears to be equivalent to certified mail. It is obvious the intent of the statute is to establish a burden of proof that is higher than the greater weight of the evidence. It would appear the burden is to prove delivery by clear and convincing evidence.

In the case at hand, there is no direct evidence that the Request was delivered. The evidence shows that the practice of the closing agent was to deliver a Request for satisfaction, but the witness did not remember delivering the Request and the Bank denies having any record of receiving such Request.

Respectfully submitted,



Harold P. Threlkeld

P. O. Box 1385

Anderson, SC 29622-1385

Telephone No.: 864.226.1305

Fax No.: 864.226.1685

Attorney for Plaintiff

Anderson, South Carolina
Dated: May 28, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
JUN 29 2010
SC Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No.: 2006-CP-04-770

Regions Bank..... Appellant,

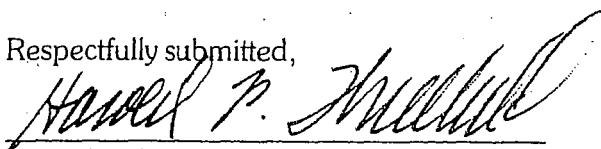
v.

Richard C. Strawn, Robert K. Borchers, individually and as
Personal Representative of the Estate of Marie Borchers and
Nancy Davidson Borchers..... Respondents.

NOTICE OF APPEAL

Appellant, Regions Bank , appeals the judgment and Order of the Honorable R. Lawton McIntosh, dated May 24, 2010 and filed with the Clerk of Court on May 26, 2010 (a copy of which is attached) and Order of Honorable R. Lawton McIntosh dated June 6, 2010 and filed with the Clerk of Court on June 15, 2010 (a copy of which is attached) denying Motion of Appellant to Reconsider and/or to Alter or Amend said Order pursuant to Rules 52(b) and 59(e), South Carolina Rules of Civil Procedure.

Respectfully submitted,


Harold P. Threlkeld
S.C. Bar No.: 5568
P. O. Box 1385
Anderson, SC 29622-1385
(864) 226-1305
Attorney for Appellants

June 28, 2010
Anderson, South Carolina

~ Other counsel of record:

Samantha P. Nelson
Epps, Nelson & Epps
P. O. Box 2167
Anderson, SC 29622-2167

Attorney for Respondents,
Robert K. Borchers, individually
and as Personal Representative
of Estate of Marie Borchers and
Nancy Davidson Borchers

STATE OF SOUTH CAROLINA ()
()
COUNTY OF ANDERSON ()

IN THE COURT OF COMMON PLEAS
C.A. NO.: 2006-CP-04-770

Regions Bank, ()

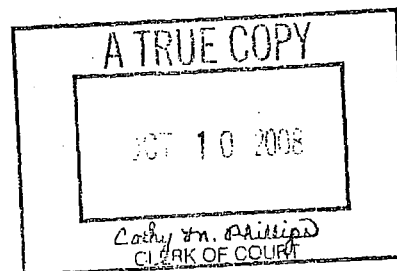
Plaintiff, ()

vs. ()

Richard C. Strawn, Robert Karl Borchers ()
as Personal Representative of the Estate ()
of Marie N. Borchers, Robert Karl Borchers ()
and Nancy Davidson Borchers, ()

Defendants. ()

ORDER OF JUDGMENT



THIS ACTION was brought by Complaint of the Plaintiff seeking a money judgment against the Defendant, Richard C. Strawn.

This matter is before the Court on motion of the Plaintiff for judgment by default against the Defendant, Richard C. Strawn, pursuant to Rule 55, South Carolina Rules of Civil Procedure.

As evidenced by Affidavit of Service exhibited to me prior to hearing in this matter, the Summons and Complaint was duly served on the Defendant, Richard C. Strawn, by Officer Lana Hendrix of the Spartanburg County Sheriff's Office on March 13, 2006, as evidenced by Affidavit of Service exhibited prior to hearing in this matter. More than 30 days have elapsed since the service of the Summons and Complaint upon the Defendant, Richard C. Strawn, and no Answer, Notice of Appearance or other responsive pleading has been filed or served in response to the Summons, therefore, the Defendant, Richard C. Strawn, is in default.

From the pleadings and testimony, I find that on September 3, 2003, the Defendant, Richard C. Strawn, made, executed and delivered to the Plaintiff an Equity Asset Line Agreement (the "Note") in the amount of Fifty thousand dollars (\$50,000.00), payable according to the terms and terms thereof, a copy of which is annexed as Exhibit "1" to the Complaint, and the terms and provisions of which are made part hereof by this reference.

The Note further provided that in the event the maker failed to pay any sum when due according to its terms or violates any covenants thereof and it becomes necessary for

NOTICE PAID

the Plaintiff to employ an attorney to exercise its rights thereunder, the Defendant Richard C. Strawn, agreed to pay all cost of collection, including a reasonable amount as attorney's fees for Plaintiff's attorney and all court costs.

The Defendant, Richard C. Strawn defaulted in payment of the Note in that he failed to pay the monthly installment due on November 24, 2005 and all installments accruing due thereafter and Plaintiff as owner and holder thereof has demanded payment of the balance due and said Defendant has refused such demand.

The principal balance due on the Note is the sum of Forty-nine thousand three hundred sixty-three and 01/100 (\$49,363.01) dollars.

Interest has accrued on the principal through September 21, 2008 in the amount of Thirteen thousand two hundred seventy-four and 94/100 (\$13,274.94) dollars.

Plaintiff is entitled to an award of taxable costs for filing fees and service fees in the amount of One hundred fifty dollars (\$150.00).

The Plaintiff is entitled to an award of attorney's fees in the amount of Ten thousand dollars (\$10,000.00). This award is made based upon a reasonable fee considering the nature, extent and difficulty of the legal services rendered, the time and labor devoted to the case, the professional standing of counsel for the Plaintiff, contingency of compensation, fee customarily charged in the locality for similar services and the beneficial results obtained. The attorney's fees is based in part on Affidavit of Plaintiff's attorney submitted in support of this award.

ORDERED that judgment be and it hereby is rendered in favor of the Plaintiff against the Defendant, Richard C. Strawn, in the amount of Seventy-two thousand seven hundred eighty-seven and 95/100 (\$72,787.95) dollars, with interest after date at the judgment rate.

IT IS ORDERED.

Richard C. Strawn Jr.

Presiding Judge for
Court of Common Pleas
Anderson County, South Carolina

Dated: October 9, 2008
Anderson, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS

C.A. No.: 2006-CP-04-770

Regions Bank,

Plaintiff,

vs.

Richard C. Strawn, Robert K.
Borchers, individually and as
personal representative of the
Estate of Marie Borchers and
Nancy Davidson Borchers,

Defendants.)

AFFIDAVIT OF CATHY SLATON

Appeared before me, Cathy Slaton, having been duly sworn, deposes and says as follows:

1. That she is now and in 2003 was employed by the Law Offices of James Belk in Anderson, South Carolina.
2. That she assists with documentation and other tasks and often takes mortgage payoff checks from Mr. Belk's office to local banks in connection with real estate closings performed by Mr. Belk.
3. That on October 31, 2003, in connection with a closing that was to take place later that day, she requested a pay off amount on a mortgage held by Regions Bank encumbering real property at / in Anderson County, South Carolina.
4. That Regions Bank responded with a pay off quote (a copy of which is attached as Exhibit 1).
5. That after the closing, she hand carried a copy of Exhibit 1, an original check for the pay off amount (a copy of which is attached as Exhibit 2), and an original, signed letter of instruction (a copy of the unsigned file copy of which is attached as Exhibit 3) to Regions Bank in Anderson and delivered the same to a bank employee working at the teller desk.

FILED
2006-10-31
CLERK OF COURT
ANDERSON, S.C.

PENGAD 800-431-6889	COURT'S
	EXHIBIT NO. <u>11</u>
	IDENTIFICATION/EVIDENCE
	DKT.# <u>06 CP 04 1770</u>
DATE: <u>3-4-10</u>	

6. That as she delivered the items to the teller, she instructed the teller that the check was to pay off a mortgage in connection with a real estate closing and that instructions were contained in the latter.
7. That on the face of the letter that she delivered to Regions Bank, Regions Bank is instructed to send the "Satisfied Documents" within the three month period required by statute so that the satisfaction could be properly filed and the mortgage could be removed from the record, and further that any questions should be directed to Mr. Belk.

Further the affiant sayeth not.

Cathy Slaton
Cathy Slaton

Sworn to and subscribed before me,
This 14th day of April, 2008.

Diana Crowell
Notary Public for South Carolina

My Commission Expires: 8-27-17

OCT-31-2003 FRI 09:07 AM KEEGAN ANDERSON SC 0642312953

AMAI 10/31/03

ACCOUNT INQUIRY

09:22:48

PG

CTL2 039 CTL3 201 CTL4 0000 ACCT
CTL2 039 CTL3 000 CTL4 0000 CUST

EFF DATE 10/31/03

ACTIVE ACCOUNT

SIMPLE INT - VAR RATE

PAYOFF 32240.42

***** RATES *****

AUTO OR N

LINE AMOUNT 50000.00

CURR RATE 6.0800000

PROD TYPE LRVI

AVAILABLE AMT 17995.05

ORIG RATE 6.0800000

PRIM OFFICER 5431

LT CHG DUE 0.00

PER DIEM 5.3312355

GL KEY 01 039 201 0

FEES DUE 0.00

***** DATES *****

CALL CODE 0101

CURRENT PRIN 32004.95

CONTRACT DATE 09/09/03

***** REPAYMENTS *****

CURRENT INT 235.47

CURR MATURITY 09/24/08

CURR TERM 60

CLOSED DATE

PYMTS MADE 0

REG PYMT AMT 107.68

NEXT DUE DATE 11/24/03

PYMTS REM 0

NEXT DUE AMT 159.77

PAST DUE DATE 10/24/03

MONTHS EXTD 000 REN N

PAST DUE AMT 107.68

LAST MAINT DT 09/15/03

YTD INT COLL 0.00

LST BAL CHG DT 10/08/03

INT COL PREV 0.00

RICHARD C STRAWN

***** CREDIT HIST *****

010 015 030 050 090 120

000 000 000 000 000 000

COLLATERAL

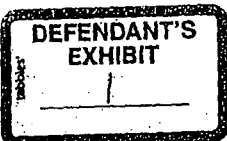
ANDERSON

SC 29625-1976 CODE: 3170

PH (864) 261-3365

DESC: REAL PROPERTY LOCATED AT 105 P

PF3-ADDL INFO



JAMES S. BELK -TRUST ACCOUNT

1813

**** REAL ESTATE CLOSING ****

Buyer/Borrower: Borchers

Seller: Strawn

Lender:

Property:

Settlement Date: October 31, 2003

Disbursement Date: October 31, 2003

Check Amount: \$32,256.41

Pay To: Regions Bank

For:

Payoff of first Mortgage

LOAN # 2003112217

001-01 11:34 0000 012000 011 000111 0

001-01 11:34 0000 012000 011 000111 0

Law Offices
James S. Belk
Attorney and Counselor at Law
1202 N Main Street
Anderson, South Carolina 29621
Phone: 864-224-8123 Fax: 864-260-9038

October 31, 2003

Regions Bank

Attention: Mortgage Loan Payoff Department

Re: Mortgagor(s): Cammie B. Strawn
Address:
Anderson, SC 29625
Loan No.:
Our File Number: BORCHERS, MARIE

Dear Sir/Madam:

In connection with the above referenced property, enclosed is our trust account check, dated October 31, 2003, in the amount of \$32,256.41, representing the final payment for the above loan number and Mortgagor (s).

PLEASE FORWARD SATISFIED DOCUMENTS (with a copy of this letter) TO THIS OFFICE TO BE REMOVED OF RECORD. PLEASE DO NOT SEND THE ORIGINAL DOCUMENTS DIRECTLY TO THE BORROWERS.

Please be advised that South Carolina Code Ann. Section 29-3-310 provides in part that any person receiving full payment of a mortgage, within 3 months after the payment has been made, shall enter satisfaction in the proper office for removal from record. South Carolina Code Ann. 29-3-320 provides in part, that if the satisfaction is not entered on record, the aggrieved party shall receive a sum of money not to exceed ONE-HALF OF THE DEBT secured by the mortgage to be recovered by action in any court of jurisdiction within the State of South Carolina.

We appreciate your assistance in this matter and, should you have any questions, please do not hesitate to contact us.

Sincerely,

James S. Belk, Attorney at Law

Enclosures
cc: File



FILED-CLERK'S OFFICE

OCT 31 - 5 P 2:52

JUDGE P. J. AND
GENERAL SESSIONS

JAMES S. BELK -TRUST ACCOUNT

1813

**** REAL ESTATE CLOSING ****

Buyer/Borrower: Borchers
 Seller: Strawn
 Lender:
 Property:
 Settlement Date: October 31, 2003
 Disbursement Date: October 31, 2003
 Check Amount: \$32,256.41
 Pay To: Regions Bank
 For:
 Payoff of first Mortgage

loan #



OCT31-03 11:34 04092 ADL2010 0713

32,256.41 LCE

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2006CP0400770

Regions Bank vs. Richard C Strawn

CHECK ONE:

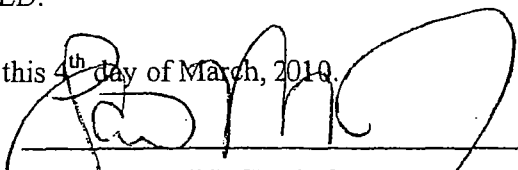
- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☒ Statement of Judgment by the Court:

Plaintiff's motion for Summary Judgment is DENIED.

Dated at Anderson, South Carolina, this 4th day of March, 2010.

Court Reporter: Jo Rice


PRESIDING JUDGE - R. Lawton McIntosh

This judgment was entered on the 3-4-10 and a copy mailed first class this 3-5-10, to attorneys of record or to parties (when appearing pro se) as follows:

Harold P. Threlkeld P O BOX 1385
ANDERSON, SC 29622
William N. Epps Jr. P O BOX 2167
ANDERSON, SC 29622
Samantha Nelson Murphy P O BOX 2167
ANDERSON, SC 29622

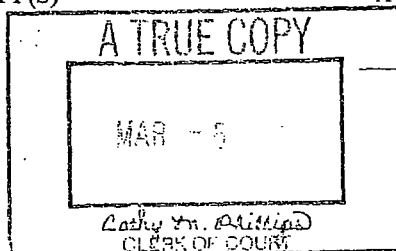
Matthew Holmes Henrikson PO BOX 6728
GREENVILLE, SC 29606
William N. Epps Jr. P O BOX 2167
ANDERSON, SC 29622
Samantha Nelson Murphy P O BOX 2167
ANDERSON, SC 29622
Matthew Holmes Henrikson PO BOX 6728
GREENVILLE, SC 29606
Richard C. Strawn, PRO SE 106 Pisgah Drive
Spartanburg, SC 29303

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRPC APP-24/FORM 4

CPFORM4M




Cathy M. Phillips - Clerk of Court

**IN THE COURT OF COMMON PLEAS
OF THE TENTH JUDICIAL CIRCUIT
2006-CP-04-770**

PLAINTIFF,

VS

MOTION FOR SUMMARY JUDGMENT

**RICHARD C. STRAWN, ROBERT)
K. BORCHERS, INDIVIDUALLY)
and as PERSONAL REPRESENTATIVE))
OF THE ESTATE OF)
MARIE BORCHERS and)
NANCY DAVIDSON BORCHERS,)**

DEFENDANTS.

**MARCH 4, 2010
ANDERSON, SOUTH CAROLINA**

BEFORE: THE HONORABLE R. LAWTON MCINTOSH

FOR THE PLAINTIFF:

**HAROLD THRELKELD
ATTORNEY AT LAW
POST OFFICE BOX 1385
ANDERSON, SC 29622-1385**

FOR THE DEFENSE:

**SAMANTHA P. NELSON
ATTORNEY AT LAW
230 W. WHITNER STREET
ANDERSON, SC 29621**

**RICHARD C. STRAWN
PRO SE DEFENDANT
106 PISGAH DRIVE
SPARTANBURG, SC 29**

JO RICE
COURT REPORTER

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EXHIBITS

NO PLAINTIFF'S EXHIBITS WERE ENTERED INTO EVIDENCE

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***ALL EXHIBITS WERE FILED WITH THE ANDERSON COUNTY CLERK OF COURT**

1 **THE COURT:** MISTER THRELKELD, THIS IS YOUR MOTION?

2 **MR. THRELKELD:** YES, SIR. MAY IT PLEASE THE COURT.

3 **THE COURT:** YES, SIR.

4 **MR. THRELKELD:** JUDGE, THIS A MOTION FOR SUMMARY JUDGMENT,
5 PURSUANT TO RULE 56 OF THE SOUTH CAROLINA RULES OF CIVIL
6 PROCEDURE. ON THE COUNTERCLAIM THAT WAS RAISED BY THE
7 DEFENDANT, THE BORCHERS, BECAUSE THE BORCHERS CONTEND THAT THE
8 BANK FAILED TO SATISFY THE MORTGAGES, AS REQUIRED BY §29-3-310. I
9 BELIEVE IT'S IMPORTANT TO BEGIN WITH A QUESTION OF WHETHER OR NOT
10 THIS STATUTORY SCHEME OF §29-3-310 AND 320 IS APPLICABLE TO THE
11 FACTUAL BACKGROUND THAT WAS HEARD IN THIS CASE.

12 FIRST OF ALL, LET ME SAY THAT THE COURT RULED IN AUGUST OF
13 2008, THAT DEBT WAS SATISFIED. THE FACT OF THE MATTER IS, THE
14 MORTGAGE WAS SATISFIED DECEMBER 22, 2005. THE STATUTORY SCHEME
15 WAS DESIGNED TO EXACT A PENALTY ON A FINANCIAL INSTITUTION THAT
16 WAS NEGLIGENT IN SATISFYING A MORTGAGE THAT HAD ADMITTEDLY BEEN
17 PAID. THAT'S NOT THE SITUATION HERE. HOWEVER, LET'S PASS THAT
18 QUESTION FOR A MOMENT AND GO INTO THE CRUX OF THE MATTER
19 ASSUMING THAT THE STATUTORY SCHEME IS APPLICABLE TO THIS
20 SITUATION.

21 THE BACKGROUND IS, MISTER STRAWN HAD A CREDIT LINE WITH
22 REGIONS BANK. I FEEL LIKE SOMETIMES IT'S DIFFICULT FOR ME TO
23 COMMUNICATE WHAT A CREDIT LINE IS, BUT IT'S REALLY THE SAME THING AS
24 A CREDIT CARD IN THE SENSE THAT EVERY MONTH, IF YOU GET BILLED FOR
25 YOUR CREDIT CARD, YOU PAY IT OFF, YOU CAN STILL GO BACK AND CHARGE

1 ON YOUR CREDIT CARD.

2 **THE COURT:** NOW WAS THE CREDIT LINE LIKE A SECOND MORTGAGE?

3 **MR. THRELKELD:** I DON'T KNOW IF IT WAS A SECOND MORTGAGE, YOUR
4 HONOR.

5 **THE COURT:** SECURED?

6 **MR. THRELKELD:** IT WAS A MORTGAGE AND, BY THE WAY, THAT
7 MORTGAGE PROVIDED A WAY TO END THAT CREDIT LINE. BUT THE FACT OF
8 THE MATTER IS, IT WAS SOMETHING THAT COULD BE PAID AND REMAIN IN
9 EFFECT, A PART OF IT OR ALL OF IT, AND PAYOFF IN THE LANGUAGE DEALING
10 WITH THESE KINDS OF TRANSACTIONS MEANS, YOU PAY IT DOWN TO ZERO.
11 THIS MORTGAGE PROVIDES, ON THE FIRST PAGE, THAT IT WOULD BE
12 SATISFIED WHEN MISTER STRAWN GAVE NOTICE TO THE BANK TO CANCEL
13 THE MORTGAGE. WITHOUT THAT NOTICE, THE BANK NEVER KNOWS WHEN
14 IT'S PAID OFF. FOR EXAMPLE, IF SOMEONE WALKS IN WITH A CHECK AND
15 SAYS, "PAY THIS AMOUNT TO ACCOUNT NUMBER SO-AND-SO," THEN THE
16 BANK HAS NO WAY OF KNOWING WHAT THE INTENT IS. AND THAT'S THE
17 BACKGROUND THAT CAUSED THIS ISSUE HERE TODAY AND I UNDERSTAND
18 THERE MAY BE SOME FACTUAL DISPUTES, OR FACTUAL ISSUES ON THAT, BUT
19 NEVERTHELESS, THAT IS THE ISSUE THAT CREATED THE PROBLEM. WAS
20 THERE ANY WAY THAT THE BANK SHOULD HAVE KNOWN THAT THE CREDIT
21 LINE WAS CANCELLED, THAT THE MORTGAGE WAS CANCELLED.

22 NOW, WE KNOW NOW, AS A MATTER OF LAW, JUDGE NICHOLSON
23 DECIDED IN AUGUST OF 2008, THAT THE BANK SHOULD HAVE KNOWN.
24 HOWEVER, THAT'S THE FIRST TIME THE BANK KNEW THAT THE DEBT WAS
25 SATISFIED, THAT IT HAD BEEN PAID. AT THE SAME TIME THE DEBT HAD BEEN

1 SATISFIED, THE MORTGAGE HAD BEEN SATISFIED IN 2005 AND THIS ACTION
2 THAT WAS BROUGHT IN 2006 WAS RAISING THE QUESTION OF WHETHER OR
3 NOT THE MORTGAGE SHOULD HAVE BEEN SATISFIED.

4 OKAY, IN 2003, MISTER STRAWN, OR HIS WIFE WHO GOT IT FROM HIM IN
5 A CASE, THERE WAS A DIVORCE AND SHE GOT THE HOUSE. SHE SOLD THE
6 HOUSE TO THE BORCHERS, WHO ARE CERTAINLY INNOCENT PEOPLE.
7 THERE'S NO QUESTION ABOUT THAT. THE AMOUNT DUE ON THE CREDIT LINE
8 WAS PAID AT THE TIME OF THE SALE, BUT ONCE AGAIN, PAYMENT OF THE
9 CREDIT LINE, THE BALANCE, IS NOT RELEVANT TO THE ISSUE OF WHETHER
10 OR NOT THE CREDIT LINE, THE OVERALL CREDIT LINE, WAS CANCELLED.
11 SINCE THE BANK CONTENDS IT HAD NO INSTRUCTIONS TO CANCEL THE LINE,
12 IT NOTIFIED MISTER STRAWN, "YOUR CREDIT LINE IS ZERO." HE ACCESSED IT,
13 AND RAN IT UP TO \$50,000.00.

14 **THE COURT:** SUBJECT TO THE CONVEYANCE.

15 **MR. THRELKELD:** BUT REMEMBER, NOW, THIS IS VERY IMPORTANT TO
16 UNDERSTANDING HOW THIS THING HAPPENED. THE BANK DOESN'T CHECK
17 THE TITLE TO MAKE NEW ADVANCES. THE STATUTORY PROVISION PROVIDES
18 THAT THAT LIEN STAYS UNTIL IT'S SATISFIED, UNTIL IT'S CANCELLED. AND
19 SO, IT'S NOT THE SITUATION WHERE THE BANK IS CONCERNED ABOUT
20 WHETHER OR NOT THE UNDERLYING MORTGAGE, THE UNDERLYING
21 PROPERTY, HAS BEEN SOLD. THAT'S NOT AN ISSUE FOR THE BANK. IN
22 RETROSPECT, I'M SURE THEY WISH THEY HAD KNOWN IT HAD BEEN SOLD IN
23 THIS CASE, BUT THAT TECHNICALLY OR LEGALLY, IS NOT AN ISSUE. IT'S A
24 MATTER OF FACT, THE CREDIT LINE WAS MAXED OUT AND BROUGHT TO THE
25 ATTENTION OF THE CLOSING ATTORNEY IN 2005 AND HE WENT DOWN TOOK

1 THE STATUTORY DIVISION, IN SECTION 29, AND SATISFIED THE MORTGAGE
2 AND THAT LED TO THE LEGAL ACTION. BY THE WAY, UNDER THE STATUTE IT
3 COULD HAVE BEEN CANCELLED AT ANY TIME, THE ATTORNEY COULD HAVE.

4 THE COURT: SAY THAT AGAIN, PLEASE, SIR.

5 MR. THRELKELD: UNDER THE STATUTE, THE CLOSING ATTORNEY
6 COULD HAVE CANCELLED THAT MORTGAGE BY STATUTE.

7 THE COURT: JUST BY THE AFFIDAVIT?

8 MR. THRELKELD: YES, SIR. THE DAY AFTER CLOSING. THE BANK LOST
9 \$50,000.00 ON THE DEAL. ALL RIGHT, THE ACTION AROSE BY THE BANK
10 BRINGING AN ACTION TO DETERMINE WHETHER OR NOT THE MORTGAGE
11 SHOULD HAVE BEEN CANCELLED AND THEN NOT TO FORECLOSE THE
12 MORTGAGE.

13 THE BORCHERS, THE PURCHASERS, SEEK TO HAVE THE COURT
14 ASSESS A PENALTY AGAINST THE BANK UNDER §29-3-320, BECAUSE IT FAILED
15 TO SATISFY THE MORTGAGE AS REQUIRED BY DIVISION §29-3-310. WHEN A
16 PARTY MOVES FOR SUMMARY JUDGMENT, A DEFENDANT FOR EXAMPLE,
17 MOVES FOR SUMMARY JUDGMENT, A NON-MOVING PARTY, HAS THE BURDEN
18 TO PROVE THAT THEY HAVE SUFFICIENT EVIDENCE TO MOVE FORWARD. I
19 WILL POINT OUT TO THE COURT THAT §29-3-310 IS A PENAL STATUTE. IT
20 MUST BE STRICTLY CONSTRUED AND THAT FITS BACK INTO MY INITIAL
21 QUESTION, IF IT MUST BE STRICKEN THROUGH, IS THAT STATUTORY SCHEME
22 DESIGNED TO DEAL WITH THE SITUATION WHERE THERE IS A DISPUTE OVER
23 WHETHER OR NOT THE DEBT'S BEEN PAID. OBVIOUSLY, THAT WASN'T WHAT
24 IT WAS DESIGNED FOR. IT CERTAINLY NEVER CONTEMPLATED THAT AND
25 DOESN'T REALLY CONTEMPLATE AN OPEN-ENDED CREDIT LINE. IT SIMPLY

1 CONTEMPLATES THE STANDARD MORTGAGE WHERE SOMEONE WOULD
2 SATISFY IT BY PAYING THE AMOUNT DUE.

3 THERE IS NO QUESTION THAT THE AMOUNT DUE ON THE DEBT WAS
4 PAID ON THE CLOSING DATE, I BELIEVE IT WAS OCTOBER 31, 2005. THERE'S
5 NO QUESTION ABOUT THAT. IN THIS CASE, IT IS A BURDEN ON THE
6 NON-MOVING PARTY TO PROVE, ONE, THAT THE MORTGAGE WAS PAID IN
7 FULL. WELL, JUDGE NICHOLSON MADE THAT CLEAR IN 2008 AND SO, AS OF
8 2008, IT WAS PAID IN FULL. BY THAT TIME, IT HAD BEEN SATISFIED FOR
9 THREE YEARS.

10 THE SECOND REQUIREMENT UNDER THE CASE THAT WAS CITED, THE
11 RECENT CASE, THE MORTGAGOR MUST PROVE THAT THEY MADE A REQUEST
12 BY "CERTIFIED MAIL" OR OTHER FORM OF DELIVERY THAT THE MORTGAGE BE
13 SATISFIED OF RECORD. OKAY. I DON'T WANT TO RUSH PAST "OTHER FORM
14 OF DELIVERY." CERTIFIED MAIL MEANS DOCUMENTARY PROOF THAT IT WAS
15 DELIVERED. THAT'S MY UNDERSTANDING. IT'S WHEN SOMEBODY SIGNS
16 SOMETHING SAYING THIS WAS DELIVERED. OBVIOUSLY, THERE IS NOT AN
17 INTENT IN THAT STATUTE TO HAVE LESS REQUESTS OR LESS NOTICE AND SO
18 TO FULFILL THE REQUIREMENTS OF THE STATUTE IN STRICT CONSTRUCTION,
19 THERE MUST BE A RECEIPT FOR NOTICE THAT SOMEONE WANTS THE
20 MORTGAGE TO BE SATISFIED. THERE WAS NO REQUEST BY CERTIFIED MAIL.
21 HAD THERE BEEN, WE WOULDN'T BE HERE TODAY.

22 **THE COURT:** LET ME ASK YOU THIS, AND I READ YOUR BRIEF AND
23 MS. NELSON, I HAVE NOT READ YOURS YET. I'M GOING TO.

24 **MS. NELSON:** YES, SIR.

25 **THE COURT:** OKAY. BUT YOU HAD A CLOSING ATTORNEY SENDING A

1 PAYOFF CHECK. WERE THERE ANY INSTRUCTIONS ALONG WITH THAT
2 CHECK, ANY INSTRUMENT AT ALL THAT SAID, "SATISFY THIS MORTGAGE," OR
3 SOMETHING ALONG THOSE LINES?

