

FINAL BRIEF OF APPELLANT
THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Philip E. Wright, Special Referee

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APR 18 2014

Case No. 2013-002-373

SC Court of Appeals

H & R Block Bank, FSB

Respondent,

v.

Ziraili M Elbey, a/k/a Ziraili
Mohassan El Bey

Appellant.

[FINAL] BRIEF OF APPELLANT

April 12, 2014

By: Ziraili M Elbey
Ziraili M Elbey, *In Propria Persona*
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S.C. Code Ann § 29-3-330

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S.C. Code Ann § 33-23-140(B)

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Video Engineering Co. b. Foto-Video Electronics, Inc., 207 Va. 1027, 154 S.E. 2d 7 (1967)

WELLS FARGO BANK, N.A., AS TRUSTEE FOR ABFC 2006-OPT3 TRUST, ABFC ASSET-BACKED CERTIFICATES, SERIES 2006-OPT3, Respondent/Plaintiff, v. ROTIMI EROBOBO, THE CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, "JOHN DOE" AND "JANE DOE" SAID NAMES BEING FICTITIOUS, IT BEING THE INTENTION OF Respondent/Plaintiff TO DESIGNATE ANY and ALL OCCUPANTS OF THE PREMISES BEING FORECLOSED HEREIN, Appellants. 31648/2009. Supreme Court, Kings County. (April 29, 2013)

Whipp v. Iverson, 43 Wis 2d 166.

LIST OF RECORD ON APPEAL MATTERS
ACCORDING TO RULE 210

1. Order of August 22, 2012
2. Order of August 01, 2013
3. Order of November 14, 2013
4. Complaint, Summons, & Notices January 14, 2011
5. Answer February 04, 2011
6. "No Verbal Testimony"
7. Final Hearing Transcript October 24, 2013
Creel Court Reporting, Inc. 803-252-3445

8. Bank One, N.A. v. Dave, State of Michigan Circuit Court
Case# 03-047448-CZ, (2003)
9. Chet Adams Co. v. James F. Pederson Co., 413 SE 2D 827- S.C.:
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10. Deutsche Bank v. Heinrich, Charleston, SC, Ct of Common Pleas,
9th District, Case. No. 2011-CP-10-1060, July (2013)
11. Deed of Full Reconveyance
 - A. Elbey Mortgage Satisfied, dated 3/17/2010 and, again on
 - B. Elbey Mortgage Satisfied, dated 2/19/2013

12. H & R Block Bank, FSBCertificate of No Record – The State of South
Carolina
13. Examination of Assignments of Mortgage Conducted in the Essex
Southern District Registry of Deeds, by M McDonnell, CFE
14. Elbey's Executive Summary – Forensic Professionals Group USA, Inc
(2011)
15. Fannie Mae Loan Lookup- "No Results"
16. Full Securitization Audit for Elbey – Loan Securitization Audit Report
17. SC Assignment filed by Respondent/Respondent/Plaintiff with Robo-
Signers
18. SC Chief Justices' Administrative Order issued June 5, 1992
"sham order" described by Special Referee –Final Transcript October 24,
2013
19. Alleged Altered Mortgage, Note & Allonge

STATEMENT OF ISSUES ON APPEAL

- 1 DID THE LOWER COURT ERR IN GRANTING, NOT CHALLENGING, RESPONDENT/PLAINIFF'S, H & R BLOCK BANK, FSB, JURISDICTION and STANDING TO FILE A LAWSUIT ACTION IN THE STATE OF SOUTH CAROLINA?
- 2 BECAUSE APPELLANT WAS DENIED DUE PROCESS TO RAISE AFFIRMATIVES DEFENSES TO INCLUDE RULE 12(b)(6) and FED RULE 17(a) WAS PRESERVED ON RECORD.

STATEMENT OF THE CASE

On January 14 ,2011 H & R Block Bank, FSB, brought this action of foreclosure of real estate mortgage against Ziraili M Elbey, I am woman a natural, indigenous member of the Family of Nations. Ziraili M Elbey answered the alleged national bank's final judgment sale order for foreclosure on August 22, 2012.

Further, on August 24, 2012, Ziraili M Elbey filed for Chapter13 and later converted to a Chapter 7 in US Bankruptcy Court in in the District of South Carolina. December 3, 2012, Chapter 7 closed as "No Asset" case.

On July 24, 2013 H & R Block Bank, FSB through Block & Scott Law Firm filed a Motion and Order to Restore case# 2011-CP-29-00035, pursuant to the Chief Justices' Administrative Order issued June 5, 1992 for Family Court, not Lancaster Court of Common Pleas. On October 24, 2013, in lower court ordered final judgment for foreclosure sale. On October 29,2013, Ziraili M Elbey served the Notice of Appeal on H & R Block Bank, FSB.

FACTS

That in the initial summons, notices, documented in [R¹, Final Brief pg 5, No 4], and complaint Respondent, H & R Block Bank, FSB stated that Appellant's mortgage & loan was owned by H & R Block Bank, FSB, owned or guaranteed by Fannie Mac or owned by FHLMC see Record of Appeal, [hereafter 'R' refer to lines in the final transcript hearing, October 24, 2013 "only" unless otherwise designated/identified on page 5 of this final brief hereafter, FB]. Neither the Respondent nor Fannie Mac or FHLMC owned Elbey's mortgage.