4 **MR. THRELKELD:** THERE'S A DISPUTE ABOUT THAT, YOUR HONOR, AND
5 REMEMBER, THE DISPUTE FAILS TO MEET THE STATUTORY SCHEME. THERE
6 IS A CLAIM THAT THERE WAS A LETTER GENERATED BY COMPUTER THAT,
7 HAD IT BEEN DELIVERED WITH THE PACKAGE, WOULD HAVE SAID, "HERE'S
8 THE CHECK. SATISFY THE MORTGAGE AND RETURN IT TO ME." THAT'S WHAT
9 THE CLAIM IS. LET'S ASSUME THAT THAT WAS DELIVERED AND THAT IS IN
10 DISPUTE. AS A MATTER OF FACT, THE AFFIDAVIT OF THE BANK SAYS THAT
11 THAT DIDN'T HAPPEN. LET'S ASSUME THAT'S TRUE. IF WE'RE LOOKING AT
12 STRICT CONSTRUCTION, THE STATUTE SAYS THAT WHAT THE INSTRUCTIONS
13 MUST BE IS THAT THE MORTGAGOR MUST TELL THE BANK, "SATISFY THAT
14 MORTGAGE, HERE ARE THE FEES THAT YOU CAN USE TO SATISFY THAT
15 MORTGAGE OF RECORD." THAT DIDN'T HAPPEN.

16 **THE COURT:** SO, IF I UNDERSTAND WHAT YOU ARE SAYING, YOU HAVE A
17 FACTUAL DISPUTE AS TO WHETHER OR NOT THERE WAS A DEMAND FOR
18 SATISFACTION, BUT THERE IS NO DISPUTE AS TO WHETHER ANY FEES FOR
19 SATISFACTION WERE MADE? IS THAT CORRECT?

20 **MR. THRELKELD:** I THINK THAT'S TRUE.

21 **MS. NELSON:** PROBABLY CORRECT. THERE WAS AN OVERPAYMENT OF
22 THE ACTUAL PAYOFF BY \$15.99 WHICH WOULD HAVE ALSO COINCIDED WITH
23 THREE DAYS PER DIEM. I DON'T KNOW FROM THE BANK WHETHER OR NOT
24 THEY ACCEPT PAYMENTS AT THEIR BRANCHES UP TO 5:00 OR IF THEY HAD
25 TO BE UP TO 2:00, BECAUSE THIS WAS A FRIDAY CLOSING. SO, THERE'S A

1 QUESTION. THE FILING FEE IS \$5.00 AND SO, DEPENDING ON WHAT THE
2 BANK'S POLICIES WERE, THAT \$15.99 WOULD HAVE BEEN SUFFICIENT TO
3 SATISFY THE FILING FEE OR IT WOULD NOT HAVE BEEN MADE UNLESS THEY
4 HAD TO INCLUDE THREE DAYS PER DIEM.

5 MR. THRELKELD: BUT THE STATUTE SAYS, THE STRICT CONSTRUCTION
6 STATUTE SAYS, "YOU MUST REQUEST AND YOU MUST SUPPLY THE
7 SATISFACTION FEES -- WHICH MAY BE \$6.00, I'M NOT SURE. IT MAY BE \$5.00
8 OR \$6.00, SOMETHING LIKE THAT -- AND IT MUST DIRECT THE BANK TO
9 SATISFY THE MORTGAGE OF RECORD. THAT'S WHAT THE STATUTE SAYS.
10 THIS LETTER SAID, "SEND ME THE MORTGAGE." THAT'S NOT WHAT THE
11 STATUTE SAYS. AGAIN, I LIVE IN A WORLD WHERE STRICT CONSTRUCTION --
12 THE FACT IS, YOU HAVE TO GO BY STRICT CONSTRUCTION AT SOME POINT
13 AND IN THIS CASE, WHAT HAPPENED DID NOT MEET THE STATUTE, OR WHAT
14 THE STATUTORY REQUIREMENTS ARE, AND AS A PENAL STATUTE, IT MUST.
15 ANY REQUESTS TO SATISFY MUST BE ACKNOWLEDGED BY EITHER CERTIFIED
16 MAIL OR "SOMETHING EQUIVALENT." ONLY A REASONABLE INTERPRETATION
17 COULD BE SOMETHING EQUIVALENT TO CERTIFIED MAIL. THE REASON FOR
18 THE STATUTE, YOUR HONOR, IS TO KEEP US FROM BEING WHERE WE ARE
19 TODAY WHERE SOMEBODY SAYS, "I TOLD THEM TO SATISFY IT AND THEY
20 DIDN'T SATISFY IT" AND THE BANK SAYS, "I DIDN'T KNOW." IT'S DESIGNED TO
21 KEEP THAT FROM HAPPENING AND THAT'S WHY IT HAPPENED BECAUSE WE
22 DIDN'T GET THAT KIND OF NOTICE.

23 ALSO, IT MUST SHOW THAT DESPITE FULL AND TECHNICAL AND STRICT
24 COMPLIANCE, THE BANK FAILED TO SATISFY THE MORTGAGE. WELL, ONCE
25 AGAIN, THE DEBT WAS DETERMINED TO BE SATISFIED IN 2008. THE

1 MORTGAGE WAS SATISFIED IN 2005.

2 **THE COURT:** SAY THAT AGAIN, PLEASE, SIR.

3 **MR. THRELKELD:** THE DEBT WAS DETERMINED TO BE SATISFIED IN
4 AUGUST OF 2008. THE MORTGAGE WAS SATISFIED IN 2005, THREE YEARS
5 BEFORE THE COURT DETERMINED THAT THE DEBT WAS SATISFIED. ONCE
6 AGAIN, UNLESS THERE IS FULL AND TECHNICAL COMPLIANCE WITH THE
7 STATUTE, THERE CANNOT BE ANY PENALTY ASSESSED. AND AGAIN, I'LL GO
8 BACK AND LOOK AT IT FROM, ASSUMING THERE IS A STATUTORY
9 APPLICABILITY TO THIS FACTUAL SITUATION, WHICH I WOULD CERTAINLY
10 ARGUE STRENUOUSLY THAT IT WOULD BE UNFAIR TO CONTINUE TO APPLY IT
11 TO THIS SITUATION EVEN UNDER AN APPLICABLE SITUATION IF IT'S NOT
12 APPLICABLE.

13 **THE COURT:** THANK YOU, SIR. MS. NELSON?

14 **MS. NELSON:** THANK YOU, YOUR HONOR. YOUR HONOR, I WOULD LIKE
15 TO -- I DO HAVE ADDITIONAL COPIES OF MY MOTION FROM MY RETURN, MY
16 MEMORANDUM IF YOU WOULD LIKE ONE.

17 **THE COURT:** LET ME SEE IT, PLEASE MA'AM. NO, ACTUALLY, SHE GAVE
18 IT TO ME. (INDICATING LAW CLERK)

19 **MS. NELSON:** ALL RIGHT. I ALSO, EVEN THOUGH ALL THESE ARE IN THE
20 COURT'S RECORDS, I WANT TO SHARE THEM WITH THE COURT, IT'S JUST
21 EASIER IN MY EXPERIENCE NOT TO HAVE TO HUNT THROUGH A FILE. THIS IS
22 THE AFFIDAVIT OF CATHY SLATON AND THIS IS THE ORDER FROM JUDGE
23 NICHOLSON FROM AUGUST 2008 AND I HAVE ADDITIONAL COPIES FOR MISTER
24 THRELKELD IF HE WOULD LIKE THEM. THESE WERE SHARED WITH HIM IN
25 DISCOVERY. I BELIEVE HE ACTUALLY USED THEM AS A BASIS FOR SUMMARY

1 JUDGMENT BACK IN JULY OF 2008, AND SO I KNOW THAT HE HAS THESE.
2 THESE EXISTED EVEN BEFORE THAT. (HANDS DOCUMENT TO THE JUDGE)

3 A COUPLE OF THINGS. I THINK IT'S EASIER FOR ME TO START WITH THE
4 THINGS I DO AGREE WITH, WITH MISTER THRELKELD RATHER THAN THE
5 THINGS I DISAGREE BECAUSE THERE ARE SO MANY MORE THINGS THAT WE
6 DISAGREE TO THAN WE AGREE TO.

7 FIRST OF ALL, I AGREE THE STATUTE IS A STRICT CONSTRUCTION.
8 THERE IS A CASE THAT HE CITED THAT FAIRLY AND ACCURATELY -- IT'S
9 ABOUT AS CLEAR AS OUR SUPREME COURT GETS TO A CERTAIN EXTENT LIKE
10 THAT. AND IT WOULD HURT ME, IT WOULD HURT ME, IF MY FACTS WERE
11 MORE SIMILAR TO THAT OF DYKEMAN AND I WANT TO SPEND JUST A FEW
12 MINUTES TALKING ABOUT THE FACTS BECAUSE I THINK THAT IS WHAT
13 DISTINGUISHES THE BORCHER'S CASE FROM THE DYKEMAN CASE.

14 IN THE DYKEMAN CASE, WHICH I'M SURE YOU READ, BUT IN THE
15 DYKEMAN CASE, IT APPEARED TO BE A COUPLE OF PLAINTIFFS. THE
16 PLAINTIFFS IN THE DYKEMAN CASE WERE LOOKING TO TRY TO BASICALLY
17 CASH IN ON THE PENAL STATUTE, SAYING, "HA, WE CAUGHT YOU, BANK. YOU
18 DIDN'T COMPLY WITH THE TIME PERIODS AND NOW, GIVE US HALF THE
19 MORTGAGE AS A PENALTY." THE SUPREME COURT RIGHTFULLY CAME DOWN
20 ON THE PLAINTIFFS WHO WERE INTERESTED IN JUST TRYING TO CASH IN ON
21 THE BANKS MAYBE NOT GETTING AROUND TO PAPERWORK IN A FASHION,
22 BUT THE BANK HAS NINETY DAYS, YOUR HONOR. IT SAYS THREE MONTHS.
23 THE BANK HAS THREE MONTHS IN WHICH TO SATISFY A MORTGAGE UPON
24 ALL THE ELEMENTS BEING SATIS -- UPON THE PLAINTIFFS, THE PERSON WHO
25 TOOK THE MORTGAGE OUT, SO THE MORTGAGOR, UPON THE MORTGAGOR'S

1 REQUEST FOR SATISFACTION. THE DYKEMAN CASE SET FORTH THAT YOU
2 HAD TO FOLLOW THE PENAL STATUTE VERY CLOSELY AND VERY CLEARLY
3 AND THEY SET OUT THE FOUR ELEMENTS. THREE OF THOSE ELEMENTS, I
4 CAN SAY THAT OUR POSITION, AND THIS IS IN MY MEMORANDUM, BUT
5 ESSENTIALLY, THE FIRST ELEMENT IS THAT THE PAYOFF WAS ACCEPTED,
6 THAT THE DEBT WAS ACTUALLY SATISFIED. THAT GOES WITHOUT SAYING.
7 IT'S NEVER BEEN A QUESTION THAT THE BORCHERS, MS. BORCHERS WHO IS
8 NOW DECEASED, THERE'S NO QUESTION THAT THE PAYOFF WAS ACCURATE
9 AND THAT MISTER STRAWN'S EQUITABLE LINE HAD A ZERO BALANCE UPON
10 THE PAYMENT AND SO THAT, I THINK, IS NOT DISPUTED. SO, THAT'S THE
11 FIRST ELEMENT, THAT THE DEBT WAS ACTUALLY SATISFIED.

12 THE SECOND ONE IS THAT YOU HAVE TO SEND AN INSTRUCTION
13 LETTER AND AN INSTRUCTION LETTER THAT STATES, "SATISFY THE
14 MORTGAGE". THAT INSTRUCTION LETTER HAS SEVERAL REQUIREMENTS
15 UNDER IT THAT THEY HAVE TO SATISFY UNDER THE STATUTE IN DYKEMAN.
16 AND ESSENTIALLY, THE INSTRUCTION LETTER HAS TO SAY, "SATISFY THE
17 MORTGAGE." AND YOU HAVE TO TENDER THE FEES. AND UNDER THE
18 DYKEMAN CASE, THAT'S HOW THOSE PLAINTIFFS REALLY LOST THEIR SUIT IS
19 THAT THEY DIDN'T SEND \$15.00 OR \$25.00 OR OTHERWISE, TO SATISFY THE
20 MORTGAGE.

21 **THE COURT:** WHAT'S THE DIFFERENCE IN YOUR SCENARIO AND ---

22 **MS. NELSON:** FROM THAT ONE. THE DIFFERENCE IN OUR ---

23 **THE COURT:** --- ASSUMING FOR THE SAKE OF ARGUMENT, THAT YOU
24 ALSO HAD TO PAY OFF AND IT'S MADE BY THE LETTER, BUT THERE SEEMS TO
25 BE SOME QUESTION ABOUT THE FEE, THE SATISFACTION OF THE FEE.

1 **MS. NELSON:** LET ME ADDRESS THAT. FIRST OF ALL, UNDER THE
2 ASSUMPTION THAT CATHY SLATON IS NOT LYING. CATHY IS JIM BELK'S
3 PARALEGAL WHO DELIVERED IT SAYING SHE -- HER AFFIDAVIT IS CLEAR, SHE
4 SAYS SHE DELIVERED THAT LETTER. SO, LET'S SAY, JUST FOR THE SAKE OF
5 ARGUMENT, SHE DID DELIVER THAT LETTER. AND LET'S SAY, FOR THE SAKE
6 OF ARGUMENT, THAT \$15.99, WHICH ALSO HAPPENS TO BE EXACTLY THREE
7 DAYS PER DIEM, WAS TENDERED FOR THE FEES FOR THE \$5.00 FILING FEES,
8 AND WE DIDN'T HAVE A FILING FEE. I WANT THE COURT TO LOOK AT
9 §29-3-320. MISTER THRELKELD, I THINK, HAS LOOKED AT THE STATUTE
10 OVERLY RESTRICTIVELY AND TAKEN A CHARACTERIZATION OF THE STATUTE
11 THAT I DISAGREE WITH. THE STATUTE SAYS IN THE SECOND PARAGRAPH
12 UNDER THE PART WHERE YOU HAVE TO TENDER THE FEES, UNDER THE
13 STATUTE -- AND I HAVE ANOTHER COPY OF IT IF THE COURT WOULD LIKE.

14 **THE COURT:** SHE GAVE IT TO ME. (INDICATING LAW CLERK)

15 **MS. NELSON:** OKAY. UNDER THE SECOND PARAGRAPH, IT SAYS,
16 "NOTWITHSTANDING ANY LIMITATIONS UNDER SECTIONS §37-2-202 AND
17 §37-3-202 -- WHICH THE CONSUMER PROTECTION CODE WHICH PROBABLY
18 TALKS ABOUT, I DON'T REMEMBER BUT PROBABLY, TALKS ABOUT THE SAME
19 FEES, BUT -- THE HOLDER OF RECORD OF THE MORTGAGE MAY CHARGE A
20 REASONABLE FEE AT THE TIME OF THE SATISFACTION NOT TO EXCEED
21 \$25.00, BLAH, BLAH, BLAH --

22 **THE COURT:** THAT'S UNDER 320?

23 **MS. NELSON:** UNDER §29-3-320. YES, SIR. OKAY?

24 **THE COURT:** YES.

25 **MS. NELSON:** THE SECOND SECTION SAYS, "IF THE MORTGAGOR OR HIS

1 LEGAL REPRESENTATIVE INSTRUCTS THE HOLDER OF THE RECORD OF THE
2 MORTGAGE THAT THE MORTGAGOR WILL BE RESPONSIBLE FOR FILING THE
3 SATISFACTION, THE HOLDER OF THE MORTGAGE SHALL MAIL OR DELIVER
4 THE SATISFIED MORTGAGE TO THE MORTGAGOR OR HIS LEGAL
5 REPRESENTATIVE WITH NO SATISFACTION FEE CHARGED." SO, THE COURT
6 SET FORTH THAT YOU DON'T HAVE TO TENDER FEES. THE STATUTE DOESN'T
7 SAY YOU HAVE TO TENDER FEES. IT WAS A FACT IN DYKEMAN THAT THEY
8 DIDN'T TENDER FEES AND THE LETTER IN DYKEMAN DIDN'T SAY, "WE'RE NOT
9 FILING IT, SATISFY IT, MAIL IT TO ME AND WE'LL FILE IT," WHICH THIS STATUTE
10 ALLOWS YOU TO DO AND ---

11 **THE COURT:** DO YOU HAVE A COPY OF THAT STATUTE?

12 **MS. NELSON:** YES, SIR.

13 **THE COURT:** WOULD YOU PASS THAT UP AND LET ME LOOK AT IT,
14 PLEASE?

15 **MS. NELSON:** YES, SIR.

16 (MS. NELSON HANDS DOCUMENT TO THE JUDGE).

17 **MS. NELSON:** "NOTWITHSTANDING." THE PARAGRAPH STARTING WITH
18 "NOTWITHSTANDING".

19 **THE COURT:** DO YOU NEED THIS BACK?

20 **MS. NELSON:** NO. I DO NOT. SO, THAT STATUTE, THAT SECOND
21 PARAGRAPH TAKES US OUT FROM UNDER DYKEMAN, NOT TO THE EXTENT IT
22 HAS TO BE CONSTRUED BUT TO THE EXTENT THAT WE WERE REQUIRED TO
23 SEND THE CHECK FOR \$5.00 WHEN MISTER BELK HAD CATHY DELIVER THE
24 LETTER AND THE PAYOFF. WE'RE NOT REQUIRED.

25 SO, LET ME TALK ABOUT ONE OTHER ELEMENT. AGAIN, TO BE

1 PERFECTLY HONEST, WE'RE ABOUT TO TRY THIS CASE SO LET'S GET TO THE
2 CRUX OF IT. I THINK THE OTHER ISSUE THAT, ASSUMING AGAIN, THAT
3 CATHY'S AFFIDAVIT SAID THAT SHE DELIVERED IT, AND THAT ASSUMING THAT
4 THE COURT ACCEPTS THAT AS EVIDENCE, ACCEPTS THAT AS PROOF OF THE
5 FACTS.

6 THE OTHER PROBLEM WE HAVE, UNDER DYKEMAN, FOR STRICT
7 CONSTRUCTION IS THAT WE HAVE TO SHOW THAT THERE WAS SOME
8 METHOD OF DELIVERY AND AGAIN, MISTER THRELKELD SAID IT HAD TO BE
9 CERTIFIED MAIL, BUT HE DID MENTION, HE DID MENTION THAT THE STATUTE
10 ALSO SAYS, "OR OTHER METHOD", BUT IT MENTIONS YOU HAVE TO HAVE A
11 PROOF OF SERVICE. WELL, I LIKEN THAT TO THE RULE, AND I CAN'T
12 REMEMBER THE RULE NUMBER, BUT THE RULE OF PERSONAL SERVICE, I
13 THINK IT'S RULE 4 OF THE CIVIL PROCEDURE WHERE YOU CAN, UNDER
14 CERTAIN CIRCUMSTANCES, SERVE AN AGENT OF RECORD, FOR INSTANCE IF
15 YOU ARE SERVING A CORPORATION AND I'M NOT SURE THEY ARE ALL
16 CORPORATIONS, THAT YOU CAN SERVE THEM BY CERTIFIED MAIL OR YOU
17 CAN SERVE THEM PERSONALLY. NOW, MOST OF THE TIME THEY ARE SERVED
18 BY CERTIFIED MAIL AND SO YOU HAVE TO HAVE A RETURN OF SERVICE
19 REQUEST.

20 THE COURT: WHAT PROOF OF SERVICE DO YOU HAVE IN THIS CASE?

21 MS. NELSON: CATHY SLATON'S AFFIDAVIT. THAT'S -- SHE PERSONALLY
22 SERVED IT. AND SO, I LIKEN THIS, I LIKEN THE STATUTE REQUIRING SERVICE,
23 PROOF OF SERVICE TO RULE 4 AND UNDER RULE 4, YOU HAVE TO HAVE
24 CERTIFIED MAIL AND YOU HAVE TO SHOW THAT IT WAS ACTUALLY RECEIVED.
25 YOU CAN SEND IT RESTRICTIVE DELIVERY OR WHATEVER. YOU HAVE TO

1 HAVE CERTIFIED MAIL, YOU HAVE TO HAVE A CARD OF PROOF OF SERVICE.

2 THE COURT: WOULDN'T PROOF OF SERVICE BE SOMETHING
3 CONTEMPORANEOUS WITH SERVICE AND NOT SOMETHING AFTER THE FACT
4 SAYING THIS IS WHAT I DID?

5 MS. NELSON: THE RULE DOESN'T REQUIRE THAT.

6 THE COURT: OKAY.

7 MS. NELSON: THE RULE DOESN'T REQUIRE THAT. IF, IN FACT, IF YOU
8 THINK ABOUT IT, AGAIN, IF YOU THINK ABOUT IT, A GREEN CARD IS JUST
9 SOMETHING -- THE PROOF OF SERVICE, THERE'S A FILING REQUIREMENT
10 UNDER ANOTHER RULE THAT ANY AFFIDAVIT OF SERVICE AND UNDER THE
11 CIVIL PROCEDURE THAT WE HAVE, HAS TO BE FILED WITHIN A CERTAIN
12 PERIOD OF TIME UNDER THAT COURT CAPTION. BECAUSE THIS ISN'T A
13 COURT CAPTION, BECAUSE THERE'S NO PLACE FOR FILING, JUST AS THE
14 GREEN CARD WOULD BE SOMETHING YOU HOLD, THAT AFFIDAVIT OF
15 PERSONAL SERVICE WOULD BE SOMETHING YOU'D HOLD. THERE'S NO
16 REQUIREMENT UNDER THE LAW THAT THE AFFIDAVIT OF SERVICE BE
17 CONTEMPORANEOUSLY GENERATED. THERE'S NO REASON FOR THAT.
18 CATHY'S AFFIDAVIT FROM 2007 OR 2008, WHENEVER SHE DID THIS, SAYS, "I
19 DELIVERED IT." AND I THINK THAT'S PROOF OF SERVICE. IT'S SUFFICIENT
20 FOR PERSONAL SERVICE.

21 THE COURT: DO YOU HAVE A COPY OF THE INSTRUCTION LETTER
22 THAT ---

23 MS. NELSON: I DO. HAVE I HANDED UP THE AFFIDAVIT OF CATHY
24 SLATON?

25 THE COURT: YES. IS IT ATTACHED?

1 **MS. NELSON:** IT IS EXHIBIT #3.

2 **THE COURT:** OKAY.

3 **MS. NELSON:** THE LAST THING IS THAT MISTER THRELKELD TAKES A
4 NOVEL APPROACH TO THE OTHER ELEMENT OF DYKEMAN, WHICH IS THAT
5 THE -- AND WHAT HE'S SAYING IS THE TIMING OF IT -- IN OTHER WORDS, THEY
6 NEVER RECEIVED IT AT THE BANK AND EVEN IF THEY DID RECEIVE THIS
7 LETTER, IT DOESN'T REALLY COUNT, AND WE'RE NOT ADMITTING THAT WE
8 DO, BUT EVEN IF IT DID, IT DOESN'T COUNT BECAUSE WE WEREN'T ON
9 NOTICE THAT WE HAD AN OBLIGATION TO ACTUALLY SATISFY THE
10 MORTGAGE UNTIL JUDGE NICHOLSON'S ORDER OF AUGUST 20, 2008. WELL,
11 THAT IN SO MANY WAYS, IS ABSOLUTELY WRONG. IF YOU THINK ABOUT, AND
12 THE FIRST THING HE SAID WAS ABOUT THE STATUTORY SCHEME THAT THIS
13 IS A PENAL STATUTE THAT THEY BASICALLY TOOK A RUNNING SHOT OVER
14 INDIVIDUALS AND I THINK THAT IS EXACTLY WHAT THE PENAL STATUTE WAS
15 FOR.

16 THE FACT IS THAT REGIONS BANK MADE A MISTAKE AND RATHER THAN
17 OWNING UP AND ACCEPTING THAT THEY MADE A MISTAKE BY THEIR TELLER,
18 THIS IS THE FACT, THIS THE LAW OF THE CASE, UNAPPEALED, UNDISPUTED.
19 THAT'S WHY I HANDED UP JUDGE NICHOLSON'S ORDER, IT SAYS THEY WERE
20 ON ACTUAL OR CONSTRUCTIVE NOTICE THAT THEY SHOULD SATISFY THEIR
21 MORTGAGE AND THEY DIDN'T. THEY ARE TRYING NOW TO RELY ON "WELL,
22 WE WOULDN'T HAVE KNOWN UNTIL THAT AUGUST 2008 ORDER AND WE
23 DIDN'T HAVE ANY DUTY, ANY DUTY TO SATISFY THE MORTGAGE BECAUSE WE
24 DIDN'T GET THE LETTER. WELL, THE FACT IS, THAT'S WHAT THIS DOCUMENT
25 IS FOR. IT PREVENTS REGIONS BANK FROM GOING AFTER A BONAFIDE

1 PURCHASER TO TRY TO FORECLOSE ON THEIR HOUSE FOR THE ARGUABLY
2 ILLEGAL CONDUCT OF SOMEBODY ELSE, IF NOT ILLEGAL ---

3 THE COURT: IT'S NOT VERY ARGUABLE AFTER THE FACT THAT HE GOT
4 MONEY.

5 MS. NELSON: EXACTLY.

6 THE COURT: WHAT HAPPENED TO HIM? DID ANYBODY SUE HIM? IS HE
7 HERE?

8 MS. NELSON: YES, SIR. SO, THE FACT IS, THESE FOLKS ROCKED ON
9 FOR TWO YEARS, WHICH IS HOW LONG IT TOOK FOR MISTER STRAWN TO
10 FINALLY STOP MAKING PAYMENTS ON THE \$50,000.00 EQUITY LOAN THAT HE
11 RAN UP ON MISTER BORCHER'S HOUSE AND FOR REGIONS BANK TO REALIZE
12 THAT THEY MADE A MISTAKE. RATHER THAN SUCKING IT UP, SUING MISTER
13 STRAWN AND LETTING GO OF THE FACT THAT THIS WAS A SCREW UP AND
14 ACCEPT ALL RESPONSIBILITY FOR IT, THEY FILED SUIT AND THAT SUIT
15 DRAGGED OUT, IT TOOK OVER TWO YEARS FOR THAT SUMMARY JUDGMENT
16 AND DRUG EVERYBODY IN, JIM BELK AS A THIRD PARTY, BUT HE'S BEEN
17 RELEASED. ALL THIS KIND OF STUFF. I CAN'T IMAGINE A SITUATION THAT IS
18 NOT EXACTLY WHAT THIS STATUTE IS ABOUT. THIS IS THE SITUATION THAT
19 THAT STATUTE WAS ABOUT AND IT WAS INTENDED TO PREVENT IT.

20 I THINK THAT THE ONLY ARGUMENT FOR A FACT FINDER, I THINK THAT
21 UNDER THE BASIS FOR SUMMARY JUDGMENT, I DON'T THINK SUMMARY
22 JUDGMENT IS APPROPRIATE ON THE BASIC ELEMENTS OF CIVIL PROCEDURE.
23 BUT, BASICALLY THERE ARE FOUR ELEMENTS AND SUBPARTS, BUT THERE
24 ARE FOUR ELEMENTS THAT HAVE TO BE SATISFIED. ONE'S BEEN
25 ACKNOWLEDGED. IT'S UNDISPUTED THAT THE BANK HAS NEVER SATISFIED

1 THE MORTGAGE AND IF YOU BELIEVE, IF YOU BELIEVE THE FACT THAT CATHY
2 DID DELIVER THAT LETTER, THEN THEIR TIME TO SATISFY THE MORTGAGE
3 BEGAN THREE MONTHS FROM OCTOBER 31, 2003. JIM BELK SAYS HE
4 SATISFIED THE MORTGAGE ALONG WITH FILING FEES UNDER THIS STATUTE
5 DECEMBER OF '05, BUT HE DIDN'T SATISFY IT AND HE COULD HAVE SATISFIED
6 IT. THAT'S SOMETHING ELSE WHERE MISTER BELK COMES IN. HE SAID HE
7 COULDN'T SATISFY IT THE DAY AFTER THE CLOSING AND UNDER THE
8 STATUTE, AND I HAVE A COPY OF THE STATUTE, IT SAYS YOU HAVE TO HAVE
9 A CANCELLED CHECK FROM YOUR BANK AND YOU COULDN'T THE DAY AFTER
10 BECAUSE IT HADN'T CLEARED. SO, YOU HAVE TO BE, AND AGAIN, I CAN
11 PROVIDE THIS, THE UNDERSIGNED WAS GIVEN THE INFORMATION AND
12 MADE SUCH A PAYMENT, HE'D BE IN POSSESSION OF THE CANCELLED CHECK
13 TO THE MORTGAGEE HOLDER OF RECORD OR REPRESENTATIVE OF SERVICE,
14 WHICH HE COULD HAVE GOTTEN FROM HIS BANK RECORDS OR WHATEVER
15 THE FOLLOWING MONTH OR WHEN THE CHECK APPEARED. AND SO, IN ANY
16 EVENT, WE FELT WE MET THAT AND THAT WE SATISFIED IT AND WE BELIEVE
17 THAT WE HAVE PROOF THAT A LETTER WAS DELIVERED, THAT WE DIDN'T
18 HAVE TO TENDER FEES BECAUSE THE STATUTE PROVIDES FOR AN
19 ALTERNATIVE METHOD. WE HAVE NOW PROOF OF AFFIDAVIT OF SERVICE
20 THROUGH CATHY SLATER WHOSE SERVICE MET THE REQUIREMENTS UNDER
21 THE STATUTE OF THAT AND THAT THEY DIDN'T SATISFY THE MORTGAGE AND
22 THAT'S ALSO NOT DISPUTED. THEY FILED SUIT TO HAVE THE MORTGAGE,
23 THE SATISFACTION THAT JIM BELK FILED, I'M SORRY, DECEMBER OF '05,
24 SATISFIED IT THE LAWSUIT AND HAVE IT DISMISSED. I DON'T THINK UNDER
25 COLLATERAL ESTOPPEL THEY ARE ALSO ENTITLED ARGUMENT.

1 **THE COURT:** WELL, THAT'S AN EQUITABLE ARGUMENT WHEN YOU
2 START TALKING ABOUT STATUTORY CONSTRUCTION.

3 **MS. NELSON:** IN ANY EVENT, THAT'S MY ARGUMENT, SIR.

4 **THE COURT:** OKAY. WE'RE SET ON TRIAL TODAY. IS THAT CORRECT?
5 DEPENDING ON WHAT MY RULING IS.

6 **MS. NELSON:** YES, SIR.

7 **THE COURT:** IN ALL FAIRNESS, I'VE READ HIS BRIEF. I HAVE NOT READ
8 YOURS. I'M GOING TO GO BACK AND DO THAT AND READ HIS AFFIDAVIT AND
9 I'LL COME RIGHT BACK OUT AND GIVE YOU WHAT MY RULING IS AND, ARE
10 Y'ALL READY TO PROCEED?

11 **MR. THRELKELD:** YOUR HONOR, WHAT I WANTED TO DO IS TO MAKE A
12 COUPLE OF COMMENTS IN REPLY WHICH I THINK IS VERY IMPORTANT AND
13 THAT IS, WHILE I ADMITTED THAT THERE WAS MONEY PAID AT THE TIME OF
14 THE CLOSING AND THE LINE ZEROED DOWN, PAID DOWN TO ZERO, I NEVER
15 ADMITTED THAT THERE WAS A RESPONSIBILITY AT THAT TIME TO SATISFY
16 THE MORTGAGE. THE DUTY TO SATISFY THE MORTGAGE WAS ONLY
17 DETERMINED IN 2008, ALTHOUGH IT HAD BEEN SATISFIED.

18 THE OTHER THING IS, THE QUOTE FROM THE STATUTES ARE NOT
19 CONSISTENT WITH THE STATUTES IN THIS RESPECT; DYKEMAN SAID THAT
20 UNDER §29-3-310, THAT YOU MUST SEND THAT MONEY AND 320 DOESN'T
21 CHANGE THAT, ACCORDING TO DYKEMAN.

22 **THE COURT:** WELL, SO YOU DISAGREE WITH WHAT MS. NELSON SAYS
23 THAT THERE IS AN ALTERNATIVE TO PAY THE FEE, THAT THE BANK WILL DO IT
24 OR THE LAWYER OR WHOEVER THE AGENT IS THAT'S CLOSING THE LOAN,
25 CAN SAY, "SEND IT TO ME AND I'LL POST IT."

1 **MR. THRELKELD:** I DISAGREE. THE STATUTE IN DYKEMAN SAYS, THAT
2 UNDER 310, THEY QUOTED THE RESPONSIBILITY UNDER 310. 320 SIMPLY
3 SAYS THE PENALTY. 310 SETS THE REQUIREMENTS AND 310 SAYS YOU'VE
4 GOT TO MAKE THOSE FOUR THINGS, AND THAT'S WHAT WAS LAID OUT,
5 THOSE FOUR THINGS, IN THE DECISION. YOU'VE GOT TO SEND THE MONEY
6 UNDER 310. THAT'S WHAT DYKEMAN SAYS.

7 **THE COURT:** I HAVE THE STATUTE IN FRONT OF ME AND IT SAYS, " IF
8 THE MORTGAGOR OR HIS LEGAL REPRESENTATIVE INSTRUCTS THE HOLDER
9 OF RECORD THAT THE MORTGAGOR WILL BE RESPONSIBLE FOR FILING THE
10 SATISFACTION, THE HOLDER OF THE MORTGAGE SHALL MAIL OR DELIVER
11 THE SATISFIED MORTGAGE TO THE MORTGAGOR OR HIS LEGAL
12 REPRESENTATIVE WITH NO SATISFACTION FEE CHARGED. THAT LANGUAGE
13 HAS TO HAVE SOME MEANING OR IT'S JUST BASICALLY FLOATING OUT THERE
14 AND ---

15 **MR. THRELKELD:** I UNDERSTAND, IT DOES HAVE SOME MEANING, BUT
16 NOT IN WHAT WOULD ---

17 **THE COURT:** WHAT WOULD BE THE MEANING OF IT?

18 **MR. THRELKELD:** WELL, YOU COULD DO THAT, BUT THE PENALTY
19 ACCORDING TO 310, SAYS YOU HAVE TO SEND THE MONEY AND THAT'S WHAT
20 DYKEMAN SAYS. THE OTHER THING IS, YOUR HONOR, THE IDEA THAT THERE
21 WAS A SERVICE. THE LETTER IS NOT VALID IN THIS RESPECT. WHAT SHE IS
22 TALKING ABOUT, THE RULE SAYS YOU CAN SERVE A SUMMONS ON A
23 MANAGER OR AN OFFICER OF A BANK. THAT AFFIDAVIT HAD NOTHING TO DO
24 WITH THAT.

25 **THE COURT:** WHAT WOULD BE THE NORMAL COURSE IF YOU WERE TO

1 CLOSE A LOAN, AND I'VE GOT A MORTGAGE PAYOFF AND YOU DON'T SEND A
2 PROCESS SERVER DOWN THERE WITH SATISFACTION SAYING YOU ARE
3 SERVED WITH THIS. I MEAN, WHAT WOULD BE THE STANDARD PRACTICE?

4 **MR. THRELKELD:** A VERY VALID QUESTION. LET ME TELL YOU WHAT
5 THE PRACTICE IS. FIRST OF ALL, I WRITE A LETTER TO REGIONS BANK. I GET
6 MISTER STRAWN TO SIGN THAT LETTER DIRECTING REGIONS BANK TO
7 SATISFY AND CANCEL THAT MORTGAGE AND I DELIVER IT TO THE LOAN
8 OFFICER WHO EXTENDED THE LOAN, AN OFFICER OF THE BANK. I DO THAT
9 DAILY AND THEREFORE, IT'S NOT A PROBLEM. KEEP IN MIND THE MORTGAGE
10 SAYS MISTER STRAWN HAS TO INSTRUCT THEM. NOW, THAT'S NOT TO SAY
11 THAT IF THE BANK HAD GOTTEN NOTICE AND WHAT THE BANK WOULD HAVE
12 ACTUALLY DONE IF THEY'D GOTTEN NOTICE IS, THEY WOULD HAVE CALLED
13 MISTER STRAWN AND SAID, "WE NEED TO GET YOU TO COME IN AND SIGN
14 SOMETHING TO SATISFY THIS MORTGAGE." THAT'S HOW IT WOULD HAPPEN.
15 BUT THAT'S WHERE THE BREAKDOWN OCCURRED.

16 **THE COURT:** WHAT ABOUT THIS EXHIBIT #3 TO CATHY SLATER'S
17 AFFIDAVIT WHERE MISTER BELK, AT LEAST I KNOW THE BANK SAYS, "WE
18 NEVER GOT IT" AND THEY SAY THEY SENT IT, BUT IF, IN FACT, THE BANK
19 RECEIVED THIS LETTER, WOULDN'T THAT BE SATISFACTORY FOR
20 INSTRUCTION TO CANCEL THE MORTGAGE?

21 **MR. THRELKELD:** I DON'T THINK IT WOULD BE.

22 **THE COURT:** YOU DON'T THINK SO?

23 **MR. THRELKELD:** NO, SIR.

24 **THE COURT:** OKAY.

25 **MR. THRELKELD:** NOW, I ALSO -- AND I WANT TO MAKE THE COURT

1 AWARE, THE BANK DOES NOT CONCEDE BY ANY MEANS THAT THEY GOT
2 NOTICE.

3 THE COURT: ALL RIGHT. I'VE GOT THAT. GIVE ME A COUPLE OF
4 MINUTES AND LET ME READ THROUGH THIS AND I'LL BE RIGHT BACK.

5 (BREAK)

6 THE COURT: LOOKING AT THE BRIEFS -- AND THEY ARE WELL DONE.
7 THANK YOU. IT LOOKS TO ME THAT THE BORCHERS DID EVERYTHING THEY
8 WERE SUPPOSED TO DO. I HAVE ONE CONCERN, THE DELIVERY. AND UNDER
9 THE PENAL STATUTE, THAT EVERYBODY AGREES IS PENAL, THE STATUTE
10 CLEARLY SAYS THAT YOU CAN MAKE THE REQUEST BY CERTIFIED MAIL OR
11 OTHER FORM OF DELIVERY. I UNDERSTAND WHAT MS. NELSON IS SAYING, AS
12 TO THE ATTORNEYS, WE HAVE PROCESS SERVERS WHO ROUTINELY DELIVER
13 AFFIDAVITS OF SERVICE AND WE FILE THOSE WITH THE COURT, BUT IT
14 SEEMS TO ME THAT THE WHOLE STATUTE IS DESIGNED THAT IF YOU HAVE
15 THE MORTGAGOR SAYING, "I TOLD YOU TO PAY IT OFF" AND THE BANK SAYS,
16 "NO, YOU DIDN'T" THAT THERE SHOULD BE SOME KIND OF FORM THAT YOU
17 COULD SHOW THAT PROVES IT, THAT I MADE A REQUEST. I AGREE WITH
18 MS. NELSON THAT UNDER THE STATUTE THAT IF MISTER BELK, WHO'S
19 SITTING BACK THERE, SAID, "SEND ME THE MORTGAGE SATISFYING IT AND
20 I'LL TAKE CARE OF FILING IT", THERE'S NO FEE REQUIRED AND I THINK THERE
21 IS NOT A FEE REQUIRED IN THIS CASE AND I THINK THAT'S WHAT HE DID. MY
22 CONCERN IS ABOUT THE DELIVERY. OTHER THAN THAT, I THINK THAT I
23 AGREE WITH EVERYTHING THAT YOU ARE SAYING, MISTER THRELKELD, BUT
24 IN THIS CASE, AN AFTER THE FACT AFFIDAVIT BY MISTER BELK'S SECRETARY
25 SAYING SHE DID IT AND I'M SURE SHE DID, BUT I DON'T THINK THAT'S WHAT

1 THIS STATUTE NECESSARILY IS CALLING FOR. ALL THAT SAID AND DONE, I
2 WANT TO HEAR SOME TESTIMONY ON IT BEFORE I DENY YOUR MOTION. I
3 RESERVE MY RULING ON IT. I WANT TO HEAR TESTIMONY ABOUT THE FACTS
4 OF THIS CASE.

5 MR. THRELKELD: YOUR HONOR, WHAT I WANT TO ASK IS, I GOT THIS
6 MEMO THIS MORNING ---

7 THE COURT: YES, SIR. YOU CAN REPLY TO IT.

8 MR. THRELKELD: --- AND BEFORE A DECISION IS MADE, I WANT TO BE
9 ABLE TO RESPOND TO THAT SO, BECAUSE I DIDN'T KNOW WHAT IT WAS
10 GOING TO SAY.

11 THE COURT: NOT A PROBLEM. ALL RIGHT. YOU GUYS READY TO
12 PROCEED?

13 MS. NELSON: YES, YOUR HONOR.

14 THE COURT: SO, THE ONLY ISSUE BEFORE ME IS THE PENALTY THE
15 BORCHERS ARE SEEKING AGAINST THE BANK FOR FAILURE TO SATISFY THE
16 MORTGAGE ACCORDING TO STATUTE. IS THAT CORRECT?

17 MS. NELSON: YES, SIR. I HAVE TO DOUBLE CHECK ON SOMETHING
18 BECAUSE WE HAD ALSO FILED CROSSCLAIMS AGAINST MISER STRAWN.

19 THE COURT: IS HE HERE? IS HE REPRESENTED? MISTER STRAWN, ARE
20 YOU HERE?

21 MR. STRAWN: YES, SIR.

22 THE COURT: STAND UP, PLEASE, SIR. DO YOU HAVE AN ATTORNEY?

23 MR. STRAWN: NO, SIR.

24 THE COURT: OKAY. I JUST WANTED TO MAKE SURE YOU WERE HERE.

25 THANK YOU. YOU FILED A CLAIM FOR DAMAGES AGAINST HIM?

1 **MS. NELSON:** YES, SIR. YES, SIR, WE DID. I WAS LOOKING AT THIS TO
2 DETERMINE -- I WILL ALSO MENTION I UNDERSTAND...

3 **THE COURT:** WHAT IS THE NATURE OF YOUR CLAIM AGAINST HIM? ARE
4 YOU SEEKING ACTUAL AND PUNITIVE DAMAGES?

5 **MS. NELSON:** MOST OF IT IS INDEMNITY. AND SINCE WE WON ON THE
6 OTHER ONE, I THINK, HONESTLY, I WAS A LITTLE BIT SURPRISED THAT HE
7 WAS HERE TODAY.

8 **THE COURT:** SO, THE INDEMNITY WOULD INCLUDE THE ACTUAL
9 LOSSES, INCLUDING ATTORNEYS FEES. WHAT ELSE WOULD YOU BE ASKING
10 FOR?

11 **MS. NELSON:** IT WOULD BE SIMPLY ATTORNEY'S FEES AND COSTS,
12 CONSEQUENTIAL DAMAGES, INDEMNITY FOR ALL COSTS ASSOCIATED WITH
13 THIS, AND I THINK WE SUED HIM FOR FRAUD.

14 **THE COURT:** YOU DID SUE HIM FOR FRAUD?

15 **MS. NELSON:** YES, SIR. WE DID SUE HIM FOR FRAUD AND I THINK
16 CONVERSION AND DAMAGES BECAUSE I THINK WE WON ON SUMMARY
17 JUDGMENT ON THE PLAINTIFF'S CLAIM THAT WE -- PROBABLY THE ONLY
18 THING WE ARE SEEKING ARE DAMAGES AND FRAUD AND THEN ULTIMATELY, I
19 GUESS, ATTORNEY'S FEES AND COSTS, BUT I'M UNSURE WHAT THE DAMAGES
20 ARE FOR MISTER STRAWN.

21 **THE COURT:** MISTER STRAWN?

22 **MR. STRAWN:** YES, SIR.

23 **THE COURT:** COME FORWARD, PLEASE, SIR. MISTER THRELKELD, I'LL
24 LET HIM SIT AT THE TABLE WITH YOU IF THAT'S OKAY, SIR.

25 **MR. THRELKELD:** YES, SIR.

1 **THE COURT:** GO FORWARD AND PUT UP YOUR CASE. THE MAIN THING,
2 LET ME TELL YOU, THE MAIN THING I'M LOOKING AT, I'M CONCERNED ABOUT
3 THIS DELIVERY ISSUE BECAUSE RIGHT NOW I THINK YOU HAVE IT, QUITE
4 FRANKLY, BUT GO AHEAD.

5 **MS. NELSON:** YES, SIR. I'D LIKE TO CALL CATHY SLATON. ACTUALLY,
6 LET ME CALL JIM BELK FIRST, IF I COULD.

7 (JAMES BELK IS DULY SWORN BY THE CLERK OF COURT)

8 **CLERK OF COURT:** AND IF YOU WOULD PLEASE GIVE US YOUR FULL
9 NAME FOR THE RECORD.

10 **MR. BELK:** JAMES S. BELK.

11 **CLERK OF COURT:** THANK YOU, SIR.

12 **DIRECT EXAMINATION OF JAMES BELK BY MS. NELSON**

13 Q MISTER BELK, COULD YOU PLEASE STATE YOUR OCCUPATION.

14 A I'M AN ATTORNEY.

15 Q ALL RIGHT, SIR. AND WHAT AREA DO YOU FOCUS ON OR WHAT IS YOUR
16 SPECIALIZATION?

17 A REAL ESTATE.

18 Q SIR, HOW LONG HAVE YOU BEEN IN PRACTICE IN TOTAL?

19 A SINCE 1969.

20 Q ALL RIGHT, SIR. AND HOW LONG HAS YOUR PRACTICE FOCUSED ON
21 REAL ESTATE?

22 A FOR ABOUT THE LAST FIFTEEN YEARS.

23 Q ALL RIGHT, SIR. CAN YOU SAY APPROXIMATELY HOW MANY REAL
24 ESTATE CLOSINGS YOU MIGHT DO IN A YEAR?

25 A IT'S NOT THE SAME THIS YEAR AS IT HAS BEEN IN THE PAST.

1 PROBABLY ABOUT THREE A WEEK.

2 Q OKAY. SO, COULD YOU SAY IN 2003, ABOUT HOW MANY YOU WERE
3 DOING A YEAR OR A WEEK? IF YOU CAN RECALL.

4 A PROBABLY IN THE NEIGHBORHOOD OF EIGHT A WEEK.

5 Q OKAY. I CAN'T DO MATH IN MY HEAD, BUT THAT'S A LOT. ISN'T IT?
6 THAT'S A LOT OF REAL ESTATE CLOSINGS.

7 A IT IS.

8 Q OKAY. HOW OFTEN, IF YOU CAN TELL ME, HOW OFTEN DO YOU DEAL
9 WITH LOCAL BANKS?

10 A PROBABLY ABOUT THIRTY PERCENT OF THE TIME.

11 Q OKAY. SO, IS IT FAIR TO CHARACTERIZE YOUR DEALINGS WITH LOCAL
12 BANKS AS VERY REGULAR OR FREQUENT?

13 A YES. IT IS.

14 Q OKAY, SIR. CAN YOU TELL ME WHAT YOU RECALL OF THE CLOSING
15 THAT OCCURRED FOR MARIE BORCHERS? WHAT KIND OF CLOSING
16 WAS IT?

17 A IT WAS A CASH CLOSING. NO BANK WAS INVOLVED IN IT.

18 Q CAN YOU EXPLAIN TO THE COURT, SPECIFICALLY, WHAT YOU MEAN BY
19 A CASH CLOSING, FOR SOMEBODY THAT DOESN'T DO CLOSINGS?

20 A THAT'S WHEN THE BORROWER OR THE PURCHASER HAS ALL THE
21 MONEY TO BUY THE PROPERTY AS OPPOSED TO A LOAN WHERE THE
22 PURCHASER HAS TO GO TO THE BANK TO GET, MOST OF THE TIME, AN
23 EIGHTY PERCENT LOAN.

24 Q ALL RIGHT, SIR. AND SO, FOR MS. BORCHERS -- IT WAS MARIE
25 BORCHERS THAT HAD THE CASH CLOSING?

1 A IT WAS.

2 Q OKAY. PLEASE FEEL FREE TO REFER TO ANY DOCUMENTATION THAT
3 YOU NEED, BUT WHAT WAS THE PURCHASE PRICE OF THE PROPERTY?

4 A (LOOKS AT DOCUMENTS) \$136,000.00.

5 Q ALL RIGHT, SIR. CAN YOU TELL FROM THE DOCUMENTATION THAT YOU
6 HAVE, WHAT WAS PAID OFF OUT OF THE ONE HUNDRED AND
7 THIRTY-SIX?

8 A THERE WAS A -- AT THIS TIME, REGIONS BANK HAD A -- THE REGIONS
9 BANK MORTGAGE WAS A FIRST MORTGAGE AT THE TIME I CLOSED THE
10 LOAN AND IT WAS A PAYOFF IN THE AMOUNT OF \$32,256.41.

11 Q ALL RIGHT, SIR. IS THAT THE AMOUNT OF THE CHECK YOU WROTE OR
12 WAS THAT THE AMOUNT OF THE ACTUAL PAYOFF RECEIVED BY THE
13 BANK?

14 A THE ACTUAL CHECK I WROTE WAS FOR \$32,256.41.

15 Q SIR ---

16 **THE COURT:** TWO FIFTY-SIX FORTY-ONE WAS WHAT THE PAYOFF WAS
17 OR DID YOU SAY TWO FIFTY-SIX THIRTY-ONE?

18 A (LOOKS AT DOCUMENTS) LET ME GET THE ACTUAL CHECK. IT WAS
19 \$32,256.41.

20 Q AND SIR, THAT WAS THE ACTUAL AMOUNT OF THE CHECK YOU WROTE.
21 CORRECT?

22 A CORRECT.

23 Q DO YOU HAVE A COPY -- WELL, LET ME SHOW YOU, THIS WILL BE
24 EASIER.

25 **MS. NELSON:** MAY I APPROACH THE WITNESS?

1 **THE COURT:** YES, MA'AM.

2 Q SIR, CAN YOU IDENTIFY WHAT THIS IS?

3 A THIS IS THE PAYOFF LETTER FROM REGIONS BANK.

4 Q ALL RIGHT, SIR. AND HOW DO YOU KNOW IT'S A PAYOFF LETTER FROM
5 REGIONS BANK?

6 A IT'S -- MY SECRETARY WILL CALL AND ASK THE BANK FOR THE PAYOFF
7 AND THEY HAVE TO SEND A WRITTEN PAYOFF AND THIS CAME FROM
8 MORGAN KEEGAN.

9 Q AND IT'S FROM MORGAN KEEGAN AND YOU RECOGNIZE THAT AS A FAX
10 IDENTIFYING INFORMATION FROM REGIONS BANK?

11 A CORRECT.

12 Q OKAY. AND TO YOUR KNOWLEDGE, IS THE TIME ON THIS FAX
13 ACCURATE, THE MORNING OF THE CLOSING?

14 A YES.

15 Q ALL RIGHT, SIR. AND ON THAT DOCUMENT -- LET ME GO AHEAD AND
16 HAVE IT MARKED AS DEFENDANT'S #1. I'M GOING SHOW YOU --
17 ACTUALLY, I WOULD LIKE TO INTRODUCE THIS INTO EVIDENCE AS
18 DEFENDANT'S EXHIBIT #1. LET ME SHOW THIS ---

19 **THE COURT:** ANY OBJECTIONS, MISTER THRELKELD?

20 **MR. THRELKELD:** NO OBJECTIONS TO THE PAYOFF STATEMENT.

21 **THE COURT:** MISTER STRAWN, DO YOU HAVE AN OBJECTION?

22 **MR. STRAWN:** I HAVE A QUESTION.

23 **THE COURT:** WHAT -- DO YOU HAVE AN OBJECTION AS TO WHETHER
24 THIS IS INTRODUCED INTO EVIDENCE?

25 **MR. STRAWN:** YES. I HAD A MORTGAGE AND I OWED ON THE

1 MORTGAGE \$32,000.00 AND ---

2 THE COURT: YOU HAVE A RIGHT TO TESTIFY AT SUCH TIME IT BECOMES
3 RELEVANT, BUT NOT NOW. DO YOU HAVE AN OBJECTION TO IT, SIR?

4 MR. STRAWN: NO.

5 THE COURT: OKAY. IT'S ADMITTED.

6 (WHEREUPON, A PAYOFF STATEMENT FROM REGIONS BANKS IS
7 ADMITTED INTO EVIDENCE AS DEFENDANT'S EXHIBIT #1, WITHOUT
8 OBJECTION)

9 MS. NELSON: THANK YOU, YOUR HONOR.

10 Q SIR, ON THAT DOCUMENT IS A PAYOFF OF \$32,240.42. IS THAT
11 CORRECT?

12 A THAT IS CORRECT.

13 Q OKAY. WHY DOES THE CHECK THAT YOU CUT FOR MORE THAN THAT?

14 A BECAUSE THIS CLOSING WAS ON A FRIDAY AND A LOT OF TIMES WITH
15 CLOSINGS, YOU CAN'T REALLY TELL WHEN IT'S GOING TO GO
16 THROUGH, WHEN IT DOES GO THROUGH. SO, IF IT'S ON FRIDAY, SOME
17 BANKS CLOSE, THEIR DAY CLOSES AT 2:00.

18 Q YES, SIR.

19 A THE THREE DAYS TAKES CARE OF SATURDAY, SUNDAY, AND MONDAY
20 SO THAT IF WE DID NOT GET IT CLOSED ON TIME. THAT BEING THE
21 CASE, MOST OF THE TIME THE BANK REFUNDS TO THE CUSTOMER THE
22 DIFFERENCE.

23 Q ALL RIGHT, SIR. SO, IN FACT, DO YOU HAVE KNOWLEDGE WHAT TIME
24 THIS CLOSING OCCURRED?

25 A TRUTHFULLY, I CAN'T --- I DON'T KNOW.

1 Q DID IT CLOSE THAT DAY?

2 A IT CLOSED THAT DAY.

3 Q ALL RIGHT, SIR. ARE YOU AWARE OF WHAT TIME -- WELL, I CAN ASK
4 THIS THIS WAY. WHAT IS YOUR STANDARD PRACTICE WITH RESPECT
5 TO TRANSFER WITH RESPECT TO CLOSING MORTGAGES ON
6 PROPERTY? I'M SORRY.

7 MR. THRELKELD: I OBJECT TO THE QUESTION.

8 THE COURT: WHAT IS YOUR OBJECTION?

9 MR. THRELKELD: MY OBJECTION IS IT IS NOT SPECIFIC ENOUGH FOR
10 HIM TO UNDERSTAND WHAT THE QUESTION IS.

11 THE COURT: SHE SAID WHAT IS THE STANDARD PRACTICE. I'LL
12 OVERRULE IT.

13 Q WHAT IS YOUR STANDARD PRACTICE WHEN YOU DO A CLOSING WITH
14 RESPECT TO STAFF, WITH RESPECT TO PAYING OFF MORTGAGES?

15 A IF THE FINANCIAL INSTITUTION IS OUT OF TOWN, I U-P-S A PAYOFF TO
16 THEM, WITH THE PAYOFF LETTER AND THE CHECK. IF IT'S A LOCAL
17 BANK, I HAVE ONE OF MY SECRETARIES TAKE THE CHECK TO THE BANK
18 WITH THE PAYOFF LETTER AND GET THE RECEIPT.

19 THE COURT: HOW DO YOU DEFINE LOCAL BANKING?

20 MR. BELK: IF IT IS WITHIN, LET'S SAY, A FIVE MILE RADIUS.

21 THE COURT: ARE YOU TALKING ABOUT SAY, REGIONS BANK OR ---

22 MR. BELK: REGIONS BANK.

23 THE COURT: --- IF THEY HAVE A FACILITY HERE?

24 MR. BELK: YES. WE HAVE ONE AT REGIONS BANK, NBSC, COMMUNITY
25 FIRST, PEOPLE'S BANK OF IVA, BANK OF AMERICA AND WACHOVIA.

1 Q SO, BASICALLY, IF THEY HAVE A BRANCH IN ---

2 A BASICALLY, IF THEY HAVE AN OFFICE IN ANDERSON, WE PAY IT OFF
3 THERE.

4 Q ALL RIGHT, SIR. WHY DO YOU DO THAT?

5 A WE GET IT DONE THAT DAY.

6 Q YES, SIR. AND TO YOUR KNOWLEDGE OR YOUR RECOLLECTION, IS
7 THAT WHAT YOU DID WITH THE PAYOFF TO REGIONS IN THIS CLOSING?

8 A YES. WE DID.

9 Q DO YOU HAVE A SPECIFIC RECOLLECTION OF DOING THAT IN THIS
10 CLOSING?

11 A I DIDN'T DO IT, BUT MY SECRETARY, CATHY, DID AND WE GOT A
12 STAMPED ---

13 **MR. THRELKELD:** YOUR HONOR, I WOULD OBJECT TO HIS TESTIFYING
14 WHAT SOMEBODY ELSE DID. THAT'S BECAUSE IT'S BASICALLY HEARSAY.

15 **THE COURT:** I'LL ALLOW IT. GO AHEAD. DON'T SAY WHAT SHE SAID.
16 JUST SAY WHAT SHE PHYSICALLY DID, WHAT YOU PERSONALLY KNOW OF
17 THAT SHE DID.

18 Q WHAT IS YOUR NORMAL -- WHAT IS YOUR STANDARD PRACTICE IN
19 CLOSINGS CONCERNING YOUR REVIEW OF DOCUMENTS? DO YOU
20 NORMALLY REVIEW THE DOCUMENTS BEFORE A CLOSING?

21 A YES. I DO.

22 Q DO YOU HAVE A RECOLLECTION THAT YOU REVIEWED THE
23 DOCUMENTS IN THIS CLOSING?

24 A YES. I DID.

25 Q NOW, I'M GOING TO ASK THIS QUESTION. DO YOU HAVE A SPECIFIC

1 RECOLLECTION OF WHAT WAS CONTAINED IN THE DOCUMENTATION OF
2 THE OCTOBER 31, 2003 CLOSING?

3 A THE TITLE NOTES WHICH SHOWED TWO MORTGAGES ON THE
4 PROPERTY AND SINCE THERE WAS NO MORTGAGE OR WHAT YOU
5 MIGHT SAY A CLOSING PACKAGE INVOLVED IN THIS, THE ONLY THING
6 INVOLVED WITH THIS WAS THE TERMITE LETTER, THE PAYOFF OF THE
7 TWO MORTGAGES AND THE DEED.

8 Q SIR, DO YOU HAVE A SPECIFIC RECOLLECTION OF SIGNING OR
9 REVIEWING A TRANSMITTAL LETTER? AND I AM GOING TO REFER TO
10 THE AFFIDAVIT OF CATHY SLATON THAT'S ALREADY IDENTIFIED AS
11 ATTACHED TO CATHY SLATON'S AFFIDAVIT, BUT IT'S IDENTIFIED AS
12 EXHIBIT #3. DO YOU HAVE A SPECIFIC RECOLLECTION OF REVIEWING
13 THAT LETTER?

14 A YES. THIS IS A FORM LETTER THAT'S GENERATED ON EVERY CLOSING.

15 A YES, SIR.

16 A IT'S IN THE FILE WHEN YOU COME TO THE CLOSING. THE CHECKS ARE
17 CUT AND THE CHECKS, AT THAT TIME, ARE PUT WITH THESE DIFFERENT
18 LETTERS.

19 Q OKAY, SIR. AND THIS CLOSING AT YOUR OFFICE, WOULD YOU HAVE LET
20 YOUR STAFF HANDLE IT OR WOULD YOU HAVE DONE IT YOURSELF?