¹ R= Final Transcript lines and pages, unless noted as FB= Final Briefs

That in the initial summons, notices, and complaint, stated that Respondent, H & R Block Bank, FSB, was not holder of Appellant's mortgage and note. And, on the same document that Respondent held an signed & /dated assignment drafted and signed March 29, 2006, but never recorded in Lancaster County, SC with Register of Deeds until August 5, 2010 in Bk 2265 and Pg. 129. [see R, Final Brief pg 5, #17 SC Assignment signed by robo-signers]

That in the [R# 12 pg. 5], H & R Block Bank, FSB, a foreign corporation has not yet obtained a certificate of authority to transact business in this state, and did not such a certificate of authority at the time its lawsuit was originally filed in the Lancaster Court of Common Pleas, 14th January 2011. Records from of the South Carolina Secretary of State in this regard to South Carolina Code 33-15-102(d) indicate [see Appellant's Exhibit No. A]. Therefore, the Respondent, H & R Block Bank, FSB in their Motion to Dismiss dated March 25, 2013 is moot.

That H & R Block Bank, FSB, its assigns and any third party debt collectors, it's lawyers never appeared in the SC Federal Bankruptcy Court 241 hearings as debt collectors or owners of creditors of mortgage or note. In lower court case 2011-CP-29-00035, H & R Block Bank, a national bank claimed to be the holder of the security instrument. Once the original mortgage and note have been monetized any obligation that may have existed no longer exist. Explanation hereto is incorporated herewith in Walker F. Todd Affidavit of an expert witness [R, FB pg 5, #8, Bank One, NA v. Dave, State of Michigan Circuit Court] the final brief as an affidavit. H & R Block Bank, FSB failed to state a claim to collect a debt relating to a mortgage. Any mortgage or note indebtedness was dismissed under Chapter 7 as a "no asset" case on December 3, 2013

That Appellant's note was securitized and sold to investors [see R, FB² pg 5, #14]. Respondent/Plaintiff did not file the original mortgage and note with the Lancaster County Recorder's office in which it was recorded and returned to the Original Bank, Option One Mortgage to invoke Fed Rule 17(a). Respondent/Respondent/Plaintiff have now involved the lower court and the Lancaster County recorder in actions that are unbecoming of a public office, as all elected and appointed officials have/of should have taken an oath of office to uphold the Constitution of the United States and also the Constitution of South Carolina. By placing a copy of a securities instrument within this claim and not having or being the holder in due course as required under the South Carolina UCC's have violated Title 18 section 470 to 473 and 474.

That lawyers for Respondent, H & R Block Bank, FSB moved in the lower court to restore previous court order dated August 22, 2012 based on the following:

1. Appellant's was discharged by order of Bankruptcy Court dated January 14, 2013, and
2. Pursuant to a Family Court Order issued by Chief Justices' Administrative Order issued June 5, 1992 stating in the interest of judicial economy,

² FB= Final Brief

justice and equity and for the good cause. [see R, Final Brief pg 5 #18], [see Appellant's Exhibit B]

That lawyers for Respondent knowingly file a frivolous complaint in violation of Rule 11, SCRPC [see 'R' lines 1-25 on pgs.44-46]. In addition to the above violation of Respondent's lawyers, and, the Special Referee declared the above Family Court Order reference in Respondent's August 01, 2013 Motion to and Order to Restore case 2011-CP-29-00035 in the lower court. Both lawyers and Special Referee agreed this insert and action on the part of the lawyers was a "sham motion and administrative order". This legal action was signed by the Special Referee in the lower court and described by the Special Referee as sham pleading defined by the S.C. Code Ann. §16-17-735(2003); S.C, Code Ann. § 15-75-60 (2005). Let it be known that the Appellant has been injured by the Respondent and their lawyers by sham legal process as defined by the criminal statute; and S.C. Code Ann. § 30-9-30 (2007), (prohibiting the filing of sham legal process and providing for civil remedies including actual damages, punitive damages, costs and attorney's fees against those who file sham legal process)³ [R. p.39, line1- 25], [R. p.40, line 1-7]

That Special Referee denied the hearing of Appellant's amended motion to [R. p.39, line1- 25], [R. p.40, line 1-7] dismiss on the grounds of Rule 12(b)(6), SCRPC as Respondent/Plaintiff lacked the necessary standing to file lawsuit, plus Mortgage Assignment was signed by nationally known robo-signers

Appellant denied due process.[see 'R' pgs.47-49, lines 1-25.

ARGUMENTS

I It has been previous held by the court of appeal in *Postal v. Mann*, 308 S.C. 385, 418 S.E. 2d 322 (S.C. App. 1992, it was well settled that parties are judicially bond by their pleadings, and by any allegations, statements, or admissions contained in therein. Respondent/Plaintiff admitted in its Complaint that it is doing business in South Carolina, but did not indicate that they are "transacting business interstate commerce". See Carolina Code 33-15-101(a) states that "[a] foreign corporation may not transact business in this State until it obtains a certificate of authority from the Secretary of State". [see Appellant's "R" Exhibit B]. Respondent/Plaintiff placed a copy of a securities instrument within this claim and not have or being the holder in due course as required under the South Carolina UCC's code violated Title 18 470 to 473 and 474. In *Fina Supply, Inc. Bank*, 726 S.W. 2D 537, (1987), it says "Party having superior knowledge who takes advantage of another's ignorance of the law to deceive him by studied concealment or misrepresentation can be held responsible for that conduct." "In the federal courts, it is well established that a national bank has no power to lend its credit to another by becoming surety,

³ The statutory provisions are available on the South Carolina General Assembly's website, www.scstatehouse.gov.

indorser, or guarantor for him." Farmers and Miners Bank v. Bluefield Nat'l Bank, 11F 2d 83, 271 U.S. 669: "a National Bank has no power to lend its credit to to any person or corporation." Bowen v. Needles Nat. Bank, 94 f 925, 36 cca 553, certiorari denied in 20 S. Ct 1024, 176, U.S. 682, 44 LED 637.