21 A I DO ALL OF THEM MYSELF.

22 Q ALL RIGHT, SIR. SPECIFICALLY, DO YOU RECALL SEEING THAT LETTER,
23 SIGNING THAT LETTER, AT THIS CLOSING?

24 A THAT LETTER IS IN EVERY ONE OF THE CLOSINGS. MY SECRETARY
25 SIGNED THEM.

1 Q ALL RIGHT, SIR.

2 MS. NELSON: I'D LIKE TO HAVE THAT LETTER MARKED AS
3 DEFENDANT'S EXHIBIT #2.

4 THE COURT: ANY OBJECTION? HAVE YOU SEEN IT?

5 (MS. NELSON HANDS DOCUMENT TO MISTER THRELKELD)

6 MS. NELSON: THIS IS THE SAME LETTER THAT'S BEEN CIRCULATED IN
7 DISCOVERY.

8 MR. THRELKELD: NO OBJECTION.

9 THE COURT: ADMITTED WITHOUT OBJECTION. IS THAT THE
10 OCTOBER 31, 2003 LETTER?

11 MS. NELSON: YES, SIR.

12 (WHEREUPON, A TRANSMITTAL LETTER IS ADMITTED INTO EVIDENCE AS
13 DEFENDANT'S EXHIBIT #2, WITHOUT OBJECTION)

14 THE COURT: WHAT WAS EXHIBIT #1, PLEASE, MS. NELSON?

15 MS. NELSON: NUMBER ONE WAS THE PAYOFF STATEMENT FROM
16 REGIONS BANK.

17 Q DO YOU RECALL ANYTHING ELSE, SPECIFICALLY, FROM THE DATE OF
18 THAT CLOSING WITH RESPECT TO, I GUESS -- AFTER THE CLOSING
19 OCCURRED, DO YOU RECALL ANYTHING, SPECIFICALLY, AFTER THAT
20 CLOSING THAT WOULD HAVE HAPPENED? I UNDERSTAND THIS WAS,
21 YOU KNOW, SEVEN YEARS AGO, OR SIX-AND-A-HALF YEARS AGO.

22 A NO.

23 Q OKAY. WHAT WOULD HAVE BEEN YOUR INSTRUCTIONS -- WHAT WOULD
24 HAVE BEEN YOUR STANDARD INSTRUCTIONS TO YOUR SECRETARY
25 AFTER YOU HAD FINISHED --

1 **MR. THRELKELD:** YOUR HONOR, I OBJECT TO THAT BEING A LEADING
2 QUESTION.

3 **THE COURT:** OVERRULED.

4 Q WHAT WOULD HAVE BEEN YOUR STANDARD INSTRUCTIONS TO YOUR
5 SECRETARY AFTER THE CLOSING, AFTER YOU HAD DONE YOUR SHARE
6 OF THE CLOSING?

7 A AFTER I DO THE CLOSING, I MAKE A COPY FOR THE FILE. MY
8 SECRETARY DELIVERS THE PAYOFF CHECKS IF THEY ARE LOCAL. IF
9 THEY HAVE TO BE EXPRESS MAILED OFF, THEY PREPARE THOSE
10 DOCUMENTS AND PUT THEM IN THE BOX.

11 Q ALL RIGHT, SIR. LET ME ASK YOU, AND PLEASE REFER TO
12 DEFENDANT'S EXHIBIT #2. THE LETTER THAT YOU SEND, WHY WOULD
13 YOU PUT THE LANGUAGE IN THERE IN PARAGRAPH TWO AND
14 PARAGRAPH THREE?

15 A THAT'S IN THERE BECAUSE IT'S REALLY, IN THE FORM THAT WE DO IT
16 IN, THAT PUTS THE BANK ON NOTICE, OR THE LENDER ON NOTICE,
17 THAT THEY HAVE A DUTY TO -- ONCE THEY GET THE PAYOFF, TO
18 SATISFY THE MORTGAGE AND SEND IT BACK TO ME.

19 Q ALL RIGHT. AND PARAGRAPH TWO INSTRUCTS, STARTING WITH,
20 "PLEASE FORWARD SATISFIED DOCUMENTS WITH A COPY OF THIS
21 LETTER TO THIS OFFICE TO BE REMOVED OF RECORD. PLEASE DO NOT
22 SEND ORIGINAL DOCUMENTS DIRECTLY TO THE BORROWERS." THAT'S
23 IN PARAGRAPH TWO THAT YOU JUST REFERENCED?

24 A THAT'S CORRECT.

25 Q OKAY. DO YOU EVER SEND A -- DO YOU EVER TENDER FEES FOR THE

1 \$5.00 RECORDING SATISFACTION FEE?

2 A NOT AS A GENERAL RULE. NO.

3 Q ALL RIGHT, SIR. AND YOU HAD SAID ON THIS CLOSING THAT -- OR HAVE
4 YOU SAID THAT ON THIS CLOSING YOU SENT A THREE DAY PER DIEM?

5 A YES. I SENT IT. THE THREE DAY PER DIEM WAS COLLECTED SO THAT
6 MS. BORCHERS WOULD HAVE KNOWN HOW MUCH MONEY TO BRING TO
7 THE CLOSING. HOW MUCH THE PURCHASERS, THE SELLERS WERE
8 GOING TO BE GETTING FROM THE CLOSING.

9 Q ALL RIGHT, SIR. TO YOUR KNOWLEDGE, WOULD YOU HAVE KNOWN IF
10 THE SELLERS GOT A REFUND ON THE OVERPAYMENT OF THE PAYOFF
11 IF THERE WAS ONE?

12 A NO.

13 Q OKAY. SIR, WHY DID YOU DO THE SATISFACTION MORTGAGE IN THE
14 SUMMER OF 2005?

15 A BECAUSE MISTER THRELKELD BROUGHT IT TO MY ATTENTION THAT
16 THAT MORTGAGE NEVER HAD BEEN SATISFIED. SO, ONCE I WAS
17 INFORMED, HE BROUGHT THAT TO MY ATTENTION, I WENT TO MY
18 OFFICE, FOUND THE PAYOFF LETTER, FOUND THE CANCELLED CHECK
19 SATISFYING IT ACCORDING TO STATUTE AND WROTE HAROLD AND
20 TOLD HIM THAT.

21 Q ALL RIGHT, SIR. AND BY THE PAYOFF LETTER, ARE YOU REFERRING TO
22 WHAT HAS BEEN ENTERED AS EXHIBIT #2?

23 A YES.

24 Q AND BY THE -- THIS IS A MATTER -- WELL, LET ME ASK YOU, IF I CAN
25 APPROACH. IS THIS THE MORTGAGE LIEN SATISFACTION THAT YOU

1 FILED WITH THE R-N-C OFFICE DATED 12-22-2005, BOOK 7123, PAGE
2 THREE?

3 A THIS IS THE ORIGINAL.

4 Q THAT'S THE ORIGINAL THAT WAS RECORDED. WHEN YOU RECORDED
5 THIS, LOOK AT THE THIRD PAGE OF THE DOCUMENT THAT I JUST
6 HANDED YOU. DID YOU RECORD THAT THIRD PAGE?

7 A NO.

8 Q OKAY. CAN YOU IDENTIFY FOR THE COURT WHAT THAT THIRD PAGE IS.

9 A THE THIRD PAGE IS THE PAYOFF LETTER.

10 Q AND SO IT'S THE DEFENDANT'S EXHIBIT #1?

11 A YES. THAT'S CORRECT.

12 Q AND WHAT'S AT THE BOTTOM OF THAT THIRD PAGE?

13 A THE BOTTOM OF THE THIRD PAGE IS THE CHECK THAT I GAVE TO THE
14 BANK WHERE WE PUT THE LOAN AMOUNT AND THIS IS THE ORIGINAL
15 OF THAT STUB AND THIS IS WHERE THE BANK CLOCKED IT IN.

16 Q ALL RIGHT. SO ACCORDING TO YOUR RECORDS ---

17 A THIS CLOCKED IN PART DOES NOT SHOW UP.

18 Q ALL RIGHT, SIR. SO THE DOCUMENTATION THAT YOU HAVE IS NOT THE
19 CLOCKED IN PART?

20 A THE PART I HAVE IS THE CLOCKED IN PART.

21 Q I SEE. SO, THAT WAS CLOCKED IN AS A MATTER OF RECORD
22 DOWNSTAIRS?

23 A NO. THAT WAS CLOCKED IN AS A MATTER OF RECORD AT THE BANK.

24 Q OKAY. MAY I HAVE THAT? (REFERRING TO DOCUMENT)

25 **MS. NELSON:** YOUR HONOR, IF I COULD MAKE A COPY OF THIS.

1 **THE COURT:** SURE.

2 **MS. NELSON:** I'D LIKE TO MAKE THIS DEFENDANT'S EXHIBIT #3.

3 **THE COURT:** ANY OBJECTION, MISTER THRELKELD?

4 **MR. THRELKELD:** I HAVEN'T SEEN IT.

5 (MS. NELSON HANDS DOCUMENT TO MISTER THRELKELD.)

6 **THE COURT:** EXPLAIN TO ME AGAIN WHILE SHE'S SHOWING HIM THAT
7 DOCUMENT, WHAT THAT IS, PLEASE.

8 **MR. BELK:** THAT'S THE STUB, THE CHECK COMES WITH, THE ORIGINAL
9 CHECK COMES WITH, THAT'S THE STUB. WE GET THAT TO THE BANK, THE
10 BANK, WITH THE LETTER. THE BANK TOOK THE STUB, CASHED THE CHECK
11 AND THAT'S WHERE THE BANK GOT THE 32 LOAN.

12 **THE COURT:** ANY OBJECTIONS?

13 **MR. THRELKELD:** TO THE CHECK STUB, NO, SIR.

14 **THE COURT:** MISTER STRAWN?

15 **MR. STRAWN:** NO, SIR.

16 **THE COURT:** ADMITTED WITHOUT OBJECTION.

17 (WHEREUPON, A MORTGAGE LIEN STATEMENT IS ENTERED INTO
18 EVIDENCE AS DEFENDANT'S EXHIBIT #3, WITHOUT OBJECTION)

19 Q MISTER BELK, WHO WAS THE INDIVIDUAL THAT TOOK THE PAPERWORK
20 DOWN TO -- THE INDIVIDUAL OUT OF YOUR OFFICE WHO TOOK THE
21 PAPERWORK DOWN TO THE BANK?

22 A AT THAT TIME, CATHY SLATON ---

23 Q YES, SIR.

24 A --- DELIVERED ALL THOSE PAPERS.

25 Q IS SHE STILL YOUR EMPLOYEE?

1 A SHE IS.

2 Q HOW LONG HAS SHE BEEN EMPLOYED WITH YOU?

3 A SINCE, PROBABLY, SINCE 2002 OR 2003.

4 **MS. NELSON:** YOUR HONOR, I HAVE NO FURTHER QUESTIONS OF THIS
5 WITNESS.

6 Q PLEASE ANSWER ANY QUESTIONS THE COURT OR MISTER THRELKELD
7 MAY HAVE.

8 **THE COURT:** MISTER THRELKELD?

9 **MR. THRELKELD:** THANK YOU, YOUR HONOR.

10 **CROSS EXAMINATION OF JIM BELK BY MISTER THRELKELD**

11 Q JIM, WERE YOU AWARE AT THE TIME THAT THIS CLOSING OCCURRED
12 THAT THIS WAS AN OPEN-ENDED CREDIT LINE?

13 A IT WAS -- I WAS AWARE THERE WAS A MORTGAGE ON THE PROPERTY.

14 **MR. THRELKELD:** THAT'S ALL THE QUESTIONS I HAVE.

15 **THE COURT:** MISTER STRAWN, DO YOU HAVE ANY QUESTIONS?

16 **MR. STRAWN:** NO, SIR.

17 **THE COURT:** ANY RE-DIRECT?

18 **MS. NELSON:** NO, SIR.

19 **THE COURT:** ANY REASON WHY MISTER BELK CAN'T BE EXCUSED?

20 **MS. NELSON:** NO, SIR.

21 **THE COURT:** THANK YOU, MISTER BELK.

22 **MR. BELK:** THANK YOU, YOUR HONOR.

23 **THE COURT:** MAY I SEE EXHIBIT #3, PLEASE. DO WE NEED TO GO
24 AHEAD AND MAKE A COPY SO THE ORIGINAL CAN GO BACK INTO THE FILE?

25 **MS. NELSON:** THAT WOULD BE NICE, SIR.

1 (BRIEF BREAK)

2 THE COURT: MS. NELSON?

3 MS. NELSON: WE'D CALL CATHY SLATON TO THE STAND, YOUR HONOR.

4 (AFTER BEING DULY SWORN BY THE CLERK OF COURT, CATHY SLATON
5 TESTIFIED AS FOLLOWS:)

6 CLERK OF COURT: YOU MAY HAVE A SEAT ON THE WITNESS STAND.

7 ONCE YOU ARE SEATED, IF YOU WOULD GIVE US YOUR FULL NAME FOR THE
8 RECORD.

9 MS. CURTIS: IT'S CATHY CURTIS. I WAS CATHY SLATON.

10 DIRECT EXAMINATION OF CATHY SLATON CURTIS BY MS. NELSON

11 Q IF I CALL YOU SLATON, IT'S BECAUSE IT IS STUCK IN MY HEAD.

12 A THAT'S FINE.

13 Q OKAY, MS. CURTIS, WHEN DID YOU BECOME CATHY CURTIS INSTEAD OF
14 SLATON? WHAT YEAR?

15 A YEAR BEFORE LAST.

16 Q OKAY. THE REASON I ASK YOU THAT IS -- ARE YOU FAMILIAR WITH, DO
17 YOU HAVE A COPY OF THE AFFIDAVIT OF CATHY SLATON?

18 A YES.

19 Q PLEASE LOOK AT IT AND MAKE SURE. IS THAT YOU AND IS THAT THE
20 AFFIDAVIT THAT YOU SUBMITTED AND THAT YOU SIGNED BACK IN APRIL
21 OF 2008?

22 A YES.

23 THE COURT: YOU HAVE AN OBJECTION?

24 MR. THRELKELD: I OBJECT TO ADMITTING THE AFFIDAVIT. IT'S
25 SOMETHING SHE CAN TESTIFY TO.

1 **MS. NELSON:** I WASN'T GOING TO ADMIT IT. I WASN'T ASKING TO ADMIT
2 IT. I WAS ASKING THAT SHE IDENTIFY THAT SHE IS THAT SAME INDIVIDUAL.
3 HER AFFIDAVIT IS ALREADY IN THE RECORD. JUST MAKING SURE THAT'S THE
4 SAME INDIVIDUAL.

5 Q IS THAT YOU?

6 A YES, MA'AM.

7 Q OKAY. MS. CURTIS, HOW OLD ARE YOU?

8 A FIFTY-THREE.

9 Q AND HOW LONG AND IN WHAT FIELD OF WORK ARE YOU IN?

10 A I'M A SECRETARY/ADMINISTRATIVE ASSISTANT.

11 Q OKAY. AND HOW LONG HAVE YOU WORKED FOR MISTER BELK?

12 A SEVEN YEARS.

13 Q OKAY. SO, KNOWING THAT, WHEN WOULD YOU HAVE STARTED?

14 A ON JANUARY 13TH OF 2003.

15 Q WHAT DID YOU DO BEFORE THAT?

16 A I WAS SECRETARY/ADMINISTRATIVE ASSISTANT AT NATIONAL CITY
17 MORTGAGE.

18 Q AT NATIONAL CITY MORTGAGE?

19 A UH-HUH.

20 Q OKAY. MS. CURTIS, CAN YOU TELL ME IF YOU WERE INVOLVED IN THE
21 CLOSING THAT OCCURRED ON OCTOBER 31, 2003, WITH RESPECT TO
22 THE SALE FROM STRAWN TO BORCHERS?

23 A YES. I DON'T REMEMBER THAT SPECIFIC DAY, BUT I DO...

24 Q WERE YOU EMPLOYED BY MISTER BELK ON THAT DAY?

25 A YES, MA'AM.

1 Q OKAY. WERE YOU PRESENT ON THAT DAY TO THE BEST OF YOUR
2 RECOLLECTION?

3 A YES, MA'AM.

4 Q WAS THAT, FOR THE LACK OF A BETTER TERM, WAS THAT A CLOSING
5 THAT YOU WERE RESPONSIBLE FOR PREPARING FOR MISTER BELK?

6 A I WAS INVOLVED IN IT, NOT NECESSARILY IN PREPARING IT.

7 Q OKAY. AND THAT MAY BE MY TERMINOLOGY. SO, YOU ARE SAYING YOU
8 WERE INVOLVED WITH THAT CLOSING?

9 A YES, MA'AM.

10 Q COULD YOU TELL THE COURT, PLEASE, IF YOU RECALL, IF YOU WERE
11 THE PERSON RESPONSIBLE FOR TAKING THE PAYOFF TO REGIONS
12 BANK FROM THAT CLOSING?

13 A YES, MA'AM.

14 Q OKAY. AND DO YOU RECALL THAT -- WHAT, IF ANYTHING, DO YOU
15 RECALL THAT YOU DID THAT DAY? DESCRIBE TO THE COURT WHAT
16 YOU DID THAT DAY WHEN YOU TOOK THE PAYOFF TO REGIONS.

17 A THAT SPECIFIC PAYOFF OR ALL THE PAYOFFS?

18 Q NO. THAT SPECIFIC PAYOFF.

19 A OKAY. I TAKE THE CHECK, THE PAYOFF LETTER AND THE PAYOFF
20 STATEMENT THAT COMES FROM THE BANK, I STAPLE ALL THREE OF
21 THEM TOGETHER AND THEN I GO TO THE INDIVIDUAL BANK AND DO THE
22 PAYOFF AND THEN I GET THE BOTTOM PART OF THE CHECK, YOU
23 KNOW, THROUGH THEIR MACHINE THAT'S GOT THE INFORMATION ON
24 THE BOTTOM OF IT AND THE DATE AND THE TIME THAT THE PAYOFF
25 WAS MADE OR THE RECEIPT FROM THE BANK.

1 Q OKAY. AND I'M GOING TO SHOW YOU WHAT HAS BEEN MARKED AS
2 DEFENDANT'S EXHIBIT #3. CAN YOU DESCRIBE FOR THE COURT WHAT
3 THAT IS.

4 A THAT IS THE BOTTOM OF THE PERFORATED CHECK, A PAYOFF FOR THE
5 MORTGAGE.

6 Q WHAT PAYOFF OF THE MORTGAGE IS THAT THE BOTTOM OF THE
7 PERFORATED CHECK OF?

8 A PARDON?

9 Q WHOSE IS IT? WHOSE MORTGAGE PAYOFF IS THAT CHECK FOR?
10 A FOR REGIONS BANK FOR STRAWN.

11 Q OKAY. CAN YOU TELL ME WHAT -- CAN YOU EXPLAIN TO THE COURT
12 WHAT IS ON THAT CHECK STUB, EXHIBIT #3.

13 A IT HAS THE LOAN NUMBER, THE AMOUNT OF THE CHECK, THE DATE,
14 THE DATE THAT IT WAS DELIVERED TO THE BANK AND SCANNED
15 THROUGH THEIR MACHINE WITH THE TIME AND THE AMOUNT ON IT.

16 Q HOW DO YOU KNOW THAT THAT WENT THROUGH A MACHINE AND THAT
17 IT HAS THE TIME AND DATE ON IT AND THE AMOUNT?

18 A BECAUSE IT'S SCANNED AT THE BOTTOM THROUGH THEIR MACHINE.
19 THEY RUN IT THROUGH THEIR MACHINE, LIKE YOU SCAN A CHECK
20 THROUGH, AND THAT PRINTS IT ON THERE.

21 Q IS THAT THE RECEIPT THAT YOU RECEIVED FROM REGIONS BANK
22 WHEN YOU TOOK THE PAYOFF FOR THIS CLOSING TO REGIONS BANK?

23 A YES, MA'AM.

24 Q ARE YOU ABSOLUTELY SURE?

25 A TO THE BEST OF MY KNOWLEDGE.

1 Q OKAY. WHAT WOULD MAKE YOU QUESTION THAT THAT'S NOT THE
2 RECEIPT?

3 A SOMETIMES THEY GIVE YOU THIS ALONG WITH THE INDIVIDUAL
4 RECEIPT. SOMETIMES THEY GIVE YOU TWO.

5 Q OKAY.

6 A NOT JUST ONE.

7 Q AND DO YOU RECALL WHETHER OR NOT YOU RECEIVED TWO RECEIPTS
8 OR ONE IN THIS INSTANCE?

9 A I DON'T RECALL.

10 Q CAN YOU TELL THE COURT WHETHER OR NOT YOU RECALL GOING
11 DOWN THERE AND DELIVERING THAT TRANSMITTAL LETTER, WHAT YOU
12 DESCRIBED AS THE THREE DOCUMENTS, THE PAYOFF -- AND IF I
13 MISQUOTE THIS YOU STOP ME, BUT AS I HEARD YOU TESTIFY -- YOU
14 SAID YOU DELIVERED A COPY OF THE PAYOFF, THE ACTUAL CHECK
15 WITH THAT STUB THAT YOU GET BACK AND THEN THE TRANSMITTAL
16 LETTER. ARE YOU SURE THAT YOU DELIVERED ALL OF THOSE?

17 A WE CALL IT A PAYOFF LETTER, BUT YES, IT'S ALL THREE DOCUMENTS
18 AND THEY ARE STAPLED TOGETHER SO THAT THEY STAY TOGETHER,
19 YOU KNOW, BECAUSE IF YOU HAVE MORE THAN ONE PAYOFF, YOU
20 WANT TO MAKE SURE THAT, YOU KNOW, ALL THE DOCUMENTS GET
21 DELIVERED TO THE CORRECT PERSON.

22 Q OKAY. SO, ARE YOU TESTIFYING THAT YOU SPECIFICALLY RECALL
23 DELIVERING ALL THREE OF THOSE DOCUMENTS?

24 A I DON'T SPECIFICALLY REMEMBER THAT DAY.

25 Q YES.

1 A BUT THAT'S WHAT I DID THEN. THAT WAS MY JOB THEN, TO DELIVER
2 THE PAYOFFS TO THE DIFFERENT BANKS AND DIFFERENT THINGS LIKE
3 THAT.

4 Q OKAY. THE DOCUMENT THAT YOU HAVE IN YOUR HAND.

5 A UH-HUH.

6 Q IS THAT THE DOCUMENT THAT YOU WOULD HAVE RECEIVED FROM
7 REGIONS BANK?

8 A YES, MA'AM.

9 Q OKAY. NOW, I NOW PRESENT TO YOU A DOCUMENT.

10 (MS.NELSON HANDS DOCUMENT TO THE WITNESS)

11 **THE COURT:** MAY I ASK A QUESTION?

12 **MS. CURTIS:** PARDON?

13 **THE COURT:** ON EXHIBIT #3, WHOSE WRITING IS OF THE LOAN
14 NUMBER? IS THAT YOUR HANDWRITING THAT SHOWS ---

15 **MS. CURTIS:** NO. THAT WAS MARISHA THAT WORKED AT OUR OFFICE.

16 **THE COURT:** OKAY. THANK YOU.

17 Q I JUST HANDED YOU BACK THE DOCUMENT ENTITLED "AFFIDAVIT OF
18 CATHY SLATON".

19 A YES, MA'AM.

20 Q AND A MOMENT AGO, YOU IDENTIFIED THAT AS YOU. YOUR NAME IS
21 NOW CURTIS, BUT ---

22 A THAT'S ME.

23 Q OKAY.

24 **MS. NELSON:** YOUR HONOR, I ASK THAT THIS BE INTRODUCED AS
25 DEFENDANT'S EXHIBIT #4 FOR THE PURPOSE OF SATISFYING THE AFFIDAVIT

1 REQUIREMENT, NOT FOR PURPOSES OF THE TRUTH OF THE MATTER
2 ASSERTED.

3 **MR. THRELKELD:** I OBJECT. THIS IS PURE HEARSAY, DOUBLE HEARSAY.

4 **THE COURT:** AND WHAT YOU ARE TRYING TO INTRODUCE IS HER
5 STATEMENT, HER AFFIDAVIT?

6 **MS. NELSON:** HER AFFIDAVIT SAYING THAT SHE DELIVERED THE
7 DOCUMENT. SINCE THIS IS THE AFFIDAVIT WE ARE ACTUALLY RELYING UPON
8 IN SATISFACTION OF THE PENAL STATUTE THAT REQUIRES AN AFFIDAVIT OF
9 SERVICE AND SO I'M ASKING THAT THIS DOCUMENT BE ADMITTED FOR THE
10 PURPOSES OF AN AFFIDAVIT OF SERVICE.

11 **THE COURT:** I'M GOING TO SUSTAIN THE OBJECTION. IT'S A PRIOR
12 CONSISTENT STATEMENT. SHE TESTIFIED SHE ASSISTED WITH THE LOAN. I
13 SUSTAIN THE OBJECTION.

14 **MS. NELSON:** ALL RIGHT. THANK YOU, YOUR HONOR. I'D LIKE TO
15 PROFFER THIS.

16 **THE COURT:** YES, MA'AM. YOU CAN MAKE IT A COURT EXHIBIT THEN.
17 (WHEREUPON, CATHY SLATON'S AFFIDAVIT IS ENTERED INTO EVIDENCE
18 AS COURT'S EXHIBIT #1, OVER OBJECTION.)

19 **MS. NELSON:** YOUR HONOR, I HAVE NO FURTHER QUESTIONS OF THIS
20 WITNESS.

21 Q MS. CURTIS, ANSWER ANY QUESTIONS OF THE COURT OR THAT MISTER
22 THRELKELD MAY HAVE.

23 **CROSS EXAMINATION OF CATHY SLATON CURTIS BY MR. THRELKELD:**

24 Q MS. CURTIS, YOU HAVE PREVIOUSLY TESTIFIED UNDER OATH THAT YOU
25 DO NOT RECALL GOING TO A BANK OR TAKING A PACKAGE TO THE

1 BANK.

2 MS. NELSON: OBJECTION, YOUR HONOR.

3 THE COURT: SUSTAINED.

4 Q HAVE YOU PREVIOUSLY TESTIFIED THAT YOU DID NOT, PRIOR TO
5 TODAY, DID YOU TESTIFY THAT YOU DO NOT RECALL TAKING THE
6 CHECK ---

7 MS. NELSON: OBJECTION.

8 Q --- OR THE ---

9 THE COURT: STOP. WHAT YOU ARE LOOKING AT IS PRIOR
10 INCONSISTENT STATEMENTS. IS THAT CORRECT?

11 MR. THRELKELD: YES, SIR.

12 THE COURT: LAY SOME FOUNDATION FOR IT.

13 MR. THRELKELD: YES, SIR.

14 Q DID YOU GIVE ME -- DID WE TAKE YOUR DEPOSITION IN MY OFFICE ON
15 THIS CASE?

16 A YES, SIR.

17 Q AND WAS THAT TAKEN ON JUNE 30, 2008?

18 A I DON'T RECALL THE DATE.

19 Q WELL, LET ME SHOW YOU...

20 MR. THRELKELD: YOUR HONOR, I NEED ---

21 THE COURT: GO AHEAD AND OPEN THAT, PLEASE, SIR.

22 (MR. THRELKELD OPENS SEALED ENVELOPE)

23 Q I'LL SHOW YOU THIS DOCUMENT AND SEE IF YOU CAN IDENTIFY THAT.
24 IS THAT YOUR AFFIDAVIT -- I'M SORRY. IS THAT YOUR DEPOSITION OF
25 JUNE 30, 2008?

1 A YES.

2 Q DID YOU GIVE A DEPOSITION ON THAT DATE?

3 A I DON'T RECALL THE SPECIFIC DATE, BUT YES, SIR.

4 Q WOULD YOU LOOK ON THERE AND SEE WHAT THE DATE IS? I'LL SHOW
5 YOU. HERE. (INDICATING)

6 A YES, SIR.

7 Q DO YOU KNOW WHETHER OR NOT THAT IS THE WRONG OR THE RIGHT
8 DATE?

9 A I DON'T KNOW.

10 Q YOU DON'T KNOW?

11 A I DON'T REMEMBER.

12 Q DO YOU DISPUTE THAT?

13 A NO. I DON'T DISPUTE IT.

14 Q DID YOU -- WERE YOU ASKED IN THAT DEPOSITION AS TO WHETHER OR
15 NOT YOU RECALL TAKING THIS PAYOFF AND OTHER DOCUMENTS TO
16 THE BANK?

17 A I DON'T RECALL THAT.

18 Q WOULD YOU LOOK AT PAGE 25?

19 (WITNESS COMPLIES)

20 **MS. NELSON:** YOUR HONOR, AT THIS POINT I OBJECT BECAUSE IT
21 APPEARS TO ME -- THAT THE REASON FOR MY OBJECTION IS THAT HE IS
22 TRYING TO PUBLISH PART OF A DEPOSITION WHICH WOULD VIOLATE THE
23 RULES WITH RESPECT TO NUMBER ONE. HE WOULD HAVE TO GIVE ME, I
24 BELIEVE, TWENTY-FOUR HOURS NOTICE OF SERVICE THAT HE WAS GOING TO
25 USE PART OF A DEPOSITION. THE DEPOSITIONS, IT'S MY UNDERSTANDING, IN

1 ORDER TO USE THEM, IT'S WHEN YOU DON'T HAVE A WITNESS AVAILABLE.

2 WE HAVE A WARM BODY HERE TO WITNESS, SO ---

3 THE COURT: LET ME STOP YOU THERE. I'M GOING TO OVERRULE THE

4 OBJECTION: YOU OBJECTED TO HER TESTIFYING AND HE'S LAYING A

5 FOUNDATION TO ESTABLISH PRIOR INCONSISTENT STATEMENTS AND I'LL LET

6 HIM GO AHEAD.

7 MS. NELSON: YES, SIR. BUT JUST FOR THE RECORD, HE HASN'T

8 ACTUALLY ASKED HER A QUESTION YET. HE'S BEEN ASKING HER ABOUT THE

9 DEPOSITION.

10 THE COURT: ALL RIGHT.

11 Q DID YOU -- ARE YOU NOW TESTIFYING THAT YOU TOOK THE PAYOFF

12 AND ALL THE DOCUMENTS THAT HAVE BEEN ADMITTED INTO EVIDENCE

13 TO REGIONS BANK ON THAT ---

14 A I DON'T REMEMBER THAT SPECIFIC DAY. THAT WAS MY JOB. THAT'S

15 WHAT I DID WAS THE PAYOFFS.

16 Q OKAY. SO ---

17 A BUT THERE WERE THREE PEOPLE IN OUR OFFICE THEN.

18 Q SO, THERE WERE TWO OR THREE OTHER PEOPLE THAT COULD HAVE

19 TAKEN THE CHECK?

20 A TWO OTHER PEOPLE THAT COULD HAVE.

21 Q SO, YOU DO NOT KNOW WHETHER OR NOT YOU HAD ANYTHING TO DO

22 WITH DELIVERING THE CHECK THEN. DO YOU?

23 A WELL, THAT WAS MY JOB, SO... I DON'T RECALL THAT SPECIFIC DAY,

24 WHICH PAYOFFS I DID, BUT THAT WAS MY JOB TO DO THE PAYOFFS. I

25 WAS THE PERSON THAT DELIVERED THE PAYOFFS.

1 Q BUT OTHER PEOPLE DELIVERED THE PAYOFFS, TOO. DIDN'T THEY?

2 A SOMETIMES.

3 Q WELL, AND DO YOU RECALL GOING TO THE BANK THAT DAY? GOING TO
4 REGIONS BANK?

5 A I DON'T RECALL THAT SPECIFIC...

6 Q AND DO YOU RECALL TAKING THE CHECK AND THE OTHER EXHIBITS TO
7 REGIONS BANK ON THE CLOSING DATE?

8 A I DON'T RECALL THAT SPECIFIC DAY. THAT'S WHAT I DID AT THAT TIME,
9 WAS TO DELIVER THE PAYOFFS.

10 Q OKAY. ONCE AGAIN, I'M GOING TO ASK YOU, DO YOU RECALL WHETHER
11 OR NOT YOU, PERSONALLY, DELIVERED THE EXHIBIT #2 TO REGIONS
12 BANK ON THE CLOSING DATE?

13 A I DON'T RECALL THAT SPECIFIC DAY. NO, SIR.

14 Q SO, I TAKE IT THAT YOU ARE NOT TESTIFYING THAT YOU TOOK
15 EXHIBIT #2 TO REGIONS BANK WHEN THIS LOAN WAS PAID OFF?

16 A I DON'T UNDERSTAND WHAT YOU'RE SAYING.

17 Q WELL, ARE YOU TESTIFYING THEN THAT YOU TOOK EXHIBIT #2 TO THE
18 BANK?

19 A I DON'T REMEMBER THAT SPECIFIC DAY, SO I...

20 Q DO YOU REMEMBER TAKING THIS TO THE BANK? (HOLDING UP
21 DOCUMENT)

22 A NO, SIR. I DON'T.

23 **MS. NELSON:** I WAS GOING TO SAY YOU CAN HAND IT TO HER SO SHE
24 CAN SEE IT.

25 **MR. THRELKELD:** THAT'S ALL I HAVE.

1 **THE COURT:** I'VE GOT IT. MISTER STRAWN, DO YOU HAVE ANY
2 QUESTIONS FOR THIS WITNESS?

3 **MR. STRAWN:** NO, SIR.

4 **THE COURT:** ANY RE-DIRECT?

5 **MS. NELSON:** NO, SIR.

6 **THE COURT:** ANY REASON WHY MS. CURTIS CAN'T BE EXCUSED?

7 **MS. NELSON:** NO, SIR. NO REASON.

8 **THE COURT:** THANK YOU, MS. CURTIS. WE NEED TO SWAP OUT EXHIBIT
9 #3, TO MAKE A COPY OF THE ORIGINAL. MISTER BELK, DO YOU NEED THE
10 ORIGINAL FOR YOUR FILE?

11 **MS. NELSON:** I WAS GOING TO MAKE A COPY AND GIVE IT TO HIM.

12 (THE JUDGE HANDS DOCUMENT TO MS. NELSON. THE CLERK OF COURT
13 MAKES COPIES. MS. NELSON HANDS A DOCUMENT TO MISTER BELK)

14 **MS. NELSON:** YOUR HONOR, I WOULD LIKE TO CALL ROBERT
15 BORCHERS.

16 (AFTER BEING DULY SWORN BY THE CLERK OF COURT, ROBERT
17 BORCHERS TESTIFIED AS FOLLOWS:)

18 **CLERK OF COURT:** IF YOU WOULD PLEASE GIVE US YOUR FULL NAME
19 FOR THE RECORD AND SPELL YOUR LAST NAME.

20 **MR. BORCHERS:** ROBERT CARL BORCHERS. B-O-R-C-H-E-R-S.

21 **CLERK OF COURT:** THANK YOU, SIR.

22 **DIRECT EXAMINATION OF ROBERT BORCHERS BY MS. NELSON**

23 Q MISTER BORCHERS, WHO WAS MARIE BORCHERS?

24 A SHE WAS MY MOTHER.

25 Q AND WHEN WAS HER -- THERE WAS A ---

1 A NOVEMBER 7, 2003.

2 Q IS THAT THE DAY SHE PASSED AWAY?

3 A YES.

4 Q MISTER BORCHERS, YOU WERE PRESENT AT THIS CLOSING. WEREN'T
5 YOU?

6 A YES.

7 Q YOU WERE PRESENT AT THE CLOSING. DO YOU RECALL ANY OF THE
8 INFORMATION -- DO YOU HAVE A SPECIFIC RECOLLECTION OF THE
9 DOCUMENTATION THAT WAS PASSED TO YOU AT THE CLOSING, ALL OF
10 THE DOCUMENTATION?

11 A I KNOW THERE WERE A LOT OF DOCUMENTS. YES.

12 Q OKAY. FAIR ENOUGH. YOUR MOTHER PASSED AWAY BEFORE THIS
13 LAWSUIT WAS FILED. IS THAT CORRECT?

14 A CORRECT.

15 Q OKAY. IS IT CORRECT THAT YOU WERE APPOINTED AS PERSONAL
16 REPRESENTATIVE OF HER ESTATE SHORTLY BEFORE THIS LAWSUIT
17 WAS FILED OR SOMETIME BEFORE THIS LAWSUIT WAS FILED?

18 A YES.

19 Q ALL RIGHT, SIR. I'M GOING TO SHOW YOU TWO DOCUMENTS AND ASK
20 IF EITHER ONE OF THEM IS FAMILIAR TO YOU. FIRST, THIS ONE.

21 A YES. IT IS.

22 Q OKAY. SIR, IS THE HANDWRITTEN, THE VERY NEATLY HANDWRITTEN
23 DOCUMENT, IS THAT YOUR HANDWRITING?

24 A YES. I PREPARED THAT.

25 Q OKAY, SIR. AND IS THAT A SUMMARY, IN YOUR OPINION, OF THE

1 DAMAGES THAT YOU HAVE INCURRED, THE OUT-OF-POCKET DAMAGES
2 THAT YOU HAVE INCURRED AS A RESULT OF THE FILING OF THIS
3 ACTION AND AS A RESULT OF THE CONDUCT OF REGIONS BANK OR THE
4 CONDUCT OF MISTER STRAWN?

5 A YES. IT IS.

6 Q WHAT ARE YOU ASKING THE COURT TO DO? HOW MUCH MONEY ARE
7 YOU ASKING THE COURT TO AWARD YOU IN DAMAGES?

8 A DO YOU WANT A FIGURE? A NUMBER?

9 Q YES, SIR. I WANT A FIGURE OF WHAT YOU BELIEVE YOU ARE ENTITLED
10 TO IN RESPECT TO DAMAGES.

11 A I HAVE TWO FIGURES AND LET ME EXPLAIN THIS.

12 Q YES, SIR.

13 A I HAVE, BASICALLY, ALL THE COSTS THAT WE HAVE PAID FOR
14 ATTORNEY'S FEES AND A HOME APPRAISAL, CURRENT, TO BRING IT
15 UP-TO-DATE AND WHAT THE HOUSE WOULD BE VALUED NOW.
16 RECORDS THAT WE WENT BACK AND RETRIEVED. PREPARATION OF
17 TAX MATERIALS FOR THE TAXES OVER THE YEARS AND THE
18 MAINTENANCE OF THE HOME, SEVERAL ITEMS THAT HAD TO BE
19 REPLACED AND WE HAD DONE, LIKE THE HOUSE WAS RE-KEYED.
20 UTILITIES UP UNTIL THE TIME THAT I RENTED THE PROPERTY AND
21 TAXES AND THAT'S ONE TOTAL. THAT COMES TO -- DO YOU WANT A
22 NUMBER?

23 Q I'M JUST ASKING FOR THE DAMAGES, THE OUT-OF-POCKET DAMAGES
24 THAT YOU BELIEVE YOU'VE INCURRED AS A RESULT OF NOT BEING
25 ABLE TO SELL THE PROPERTY AND DISPOSE OF IT BACK IN 2006

1 VERSUS HAVING TO KEEP IT UNTIL 2008.

2 **MR. THRELKELD:** YOUR HONOR, I'M GOING TO OBJECT TO JUST ASKING
3 FOR A BLANK CHECK. I THINK THEY NEED TO CHARACTERIZE THE DAMAGES
4 THEY ARE TALKING ABOUT THAT WOULD BE RECOVERABLE UNDER THE
5 STATUTE.

6 **THE COURT:** I UNDERSTAND WHAT YOU ARE SAYING. LET ME JUST
7 MAKE SURE I UNDERSTAND WHAT YOU ARE SAYING. I'VE GOT ATTORNEY'S
8 FEES, OBVIOUSLY, FOR THE CASE AND YOU ARE SAYING YOU HAVE LOST
9 SALES OPPORTUNITIES. IS THAT WHAT YOU ARE SAYING?

10 **MS. NELSON:** WELL, MOST OF THE DAMAGES IN THE DOCUMENTATION --
11 CAN I ---

12 **THE COURT:** CAN I HAVE A COPY OF THAT?

13 **MS. NELSON:** YES, SIR. I'M JUST TRYING TO LAY A FOUNDATION.

14 **THE COURT:** OKAY. I'LL OVERRULE THE OBJECTION SUBJECT TO
15 LAYING A FOUNDATION.

16 **MR. THRELKELD:** I'M SORRY. SUBJECT TO WHAT?

17 **THE COURT:** SUBJECT TO MY RULING -- I'M GOING TO LET HER TRY TO
18 GO FORWARD AND LAY A FOUNDATION. DO YOU NEED THIS BACK?

19 **MS. NELSON:** NO, SIR.

20 Q MISTER BORCHERS, LET ME ASK YOU, I GUESS LET ME BREAK IT DOWN
21 A LITTLE MORE SPECIFICALLY. THE DOCUMENT THAT YOU ARE
22 LOOKING AT RIGHT NOW, THAT YOU HAND-WROTE, SOME OF THAT
23 DOCUMENT IS SEEKING ATTORNEY'S FEES. IS THAT CORRECT?

24 A YES, MA'AM.

25 Q OKAY. SO, LET ME STOP FOR A SECOND. YOUR OUT-OF-POCKET

1 ATTORNEY'S FEES ARE AROUND \$3800.00. IS THAT CORRECT?

2 ACCORDING TO THE DOCUMENT?

3 A TRUE.

4 Q OKAY. AND YOU'VE INCURRED ADDITIONAL ATTORNEY'S FEES THAT --

5 YOU AGREE THAT YOU'VE INCURRED ADDITIONAL ATTORNEY'S FEES

6 FOR THE PROSECUTION OF THIS ACTION AND THE DEFENSE?

7 A YES.

8 Q OKAY. PLEASE LOOK AT THE OTHER DOCUMENT, THE ATTORNEY FEE

9 AFFIDAVIT. IS THAT AN ACCURATE REFLECTION OF THE TIME -- WOULD

10 YOU AGREE WITH ME THAT THE TIME THAT HAS BEEN PUT IN THERE

11 FOR THE AMOUNT OF OUTSTANDING ATTORNEY'S FEES IS LESS THE

12 PAYMENTS THAT YOU'VE MADE?

13 A YES.

14 Q OKAY. SO, THAT'S AN ACCURATE REFLECTION OF WHAT YOU

15 ACTUALLY OWE US, NOT INCLUDING THE CREDIT FOR WHAT YOU'VE

16 PAID, FOR THE DEFENSE OF THIS ACTION?

17 A ABSOLUTELY.

18 Q AND WHAT IS THE AMOUNT OF THAT, INCLUDING THE COSTS?

19 A WE HAVE A TOTAL HERE OF \$6225.00.

20 Q THANK YOU, SIR. GOING BACK TO THE NEXT DOCUMENT. I'M ASKING

21 YOU SPECIFICALLY, BECAUSE YOU HAVE THIS BROKEN UP INTO

22 DIFFERENT WAYS, OUT-OF-POCKET EXPENSES. I'M NOT ASKING YOU

23 FOR WHAT YOU BELIEVE WAS THE POSSIBILITY OF THE SELLING PRICE.

24 I'M ASKING FOR OUT-OF-POCKET EXPENSES THAT YOU HAVE PAID

25 DURING THE PENDENCY OF THIS ACTION.

1 A \$17,713.06.

2 Q OKAY. AND THAT INCLUDES THE THIRTY-EIGHT HUNDRED AND SOME
3 CHANGE IN ATTORNEY'S FEES. DOES IT NOT?

4 A YES. IT DOES.

5 Q OKAY. YOU ALSO BELIEVE THAT YOU HAD SOME OPPORTUNITY COSTS
6 IN NOT BEING ABLE TO SELL THE PROPERTY.

7 A CORRECT.

8 **MR. THRELKELD:** THIS IS SUBJECT TO MY OBJECTION?

9 **THE COURT:** YES, SIR.

10 **MR. THRELKELD:** ALL RIGHT.

11 Q AND WHAT DO YOU BELIEVE YOUR OPPORTUNITY COST IS IN NOT
12 BEING ABLE TO SELL THE PROPERTY, JUST A FIGURE OF THE
13 DIFFERENCE, IN YOUR OPINION?

14 A I WOULD FIGURE ABOUT \$11,000.00.

15 Q ALL RIGHT, SIR. BUT THE FIGURE OF THE \$17,713.06 IS THE ACTUAL
16 OUT-OF-POCKET THAT YOU INCURRED?

17 A CORRECT.

18 Q OKAY.

19 **MS. NELSON:** I'D LIKE TO INTRODUCE THIS DOCUMENT AS
20 DEFENDANT'S #4.

21 **MR. THRELKELD:** YOUR HONOR, I WOULD OBJECT TO THE ADMISSION
22 OF THE DOCUMENT AND ALSO ASK THAT ANY EVIDENCE OF THE HOLDING
23 COSTS AND PRESENT FEES AND THE STUFF LIKE THAT BE STRICKEN FROM
24 THE RECORD BECAUSE UNDER THE STATUTE, THE ONLY THINGS COVERED
25 WOULD BE ATTORNEY'S FEES AND LEGAL COSTS.

1 **THE COURT:** I DISAGREE WITH YOU ON THE STATUTE. I'LL LET IT BE
2 ADMITTED INTO EVIDENCE AND MISTER THRELKELD, I'LL LET YOU CROSS
3 EXAMINE HIM AS TO DAMAGES, SIR.

4 (WHEREUPON, A COST ESTIMATE BY MISTER BORCHERS IS ADMITTED
5 INTO EVIDENCE AS DEFENDANT'S EXHIBIT #4, OVER OBJECTION)

6 **MS. NELSON:** I WOULD ALSO LIKE TO ADMIT DEFENDANT'S EXHIBIT #5,
7 WHICH IS THE ATTORNEY FEES AFFIDAVIT. I PROVIDED A COPY OF EACH OF
8 THESE TO OPPOSING COUNSEL.

9 **THE COURT:** DO YOU HAVE AN OBJECTION TO ADMITTING INTO
10 EVIDENCE THE ATTORNEY FEES AFFIDAVIT?

11 **MR. THRELKELD:** YOUR HONOR, I'M NOT SURE THAT'S AN EVIDENTIARY
12 ISSUE.

13 **THE COURT:** WELL, THIS IS NON-JURY AND SO I'LL GO AHEAD AND TAKE
14 IT. SHE'LL GIVE IT TO ME ANYWAY.

15 **MS. NELSON:** I DON'T HAVE TO MAKE IT AN EXHIBIT. I JUST WASN'T
16 SURE AND I DIDN'T WANT TO NOT ENTER IT.

17 **THE COURT:** OTHER THAN THAT, MISTER THRELKELD, DO YOU HAVE
18 ANY STRONG OBJECTION?

19 **MR. THRELKELD:** NO, SIR.

20 (WHEREUPON, AN AFFIDAVIT OF ATTORNEY FEES IS ENTERED INTO
21 EVIDENCE AS DEFENDANT'S EXHIBIT #5)

22 Q VERY BRIEFLY, SIR, CAN YOU -- THE DOCUMENT THAT'S BEEN ENTERED
23 THAT YOU WROTE OUT IS A REFLECTION OF YOUR OUT-OF-POCKET
24 COSTS. IS THAT RIGHT? OR IT IS WHATEVER IT WAS THAT YOU
25 TESTIFIED IT WAS. CORRECT?

1 A YES, MA'AM.

2 Q ALTHOUGH NOT MONETARY DAMAGES, CAN YOU TELL THE COURT
3 WHAT OTHER COSTS THAT YOU HAVE INCURRED BECAUSE OF THE
4 FILING OF THIS LAWSUIT AND THE DRAGGING OUT OF THIS LITIGATION?
5 I'M TALKING ABOUT HOW MUCH TROUBLE, HAS IT CAUSED YOU ANY
6 TROUBLE BECAUSE OF THIS?

7 A A TREMENDOUS AMOUNT OF TROUBLE AND NOT JUST FOR MYSELF.
8 IT'S FOR MY WIFE AND MY SISTER-IN-LAW IN CALIFORNIA WHO WE'VE
9 COMMUNICATED WITH ON A FAIRLY REGULAR BASIS. I THINK THE
10 HARDEST THING IS THAT, YOU KNOW, WE NEVER REALIZED THE TIME
11 THAT IT WOULD TAKE TO GO THROUGH ALL THE WHOLE PROCESS, BUT
12 I KNOW THAT WE WERE TREMENDOUSLY HURT BY NOT BEING ABLE TO
13 SELL THE PROPERTY. WE HAD PLANNED THIS. WE ALREADY HAD THE
14 SALE OF THE FURNITURE, WE HAD AN OPEN HOUSE, MY MOTHER'S
15 HOUSE, TO SELL THE FURNITURE AND ALL THE FURNISHINGS AND WE
16 WERE IN THE PROCESS OF REFURBISHING A NUMBER OF THINGS. YOU
17 KNOW, MINOR TOUCH-UPS WITH PAINT AND ALL THIS BEFORE WE
18 WERE SERVED WITH THE SUIT AND ONCE WE WERE SERVED WITH THE
19 SUIT, IT KIND OF LIKE STOPPED THE WHOLE PROCESS. I REALLY SAID
20 TO MYSELF, "MAYBE I CAN'T EVEN RENT THIS." IN FACT, WE THOUGHT
21 THAT -- I KNEW WE COULDN'T SELL THE PROPERTY BECAUSE THERE
22 WAS A LAWSUIT ON THAT, BUT WE COULDN'T EVEN RENT IT. BUT WE
23 HAD SEVERAL PEOPLE THAT WERE INTERESTED IN BUYING IT --

24 Q YOU CAN'T SAY WHAT SOMEBODY ELSE TOLD YOU.

25 A OKAY. BUT ANYWAY, THE LONG STORY SHORT, MY AUNT'S SISTER,

1 WHO IS UP IN AGE, SHE LIVED IN ANOTHER PART OF THE STATE AND
2 WANTED TO RELOCATE NEAR HER SISTER WHO LIVES HERE IN
3 ANDERSON AND SHE SAW THE HOUSE AND WE SHOWED IT TO HER AND
4 SHE LOVED IT AND SHE SAYS, "WELL, I'LL RENT IT."

5 **THE COURT:** DON'T GO INTO WHAT SOMEBODY ELSE SAID.

6 A ALL RIGHT. SO, THAT'S BASICALLY IT. BUT ALL THESE DAMAGES THAT
7 WE'VE SUFFERED BECAUSE OF THIS, I FELT LIKE THE HOUSE WAS PUT
8 UP AS HOSTAGE AND WE COULDN'T DO ANYTHING WITH IT AND, YOU
9 KNOW, THAT BASICALLY IS IT, THE COST BREAK DOWN. I KNOW WE
10 WERE VERY CONCERNED ABOUT -- WE IMMEDIATELY CHANGED THE
11 LOCKS ON THE HOUSE BECAUSE I HAD NO IDEA WHAT MIGHT HAPPEN
12 AND SO I DIDN'T WANT ANYBODY ENTERING THE HOME AND WE
13 STARTED DOING THOSE KINDS OF THINGS TO PROTECT OURSELVES
14 AND I THOUGHT IT WOULD BE A GOOD WAY TO MITIGATE SOME OF MY
15 COSTS BY RENTING THE PROPERTY. THAT WOULD BE ABOUT IT.

16 Q THANK YOU, MISTER BORCHERS. PLEASE ANSWER ANY QUESTIONS
17 THE COURT OR OTHER COUNSEL MAY HAVE.

18 **MR. THRELKELD:** YOUR HONOR, I'M RESERVING MY OBJECTION ON THIS
19 DOCUMENT AND I HAVE A FEW QUESTIONS I'D LIKE TO ASK NOW.

20 **CROSS EXAMINATION OF ROBERT BORCHERS BY MR. THRELKELD**

21 Q NOW, IT SHOWS THAT YOU HAD THE HOUSE APPRAISED IN 2010?

22 A YES, SIR. YES, I DID. WE WENT TO ANDERSON APPRAISERS.

23 Q FOR WHAT PURPOSE WAS IT APPRAISED?

24 A WELL, BASICALLY, TO SHOW THAT, YOU KNOW, SOME OF THE VALUE OF
25 THE HOUSE IN THESE DAYS MARKET BECAUSE THE MARKET WAS

1 COMPLETELY DIFFERENT IN SELLING HOUSES BACK IN 2003 THAN IT IS
2 NOW IN 2009 AND 2010 AND I FELT LIKE, YOU KNOW, I WANTED TO GET
3 SOME GOOD AWARENESS OF WHAT THE VALUE OF OR THE PRICE OF
4 THE HOUSE WOULD BE IF I TRIED TO SELL IT IN THIS MARKET.

5 Q WELL, MISTER BORCHERS, DID YOU MAKE ANY ATTEMPT TO SELL THE
6 HOUSE IN 2003?

7 A NO. BECAUSE I WASN'T GOING TO ADVERTISE IT UNTIL PROBABLY
8 ANOTHER MONTH FROM THE LAWSUIT. THE LAWSUIT WAS SERVED TO
9 US MARCH 1ST AND WE ACTUALLY GOT A LITTLE BIT INTO THIS
10 PREVIOUS TO THAT, THAT WE WERE GOING TO MAYBE BE SUED, I
11 DON'T KNOW, SOMETIME IN MID-FEBRUARY.

12 Q SO, AFTER YOU GOT WORD OF THE LAWSUIT, YOU NEVER OFFERED
13 THE HOUSE FOR SALE?

14 A NO. I DIDN'T.

15 Q AND DID YOU EVER RENT THE HOUSE?

16 A YES, SIR.

17 Q WHEN DID YOU RENT IT?

18 A AUGUST 25, 2003.

19 Q AND DID IT STAY RENTED ALL THIS TIME?

20 A YES. CURRENTLY, THE SAME RENTER IS IN THE HOUSE.

21 Q AND HOW MUCH INCOME DID YOU EARN?

22 A \$22,680.00.

23 Q AND HOW MUCH IS THAT A MONTH?

24 A \$540.00 A MONTH. AND I MIGHT SAY THAT THIS IS THE SISTER TO MY
25 AUNT AND THIS WAS THE VERY INTERESTED PARTY THAT WAS

1 ORIGINALLY INTERESTED IN BUYING THE HOUSE.

2 Q AND WHAT ABOUT BANK RECORDS? WHAT WERE THE BANK RECORDS
3 FOR?

4 A TO RETRIEVE ALL THE CHECKS THAT WERE PAID OUT TO COMPILE THIS
5 LIST TO VERIFY EVERYTHING SO MY WIFE DIDN'T HAVE TO GO BACK
6 THROUGH ALL THE TAXES FOR EACH YEAR, TO RESEARCH THIS, TO
7 BASICALLY CUT SOME TIME, TO LET THE BANK DO THE WORK INSTEAD
8 OF SHE.

9 Q HOW ABOUT TAX PREPARATION? ARE YOU TALKING ABOUT INCOME
10 TAXES?

11 A YES, SIR.

12 Q WHAT CAUSE WAS THERE FOR INCOME TAX PREPARATION ON THIS
13 HOUSE?

14 A WELL, NOT BEING REAL GOOD AT COMPUTING TAXES FOR BOTH
15 MYSELF AND THIS NEW INCOME PROPERTY, WE'VE ALWAYS HAD OUR
16 TAXES PREPARED BY COX HERE IN ANDERSON, AND WE SUBMITTED
17 THE PAPERWORK THAT, WHEN MY MOTHER DIED, TO HIM TO GO OVER
18 EACH KIND AND THAT'S WHAT THAT'S FOR.

19 Q AND SO THAT WAS THE COST FOR PREPARING YOUR TAX RETURN?

20 A NO. THAT'S JUST FOR HERS, HER PART OF THE HOME.

21 Q YOUR MOTHER'S ESTATE?

22 A YES, SIR. THAT DOES NOT INCLUDE OURS IN THAT. THAT WOULD BE
23 SEPARATE. IT WAS SEPARATED. THE UTILITIES THAT ARE -- IF I MAY?

24 Q YES, SIR.

25 A THE UTILITIES THAT ARE ON THERE WERE ONLY FOR THE MONTHS

1 UNTIL THE PROPERTY WAS RENTED. IT WAS NOT, YOU KNOW, PAST
2 THAT POINT IN TIME. THE RENTER TOOK UP THE UTILITIES
3 AFTERWARDS AND CONTINUES TO PAY THEM.

4 Q ALL RIGHT, SIR. I ALSO SEE WHERE YOU PAID SOME INCOME TAXES.

5 A AGAIN, YOU KNOW, I GUESS THAT'S TRUE. YES, SIR.

6 Q YOU PAID \$73.00 TO THE DEPARTMENT OF REVENUE?

7 A FOR 2006. YES.

8 Q AND 2008, A TOTAL OF \$73.00?

9 A 2008. I HAVE, I THINK ON THIS PAPER I HAVE, I HAVE \$20.00.

10 Q ALL RIGHT, SIR. AND ON THE U.S. TREASURY. IS THAT FOR INCOME
11 TAXES?

12 A I DON'T KNOW. I WOULD IMAGINE IT IS.

13 Q AND UNDER INSURANCE, THAT'S FOR CASUALTY INSURANCE ON THE
14 PROPERTY?

15 A THIS IS FOR CASUALTY AND FIRE ON THE PROPERTY.

16 Q AND DID YOU HAVE THE PROPERTY APPRAISED IN 2006?

17 A NO. THAT WAS AN ESTIMATE. I SOLD OUR HOME IN CALIFORNIA IN 2001
18 BY MYSELF. MY WIFE AND I CHOSE TO SELL IT BY OWNER AND I FELT
19 THAT I WAS PRETTY GOOD AT VALUING PROPERTY AND I'M NOT TRYING
20 TO SAY THAT I'M AN EXPERT AT ALL, BUT THAT'S AN ESTIMATE PRICE
21 THAT YOU SEE, THE SELLING MARKET VALUE. IT'S NOT NECESSARILY A
22 FINAL SELLING PRICE.

23 **MR. THRELKELD:** THAT'S ALL THE QUESTIONS I HAVE.

24 **THE COURT:** MISTER STRAWN, DO YOU HAVE ANY QUESTIONS?

25 **MR. STRAWN:** NO, SIR.

1 THE COURT: MS. NELSON?

2 RE-DIRECT EXAMINATION OF ROBERT BORCHERS BY MS. NELSON

3 Q SIR, I HAVE ONE RE-DIRECT. YOU MENTIONED WHEN YOU WERE
4 TALKING TO MISTER THRELKELD THAT YOU RENTED YOUR HOUSE IN
5 2003.

6 A YES.

7 Q DID YOU MEAN 2006? I'M ASKING. WHEN YOU WERE TALKING ABOUT
8 THE RENTAL OF THE PROPERTY. YOU DIDN'T RENT THE PROPERTY
9 WHEN YOUR MOM WAS STILL LIVING IN IT. DID YOU?