Chet Adams Co. v. James F. Pederson Co., 413 SE 2d 827 - SC: Supreme Court 1992

307 S.C. 33 (1992)
413 S.E.2d 827

CHET ADAMS COMPANY, Petitioner

v.

**JAMES F. PEDERSON COMPANY, and Heil Quaker Corporation, f/d/b/a
Zonaire Corporation, Respondents.**

Supreme Court of South Carolina.

Heard December 2, 1991.
Decided January 13, 1992.

34*34 *Robert T. Lyles, Jr., of Wall and Shoun, Charleston, for petitioner.*

T.E. Pederson, Charleston, for respondents.

Heard Dec. 2, 1991.

Decided Jan. 13, 1992.

HARWELL, Justice:

The sole issue on appeal is whether the Court of Appeals erred in remanding this case to me circuit court for a determination of issues arising out of petitioner Chet Adams' failure to comply with S.C. Code Ann. § 33-15-102(a) (1990).^[1] We reverse and remand the case to the Court of Appeals for a decision on the merits.

I. FACTS

Petitioner Chet Adams Company, a **foreign corporation**, brought this action against respondent James F. Pederson Company to recover monies allegedly owed on an account as the result of the sale of air conditioning equipment.^[2] After a non-jury trial, the circuit court judge entered judgment in favor of Chet Adams. Pedersen appealed and the case was assigned to the Court of Appeals.

In its reply brief to the Court of Appeals, Pedersen claimed that the case should be dismissed because Chet Adams had not obtained a certificate of authority as required by Section 33-15-102(a). At the oral argument in front of the Court of Appeals, Chet Adams submitted a certificate of registration 35*35

Decided Jan. 13, 1992.

HARWELL, Justice:

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I. FACTS

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In its reply brief to the Court of Appeals, Pedersen claimed that the case should be dismissed because Chet Adams had not obtained a certificate of authority as required by Section 33-15-102(a). At the oral argument in front of the Court of Appeals, Chet Adams submitted a certificate of registration 35*35 which it had obtained that day. After some discussion regarding this issue, the parties argued the merits of the appeal.

On April 11, 1991, the Court of Appeals issued a per curiam, unpublished decision holding that, since the registration issue was raised for the first time on appeal and had not been ruled on by the circuit court, the case should be remanded so the circuit court could address the issue. On remand, the Court of Appeals ordered the circuit court to determine three issues:

- (1) whether Pederson waived the right to complain about Chet Adams' not having the required certificate by not raising the issue until the case was on appeal; or
- (2) whether the fact Chet Adams did not have the certificate deprived the Court of subject matter jurisdiction to entertain the suit; and
- (3) whether Chet Adams should be allowed to remove, *ex post facto*, the impediment to maintaining the proceeding by obtaining the certificate after judgment was rendered.

We granted petitioner Chet Adams' petition for writ of certiorari to review the Court of Appeals' decision to remand the case to the circuit court.

II. DISCUSSION

The primary question in this case is whether Section 33-15-102 is jurisdictional or whether it merely affects a party's capacity to **sue**. We find that our prior case law, as well as the Official Comments to Section 33-15-102, demonstrate that the failure to comply with Section 33-15-102 does not affect a court's subject matter jurisdiction.

In *Cost of Wisconsin v. Shaw*, 292 S.C. 435, 357 S.E. (2d) 20 (1987), Cost of Wisconsin, a **foreign corporation** that was not registered to do business in South Carolina, sought to foreclose a mechanics' lien filed against property owned by Theme Golf, Inc. Theme Golf moved to dismiss the action on the ground that Cost of Wisconsin lacked **standing** to maintain the suit because it was not authorized to do business in South Carolina as required by S.C. Code Ann. § 33-23-140(B) (Supp. 36*36 1986).^[3] We held that a **foreign corporation** could qualify under Section 33-23-140(B) after commencement of the suit.

This holding is consistent with the Official Comments to our current statute, which provide that:

[Section 33-15-102] authorizes a court to stay a proceeding to determine whether a **corporation** should have qualified to transact business and, if it concludes that qualification is necessary, it may grant a further stay to permit the **corporation** to do so. Thus, the **corporation** will not be compelled to re-file a suit if the **corporation** qualifies to transact business within a reasonable period. The purpose of these provisions is to encourage corporations to obtain certificates of authority and to eliminate the temptation to raise [Section 33-15-102] defenses only after applicable statutes of limitation have run.

Acts by a court as to a matter over which it has no jurisdiction are void. *Hoover v. Hoover*, 271 S.C. 177, 246 S.E. (2d) 179 (1978). Accordingly, if the failure of a **foreign corporation** to comply with Section 33-15-102 deprived a court of jurisdiction, a court-ordered stay such as is authorized by the above cited authorities would be impossible; once a lack of jurisdiction was determined, the court would have to dismiss the action and could not order a stay *See* Rule 12(h)(3), SCRPC ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

filed against property owned by Theme Golf, Inc. Theme Golf moved to dismiss the action on the ground that Cost of Wisconsin lacked **standing** to maintain the suit because it was not authorized to do business in South Carolina as required by S.C. Code Ann. § 33-23-140(B) (Supp. 36*36 1986).^[3] We held that a **foreign corporation** could qualify under Section 33-23-140(B) after commencement of the suit.

This holding is consistent with the Official Comments to our current statute, which provide that:

[Section 33-15-102] authorizes a court to stay a proceeding to determine whether a **corporation** should have qualified to transact business and, if it concludes that qualification is necessary, it may grant a further stay to permit the **corporation** to do so. Thus, the **corporation** will not be compelled to re-file a suit if the **corporation** qualifies to transact business within a reasonable period. The purpose of these provisions is to encourage corporations to obtain certificates of

authority and to eliminate the temptation to raise [Section 33-15-102] defenses only after applicable statutes of limitation have run.

Acts by a court as to a matter over which it has no jurisdiction are void. Hoover v. Hoover, 271 S.C. 177, 246 S.E. (2d) 179 (1978). Accordingly, if the failure of a **foreign corporation** to comply with Section 33-15-102 deprived a court of jurisdiction, a court-ordered stay such as is authorized by the above cited authorities would be impossible; once a lack of jurisdiction was determined, the court would have to dismiss the action and could not order a stay *See* Rule 12(h)(3), SCRCPP ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

Courts from other jurisdictions which have addressed this issue have also concluded that statutes such as Section 33-15-102, known as "door closing" statutes, affect a **foreign corporation's** capacity to **sue** rather than a court's subject matter jurisdiction. *See, e.g., Hot Roll Mfg. Co. v. Cerone Equipment Co.*, 38 A.D. (2d) 339, 329 N.Y.S. (2d) 466 (1972); Video Engineering Co. v. Foto-Video Electronics, Inc., 207 Va. 1027, 154 S.E. (2d) 7 (1967).

Thus, we hold that a **foreign corporation's** failure to comply with the provisions of Section 33-15-102 does not affect a court's subject matter jurisdiction. Instead, 37*37 compliance with this statute affects a **foreign corporation's** capacity to **sue**. Further, the defense of capacity to **sue** can be waived by a Appellant if not raised. H & H Glass Co. v. Wynne, 289 S.C. 389 346 S.E. (2d) 523 (1986) (Where lack of capacity to **sue** is not timely raised by demurrer or answer, it is waived.). *See also*, Rule 9(a), SCRCPP (In order to raise an issue as to the capacity of a party to **sue**, a party must have a specific negative averment to that effect.). In this case, Chet Adams' failure to register was not raised as a defense by Pedersen in its pleadings, at the trial of the case, or as an exception on appeal. It was raised for the first time in Pedersen's reply brief. Accordingly, Pedersen has waived its right to complain that Chet Adams lacks capacity to **sue**.

In sum, we conclude that the Court of Appeals erred in remanding this case to the circuit court. Instead, it should have determined that the circuit court was not deprived of jurisdiction and that Pedersen waived its right to complain as to Chet Adams' lack of capacity to **sue**. Accordingly, we reverse and remand the case to the Court of Appeals for a decision on the merits.

Reversed and remanded.

GREGORY, C.J., and CHANDLER, FINNEY and TOAL, JJ., concur.

[1] Section 33-15-102(a) requires a **foreign corporation** transacting business in this State to obtain a certificate of authority before it can maintain a proceeding in any court in this State.

[2] Originally, Chet Adams also named Heil Quaker **Corporation**, f/d/b/a Zoneaire **Corporation**, as a Appellant. However, Heil Quaker filed a crossclaim against Pedersen and assigned its cause of action to Chet Adams, leaving Pedersen as the only remaining Appellant.

[3] Section 33-23-140(B), the predecessor of Section 33-15-102(a), provided that a **foreign corporation** could not maintain a suit until it was authorized to do business in this State.

ARGUMENT II

II In South Carolina, a mortgage is a mere security for a debt. *Williams v. Lawrence*, 194 S.C. 1, 8 S.E. 2d 838 [S.C. 1940]; *Patterson v. Rabb*, 38 S.C., 138, 17 S.E.. 463 (1893); *Blackwell v. Blackwell*, 289 S.C. 470, 346 S.E.2d 731 [S.C. ct. App. 1986]. A mortgage is different from other instruments in that, in order for it to be a valid instrument, there must be a debt or obligation of the mortgagor for which it is given as security. *Williams v. Lawrence, supra*. If there is no debt, then there is no valid mortgage. *Duckworth v. McKinney*, 58 S.C. 418, 36 S.E. 730 [1900]. In *Carpenter v. Deutsche Bank National Trust v. Heinrich* in the Ninth Judicial Circuit, docket no.: 2011-CP-10-1060, It is clear that to have standing in a foreclosure case, a Plaintiff must not only be the holder and owner of the original Note, but also the Mortgage as well. Plaintiff claimed possession of the original Note with an Allonge which is indorsed in blank, at the time of the Summary Judgment August 2013. Plaintiff claims that the note is a negotiable instrument under the South Carolina Uniform Commercial Code §36-3 et seq. which would entitle them sue in foreclosure action. However, Plaintiff according to the Summons, Notices, and the Complaint is seeking foreclosure on the mortgage that is attach to real property as opposed to simply suing on the promissory note. The idea that the Mortgage follows the Note is one which has been repeatedly confirmed by the "South Carolina recognizes the 'familiar and uncontroverted proposition' that' the assignment of a note secured by a mortgage carries with it an assignment of mortgage. *Plaintiff in its claims at*

the final hearing, October 24, 2013 clearly stated that it own the Note and the Mortgage, and presented so called original copies of the Mortgage and so called original copies of the Note. However, in *Carpenter v. Longan*, 83 U.S. 271, 16 Wall. 2 71, 21 L.Ed. 313 (1872), clearly support the notion that the Plaintiff must clearly **own the Note and the Mortgage** to foreclose on the property. This holding has long been recognized in state of South Carolina law as well. *Talbert b. Talbert*, 97 S.C. 136, 145, 81 S.E. 644, 647 (S.C. 1914); *Patterson v. Rabb*, 38 S.C. at 467; and *Dearman v. Trimmier*, 26 S.C. 506, 513, 2S.E. 501, 505 (S.C. 1887).