10 A NO. NO. OKAY. I DID ERR THERE.

11 Q SO, WOULD 2003 HAVE COME INTO ANY OF THE FIGURES?

12 A RIGHT. NO. NO.

13 Q 2006?

14 A CORRECT. THAT'S RIGHT. I BLEW IT.

15 Q NO. NO. NO. 2006 IS WHEN YOU STARTED ANY OF THE CALCULATIONS
16 THAT YOU USED?

17 A PARDON?

18 Q WOULD 2006 HAVE BEEN THE START OF ANY CALCULATIONS THAT YOU
19 USED?

20 A YES.

21 Q OKAY. AND ARE ANY OF YOUR PERSONAL INCOME TAXES INCLUDED ON
22 THIS STATEMENT?

23 A NONE. NO.

24 Q IS THE ESTATE, IN FACT, STILL OPEN?

25 A PARDON?

1 Q IS THE ESTATE STILL OPEN?

2 A YES. IT IS.

3 Q SO THIS WAS FOR ALL THE ESTATE TAXES AND WHATNOT?

4 A RIGHT.

5 Q OKAY. THANK YOU.

6 MS. NELSON: NOTHING FURTHER.

7 RE-CROSS EXAMINATION OF MISTER BORCHERS BY MR. THRELKELD

8 Q DOES THE ESTATE OWN THIS HOUSE?

9 A PARDON?

10 Q DOES THE ESTATE OWN THIS HOUSE?

11 A YES. I STILL OWN THIS HOUSE WITH MY SISTER-IN-LAW.

12 Q WHOSE NAME IS THE TITLE IN?

13 A THE TITLE HAS NEVER BEEN CHANGED TO MY KNOWLEDGE. THE TITLE,
14 I BELIEVE, IS STILL IN MY MOTHER'S NAME.

15 Q THANK YOU.

16 THE COURT: MISTER STRAWN, ANYTHING?

17 MR. STRAWN: NO, SIR.

18 THE COURT: MISTER BORCHERS, YOU MAY STEP DOWN.

19 MR. BORCHERS: THANK YOU, YOUR HONOR.

20 THE COURT: ANYTHING FURTHER?

21 MS. NELSON: THAT'S IT, YOUR HONOR. THAT'S THE DEFENDANT'S
22 CASE.

23 THE COURT: ALL RIGHT. LET'S TAKE ABOUT A FIVE MINUTE BREAK.

24 HOW MANY WITNESSES DO YOU HAVE MISTER THRELKELD? ONE? ALL

25 RIGHT, LET'S TAKE ABOUT A FIVE MINUTE BREAK AND COME BACK.

1 (BRIEF BREAK)

2 THE COURT: YES, SIR.

3 MR. THRELKELD: I'D LIKE TO CALL PAM HARBIN.

4 (AFTER BEING DULY SWORN BY THE CLERK OF COURT, PAMELA HARBIN
5 TESTIFIED AS FOLLOWS:)

6 CLERK OF COURT: MS. HARBIN, IF YOU WOULD PLEASE GIVE US YOUR
7 FULL NAME AND THE CORRECT SPELLING OF YOUR LAST NAME.

8 MS. HARBIN: PAMELA H. HARBIN. H-A-R-B-I-N.

9 CLERK OF COURT: THANK YOU, MA'AM.

10 DIRECT EXAMINATION OF PAMELA HARBIN BY MISTER THRELKELD

11 Q PAM, ARE YOU EMPLOYED?

12 A NO. I'M NOT.

13 Q AND HOW LONG HAS IT BEEN SINCE YOU'VE BEEN EMPLOYED?

14 A SINCE JULY OF 2009.

15 Q AND IN JULY OF 2009, WERE YOU EMPLOYED?

16 A YES.

17 Q BY WHOM?

18 A REGIONS BANK.

19 Q AND PRIOR TO JULY OF 2009, HOW LONG DID YOU WORK FOR REGIONS
20 BANK?

21 A ABOUT FIVE YEARS.

22 Q AND BEFORE THAT, DID YOU WORK?

23 A YES.

24 Q WESTWIND, INCORPORATED.

25 Q AND PRIOR TO THAT WERE YOU EMPLOYED?

1 A YES.

2 Q AND WHERE DID YOU WORK?

3 A ANDERSON NATIONAL BANK.

4 Q AND HOW LONG DID YOU WORK FOR ANDERSON NATIONAL BANK?

5 A ABOUT THIRTEEN YEARS.

6 Q AND PRIOR TO THAT?

7 A FIRST FEDERAL OF SOUTH CAROLINA.

8 Q SO, WOULD IT BE SAFE TO SAY THAT MOST OF YOUR TIME WORKING
9 HAS BEEN IN BANKS?

10 A YES.

11 Q AND ARE YOU FAMILIAR WITH THE STRAWNS' LOAN?

12 A YES.

13 Q WHAT WAS YOUR POSITION WITH REGIONS BANK?

14 A I WAS EXECUTIVE ASSISTANT TO THE BANK PRESIDENT.

15 Q OKAY. AND AS THAT, DID YOU WORK IN THE COMMERCIAL LOAN AREA
16 OR OTHER AREAS?

17 A YES.

18 Q AND AS PART OF THE AREA THAT YOU WORKED, DID YOU MAKE CREDIT
19 LINE LOANS?

20 A I WAS NOT RESPONSIBLE FOR MAKING THE DECISION FOR THOSE
21 LOANS, BUT, YES, I WAS INVOLVED IN THE ADMINISTRATIVE PART OF
22 THOSE LOANS.

23 Q AND WERE YOU AWARE AT THE TIME THE STRAWN LOAN WENT IN
24 DEFAULT?

25 A YES.

1 Q AND WERE YOU AWARE AT THAT TIME THAT AT SOME POINT THE LOAN
2 HAD BEEN PAID DOWN TO ZERO?

3 A YES.

4 Q AND WAS THE MORTGAGE CANCELLED WHEN THE LOAN WAS PAID
5 DOWN TO ZERO?

6 A NO.

7 MS. NELSON: OBJECTION, YOUR HONOR. FIRST OF ALL, HE'S LEADING
8 THE WITNESS AND HE ALSO HAS NOT LAID A FOUNDATION FOR THE
9 CANCELLATION ON THE LOAN. THE CANCELLATION OF RECORD WASN'T
10 UNTIL ---

11 THE COURT: I'M SORRY. SPEAK UP JUST A LITTLE BIT.

12 MS. NELSON: I'M SORRY. MY OBJECTION IS, ONE, HE'S LEADING HER
13 TERRIBLY, HE'S LEADING THE WITNESS AND THE OTHER OBJECTION, HE'S
14 NOT LAYING ANY FOUNDATION BECAUSE HE'S LEADING HER TELLING HER
15 ABOUT THE CANCELLATION AND THE CANCELLATION, THERE'S ALREADY A
16 MATTER OF RECORD THAT DOWNSTAIRS IT WASN'T CANCELLED UNTIL 2005.
17 SO, THAT'S MY OBJECTIONS.

18 THE COURT: OKAY. JUST RE-PHRASE YOUR QUESTION. I'LL ALLOW HIM
19 TO GO AHEAD AND QUESTION HER ABOUT WHAT SHE KNEW ABOUT THE
20 CANCELLATION.

21 MR. THRELKELD: OKAY.

22 Q PAM, DO YOU HAVE ANY KNOWLEDGE SURROUNDING THE 2003 PAYOFF
23 OR PAYMENT MADE ON THE STRAWN LOAN?

24 A AT WHAT TIME?

25 Q IN 2003.

1 A NOT AT THAT TIME.

2 Q DID YOU LATER BECOME AWARE OF IT?

3 A YES.

4 Q AND WAS THE AMOUNT PAID CREDITED TO THE LOAN BALANCE?

5 A YES.

6 Q AND TO YOUR KNOWLEDGE, WAS THE MORTGAGE THAT WAS

7 SECURING -- FIRST OF ALL, LET ME ASK YOU THIS. WAS THE

8 MORTGAGE SECURING THE PAYMENT OF THAT CREDIT LINE?

9 A YES.

10 Q AND TO YOUR KNOWLEDGE, WAS THE MORTGAGE SECURING THE

11 CREDIT LINE CANCELLED AT THE TIME OF THE PAY DOWN?

12 A NO.

13 Q AND DO YOU KNOW WHY IT WASN'T CANCELLED?

14 **MS. NELSON:** OBJECTION, YOUR HONOR. THE -- FIRST OF ALL, HE

15 HASN'T LAID ANY FOUNDATION AS TO WHY SHE DIDN'T KNOW WHETHER OR

16 NOT THE CLERK OF COURT HAD CANCELLED IT OR NOT, WHETHER OR NOT ---

17 **THE COURT:** I THINK HE'S ASKING FROM THE TERM OF THE BANKING

18 PROCEDURES.

19 **MS. NELSON:** OKAY.

20 **MR. THRELKELD:** RIGHT.

21 **THE COURT:** GO AHEAD. EXCUSE ME, I DIDN'T MEAN TO ANSWER THE

22 QUESTION, BUT THAT WAS THE WAY I WAS TAKING IT.

23 **MR. THRELKELD:** AND THAT'S CORRECT.

24 Q AND SO FAR AS, AT THE TIME THAT THE PAYMENT WAS MADE IT WAS

25 MY UNDERSTANDING THAT THE CREDIT LINE WAS NOT CANCELLED BY

1 THE BANK.

2 A CORRECT.

3 Q AND DO YOU KNOW WHY?

4 MS. NELSON: OBJECTION, YOUR HONOR. SHE'S ALREADY TESTIFIED TO
5 THAT. SHE WAS NOT WORKING THERE AT THE TIME THE PAY DOWN
6 OCCURRED OR WHAT THEY ARE CALLING THE PAYOFF. SHE DIDN'T START
7 WORKING THERE UNTIL 2004.

8 MS. HARBIN: IT WAS '03.

9 MS. NELSON: OKAY. EARLIER SHE TESTIFIED, A MOMENT AGO, THAT
10 SHE DIDN'T NOW ABOUT THE CLOSING AT THE TIME. SO, I APOLOGIZE.

11 THE COURT: IF SHE KNOWS, SHE CAN TESTIFY. IF SHE DOESN'T, SHE
12 WON'T. JUST DON'T TESTIFY AS TO WHAT SOMEBODY ELSE TOLD YOU. ALL
13 RIGHT.

14 Q DO YOU KNOW WHY THE MORTGAGE WASN'T INTERNALLY CANCELLED
15 BY THE BANK AS A RESULT OF THE PAY DOWN?

16 MS. NELSON: YOUR HONOR, AGAIN -- WELL, I'LL WITHDRAW THE
17 QUESTION. I'LL WITHDRAW MY OBJECTION.

18 A I CAN'T TESTIFY AS TO, AT THAT POINT IN TIME, WHY IT WASN'T DONE. I
19 CAN GIVE YOU REASONS FOR WHY IT PROBABLY WASN'T DONE.

20 THE COURT: I'M GOING TO SUSTAIN THE OBJECTION. SHE CAN'T
21 SPECULATE. IF SHE KNOWS, SHE CAN TESTIFY TO IT. IF SHE DOESN'T, SHE
22 CAN'T.

23 Q DO YOU KNOW WHETHER OR NOT -- DID YOU RESEARCH THE RECORDS
24 TO DETERMINE WHAT WAS RECEIVED BY THE BANK ON THE PAY DOWN
25 DATE?

1 A YES.

2 Q OKAY. AND I'LL ASK YOU TO LOOK AT WHAT'S BEEN MARKED AS
3 DEFENDANT'S EXHIBIT #2 AND ASK IF YOU ARE FAMILIAR WITH THAT.

4 A YES. I HAVE SEEN THIS.

5 Q OKAY. DID YOU RESEARCH THE RECORDS OF THE BANK TO
6 DETERMINE WHETHER OR NOT THE BANK RECEIVED THAT LETTER?

7 A YES.

8 Q DID THE BANK RECEIVE THAT LETTER?

9 A I SAW NO EVIDENCE THAT THE BANK RECEIVED THAT LETTER.

10 Q AND IF THEY HAD RECEIVED IT, WOULD THERE BE EVIDENCE THAT YOU
11 WOULD BE ABLE TO FIND?

12 A YES. WE SHOULD BE ABLE TO.

13 Q AND -- OKAY, IF A LETTER HAD BEEN RECEIVED, WOULD THERE HAVE
14 BEEN A PROCEDURE BY WHICH THE BANK WOULD HAVE PROCESSED
15 THAT LETTER?

16 A YES.

17 Q AND WHAT WOULD THAT PROCESS BE?

18 A THEY WOULD HAVE OR SHOULD HAVE FORWARDED THIS LETTER WITH
19 THE PAYOFF CHECK TO OUR LOAN DEPARTMENT FOR PROPER
20 PROCESSING.

21 Q OKAY. AND DO YOU KNOW WHERE THE MONEY WAS PAID TO BY THE
22 CLOSING ATTORNEY?

23 A OUR CLEMSON BOULEVARD BRANCH.

24 Q AND DO YOU KNOW WHO GAVE THE PAYOFF OR WHAT DEPARTMENT
25 GAVE THE PAYOFF NUMBER FOR THE PAYOFF AMOUNT FOR CLOSING?

1 A NO. I DON'T.

2 Q AND IF EXHIBIT #2 HAD BEEN RECEIVED BY THE BANK, WOULD THE
3 BANK HAVE TAKEN ANY ACTION TO CANCEL THE RECORDED
4 MORTGAGE?

5 MS. NELSON: YOUR HONOR, I'M GOING TO OBJECT. HE'S AGAIN ASKING
6 HER TO SPECULATE AS TO WHAT THE BANK WOULD HAVE DONE UNDER
7 CIRCUMSTANCES THAT SHE HAS ALREADY SAID SHE IS NOT FAMILIAR WITH.

8 THE COURT: YOU ARE ASKING HER FOR PROCEDURES?

9 MR. THRELKELD: YES. I'M ASKING FOR PROCEDURES.

10 THE COURT: ALL RIGHT. I'M GOING TO OVERRULE ON THAT BASIS.

11 Q UNDER THE PROCEDURES THAT WERE EMPLOYED BY THE BANK AT
12 THE TIME, WHAT WOULD HAVE HAPPENED HAD THIS LETTER BEEN
13 RECEIVED BY THE LOAN DEPARTMENT?

14 A WE WOULD HAVE SATISFIED THE MORTGAGE AND FOLLOWED THE
15 INSTRUCTIONS ON THE LETTER. WE WOULD HAVE EITHER PROBABLY
16 CONTACTED MISTER STRAWN TO FIND OUT FOR CERTAIN, "DO YOU
17 WANT THE CREDIT LINE CLOSED OR IS IT TO REMAIN OPEN? WHAT IS
18 YOUR INTENT?"

19 Q WELL, LET ME ASK YOU THIS. DO YOU KNOW WHETHER OR NOT THE
20 MORTGAGE REQUIRES MISTER STRAWN TO AUTHORIZE CLOSING THE
21 CREDIT LINE?

22 A YES.

23 Q SO, WITHOUT MISTER STRAWN AUTHORIZING IT, WAS IT PROCEDURE
24 TO, COULD THE BANK, IN YOUR JUDGMENT, CLOSE OR SATISFY THE
25 MORTGAGE?

1 A PROPER PROCEDURE WOULD BE TO GET PERMISSION FROM MISTER
2 STRAWN.

3 Q OKAY. AND IF YOU HAD RECEIVED THAT LETTER OR IF THE BANK HAD
4 RECEIVED THAT LETTER, WOULD THE BANK HAVE CONTACTED MISTER
5 STRAWN?

6 A YES.

7 Q AND WOULD YOU HAVE ASKED MISTER STRAWN IF HE WANTED THE
8 CREDIT LINE CANCELLED?

9 A YES.

10 Q IF HE HAD SAID NO, WOULD YOU HAVE A PROCEDURE?

11 A IF HE HAD SAID NO, THEN WE WOULD HAVE LEFT THE CREDIT LINE
12 OPEN. PROBABLY, YOU KNOW, WE PROBABLY WOULD HAVE ASKED
13 HIM, "SO, THIS IS JUST A PAY DOWN?" AND WOULD HAVE JUST ASKED,
14 YOU KNOW, "WHAT IS YOUR INTENT."

15 Q ALL RIGHT. IF YOU DID NOT RECEIVE EXHIBIT #2, WOULD YOU HAVE
16 KNOWN HOW TO HANDLE THE PAYMENT OF MONEY?

17 A YES.

18 Q AND HOW WOULD YOU HAVE HANDLED IT?

19 A PROCESSED IT AS A REGULAR PAYMENT.

20 Q IS THAT WHAT THE BANK DID?

21 A YES.

22 **MR. THRELKELD:** THAT'S ALL THE QUESTIONS I HAVE.

23 **THE COURT:** MS. NELSON.

24 **MS. NELSON:** THANK YOU.

25 **CROSS EXAMINATION OF MS HARBIN BY MS. NELSON**

1 Q I'M CONFUSED, WHICH, HOPEFULLY YOU CAN CLEAR IT UP FOR ME.

2 WERE YOU BORN IN 1960?

3 A NO.

4 Q OKAY. WELL, THAT WOULD START MY CONFUSION. I WAS REFERRING

5 -- I WAS REVIEWING YOUR DEPOSITION AND YOU GAVE A DEPOSITION

6 JUNE 7, 2007. DOES THAT SOUND ACCURATE?

7 A YES.

8 Q WHEN DID YOU START WORKING AT REGIONS BANK?

9 A I BELIEVE IT WAS MAY, 2003.

10 Q MAY OF 2003. OKAY. THAT CLEARS SOME OF IT UP. YOU TESTIFIED

11 EARLIER -- AND CORRECT ME IF I'M WRONG -- YOU TESTIFIED EARLIER

12 THAT YOU HAD NO, YOU WEREN'T AWARE OR FAMILIAR WITH THIS

13 SITUATION WITH THE STRAWN/BORCHERS' CLOSING UNTIL YOU BEGAN

14 RESEARCHING IT IN 2005. IS THAT AN ACCURATE PORTRAYAL OF WHAT

15 YOU TESTIFIED TO EARLIER?

16 A YES.

17 Q OKAY. AND AGAIN, CORRECT ME IF I'M WRONG, BUT THAT WOULDN'T

18 HAVE OCCURRED OR THAT OCCURRED BECAUSE, AT THAT POINT, THE

19 LOAN WENT INTO DEFAULT. IS THAT CORRECT?

20 A CORRECT.

21 Q OKAY. DOES DECEMBER OF 2005 SOUND LIKE THE RIGHT DATE WHEN

22 THAT WENT INTO DEFAULT? NOVEMBER TO DECEMBER OF 2005?

23 A I DO NOT RECALL.

24 Q OKAY. BUT WOULD YOU SAY THE END OF 2005?

25 A I DON'T RECALL THE DATE.

1 Q WHEN DID YOU RESEARCH THE BANKS RECORDS? YOU SAID A
2 MOMENT AGO THAT YOU WENT AND SEARCHED THE BANK'S RECORDS.
3 WHEN DID YOU DO THAT?

4 A I DON'T RECALL WHEN THAT WAS.

5 Q OKAY. WAS IT FOR THIS LITIGATION?

6 A TODAY?

7 Q FOR THIS LAWSUIT. FOR THE LAWSUIT THAT WAS FILED IN 2006.

8 A YES.

9 Q OKAY. SO, I'M ASKING, DO YOU THINK YOU WOULD HAVE SEARCHED
10 THE BANK'S FILES BEFORE 2006 OR 2007?

11 A IT'S POSSIBLE.

12 Q OKAY. IS IT MORE LIKELY THAT YOU SEARCHED THOSE RECORDS IN
13 2006 OR 2007?

14 A I DON'T KNOW.

15 Q OKAY. YOU CAN'T SAY AFFIRMATIVELY THAT THE LETTER WASN'T
16 RECEIVED. WHAT YOU ARE TESTIFYING TO IS THAT THERE IS NO COPY
17 OF IT OR THERE IS NO DOCUMENTATION REFLECTING IT IN THE BANK'S
18 RECORDS. IS THAT RIGHT?

19 A YES.

20 Q YOU'VE TALKED -- I WANT TO ASK YOU A LITTLE BIT ABOUT YOUR
21 PROCEDURE THAT YOU TALKED ABOUT BEFORE. YOU HAD SAID, AND
22 AGAIN CORRECT ME IF I'M WRONG, BUT YOU SAID THAT PROCEDURE-
23 WISE, IF YOU HAD RECEIVED A PAYMENT -- WELL, LET ME ASK YOU
24 THIS. IF YOU HAD RECEIVED THAT LETTER AND -- THE ONE THAT'S
25 EXHIBIT #2 THAT YOU SAID YOU ARE FAMILIAR WITH. RIGHT?

1 A YES.

2 Q IF YOU RECEIVED THAT LETTER AND THE CHECK WITH THE PAYOFF OF
3 \$32,356.00, 256, WHATEVER IT IS, THAT THE BANK POLICY WOULD HAVE
4 BEEN THEN TO CALL MISTER STRAWN TO CONFIRM THAT HE WANTED
5 THE SATISFACTION, THAT HE WANTED THE MORTGAGE SATISFIED?

6 A I CAN'T SPEAK TO THE SPECIFIC POLICY. IT WOULD HAVE JUST BEEN
7 PRUDENT TO DO SO.

8 Q I SEE. SO, YOU DON'T KNOW WHAT THE POLICY WOULD HAVE BEEN?

9 A NOT PERTAINING TO THAT SPECIFIC QUESTION.

10 Q OKAY. WELL, SO WHAT POLICY WERE YOU TESTIFYING TO A MOMENT
11 AGO WHEN YOU SAID THAT BANK POLICY WOULD HAVE DICTATED THAT
12 YOU CALL MISTER STRAWN? ARE YOU SAYING THAT IF THE CHECK
13 ALONE WAS JUST RECEIVED THAT YOU WOULD HAVE CALLED HIM?
14 BECAUSE WHAT I THOUGHT YOU SAID WAS THAT IF YOU JUST
15 RECEIVED THE CHECK YOU WOULD HAVE JUST HAVE ACCEPTED IT AS A
16 PAY DOWN. IS THAT WHAT YOU SAID A MOMENT AGO?

17 A YES.

18 Q SO, UNDER WHAT CIRCUMSTANCES WOULD YOU HAVE CALLED MISTER
19 STRAWN UNDER THE BANK POLICY?

20 A WELL, I THINK THAT IT WAS BANK POLICY TO BE CERTAIN THAT WE
21 FOLLOWED THE CUSTOMER'S REQUEST OR THEIR INTENT AND IF THAT
22 MEANS USING A LETTER OR IF THAT MEANS CALLING THE CUSTOMER.
23 YOU KNOW, WHAT YOU ARE TRYING TO DO IS TO MAKE SURE THAT YOU
24 ARE ACTING ON BEHALF OF THE CUSTOMER AS TO WHAT THEIR INTENT
25 IS.

1 Q ALL RIGHT. WELL, I WANT TO FOLLOW UP WITH THAT, BUT FIRST I
2 WANT TO ASK YOU A QUICK QUESTION. YOU HAVE PERSONAL
3 KNOWLEDGE THAT THE MONEY WAS RECEIVED ON OCTOBER 31, 2003.
4 YOU HAVE REVIEWED THE BANK RECORDS AND YOU KNOW THAT AND I
5 HAVE THE FIGURE HERE, \$32,256.41 WAS CREDITED AT THE BANK ON
6 THAT DATE. IS THAT CORRECT?

7 A YES.

8 Q OKAY. AND SO, AS FAR AS YOU KNOW, THERE IS NO DISPUTE THAT
9 THAT BROUGHT THE BALANCE ON THAT ACCOUNT DOWN TO ZERO. IS
10 THAT RIGHT?

11 A YES.

12 Q OKAY. ARE YOU FAMILIAR WITH YOUR BANK POLICIES BACK ON
13 OCTOBER 31, 2003 AS TO WHEN A PAYMENT MADE WOULD BE
14 CREDITED TO AN ACCOUNT? AND I'M TALKING ABOUT WHETHER IT'S
15 2:00 OR 5:00.

16 A YES. I'M FAMILIAR WITH IT.

17 Q OKAY. AND I'M GOING TO SHOW YOU WHAT HAS BEEN MARKED AS
18 DEFENDANT'S EXHIBIT #3. TAKE A LOOK AT THAT. IS THE WRITING
19 ACROSS THE -- ARE YOU FAMILIAR WITH WHAT KIND OF DOCUMENT
20 THAT IS?

21 A YES.

22 Q WHAT IS IT? WHAT DOES IT LOOK LIKE?

23 A IT'S A CHECK STUB.

24 Q ALL RIGHT. AND ARE YOU FAMILIAR WITH THE SORT OF WRITING, THE
25 LINE ACROSS THE BOTTOM?

1 A YES.

2 Q CAN YOU TELL THE COURT WHAT THAT IS?

3 A THAT IS A TELLER VALIDATION.

4 Q OKAY. WHAT IS A TELLER VALIDATION?

5 A WELL, IF YOU BRING ANY TYPE OF TRANSACTION INTO THE BANK AND
6 HAND IT TO A TELLER, SHE VALIDATES IT IN HER TELLER MACHINE AND
7 HANDS IT TO YOU AS A RECEIPT.

8 Q OKAY. SO, THAT WOULD NORMALLY BE THE RECEIPT FOR PAYMENT?

9 A NO.

10 Q OKAY. WHAT WOULD NORMALLY BE THE RECEIPT FOR PAYMENT?

11 A NORMALLY, IT WOULD BE A REGIONS BANK RECEIPT TYPED.

12 Q WOULD THE REGIONS BANK RECEIPT ALSO BE RUN THROUGH AND
13 HAVE THE SAME INFORMATION THAT'S ON THERE?

14 A YES.

15 Q OKAY. WHAT'S THE TIME STAMP ON THAT VALIDATION?

16 A 11:34.

17 Q AND IS THAT 11:34 IN THE MORNING?

18 A I WOULD ASSUME. BANKS AREN'T OPEN AT 11:30 AT NIGHT.

19 Q OKAY. FAIR ENOUGH. SO, LET'S GO BACK TO, LET'S GO BACK TO WHAT
20 I STARTED TO ASK YOU ABOUT EARLIER. WHEN QUESTIONED BY
21 MISTER THRELKELD, YOU SAID THAT IT WAS BANK POLICY TO CONTACT
22 THE CUSTOMER TO FIND OUT WHAT THEIR INTENT WAS, WHAT THEIR
23 DESIRE WAS. RIGHT?

24 A YES.

25 Q WAS IT IN RESPONSE TO THE QUESTION THAT HE ASKED THAT

1 BECAUSE A LETTER WASN'T SENT FROM MISTER STRAWN? IS THAT
2 WHAT YOU WERE SAYING EARLIER? THAT BECAUSE THERE WASN'T A
3 DIRECTIVE FROM MISTER STRAWN SAYING THAT THE MORTGAGE WAS
4 TO BE CANCELLED, THAT'S WHY YOU CONTACT HIM. IS THAT WHAT
5 YOU MEANT? JUST ASKING.

6 A NO. IF YOU GO INTO THE BANK AND HAND A TELLER JUST A CHECK TO
7 PAY ON AN EQUITY LINE OF CREDIT, THEN THEY ARE GOING TO
8 PROCESS THAT AS A PAYMENT.

9 Q CORRECT.

10 A BECAUSE EVEN IF IT'S PAID DOWN TO ZERO, IT'S AVAILABLE FOR THE
11 CUSTOMERS TO USE AGAIN.

12 Q SO, UNDER THAT CIRCUMSTANCE, YOU WOULDN'T CONTACT MISTER
13 STRAWN FOR ANY INSTRUCTIONS?

14 A NO.

15 Q MY QUESTION TO YOU IS, ARE YOU TELLING THE COURT THAT THE
16 BANK PROCEDURE WOULD HAVE BEEN, IF THEY HAD RECEIVED THAT
17 LETTER FROM A CLOSING ATTORNEY, THAT LETTER, EXHIBIT #2, THIS IS
18 WHAT MISTER THRELKELD ASKED YOU, WAS THAT EXHIBIT #2, WHICH
19 I'M HAPPY TO SHARE WITH YOU. DO YOU KNOW WHAT I'M TALKING
20 ABOUT? THIS LETTER. (STARTS TO HAND DOCUMENT TO THE
21 WITNESS) OH, YOU'VE GOT IT IN FRONT OF YOU.

22 A UH-HUH.

23 Q IF Y'ALL RECEIVED THAT LETTER AND THE CHECK, YOU STILL
24 WOULDN'T HAVE CLOSED THE MORTGAGE. YOU WOULDN'T HAVE
25 CANCELLED THE MORTGAGE. YOU WOULD HAVE CONTACTED MISTER

1 STRAWN TO FIND OUT HIS INTENT. THAT'S WHAT YOU TESTIFIED TO A
2 MOMENT AGO. RIGHT?

3 A RIGHT.

4 Q OKAY. SO, MISTER STRAWN, IF YOU CONTACTED MISTER STRAWN AND
5 HE HAD SAID NO, THAT'S NOT A PAY DOWN, YOU WOULD HAVE SAID
6 THANK YOU. WE'LL SEND EXTRA CHECKS. IS THAT WHAT YOU ARE
7 SAYING?

8 A IF HE SAID NO, I DON'T KNOW. I CAN'T SPEAK TO BANK POLICY BUT IF I
9 WERE CALLING HIM AND HE SAID NO IT'S JUST A PAY DOWN AND I HAD
10 THIS LETTER IN FRONT OF ME THEN I THINK I WOULD QUESTION IT AND
11 I WOULD CALL MISTER BELK'S OFFICE FOR FURTHER INSTRUCTION.

12 Q WHY CAN'T YOU SPEAK TO BANK POLICY?

13 A WELL, I DON'T KNOW WHAT THE BANK'S SPECIFIC -- I CAN'T QUOTE THE
14 SPECIFIC POLICY. I'M JUST TELLING YOU WHAT I WOULD DO TO
15 PROTECT THE BANK IN THAT POSITION.

16 Q SO, YOU ARE NOT FAMILIAR WITH THE BANK'S SPECIFIC POLICY IN THIS
17 CIRCUMSTANCE. IS THAT RIGHT?

18 A CORRECT.

19 Q THANK YOU.

20 **MS. NELSON:** YOUR HONOR, I HAVE NO FURTHER QUESTIONS.

21 **THE COURT:** MISTER STRAWN, DO YOU HAVE ANY QUESTIONS?

22 **MR. STRAWN:** YES, SIR. I DO.

23 **THE COURT:** OKAY, SIR.