Plaintiff failed to show that it owned the Mortgage at the time the initial Complaint was filed, January 14, 2011. Plaintiff merely contends to be the holder and has the right to enforce the Mortgage and the Note in the Summons, and Notices, pgs 3-4, but not in the initial Complaint. The state court of appeals made a recent decision in *BAC home Loan Servicing, L.P. v Kinder*, 398 S.C. 19, 731 S.E.2d 547 (Ct.App. 2012). “[T]he assignment of the mortgage does not need to be recorded, and failure to do so has no effect on the rights of assignee.” The Assignment in this case was colorable, having been made without consideration, of bank authorities signing the Assignment, and for the purpose of evading a disability of the assignor to sue, or of enabling H & R Block Bank, FSB, to confer jurisdiction on a particular Court and ask specifically for a Special Referee. *Hodges v. Lake Summit co.*, 155 S.C. 436, 447, 152 S.E. 658, 662 (S.C. 1930- quoting from 5TH C.J.,, 940). One might distinguish the facts of *Kinder* from this case as the Assignment of Mortgage was defective and ineffective with robo-signers as bank officials, *Kinder* was after the foreclosure was already complete

and the issue at dispute in that case was surplus funds going to the Assignee. Filing ineffective assignment is not the issue in this case, but ownership of the Note. Let it be clear, that to have standing in this foreclosure case, Plaintiff must not only be the holder and owner of the original Note, but also the Mortgage as well. Plaintiff failed in its Complaint in this case to meet this criteria. Plaintiff lacks the standing to initiate and prosecute the foreclosure, and dismissal pursuant to Rule 17(a) and Rule 12(b)(6) SCRPC in law appears to be appropriate.

This Hon. Court may allow Respondent/Plaintiffs time to properly register, which in my opinion would be futile. The Respondent/Respondent/Plaintiff already by their actions have shown through their actions and through their counsel that they have no respect for this Hon. Court, the people of South Carolina and their stockholders by their actions. Respondent/Respondent/Plaintiff holds a fiduciary duty to the stockholders to ensure that all parties that have an interest in the property were signed upon the original mortgage and promissory note. Respondent/Respondent/Plaintiffs' are not the real party in interest, meaning not being the holder in due course, and have now by Respondent/Plaintiffs' actions involved officers of the Court, and officers of the county to do actions unbecoming to their oaths. Appellant has reported these actions to the necessary agencies, including the Atty. Gen. of South Carolina. If this case goes any further Appellant has a duty to protect this Hon. Court, as well as Respondent/Plaintiff's counsel. Appellant is under the opinion that the Respondent/Plaintiff have not registered with the purpose and intent to defraud and commit Fraud in the Factum, Fraud in the Inducement, and Fraud in the Execution. Appellant is under the opinion that

Respondent/Plaintiffs have also not register within the State in order to not have to pay any state income tax on their actions, in which, the State is in desperate need, of and once a corporation properly registered to do business in said state. It would be necessary to look into all the state actions involving Federal National Mortgage Association thru this Hon. Court that have ever been filed in order to determine whether or not properly Federal National Mortgage Association have filed state income taxes.

Respondent/Respondent/Plaintiff claims to be the holder due course and claims to be the real party in interest under Fed Rule 17 (a) Ratification of Commencement and Real Party of Interest,(the original lender has to appear in court and grant power of attorney to a servicer in order for a servicer to commence a foreclosure action in court. Respondent/Plaintiff claim to be original party and Holder in Due Course but if a servicer takes a note by transfer and is **Entitled or Authorized to Receive Payments from the borrower is called a note holder** in said state. It would be necessary to look into all the state actions involving Federal National Mortgage Association thru this Hon. Court that have ever been filed in order to determine whether or not properly Federal National Mortgage Association have filed state income taxes.

Respondent/Plaintiff claims to be the holder due course and claims to be the real party in interest under Fed Rule 17 (a) Ratification of Commencement and Real Party of Interest,(the original lender has to appear in court and grant power of attorney to a servicer in order for a servicer to commence a foreclosure action in court. Respondent/Plaintiff claim to be original party and Holder in Due Course but if a servicer takes a note by transfer and is **Entitled or Authorized to Receive Payments from the borrower is called a note holder, Art. 3-301 of the UCC Statue.** A mortgage servicer

and a bank trustee would have no interest in this note. The only party with authority to enforce this note is the same party entitled to the borrowers payments under the Pooling and Servicing Agreement, and since Respondent/Plaintiff has never demonstrated or produced a "PSA" Respondent/Plaintiff does not have the ability to invoke the jurisdiction of this Hon. Furthermore if the alleged loan has been securitized then the only person entitled to collect, whom would also be the only party able to bring forth a foreclosure proceeding is the true certificate holder of the original note and original mortgage together, for a separation of the two would cause a nullity of all contractual obligations(please provide proof). It was not disclosed what form of credit was created off of my signature such as M1 and payments under the Pooling and Servicing Agreement, and since Respondent/Plaintiff has never demonstrated or produced a "PSA" Respondent/Plaintiff does not have the ability to invoke the jurisdiction of this Hon. Court, therefore the Respondent's Motion to Dismiss is moot. . . Furthermore if the alleged loan has been securitized then the only person entitled to collect, whom would also be the only party able to bring forth a foreclosure proceeding is the true certificate holder of the original note and original mortgage together, for a separation of the two would cause a nullity of all contractual obligations (please provide proof). It was not disclosed what form of credit was created off of my signature such as M1 and 2 or M3. It was not disclosed that the bank cannot lend its own credit, nor could it have lent the stockholders credit (Banks and Banking Title 12 U.S.C., Chapter II, Subchapter IV § 83), that would be a violation and bank fraud (ENRON Case), it was not disclosed that the bank had nothing to lend upon the signing of the promissory note. The bank proceeded to do a double book entry, entering my promissory note and mortgage upon their books to pad and show that

they had money, the credit that was created off my signature was purported to be lent to me at that time. They also were allowed to lend 10 times the amount of credit that was created by fractionalizing of my signature. Once again "off of my signature" I am in fact the true creditor and Lender is entitled to a processing fee. Original lender also did not disclose the monetization of the original note and mortgage. Once the original mortgage and promissory note had been monetized any obligation that may have existed no longer exists. Attached hereto and incorporated herein, [See the affidavit of Walker Todd Affidavit, Exhibit C].

Respondent/Plaintiffs did not file the original mortgage and promissory note with the County Recorder's Office in which it was recorded and returned to the Original Bank to invoke Fed Rule 17(a). Respondent/Plaintiffs have now involved this Hon. Court and the County recorder in actions that are unbecoming of a public office, all elected and appointed officials have/or should have taken an oath of office to uphold the Constitution of the United States and also the Constitution of South Carolina. By placing a copy of a securities instrument within this claim and not having or being the holder in due course as required under the UCC's, have violated Title 18 sections 470 to 473 and 474.

In *Fina Supply, Inc. v. Abilene Nat. Bank*, 726 S.W.2d 537, 1987 it says "Party having superior knowledge who takes advantage of another's ignorance of the law to deceive him by studied concealment or misrepresentation can be held responsible for that conduct."

**"In the federal courts, it is well established that a national bank has no power to lend its credit to another by becoming surety, indorser, or guarantor for him."
Farmers and Miners Bank v. Bluefield Nat 'l Bank, 11 F 2d 83, 271 U.S. 669; "A national bank has no power to lend its credit to any person or corporation."
Bowen v. Needles Nat. Bank, 94 F 925, 36 CCA 553, certiorari denied in 20 S.Ct 1024, 176 US 682, 44 LED 637**

The Counterfeit Detection Act of 1992, Public Law 102-550, in Section 411 of Title 31 of the Code of Federal Regulations, permits color illustrations of U.S. currency provided:

The illustration is of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of the item illustrated

- The illustration is one-sided
- All negatives, plates, positives, digitized storage medium, graphic files, magnetic medium, optical storage devices, and any other thing used in the making of the illustration that contain an image of the illustration or any part thereof are destroyed and/or deleted or erased after their final use

Other Obligations and Securities

- Photographic or other likenesses of other United States obligations and securities and foreign currencies are permissible for any non-fraudulent purpose, provided the items are reproduced in black and white and are less than three-quarters or greater than one-and-one-half times the size, in linear dimension, of any part of the original item being reproduced. Negatives and plates used in making the likenesses must be destroyed after their use for the purpose for which they were made.

Title 18 USC § 472 Uttering counterfeit obligations or securities Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both.

Title 18 USC § 473 Dealing in counterfeit obligations or securities Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined under this title or imprisoned not more than 20 years, or both.

Title 18 USC § 474 Plates, stones, or analog, digital, or electronic

images for counterfeiting obligations or securities Whoever, with intent to defraud, makes, executes, acquires, scans, captures, records, receives, transmits, reproduces, sells, or has in such person's control, custody, or ossession, an analog, digital, or electronic image of any obligation or other security of the United States is guilty of a class B felony.

**"Fraud vitiates the most solemn Contracts, documents and even judgments"
[U.S. vs. Throckmorton, 98 US 61, at pg. 65].**

"It is not necessary for rescission of a contract that the party making the misrepresentation should have known that it was false, but recovery is allowed even though misrepresentation is innocently made, because it would be unjust to allow one who made false representations, even innocently, to retain the fruits of a bargain induced by such representations." Whipp v. Iverson, 43 Wis 2d 166].

"Any false representation of material facts made with knowledge of falsity and with intent that it shall be acted on by another in entering into contract, and which is so acted upon, constitutes 'fraud,' and entitles party deceived to avoid contract or recover damages." Barnsdall Refining Corn. v. Birnam Wood Oil Co. 92 26 817.

CONCLUSION

I believe that the Lancaster lower court, Hon. Court and the County Recorder would have not intentionally participated, and have unknowingly violated their oaths of office. By violating my rights to Due Process of Law, I have now rescinded all contracts due to the fraudulent inducement with the alleged promissory note and mortgage.