24 **CROSS EXAMINATION OF MS. HARBIN BY MISTER STRAWN**

25 Q I'VE HEARD THE LADY GIVE TESTIMONY THAT ---

1 **THE COURT:** LET ME JUST TELL YOU SOMETHING. YOU NEED TO ASK A
2 QUESTION. YOU CAN'T GIVE A SPEECH. YOU WILL HAVE AN OPPORTUNITY
3 TO PRESENT YOUR CASE. OKAY, SIR?

4 **MR. STRAWN:** YES, SIR.

5 Q AT THE TIME THE BANK RECEIVED THE CHECK, DID YOU NOT ALSO
6 RECEIVE DOCUMENTATION SHOWING THAT IT JUST CAME FROM A
7 CLOSING?

8 A I DIDN'T RECEIVE IT. SO, ARE YOU ASKING ME IN MY RESEARCH?

9 Q NO, MA'AM. I'M SAYING THAT AT THE TIME THE BANK RECEIVED THAT
10 CHECK, THEY RECEIVED CLOSING DOCUMENTS THAT THIS HOUSE HAD
11 JUST BEEN CLOSED ON. CORRECT?

12 A I DID NOT. I DON'T KNOW. I DIDN'T RECEIVE IT MYSELF.

13 Q BUT YOU JUST TESTIFIED THAT Y'ALL RECEIVED BOTH THE
14 DOCUMENTATION THAT THE OTHER ATTORNEY JUST MENTIONED, YOU
15 TESTIFIED THAT Y'ALL RECEIVED THAT WITH THE CHECK AND SO YOU
16 SHOULD HAVE KNOWN THAT IT CAME FROM A CLOSING, THEREFORE,
17 THE ACCOUNT WOULD BE TERMINATED. THAT'S WHY WE CLOSED IT.

18 A WELL, IF -- OBVIOUSLY, THE BANK RECEIVED THIS CHECK WITH THIS
19 STUB ON THE BOTTOM AND NO WHERE ON HERE DOES IT SAY THAT
20 THE PROPERTY WAS SOLD. YOU COULD HAVE GONE TO ANOTHER
21 BANK AND GOTTEN ANOTHER LOAN, PAID THIS DOWN AND SO JUST
22 BECAUSE WE GOT THIS DOESN'T NECESSARILY MEAN THE PROPERTY
23 WAS SOLD.

24 Q BUT YOU ALREADY TESTIFIED THAT YOU RECEIVED THE CLOSING
25 DOCUMENTS WITH THAT CHECK ---

1 A I DID NOT TESTIFY ---

2 Q --- I THINK THAT HAS BEEN ESTABLISHED.

3 A --- I DON'T BELIEVE I DID.

4 Q ONE LAST QUESTION. IF THE BANK RECEIVED THAT CHECK AND ANY
5 KIND OF CLOSING DOCUMENTS WITH IT, WOULD THAT NOT INDICATE
6 THAT THE HOUSE HAD BEEN SOLD AND EVERYTHING IS SUPPOSED TO
7 BE CLOSED OUT?

8 A IF WE HAD RECEIVED THIS WITH CLOSING DOCUMENTS, IF THERE
9 WERE SPECIFIC DOCUMENTS THAT -- I MEAN, IT DEPENDS ON WHAT
10 THE DOCUMENTS SAID OR WHAT THEY WERE.

11 Q THANK YOU.

12 **THE COURT:** LOOK AT THAT EXHIBIT YOU HAVE IN FRONT OF YOU. DO
13 YOU SEE ON THERE THAT IT SAYS BUYER, BORROWER, SELLER?

14 **MS. HARBIN:** YES. I SEE THAT.

15 **THE COURT:** DOES THAT NOT INDICATE THAT THAT, IN FACT, IS A
16 CLOSING, A SALES TRANSACTION?

17 **MS. HARBIN:** YES. I WOULD SAY SO.

18 **THE COURT:** OKAY. ANY FURTHER QUESTIONS FOR THIS WITNESS?

19 **MR. THRELKELD:** I HAVE JUST ONE.

20 **RE-CROSS EXAMINATION OF MS. HARBIN BY MR. THRELKELD**

21 Q PAM, THE FACT THAT YOU DIDN'T RECEIVE ALL THE DOCUMENTS THAT
22 YOU WOULD NORMALLY RECEIVE FROM A REAL ESTATE TRANSACTION,
23 WOULD YOU HAVE KNOWN THERE WAS A SALE OF THE PROPERTY?

24 A NO.

25 **MR. THRELKELD:** THAT'S ALL THE QUESTIONS THAT I HAVE.

1 **THE COURT:** CAN THIS WITNESS BE EXCUSED? THANK YOU, MA'AM.

2 **MR. THRELKELD:** THAT'S ALL I HAVE.

3 **THE COURT:** LET ME GET A FEW FACTS STRAIGHT FROM THE
4 ATTORNEYS AND MISTER STRAWN, PLEASE. WE HAVE A \$32,256.00 EXISTING
5 MORTGAGE AS OF THE OCTOBER 31, 2003 DATE. NOW, IS THERE ANY
6 EVIDENCE THAT THERE WERE ANY OTHER MONIES TAKEN OR BORROWED BY
7 MISTER STRAWN SUBSEQUENT TO THAT TIME?

8 **MS. NELSON:** NO. NO. HE BORROWED -- IF I CAN...

9 **THE COURT:** AFTER THE SALE?

10 **MS. NELSON:** WHAT ULTIMATELY HAPPENED, THE BANK ACCEPTED --
11 AND THIS IS WITHOUT QUESTION.

12 **THE COURT:** SURE. I UNDERSTAND.

13 **MS. NELSON:** THE BANK ACCEPTED THE MONEY. THEY CALLED IT A PAY
14 DOWN, NOT A PAYOFF. THEY ZERO BALANCED IT AND IMMEDIATELY, VERY
15 QUICKLY WITHIN A MATTER OF WEEKS, MAILED MISTER STRAWN A NEW SET
16 OF CHECKS SAYING WE NOTICE THAT YOU HAVE \$50,000.00 AVAILABLE FOR
17 CREDIT. THOSE CHECKS WERE USED IN WHATEVER MANNER UNTIL
18 ULTIMATELY, OCTOBER OR DECEMBER 2005, AT WHICH TIME THE PAYMENT
19 ON THE FIFTY GRAND HAD BEEN RUN UP AND ---

20 **THE COURT:** HE DEFAULTED THE MORTGAGE AND THAT BEGAN THE
21 FORECLOSURE ACTION.

22 **MS. NELSON:** CORRECT.

23 **THE COURT:** OKAY. I THOUGHT THAT WAS IT ESSENTIALLY. I JUST
24 WANTED TO MAKE SURE. YOU DISAGREE WITH THAT MISTER STRAWN?

25 **MR. STRAWN:** JUST IN THE TIME FRAME, YOUR HONOR.

1 **THE COURT:** OKAY. I'LL LET YOU EXPLAIN IT. I KNOW I'VE BEEN
2 CUTTING YOU OFF, BUT YOU WILL HAVE TIME TO. DO YOU HAVE ANY OTHER
3 WITNESSES, MISTER THRELKELD?

4 **MR. THRELKELD:** I HAVE NO OTHER WITNESSES.

5 **THE COURT:** ALL RIGHT. MISTER STRAWN, IT'S NOW YOUR TIME TO
6 PRESENT YOUR PART OF THE CASE. OKAY, SIR? DO YOU WANT TO TESTIFY
7 OR DO YOU HAVE ANY WITNESSES YOU'D LIKE TO CALL?

8 **MR. STRAWN:** I HAVE NO WITNESSES, YOUR HONOR, BUT I DO HAVE
9 SOME THINGS I WANT TO SAY ABOUT IT.

10 **THE COURT:** WE'LL PUT YOU UNDER OATH AND LET YOU COME
11 TESTIFY. OKAY, SIR? IF YOU'D COME AROUND.

12 (AFTER BEING DULY SWORN BY THE CLERK OF COURT, RICHARD
13 STRAWN TESTIFIED AS FOLLOWS:)

14 **CLERK OF COURT:** YOU MAY HAVE A SEAT ON THE WITNESS STAND.
15 ONCE SEATED, WOULD YOU PLEASE GIVE US YOUR FULL NAME FOR THE
16 RECORD AND SPELL YOUR LAST NAME.

17 **MR. STRAWN:** RICHARD C. STRAWN. S-T-R-A-W-N.

18 **CLERK OF COURT:** THANK YOU, SIR.

19 **THE COURT:** OKAY, MISTER STRAWN. GO AHEAD.

20 **TESTIMONY OF RICHARD STRAWN**

21 WELL, THE FIRST THING I'D LIKE TO ADDRESS IS THE TIME FRAME.
22 AFTER THE CLOSING, WHICH I'VE SOLD A COUPLE OF PERSONAL HOMES, AND
23 IT WAS ALWAYS ASSUMED THAT WHEN YOU WALKED OUT OF THE
24 ATTORNEY'S OFFICE, THEY WOULD HANDLE ALL THE DOCUMENTATION.
25 THEY'D PAY OFF THE MORTGAGE, THEY WOULD DO ALL THAT. NEVER HAVE I

1 HAD AN ISSUE OR STATEMENT FROM THE BANK WHO GOT THE CLOSING
2 DOCUMENTS TO SAY, "PLEASE CLOSE THIS LOAN." I'VE NEVER HAD TO DO
3 THAT AND SO I TOTALLY DON'T UNDERSTAND ALL THIS. ANYWAY, THE OTHER
4 THING WAS, AFTER I HAD SOLD THE HOME, I MOVED AWAY. SEVERAL
5 MONTHS LATER, NOT WEEKS, NOT DAYS, SEVERAL MONTHS LATER I
6 RECEIVED IN THE MAIL A NEW LITTLE PAYMENT BOOKLET FOR THE EQUITY
7 LINE. THIS WAS SEVERAL MONTHS LATER. AFTER THAT, I MADE SOME BAD
8 CHOICES, BAD DECISIONS, AND STARTED USING THE EQUITY LINE THAT WAS
9 AVAILABLE WITH INTENTS OF PAYING IT BACK. CIRCUMSTANCES IN MY OWN
10 PERSONAL LIFE ESCALATED AND WE'RE NOT HERE TO DISCUSS ALL THAT,
11 BUT ANYWAY, I WOUND UP USING MONEY OUT OF IT TO MAKE PAYMENTS ON
12 IT. NOT UNTIL SOME TIME LATER WHEN IT HAD GOT EXORBITANT, DID I
13 REALIZE THAT THE PAYMENTS THAT I HAD BEEN MAKING WAS INTEREST
14 ONLY. STILL, IN MY STUPIDITY, I STILL MADE A BAD DECISION. I DID THAT,
15 BUT I WAS NOT MAKING ANY HEADWAY TOWARDS PAYING THIS THING DOWN.
16 AGAIN, BECAUSE OF PERSONAL CHOICES AND BAD DECISIONS ON MY PART, I
17 FOUND MYSELF IN A MESS THAT I COULDN'T CONTROL ANY LONGER. WHAT I
18 STILL DON'T UNDERSTAND IS, WHEN I LOOK AT THIS DOCUMENTATION HERE
19 TODAY AND I SEE A BALANCE OF \$32,000.00, I'M ASSUMING THAT'S FOR THE
20 EQUITY LINE BECAUSE I ALSO HAD A MORTGAGE ON THIS HOUSE FOR LIKE
21 \$90,000.00. SO, I DON'T KNOW WHY THAT AMOUNT IS NOT MENTIONED
22 ANYWHERE AND NOT SHOWING IN THIS DOCUMENTATION. I DON'T
23 UNDERSTAND ALL THAT. I DIDN'T KNOW ALL THIS STUFF WAS HAPPENING
24 UNTIL MISTER BELK -- AND I'VE NOT BEEN PRIVY TO A LOT OF THIS
25 INFORMATION SO I'M COMING AT IT FROM AN OUTSIDER'S POINT OF VIEW

1 EVEN THOUGH I'M VERY MUCH IN THE MIDDLE OF IT AND UNDERSTAND THAT.
2 BUT I'M NOT AN ATTORNEY AND SO I DON'T KNOW HOW TO PHRASE THE
3 QUESTIONS OR GET THE INFORMATION THAT I NEED. I DON'T HAVE THE
4 MEANS OR WHATEVER TO HAVE AN ATTORNEY HERE THIS MORNING OR I
5 WOULD. SO HERE I AM, YOUR HONOR, AND I'M TRYING TO EXPLAIN TO YOU
6 HOW I GOT HERE.

7 THE COURT: YES, SIR. ANYTHING FURTHER?

8 MR. STRAWN: NO, SIR.

9 THE COURT: WOULD YOU ANSWER ANY QUESTIONS THESE ATTORNEYS
10 HAVE?

11 MR. STRAWN: I WOULD.

12 THE COURT: MS. NELSON?

13 **CROSS EXAMINATION OF MISTER STRAWN BY MS. NELSON**

14 Q MISTER STRAWN, ISN'T IT TRUE THAT YOU HAD ACTUALLY SIGNED
15 YOUR INTEREST IN THIS HOUSE OVER TO CAMMIE STRAWN, WHO WAS
16 AT THE TIME YOUR EX-WIFE, IN 2001?

17 A YES, MA'AM.

18 Q SO, IN FACT, WHEN YOU GOT THAT LETTER IN THE MAIL FROM REGIONS
19 SAYING YOU HAD \$50,000.00 ON AN EQUITY LINE, IT WAS ON A HOUSE
20 YOU HADN'T OWNED OR HAD TITLED INTEREST IN SINCE 2001, OVER
21 TWO YEARS BEFORE.

22 A THAT'S CORRECT.

23 Q WOULD YOU AGREE WITH ME THAT YOU SHOULD BE RESPONSIBLE TO
24 THE BORCHERS FOR REIMBURSING THEM FOR THE COSTS THEY'VE
25 INCURRED DUE TO YOUR CONDUCT?

1 A NOT TO THE EXORBITANT AMOUNT THAT THEY'VE LISTED. NO.

2 Q WHAT DO YOU THINK WOULD BE A FAIR AMOUNT?

3 A I'M NOT PREPARED TO DISCUSS THAT.

4 Q WELL, YOU OWN A HOUSE UP IN SPARTANBURG. DON'T YOU?

5 A IT'S A TRAILER. YES, MA'AM.

6 Q ALL RIGHT. AND YOU DO SOME WORK ON THE SIDE. DON'T YOU?

7 A WELL...

8 THE COURT: ANSWER THE QUESTION.

9 A YES. I DO.

10 Q ALL RIGHT, SIR. WHY SHOULD THEY HAVE TO FOOT THE BILL FOR YOUR
11 CONDUCT?

12 A I HAVEN'T ASKED THEM TO.

13 Q THEY'VE HAD TO PAY ATTORNEY'S FEES AND THEY'VE HAD TO LITIGATE
14 THIS FOR THREE-PLUS YEARS, BUT YOU'RE NOT ---

15 A BUT THAT WAS NOT MY FAULT.

16 Q THANK YOU.

17 MS. NELSON: NOTHING FURTHER.

18 THE COURT: MISTER THRELKELD?

19 MR. THRELKELD: I DON'T HAVE ANY QUESTIONS, YOUR HONOR.

20 THE COURT: DO YOU HAVE ANYTHING ELSE YOU'D LIKE TO SAY IN
21 RESPONSE TO THE QUESTIONS JUST POSED TO YOU, MISTER STRAWN?

22 MR. STRAWN: I WOULD LIKE TO ANSWER ONE THING THAT I THINK WAS
23 INSINUATED THERE. THE REASON THAT HOUSE WAS IN MY WIFE'S NAME
24 WAS BECAUSE OF AN AUTO ACCIDENT THAT I'D HAD AND THE COURTS AND
25 THE DOCTORS DEEMED ME NOT MENTALLY FIT TO DO MY OWN BUSINESS

1 AND SO MY WIFE HAD MY POWER OF ATTORNEY, MY EX-WIFE, MY WIFE AT
2 THE TIME. THAT'S THE REASON OUR HOUSE WAS IN HER NAME.

3 THE COURT: ANYTHING FURTHER?

4 MR. STRAWN: NO, SIR.

5 THE COURT: ANY QUESTIONS IN RESPONSE TO WHAT HE HAD TO SAY?

6 MS. NELSON: NO, SIR.

7 MR. THRELKELD: NO, SIR.

8 THE COURT: MISTER STRAWN, YOU CAN STEP DOWN. THANK YOU, SIR.

9 DO YOU HAVE ANY OTHER WITNESSES, MISTER STRAWN, THAT YOU'D LIKE
10 TO CALL IN YOUR DEFENSE?

11 MR. STRAWN: NO, SIR.

12 THE COURT: ANY REPLY OR REBUTTAL?

13 MS. NELSON: NO, SIR.

14 MR. THRELKELD: NONE, YOUR HONOR.

15 THE COURT: LET ME MAKE SURE I STATE FIRST, I WANT TO POINT OUT I

16 WAS INCORRECT IN A COMMENT I MADE EARLIER ABOUT THE DELIVERY.

17 THERE IS A BOSTIC VERSUS AMERICAN HOME MORTGAGES SERVICES

18 §650 S.E. 2d 479, WHICH INDICATES THAT THERE IS A LESS THAN FORMAL

19 DELIVERY REQUIRED. IT SAYS IT'S PERMISSIBLE UNDER THE STATUTE,

20 SPEAKING OF THE STATUTE IN QUESTION, FOR A MORTGAGOR TO MAKE AN

21 ORAL REQUEST TO THE MORTGAGEE AND THEN THE MORTGAGEE

22 ACKNOWLEDGE THE REQUEST EITHER VERBALLY OR THROUGH ANOTHER

23 FORM OF COMMUNICATION SUCH AS A LETTER OR ELECTRONIC MAIL. AND

24 SO, I'M GOING TO FIND THAT THE BORCHERS ARE ENTITLED TO A JUDGMENT

25 AGAINST BOTH REGIONS BANK AND THIS GENTLEMAN. I THINK THE BANK,

1 UNFORTUNATELY, JUST -- I'VE REPRESENTED BANKS AS YOU KNOW, MISTER
2 THRELKELD, AND AN UNFORTUNATE PART OF THE COST OF DOING BUSINESS
3 IS MISTAKES AND I THINK THIS IS ALL IT WAS. MY UNDERSTANDING UNDER
4 THE STATUTE IS THAT THE BORCHERS ARE ENTITLED TO ONE-HALF OF THE
5 AMOUNT OF THE MORTGAGE OR \$25,000.00, WHICHEVER IS LESS. WHAT I
6 HEARD EARLIER IS THAT THERE WAS A \$50,000.00 CREDIT LINE AND IT SEEMS
7 TO ME THAT \$25,000.00 UNDER THE STATUTE IS THE PENALTY AND I AWARD
8 THAT.

9 THESE DAMAGES THAT THE BORCHERS ARE CLAIMING, I DON'T FIND
10 THEM CREDIBLE OR RECOVERABLE AND I'M NOT GOING TO AWARD ANY OF
11 THEIR DAMAGES THEY ARE REQUESTING. I THINK THOSE ARE JUST A PART
12 OF OWNING A HOUSE AND ALSO AS FAR AS THE LOSS OF SALE
13 OPPORTUNITY, THEY DIDN'T SHOW THEY HAD A CONTRACT THAT ACTUALLY
14 FELL THROUGH AS A RESULT OF THIS CLAIM. IT'S JUST SPECULATION.

15 AS FAR AS MS. NELSON'S FEES, MAKE SURE I UNDERSTAND THIS,
16 MS. NELSON. YOUR TOTAL FEES IN DEFENDING ALL THE WAY UP UNTIL
17 TODAY IS \$6225.00 NOT COUNTING COURT TIME FOR TODAY. IS THAT
18 CORRECT?

19 **MS. NELSON:** I BELIEVE THAT -- NO. I THINK THAT I ESTIMATED THREE
20 HOURS FOR COURT TIME.

21 **THE COURT:** RIGHT. I'M GOING TO GIVE YOU SOME TIME FOR TODAY,
22 BUT NOT COUNTING COURT TIME FOR TODAY, IT LOOKS LIKE YOU HAD
23 \$6225.00 AND \$160.50 IN COSTS. IS THAT CORRECT?

24 **MS. NELSON:** YES, SIR.

25 **THE COURT:** I'M GOING TO GIVE YOU FOUR HOURS TODAY. OKAY?

1 **MS. NELSON:** YES, SIR.

2 **THE COURT:** SO, THAT WILL BE THE JUDGMENT AGAINST THE BANK. AS
3 FAR AS MISTER STRAWN IS CONCERNED, I'M GOING TO GIVE YOU THE SAME
4 ACTUAL DAMAGES UNDER THE STATUTE. I'M ALSO GOING TO AWARD
5 PUNITIVE DAMAGES. YOU CAUSED THIS WHOLE CONDUCT TO HAPPEN
6 REGARDLESS OF WHAT'S HAPPENED. IT'S FAIRLY REPREHENSIBLE AND I
7 THINK \$10,000.00 PUNITIVE DAMAGES IS APPROPRIATE AGAINST YOU SOLELY.
8 THE ACTUAL DAMAGES, I GUESS, WILL BE JOINT AND SEVERAL BETWEEN THE
9 BANK AND YOU AND THE BANK HAS LEAVE TO BRING ANY ACTION AGAINST
10 MISTER STRAWN THEMSELVES.

11 **MR. THRELKELD:** YOUR HONOR, NOW, THE PUNITIVE DAMAGES ---

12 **THE COURT:** ARE ONLY AGAINST MISTER STRAWN. I THINK THE BANK
13 JUST MADE A MISTAKE AND IT'S THE COST OF DOING BUSINESS, SO UNDER
14 THE STATUTE, LOOKING AT THE FOUR ELEMENTS THAT YOU PROVED VERY
15 WELL, UNDER THE STATUTE, I THINK MS. NELSON HAS MET THAT BURDEN
16 AND I THINK THE BANK JUST FAILED TO PROPERLY CREDIT THE ACCOUNT.
17 SO, THAT BEING SAID, IF YOU'D PREPARE ME AN ORDER, MS. NELSON?

18 **MS. NELSON:** YES, SIR. FOR THE RECORD, COULD I GET A MAILING
19 ADDRESS FOR MISTER STRAWN?

20 **THE COURT:** MISTER STRAWN, WOULD YOU STAND UP AND GIVE
21 MS. NELSON YOUR ADDRESS?

22 **MR. STRAWN:** YES, SIR, YOUR HONOR.

23 **THE COURT:** WHAT'S GOING TO HAPPEN, I'M JUST GOING TO TELL YOU,
24 MS. NELSON IS GOING TO PREPARE AN ORDER. BEFORE SHE SENDS IT TO
25 ME, SHE'S GOING TO MAIL IT TO MISTER THRELKELD AND YOU. IF THERE ARE

1 ANY CONCERNS THAT YOU HAVE ABOUT WHAT'S IN THAT ORDER, NOT WHAT I
 2 ORDERED BECAUSE I JUST ORDERED WHAT I DID AND SHE CAN'T CHANGE
 3 THAT, BUT IF YOU HAVE ANY CONCERNS ABOUT THE WAY IT'S WORDED, YOU
 4 CAN CONTACT HER OFFICE AND TELL HER WHAT YOUR CONCERNS ARE AND
 5 SEE IF YOU CAN WORK IT OUT. IF YOU CAN'T WORK IT OUT, AND SHE'S NOT
 6 WILLING TO CHANGE IT, THEN YOU ARE TO WRITE A LETTER NOTIFYING ME
 7 AND I'LL LOOK AT IT AND MAKE A DECISION ABOUT WHAT IT SHOULD BE.

8 OKAY, SIR?

9 **MR. STRAWN:** YES, SIR.

10

11 **MS. NELSON:** THANK YOU, YOUR HONOR. THANK YOU, MISTER
 12 STRAWN.

13 **MR. THRELKELD:** THANK YOU, SIR.

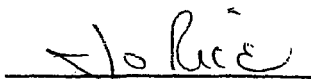
14 **THE COURT:** THANK YOU BOTH FOR YOUR PRESENTATIONS AND BEING
 15 WELL PREPARED.

CERTIFICATE

I, THE UNDERSIGNED JO RICE, OFFICIAL COURT REPORTER FOR THE TENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING NINETY-ONE PAGED TRANSCRIPT IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF THE HEARING IN THE CAPTIONED CASE, IN THE COURT OF COMMON PLEAS FOR ANDERSON COUNTY, SOUTH CAROLINA ON MARCH 4, 2010, AT THE ANDERSON COUNTY COURTHOUSE, TO THE BEST OF MY SKILL AND ABILITIES.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

SEPTEMBER 24, 2010

A handwritten signature in cursive script, appearing to read "Jo Rice", is written over a horizontal line.

JO RICE

State of South Carolina

County of Anderson

In the Court of Common Pleas

Regions Bank,

Plaintiff,

-vs-

Richard C. Strawn, Nancy
Davidson Borchers, Robert Karl
Borchers, individually and as
personal representative of the estate
of Marie N. Borchers,

Defendants.

2006-CP-04-0770

July 9, 2008

Transcript of Record

B E F O R E:

The Honorable J.C. "Buddy" Nicholson, Jr., Judge

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

Harold Threlkeld, Esquire
Attorney for the Plaintiff

Samantha P. Nelson, Esquire
Matthew Henrikson, Esquire
Attorneys for Defendants

Renee Tollison
Circuit Court Reporter

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EXHIBITS

No	DESCRIPTION	ID	EV
	No Exhibits Were Presented During the Hearing		

1 (WHEREUPON, court convened with all parties present
2 and the following proceedings were had commencing at
3 approximately 10:50 a.m.)

4 THE COURT: Regions Bank versus Strawn? Mr.
5 Threlkeld and Samantha Nelson. Anybody else?

6 MR. HENRIKSON: Matt Henrikson.

7 THE COURT: Matt Henderson?

8 MR. HENRIKSON: Yes, sir.

9 THE COURT: How are you doing?

10 MR. HENRIKSON: Fine, thanks. How are you?

11 THE COURT: Fine. I assume -- they've got on
12 this list Mr. Epps representing the plaintiff. That's an
13 error. You represent the plaintiff. Is that an error?

14 MS. NELSON: Your Honor ---

15 THE COURT: What is the -- it's showing Epps
16 and you represent the plaintiff and showing you represent
17 the defendant on my little sheet here. Who do you
18 represent?

19 MS. NELSON: We're third-party plaintiff.

20 THE COURT: Oh, you're third-party plaintiff?

21 Okay.

22 MS. NELSON: We're third-party plaintiff.

23 THE COURT: Okay. All right.

24 MS. NELSON: And a counterclaim, I guess, also,
25 yes, technically. We have a counterclaim against regions

1 Bank.

2 THE COURT: So you're defending the
3 counterclaim and you're third-party plaintiff?

4 MS. NELSON: Mr. Henrikson is defending it. He
5 has taken over the defense for the purposes of this
6 motion today.

7 THE COURT: Okay. You've got a motion for
8 summary judgment by who?

9 MR. HENRIKSON: It's actually -- there's no
10 more third-party complaint, and there's a direct action
11 by the Bank against the owners of the property. Ms.
12 Nelson and I represent the owners of the property. She
13 represents the owners on a counterclaim against the bank,
14 and I am defending the owners.

15 THE COURT: You are defending who?

16 MR. HENRIKSON: And defending all the
17 defendants except for Richard Strawn.

18 THE COURT: All right. And Ms. Nelson, you
19 represent Strawn?

20 MS. NELSON: No.

21 MR. HENRIKSON: Sorry. He's not represented.

22 THE COURT: All right. Who do you represent,
23 Ms. Nelson?

24 MS. NELSON: I represent the same individuals
25 that Mr. Henrikson, Matt Henrikson, represents.

1 THE COURT: All right. Who are they?

2 MS. NELSON: Mr. and Ms. Borchars, Nancy

3 Borchers, Robert Borchars and then the estate.

4 THE COURT: All right. Let me find -- okay.

5 So Strawn is pro se. Everybody else is represented by
6 the two of you?

7 MR. THRELKELD: Strawn is in default, Your
8 Honor.

9 MR. HENRIKSON: Yes, sir.

10 THE COURT: Strawn is in default?

11 MR. THRELKELD: Yes, sir.

12 THE COURT: Okay. And it's James Belk?

13 MR. THRELKELD: Yes, sir.

14 THE COURT: All right. Who is James Belk? Is
15 that the ---

16 MS. NELSON: He was the former third-party
17 defendant. He has been dismissed as a party to this
18 action.

19 THE COURT: Is he still in this lawsuit?

20 MS. NELSON: No.

21 THE COURT: He's out?

22 MS. NELSON: Yes.

23 THE COURT: So his motion for summary judgment
24 is gone?

25 MR. HENRIKSON: Well, it was a voluntary

1 dismissal.

2 THE COURT: All right. So he's out of the
3 lawsuit?

4 MR. HENRIKSON: Yes, sir.

5 THE COURT: So we're here just on Mr.
6 Threlkeld's motion to refer it?

7 MR. HENRIKSON: Well, no, Your Honor. The
8 defendants have a motion for summary judgment.

9 THE COURT: Okay.

10 MR. HENRIKSON: Other than Mr. Strawn, who is
11 in default and not represented.

12 MR. THRELKELD: And then there's a motion for
13 reference, Your Honor.

14 THE COURT: Okay. All right. I guess if the
15 summary judgment is granted, there wouldn't be anything
16 to refer, right?

17 MR. HENRIKSON: You've got it.

18 THE COURT: Okay. I'll be glad to hear the
19 summary judgment first.

20 MR. HENRIKSON: Your Honor, this case involves
21 the sale of a home. In 2003 Marie Borchers purchased a
22 home in Anderson County. Jim Belk was the closing
23 attorney. The home was purchased from Connie Strawn who
24 had legal title to the property. She was, I believe at
25 the time, the wife or ex-wife of Richard Strawn who is

1 the defendant in this case.

2 Mr. Strawn had owned the property previous to that
3 time. At the time that he owned the property, among
4 other encumbrances, he had a home equity account with
5 Regions Bank which was secured by a mortgage on this
6 particular property. It had been paid off one time
7 previously when he transferred the title of the property
8 to his wife. However, the account was not closed at that
9 time. He received checks as you do from -- if you have a
10 home equity line, the Bank will send you checks so you
11 can spend it up and make payments to them.

12 At the time that this property was sold from Connie
13 Strawn to Marie Borchers who is deceased -- and her
14 estate is essentially the defendant here -- this mortgage
15 was of record as a first mortgage, and it was paid in
16 full. Ms. Borchers paid in cash to buy the home. Mr.
17 Belk completed the closing. He sent the payoff check to
18 the bank along with instructions to have the satisfied
19 documents returned to him within the three-month period
20 allowed by the statute.

21 In the record should be an affidavit of James Belk
22 and an affidavit of his employee at the time, Kathy
23 Slayton, along with three exhibits. The exhibits are a
24 copy of the payoff quote which was given by the bank to
25 Mr. Belk's office so they could know how much needed to

1 be paid to pay off the mortgage. There is also a copy of
2 the stub of the check which has ---

3 THE COURT: Well, what did they do? Make a
4 mistake on the amount or what? What's going on?

5 MR. HENRIKSON: Well, what happened is, is that
6 the closing attorney paid off the account, and then it
7 asked for the satisfied documents to come back. The bank
8 never satisfied the mortgage. And about four or five
9 weeks later, they sent an additional set of checks to Mr.
10 Strawn who knew that he didn't own the property anymore.
11 But he ran up \$50,000 on that account. The bank then
12 sued Mr. Strawn and was attempting to foreclose on the
13 property to get their money back.

14 To cut to the chase somewhat, Your Honor, the
15 Borchers are essentially the purchasers, bona fide
16 purchasers for value. In South Carolina, it's well-
17 established that a bona fide purchaser for value is
18 someone who pays in full -- doesn't finance, but pays in
19 full for the property, takes legal title or the best
20 title available. In this case, they got -- she got a
21 good legal title -- and do so, without notice of a
22 defect, owns the property outright. And it's not subject
23 to foreclosure or any other kind of tack.

24 It's undisputed that the payment was made in full.
25 It's undisputed that good legal title passed to Ms.

1 Borchers who passed away shortly after purchasing the
2 property. And I believe that it's undisputed that she
3 did so at the time without any notice of any lien or
4 defect. Her closing attorney sent instructions per the
5 affidavits that are on file -- sent instructions to the
6 bank along with a check that actually ---

7 THE COURT: So the bank doesn't dispute the
8 amount at the time of the closing?

9 MR. HENRIKSON: Correct.

10 THE COURT: They were just not dilatory to
11 satisfy it. And then all of a sudden when all of this
12 other came in, they decided they still had a mortgage.
13 Is that sort of what happened?

14 MR. HENRIKSON: Yes, sir. They never removed
15 -- they never closed the account despite the instructions
16 to send the satisfying documents They dispute that they
17 ever received instructions.

18 THE COURT: They said they never received the
19 instructions?

20 MR. HENRIKSON: Well, that's my understanding
21 from Mr. Threlkeld. Despite the fact ---

22 THE COURT: Did they get the money?

23 MR. HENRIKSON: Yes, sir, they got the money.
24 They cashed the check, they took the money.

25 THE COURT: And it was marked the note paid or

1 anything?

2 MR. HENRIKSON: No, sir.

3 THE COURT: The account just stayed open?

4 MR. HENRIKSON: Yes, sir.

5 THE COURT: Did that zero out the account?

6 MR. HENRIKSON: Well, they brought it down to
7 zero, but then they gave the borrower checks again. So
8 he ---

9 THE COURT: And he didn't even own the
10 property.

11 MR. HENRIKSON: He didn't even own the
12 property. You're right.

13 THE COURT: Okay. Let me hear from you.

14 MR. THRELKELD: All right, sir. What you're
15 not being told is that this is a revolving credit line.
16 Okay? And in 2000 ---

17 THE COURT: How are you supposed to pay it off
18 other than telling them to send them the money, zero the
19 account out and say satisfied? The property has been
20 sold. I mean, how else do you pay it off, Mr. Threlkeld?

21 MR. THRELKELD: Okay. I'll go into that.

22 THE COURT: I need to hear from you.

23 MR. THRELKELD: Yes, sir. This action was
24 brought in March of 2006 to foreclose a lien ---

25 THE COURT: March?

1 MR. THRELKELD: That's when the action was
2 brought, March 1st of 2006, foreclosing a lien on
3 indebtedness that accrued after October the 31st, 2003,
4 which was the date that the closing of the sale and the
5 purchase occurred between Connie Strawn and the other
6 people.

7 THE COURT: When was the property closed? When
8 was the property sold?

9 MR. THRELKELD: October 31, 2003 is when ---

10 THE COURT: When?

11 MR. THRELKELD: October 31st, 2003.

12 THE COURT: 23 is when the property was sold?

13 MR. THRELKELD: October 31st, 2003.

14 THE COURT: Okay. When was the debts incurred?

15 MR. THRELKELD: The debt was incurred after
16 that, prior to 2006.

17 THE COURT: So the debt was incurred?

18 MR. THRELKELD: Yes, sir.

19 THE COURT: And then -- okay.

20 MR. THRELKELD: All right. Now, I believe that
21 it would of necessity be undisputed that the bank has a
22 lien and is entitled to foreclose its mortgage unless
23 there is proof that the mortgage released its lien or
24 canceled its debt, or canceled its mortgage. For
25 example, the mortgage, Your Honor -- and I want to pay --

1 make clear attention to this. The mortgage says that the
2 way you cancel this credit line is very simple. You get
3 the grantor to instruct the bank to enclose -- or to
4 satisfy the lien. Okay?

5 And by the way, that's a very important
6 consideration. It's a conventional way of dealing with
7 this problem. The reason it's important is because the
8 bank, on a revolving credit line, owes a duty to Richard
9 Strawn to advance money pursuant to his request. And if
10 it fails to advance those funds, it violates its duty to
11 Mr. Strawn.

12 In this particular case, Mr. Strawn is required by
13 the mortgage and by law to give it instructions to the
14 bank to close that credit line. Now, remember there's
15 one other thing that is contested. When you look at the
16 affidavits, the bank says what it got was merely one
17 thing. A check. The second thing it got was the payoff
18 notice that it sent. Those checks were delivered --
19 according to the affidavit submitted by the bank were
20 submitted -- were delivered to a teller at the bank in
21 routine fashion. It is not uncommon, it is quite usual
22 for people who have revolving credit lines to go to the
23 bank, deliver to the teller a check for the amount due.

24 THE COURT: The bank didn't know the property
25 was being sold?

1 MR. THRELKELD: No. Of course not, no.

2 THE COURT: What do you think Mr. Belk told
3 them when they called him up? Say, I'm doing the
4 closing. This property is being sold. What's the
5 payoff? That didn't -- isn't that how you normally do
6 it, Mr. Threlkeld? You've been doing it that way for
7 forty years.

8 MR. THRELKELD: But let me tell you how you do
9 it, Your Honor. The way you do it is -- and everybody
10 knows this -- you get a letter from Mr. Strawn delivered
11 to the bank with the check telling the bank, cancel this
12 credit line. If that happened, we wouldn't be here
13 today. That's the way it's done. And it's an easy thing
14 to do. Everybody knows that. There's one problem. You
15 can't do that unless you recognize we've got a credit
16 line. And in this particular case, it's obvious that
17 there was not a recognition that you had a revolving
18 credit line. So it was paid off as if it were a
19 conventional loan, and nobody recognized the fact that
20 they were attempting to satisfy the credit line.

21 There's two elements. One is you have a balance
22 due. You have to pay that off. And secondly, you have
23 to the instruct the bank -- and this is the way all
24 credit lines work. You have to the instruct the bank to
25 cancel that credit line. And there are many cases that

1 are cited in my brief that simply relates to this issue
2 and in fact says, even if the bank knew that the property
3 had been transferred to someone else, it doesn't affect
4 this lien. And the fact is Mr. Henriksen was talking
5 about a bona fide purchase for a value. He obviously
6 didn't read the rest of the rule because it says without
7 notice of an encumbrance. Here the mortgage was on the
8 public record, and everybody on Earth had notice.
9 Everybody who's interested had notice that this mortgage
10 was outstanding. So it was bought with notice. That
11 certainly obviates or negates the rule that he's quoting.

12 It's not claimed by anybody that Mr. Strawn
13 instructed the bank to close the loan, to close the
14 credit line.

15 THE COURT: Well, did Mr. Belk -- I haven't
16 read the affidavits. Did Mr. Belk tell them to close it?
17 What did Mr. -- did Mr. Belk write them a letter?

18 MR. THRELKELD: As a matter of fact ---

19 MR. HENRIKSON: He did.

20 THE COURT: What did he say in the letter?

21 MR. HENRIKSON: He said in the letter -- to
22 Regions Bank, sir or madam, in connection with the above
23 referenced property, enclosed is our trust account check
24 dated October 31 in the amount of 32,000 representing the
25 final payment for the above loan number and mortgagor.

1 Please forward satisfied documents with a copy of this
2 letter to this office to be removed of record. Please do
3 not send the original documents directly to the
4 borrowers. And then he quotes South Carolina code 29-3-
5 310 which says you don't do it in three months, you know,
6 we'll do it ---

7 THE COURT: Now, what do you think that told
8 the bank?

9 MR. THRELKELD: The bank didn't receive that
10 letter, Your Honor.

11 THE COURT: Oh, they didn't? What happened to
12 it? It got eaten up in the mail or what?

13 MR. THRELKELD: I don't know what happened to
14 it, but it was not received by the bank. In the
15 affidavits ---

16 THE COURT: Is that right?

17 MR. HENRIKSON: No, Your Honor. The two
18 affidavits before you in the record indicate that it was
19 delivered to the bank. We know that it was delivered to
20 the bank because exhibit 2 ---

21 MR. THRELKELD: I object to him testifying.

22 THE COURT: Hold on a second.

23 MR. HENRIKSON: Your Honor ---

24 MR. THRELKELD: He doesn't know.

25 THE COURT: You've got an affidavit that says

1 it was delivered to the bank?

2 MR. HENRIKSON: It was delivered to the bank.
3 The only thing Mr. Threlkeld can say is they don't have
4 the document now.

5 THE COURT: No. Mr. Threlkeld says it wasn't
6 delivered.

7 MR. THRELKELD: Right.

8 MR. HENRIKSON: Well, he doesn't have any
9 evidence of that.

10 THE COURT: Okay. Well, where does that put
11 you on summary judgment on material issue on whether they
12 had proper notice or not?

13 MR. HENRIKSON: Well, it puts me here, Your
14 Honor. On exhibit 2 on the bank -- on the check itself,
15 it has the words, payoff of first mortgage on the check
16 itself. I deposed --

17 THE COURT: Well, doesn't that create a factual
18 issue for the jury on whether the bank had notice to
19 close the account or not?

20 MR. HENRIKSON: No, Your Honor.

21 THE COURT: I'm just asking the question.

22 MR. HENRIKSON: I understand. And I'm telling
23 you I don't think it does because Brent Bole (phonic) who
24 was provided to made as the bank's witness in this case

25 ---

1 THE COURT: Uh-huh (affirmative).

2 MR. HENRIKSON: --- testified under oath that
3 if the check had the word payoff on it -- and this check
4 -- he admitted this check had the word payoff of first
5 mortgage. That if the check had the word payoff on it,
6 that that would put the bank on notice that this is a
7 payoff and not a pay down. His answer, it should, yes.
8 Question, and had you seen or some other loan officer
9 seen a check with payoff on it, then you would have known
10 to verify whether the property was being sold, correct?
11 Correct, yes. And the fact that the teller did it and
12 just misunderstood or didn't see or didn't notice the
13 import of the word payoff, then that was just something
14 that happened, right? Right.

15 It's clear the bank admits that it knew it had
16 knowledge that this was for a payoff. It also admits
17 that it was its policy if it knew that if the word payoff
18 was on the document that at the very least they were put
19 on inquiry notice to go and find out whether the property
20 was sold or not. But Mr. Bole goes on to say that he
21 understood that a payoff meant that that was to close the
22 account. The document sent by Mr. Belk that was provided
23 to the bank which made it to the trash can or something,
24 the people had it in their hands. Whether they chose to
25 read it or heed its words or not, I don't know. But the

1 bank does not have any evidence that they never received
2 it. In fact, the only evidence is that they did because
3 exhibit 1 to Ms. Slaton's deposition shows that the bank
4 processed the documents by, you know, putting the date
5 and the time and some other language on the stub of the
6 check. It's clear that the bank knew or at least should
7 have known that this was a payoff. Their own policy
8 required an inquiry notice. Their own witness said that
9 if the check had the word payoff on it, we should have
10 verified it. They admitted their own mistake.

11 THE COURT: Okay.

12 MR. HENRIKSON: And just one last point, if I
13 could, Your Honor.

14 THE COURT: Okay. All right.

15 MR. HENRIKSON: Mr. Threlkeld's contention that
16 because there was a mortgage somehow defeats the bona
17 fide purchaser argument, that's crazy because in every --
18 almost in every single closing, there's a first mortgage
19 that is paid off. That takes time to do. You still have
20 good legal title. You pay off the mortgage. That takes
21 some time to get satisfied of record. When --, the defect
22 that occurred -- the defect that arose ---

23 THE COURT: Does a bona fide purchase for value
24 make a distinction between credit lines versus purchase
25 money mortgage?

1 MR. HENRIKSON: It does not.

2 THE COURT: Okay.

3 MR. HENRIKSON: And the defect, if any,
4 occurred three months later when the satisfaction was not
5 provided for by the bank and Mr. Belk went and satisfied
6 it himself as the statute allows. But in this case, the
7 bank simply made a mistake.

8 THE COURT: But the money -- Mr. Belk satisfied
9 it himself? Had the debt been incurred during that
10 three-month period?

11 MR. HENRIKSON: No. The debt had started to be
12 incurred at that time, yes, sir.

13 THE COURT: All right.

14 Mr. Threlkeld, it appears that the only thing they
15 have to show that the bank actually received was the
16 check that had payoff on it. What does that do to your
17 argument that the bank didn't have notice that it was to
18 terminate the loan or terminate the line of credit?

19 MR. THRELKELD: There is no question it was a
20 payoff, a payoff in this sense. And that's what he's
21 misunderstanding.

22 THE COURT: What does payoff mean?

23 MR. THRELKELD: Payoff means that you reduce
24 the credit line. And that's what Brent Bole testified to
25 when he asked him. Payoff means that you reduce the

1 credit line to zero. And it happens every day in a
2 credit line situation. The problem is that he clarified
3 that on further questioning saying -- but the fact that
4 it's a payoff has nothing to do with the fact that you
5 cancel the credit line. In order to cancel the credit
6 line, we have to have instructions because we owe a duty
7 to Mr. Strawn. We have to have instructions to ---

8 THE COURT: You don't think that put the bank
9 on notice to make an inquiry when they receive a check
10 for the payoff?

11 MR. THRELKELD: I don't think that the bank is
12 -- I don't think it's a question to inquire ---

13 THE COURT: Every time you reduce your credit
14 line, you write payoff on it? Or you send them a check?

15 MR. THRELKELD: Every time. And actually the
16 quote that came to Mr. Belk had the word payoff on it.
17 Payoff means how much money do you owe on the credit
18 line. It had it on the bill that was sent to Mr. Belk.
19 It's purely a question as to whether or not there was a
20 requirement for the mortgage and the applicable law to
21 give the bank sufficient notice. That's a question of
22 fact. The bank denies it and is entitled to have that
23 issue resolved as a matter of fact.

24 MR. HENRIKSON: Your Honor, just in response if
25 I could hand up what is exhibit ---

1 THE COURT: Well, anything y'all want to hand
2 up, that's fine, because I'm going to have to read your
3 affidavits and your memorandums.

4 MR. HENRIKSON: I think this is important in
5 response to that.

6 THE COURT: Pardon?

7 MR. HENRIKSON: I think this is important in
8 response to that.

9 THE COURT: That's fine.

10 MR. HENRIKSON: This is exhibit 8 to Mr. Bole's
11 deposition, the bank representative. And Mr. Threlkeld
12 was asking the questions on cross-examination. And he
13 says Brent, I'm showing you exhibit 8.

14 THE COURT: Do you have those -- have you got
15 that -- those excerpts in your memorandums you're reading
16 to me now?

17 MR. HENRIKSON: They're very short.

18 THE COURT: How about giving them to me when
19 you finish reading them.

20 MR. HENRIKSON: Yes, sir. The question is,
21 Brent, I'm showing you exhibit 8. Up at the top left
22 there's a word circled. What is that word? And he says
23 payoff. And what does that refer to? The full payoff of
24 the loan. Is that the amount due? Is that the amount
25 due on the loan? No. That's the payoff. Well, how much

1 is it due on the loan? The principal due, or were you
2 talking -- and it goes on and it says, well, what does
3 that refer to up there at the top on that line? This is
4 the payoff. And Mr. Threlkeld said, the payoff of what?
5 And he said, of the equity line. It is clear that the
6 bank understands what the word payoff means. And I
7 guarantee you Mr. Threlkeld ---

8 THE COURT: But Mr. Threlkeld -- that's not Mr.
9 Threlkeld's argument. His argument is the credit line
10 still stayed open. And until the credit line was
11 actually canceled, you can pay it off or pay it down or
12 what -- I think that's Mr. Threlkeld's argument.

13 MR. THRELKELD: Yes, sir.

14 THE COURT: Even though the bank says it was a
15 payoff, that reduced it to zero, that didn't cancel the
16 line of credit is his argument.

17 MR. THRELKELD: Yes, sir.

18 MR. HENRIKSON: Exactly. And the bank
19 essentially made an unsecured loan to Mr. Strawn when
20 they gave him new checks on this credit line.

21 THE COURT: Okay. All right. Give me a chance
22 to read y'all's affidavits. I appreciate it.

23 MR. HENRIKSON: Thank you, Judge.

24 THE COURT: Thank y'all very much.

25 MR. THRELKELD: Your Honor, how about the issue

1 on the reference? Now, assuming ---

2 THE COURT: Well, I'll hear it. Let me go
3 ahead. Assuming I do not grant the summary judgment
4 motion, I'll hear your motion for reference.

5 MR. THRELKELD: It's simply that ---

6 THE COURT: What is it? A foreclosure and a
7 counterclaim? What's your counterclaim for?

8 MS. NELSON: Your Honor, I can address that.
9 Our counterclaim ---

10 THE COURT: Let me find out what the
11 counterclaim is, Mr. Threlkeld.

12 MR. THRELKELD: All right.

13 MS. NELSON: I'm sorry. The counterclaim is
14 under the statute § 29-3-310 that basically says when you
15 pay off a mortgage they are required to satisfy it. And
16 failure to do so subjects them to treble damages and
17 attorney's fees. That's our counterclaim.

18 THE COURT: All right. Have you asked for a
19 jury trial?

20 MS. NELSON: We did not ask for a jury trial.
21 We asked for a bench trial in the original pleadings.

22 THE COURT: Okay.

23 MS. NELSON: Thank you.

24 THE COURT: You got any opposition to referring
25 it?

1 MR. HENRIKSON: I do. Your Honor, I think it
2 would be -- it's a jury trial because I think there's
3 some questions of fact that need to be determined by a
4 jury. I brought this issue up ---

5 THE COURT: Did you ask for a jury trial?

6 MR. HENRIKSON: Well ...

7 THE COURT: In your pleadings.

8 MR. HENRIKSON: Well, in my pleadings I did.
9 But I was -- originally I was a third-party defendant.

10 THE COURT: I know. But you asked for
11 pleadings -- you asked for a jury trial in your
12 pleadings?

13 MR. HENRIKSON: Yes, sir.

14 THE COURT: Okay. I'll be glad to hear from
15 you.

16 MR. THRELKELD: Your Honor, this is a mortgage
17 foreclosure action. It's an equity action. And in fact,
18 they are not entitled to a jury trial unless there are
19 jury issues. And a mortgage foreclosure is equity. Now,
20 the people who raised the counterclaim didn't ask for a
21 jury trial; therefore, they waived it. So there is no
22 right to a jury trial on anybody's part.

23 THE COURT: Okay. Why do you think you're
24 entitled to a jury trial?

25 MR. HENRIKSON: Well, Your Honor, I think if I

1 don't -- if I don't get the summary judgment granted,
2 that means there are questions of fact out there.

3 THE COURT: Well, the judge makes a decision on
4 a question of fact. What does that have to do with
5 whether you have a jury trial or a bench trial? Whether
6 there's a question of fact -- I mean, I try cases all the
7 time on the bench where there's a factual question.

8 MR. HENRIKSON: I understand that. But I think
9 that ---

10 THE COURT: I mean, why would that -- just a
11 factual dispute, why would that entitle you to a jury
12 trial?

13 MR. HENRIKSON: Well, if I could -- I started
14 -- I brought this up, the question about having a jury
15 trial, months ago. My understanding was that everyone
16 was in agreement. I sent around a proposed order. And
17 then my understanding is Mr. Threlkeld ---

18 THE COURT: Well, apparently he's not in
19 agreement today.

20 MR. HENRIKSON: --- decided he didn't want one.

21 THE COURT: Okay.

22 MR. HENRIKSON: I mean, I think that the -- of
23 course, a jury trial ---

24 THE COURT: I can understand why he doesn't
25 want one. If I was in his shoes, I wouldn't want one

1 either.

2 MR. HENRIKSON: Well, Your Honor, I think that
3 the -- you know, when I originally got in the case, I
4 requested a jury trial.

5 THE COURT: That doesn't mean you're entitled
6 to it if it's a matter of equity, does it?

7 MR. HENRIKSON: Well ---

8 THE COURT: What law issues have you raised in
9 your defense? Let's put it that way.

10 MR. HENRIKSON: Well ---

11 THE COURT: Do you have any law issues that a
12 jury needs to determine facts or basis on?

13 MR. HENRIKSON: Yes.

14 THE COURT: Otherwise, Mr. Threlkeld is
15 correct.

16 MR. HENRIKSON: Well, I think the issue of
17 whether or not they are bona fide purchasers and
18 certainly whether there's even entitlement to foreclosure
19 at any point, I think that a jury would -- it would be a
20 jury question as to whether the bank even has any kind of
21 enforceable lien on the property. Mr. -- and certainly
22 ---

23 THE COURT: You're not answering my question.
24 You keep arguing about the facts in this case. Tell me
25 why it's a matter of law rather than a matter of equity.

1 If it's a matter of equity, the court hears it. If it's
2 a matter of law, the jury hears it. Why is it a matter
3 of law rather than the jury?

4 MR. HENRIKSON: Well ---

5 THE COURT: Have you raised fraud? Have you
6 raised anything else?

7 MR. HENRIKSON: The counterclaim is a matter of
8 law whether or not there is a -- whether or not the ---

9 THE COURT: Well, she says she waived the jury
10 trial.

11 MS. NELSON: Your Honor ---

12 THE COURT: So I mean -- you understand my
13 question? I'm not trying to pick at you. But all you
14 want to do is argue the facts of the case when that
15 doesn't give you a jury trial. If it's an equitable
16 matter, it goes before a court. If it's a law matter, it
17 goes before the jury. What have you raised in your
18 defense to make it a law matter?

19 MS. NELSON: I may be more able to answer on
20 this.

21 THE COURT: Pardon?

22 MS. NELSON: I may be more able to answer on
23 this one, Your Honor.

24 THE COURT: Okay. I'll be glad to you. Speak
25 up so I can hear you.

1 MS. NELSON: Yes, sir. Strawn who is in
2 default -- and it becomes an issue. But he is clearly
3 the crook here. And we sued him for fraud. In our
4 complaint we sued him for fraud. I think that makes this
5 a legal issue. I think ---

6 THE COURT: Has anybody got the sheriff's
7 department to investigate it or the solicitor's office?

8 MS. NELSON: He's actually ---

9 THE COURT: Huh?

10 MS. NELSON: No, he actually did not. I would
11 think that that would be something that Regions Bank
12 would pursue. The fact is he answered pro se. He's
13 answered some interrogatories. He's admitted, yes, I
14 took the money. At the end there he was mailing the
15 checks back to Regions Bank to pay the payment, and
16 that's how he ultimately ran it up. He wasn't even the
17 legal title holder of this property since 2001.

18 In any event, we do have a fraud claim against him.
19 I think that we have a right to a jury trial. The fact
20 that we didn't ask for one then, we have asked for one
21 ---

22 THE COURT: Fraud against him?

23 MS. NELSON: Fraud against Strawn.

24 THE COURT: But he's in default.

25 MS. NELSON: He's in default to ---

1 THE COURT: If you have a default damages
2 hearing, it goes to him.

3 MS. NELSON: I don't think he's in default.

4 THE COURT: Oh, he's not in default?

5 MS. NELSON: I wasn't aware that he was in
6 default because he's pro se. He sent an answer back.

7 THE COURT: Okay. All right. Okay. So he has
8 answered and he's pro se.

9 MS. NELSON: He answered my cross-claim. I
10 don't know anything about the plaintiffs. He's answered
11 my cross-claim. And in his answer to the cross-claim, he
12 basically -- it was a typical pro se answer.

13 THE COURT: Okay. Well, you've answered my
14 question. Thank you so very much.

15 MR. THRELKELD: Your Honor, he's in default as
16 far as my claim is concerned.

17 THE COURT: I understand. I understand, but
18 she's saying he's answered the counterclaim. Therefore,
19 that a matter of law that's involved in the lawsuit.

20 MR. THRELKELD: On them.

21 THE COURT: Right, on you.

22 MR. THRELKELD: Yes, sir.

23 THE COURT: All right. Thank you very much.
24 Appreciate it.

25 MR. HENRIKSON: Thank you, Judge.

1 THE COURT: If you think of any law you raise
2 in your defense, let me know, okay?

3 MR. HENRIKSON: Yes, sir.

4 MR. THRELKELD: Your Honor, the one thing that
5 was quoted was the testimony from Brent Bole. Does the
6 court have a copy of that deposition?

7 THE COURT: No. No, I don't.

8

9 (WHEREUPON, Mr. Henrikson handed up document to the
10 Court.)

11 THE COURT: Thank you very, sir.

12 MR. HENRIKSON: Thank you, Judge.

13 THE COURT: I've got it now. Thank you, Mr.
14 Threlkeld. Anything else you would like to submit? I'm
15 going to have to read all of this stuff. I don't know
16 what the answer is. I'm going to have to do a little
17 research on bona fide purchaser.

18 MR. THRELKELD: Could I have ten days in which
19 to look?

20 THE COURT: Pardon?

21 MR. THRELKELD: Could we have ten days in which
22 to follow up with anything else that we might find?

23 THE COURT: Yeah, you can have ten days to
24 submit anything else you want to submit to me by way of
25 memorandum or affidavits or whatever because I'm going to

1 have to read the transcripts and read the memorandums to
2 make a decision. I've got a -- let me tell you my
3 question ...

4 MR. HENRIKSON: Yes, sir.

5 THE COURT: --- in my mind today. And I
6 haven't a read your memorandums. The memorandums may
7 answer my question. The question does the bona fide
8 purchaser law override his argument on cancellation of
9 the account.

10 MR. HENRIKSON: I'll brief that issue.

11 THE COURT: Do you understand that's my
12 question that I have that I've got to resolve in my mind.

13 MR. HENRIKSON: Yes, sir, I will.

14 THE COURT: Okay. All right?

15 MR. HENRIKSON: Thank you, sir.

16 THE COURT: Thank you very much.

17 (WHEREUPON, the hearing ended at approximately 11:18
18 a.m.)

19 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

1 Certificate of Reporter

2 I, the undersigned Renee H. Tollison, Official Court
3 Reporter for the Tenth Judicial Circuit of the State of
4 South Carolina, do hereby certify that the foregoing is a
5 true, accurate, and complete transcript of record of all
6 the proceedings had and evidence introduced in the
7 trial/hearing of the captioned case, relative to appeal,
8 in the Circuit Court for Anderson County, South Carolina,
9 on the 9th day of July 2008.

10 This transcript may contain quoted material. Such
11 material is reproduced as read by the speaker.

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

14 July 22, 2010

15

16

Renee H. Tollison

17

Circuit Court Reporter

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No.: 2006-CP-04-770

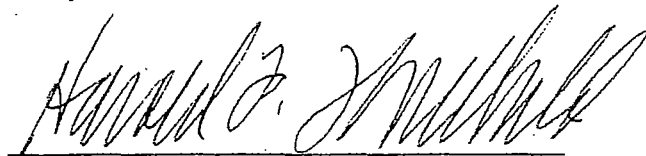
Regions Bank..... Appellant,

v.

Richard C. Strawn, Robert K. Borchers, individually and as
Personal Representative of the Estate of Marie Borchers and
Nancy Davidson Borchers..... Respondents.

CERTIFICATE OF COUNSEL

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



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January 3, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No.: 2006-CP-04-770

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S.C. Supreme Court

Regions Bank..... Petitioner,

v.

Richard C. Strawn, Robert K. Borchers, individually and as
Personal Representative of the Estate of Marie Borchers and
Nancy Davidson Borchers..... Respondents.

PROOF OF SERVICE

I certify that I have served the copy of Appendix on the Respondents, Robert K. Borchers, individually and as Personal Representative of Estate of Marie Borchers and Nancy Davidson Borchers, by depositing a copy of it in the United States Mail, postage prepaid, on October 22, 2012 addressed to their attorney of record, Samantha Nelson Murphy, Esquire, Epps, Nelson & Epps, at P. O. Box 2167, Anderson, South Carolina, 29622-2167.



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