Respondent/Plaintiffs have violated [FDCPA] by their actions as a third-party debt collector Appellant has not been given notice and opportunity to validate any alleged debt. Attached hereto and incorporated herein demand for debt validation under the [FDCPA]. Respondent/Plaintiff's counsel has violated his/her disciplinary rules and ethical canons by the filing of this alleged action having an obligation to ensure that the party they represent, are properly registered as a Real Party in Interest within the State of South Carolina and in order to have standing to sue in the first instance, not to mention counsel of Respondent/Plaintiff also had a duty to protect this Hon. Court from any void or voidable actions.

WHEREFORE: Appellant requests that this Hon. Appeal Court reversed and remanded for lack of standing. This Hon. Appeal Court does not possess Personum

Jurisdiction over a foreign entity not possessing a foreign certificate of authority to be able to commence an action in S.C. court, and not simply defending an action against said Bank. This Hon. Court may have jurisdiction of the Subject Matter to be the proper court to hear this issue. However this Hon. Court does not possess Jurisdiction Over Subject Matter if one of the parties being a foreign corporation does not possess a Foreign Certificate of Authority to be able to maintain an action in this S.C. Court, the foreign corporation without Foreign Certificate of Authority does not need to have it to defend against an action in this S.C. Court. Due to the prima facie evidence that the Respondent/Plaintiffs not now, nor was ever the Real Party in Interest and definitely not registered with the Secretary of State [hereafter see Exhibit A] in order to have standing or lawfully conduct and transact business in this State. I, Pray for any and all other relief this court may deem just via Sua Sponte of the Court in regards to matter such as this. Appellant requests that this Hon. Court reversed and remanded to lower court, and that all parties uphold their oaths of office and not violated the Federal, and State constitutionally protected rights. Equality Under the Law Is paramount And a Must.

Reverse and remand.

VERIFICATION

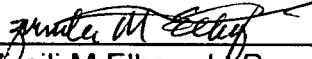
I, Ziraili M Elbey, Respondent in the above entitled action, hereby verify under penalty of perjury, under the laws of the **United States of America**, without the “**United States**” (federal government), that the above statement of facts and laws is true and correct, according to the best of My current information, knowledge, and belief, so help me God, pursuant to 28 U.S.C. 1746(1).

By: 

CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

This is to certify that the Final Respondent's Brief I am filing in this case complies with rule 211(b) of the South Carolina Rules of Appellate Procedures.


April 14, 2013

By: 
Zrilli M Elbey, *In Propria Persona*
9789 Charlotte Highway #400-191
Indian Land, South Carolina 29707
803-233-2665

CERTIFICATE OF SERVICE

This is to certify that I have served one copy of the Respondent' Final Brief by placing the same in the U.S. Mail, postage prepaid, to Respondent/Plaintiff, and the 'same' to SC Court of Appeals (15) fifteen copies with the clerk of the appellat court, plus one unbound copy posted on April 14, 2014 addressed as follows:

April 14, 2013

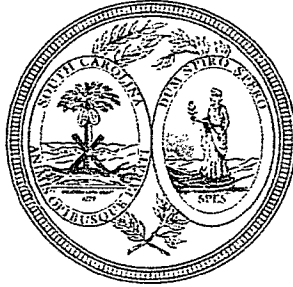
By: 
Zrilli M Elbey, *In Propria Persona*
9789 Charlotte Highway #400-191
Indian Land, South Carolina 29707
803-233-2665

Chad Burgess
c/o Brock & Scott, PLLC
3800 Fernandina Rd, Suite 110
Columbia, SC. 29210

Jenny Abbott Kitchings, Clerk
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

EXHIBIT
~~A~~

The State of South Carolina



Office of Secretary of State Mark Hammond

Certificate of No Record

I, Mark Hammond, Secretary of State of South Carolina Hereby certify that:

At this time, this office can find no record of a corporation using the name:
H&R BLOCK BANK, FSB

Given under my Hand and the Great
Seal of the State of South Carolina this
18th day of October, 2013.

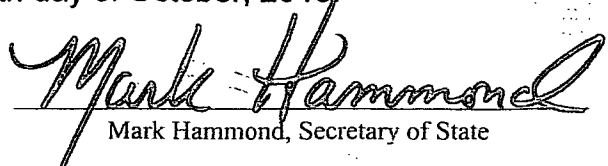

Mark Hammond, Secretary of State

EXHIBIT
B

Court News

2006-02-27-02

The Supreme Court of South Carolina

RE: FAMILY COURT FORMS

ADMINISTRATIVE ORDER

Pursuant to the provisions of S.C. Const. Art. V, § 4,

IT IS ORDERED that the Administrative Order for the Family Courts, dated June 5, 1992, and signed by Chief Justice David Harwell, is hereby rescinded, effective immediately.

There shall no longer be a requirement for the Clerks of Court to strike family court actions from the active docket. All cases shall remain pending until they are dismissed or a final order is issued.

This Order is effective as of the date of its signing.

IT IS SO ORDERED.

s/Jean Hofer Toal
Jean Hofer Toal, Chief Justice

February 27, 2006
Columbia, South Carolina

EXHIBIT
C

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BANK ONE, N.A.,)	Case No. 03-047448-CZ
)	
Plaintiff,)	Hon. E.. Sosnick
)	
v.)	AFFIDAVIT OF WALKER F. TODD,
)	EXPERT WITNESS FOR DEFENDANTS
HARSHAVARDHAN DAVE and)	
PRATIMA DAVE, jointly and severally,)	
)	
Defendants.)	

Harshavardhan Dave and Pratima H. Dave
C/o 5128 Echo Road
Bloomfield Hills, MI 48302
Defendants, *in propria persona*

Michael C. Hammer (P41705)
Ryan O. Lawlor (P64693)
Dickinson Wright PLLC
Attorneys for Bank One, N.A.
500 Woodward Avenue, Suite 4000
Detroit, Michigan 48226
(313) 223-3500

Now comes the Affiant, Walker F. Todd, a citizen of the United States and the State of Ohio over the age of 21 years, and declares as follows, under penalty of perjury:

1. That I am familiar with the Promissory Note and Disbursement Request and Authorization, dated November 23, 1999, together sometimes referred to in other documents filed by Defendants in this case as the "alleged agreement" between Defendants and Plaintiff but called the "Note" in this Affidavit. If called as a witness, I would testify as stated herein. I make this Affidavit based on my own personal knowledge of the legal, economic, and historical principles stated herein, except that I have relied entirely on documents provided to me, including the Note, regarding certain facts at issue in this case of which I previously had no direct and personal knowledge. I am making this affidavit based on my experience and expertise as an attorney, economist, research writer, and teacher. I am competent to make the following statements.

PROFESSIONAL BACKGROUND QUALIFICATIONS

2. My qualifications as an expert witness in monetary and banking instruments are as follows. For 20 years, I worked as an attorney and legal officer for the legal departments of the Federal Reserve Banks of New York and Cleveland. Among other things, I was assigned responsibility for questions involving both novel and routine notes, bonds, bankers' acceptances, securities, and other financial instruments in connection with my work for the Reserve Banks' discount windows and parts of the open market trading desk function in New York. In addition, for nine years, I worked as an economic research officer at the Federal Reserve Bank of Cleveland. I became one of the Federal Reserve System's recognized experts on the legal history of central banking and the pledging of notes, bonds, and other financial instruments at the discount window to enable the Federal Reserve to make advances of credit that became or could become money. I also have read extensively treatises on the legal and financial history of money and banking and have published several articles covering all of the subjects just mentioned. I have served as an expert witness in several trials involving banking practices and monetary instruments. A summary biographical sketch and resume including further details of my work experience, readings, publications, and education will be tendered to Defendants and may be made available to the Court and to Plaintiff's counsel upon request.

GENERALLY ACCEPTED ACCOUNTING PRINCIPLES

3. Banks are required to adhere to Generally Accepted Accounting Principles (GAAP).

GAAP follows an accounting convention that lies at the heart of the double-entry bookkeeping system called the Matching Principle. This principle works as follows: When a bank accepts bullion, coin, currency, checks, drafts, promissory notes, or any other similar instruments (hereinafter “instruments”) from customers and deposits or records the instruments as assets, it must record offsetting liabilities that match the assets that it accepted from customers. The liabilities represent the amounts that the bank owes the customers, funds accepted from customers. In a fractional reserve banking system like the United States banking system, most of the funds advanced to borrowers (assets of the banks) are created by the banks themselves and are not merely transferred from one set of depositors to another set of borrowers.

RELEVANCE OF SUBTLE DISTINCTIONS ABOUT TYPES OF MONEY

4. From my study of historical and economic writings on the subject, I conclude that a common misconception about the nature of money unfortunately has been perpetuated in the U.S. monetary and banking systems, especially since the 1930s. In classical economic theory, once economic exchange has moved beyond the barter stage, there are two types of money: money of *exchange* and money of *account*. For nearly 300 years in both Europe and the United States, confusion about the distinctiveness of these two concepts has led to persistent attempts to treat money of account as the equivalent of money of exchange. In reality, especially in a fractional reserve banking system, a comparatively small amount of money of exchange (e.g., gold, silver, and official currency notes) may support a vastly larger quantity of

business transactions denominated in money of account. The sum of these transactions is the sum of credit extensions in the economy. With the exception of customary stores of value like gold and silver, the monetary base of the economy largely consists of credit instruments. **Against this background, I conclude that the Note, despite some language about “lawful money” explained below, clearly contemplates both disbursement of funds and eventual repayment or settlement in money of account (that is, money of exchange would be welcome but is not required to repay or settle the Note).** The factual basis of this conclusion is the reference in the Disbursement Request and Authorization to repayment of \$95,905.16 to Michigan National Bank from the proceeds of the Note. That was an exchange of the credit of Bank One (Plaintiff) for credit apparently and previously extended to Defendants by Michigan National Bank. Also, there is no reason to believe that Plaintiff would refuse a substitution of the credit of another bank or banker as complete payment of the Defendants’ repayment obligation under the Note. This is a case about exchanges of money of account (credit), not about exchanges of money of exchange (lawful money or even legal tender).

5. Ironically, the Note explicitly refers to repayment in “lawful money of the United States of America” (see “Promise to Pay” clause). Traditionally and legally, Congress defines the phrase “lawful money” for the United States. Lawful money was the form of money of exchange that the federal government (or any state) could be required by statute to receive in payment of taxes or other debts. Traditionally, as defined by Congress, lawful money only included gold, silver, and currency notes redeemable for gold or silver on demand. In a banking law context, lawful money was only those forms of money of exchange (the forms just mentioned, plus U.S. bonds and notes redeemable for gold) that constituted the reserves of a national bank prior to 1913

(date of creation of the Federal Reserve Banks). *See, Lawful Money, Webster's New International Dictionary* (2d ed. 1950). In light of these facts, I conclude that Plaintiff and Defendants exchanged reciprocal credits involving money of account and not money of exchange; no lawful money was or probably ever would be disbursed by either side in the covered transactions. This conclusion also is consistent with the bookkeeping entries that underlie the loan account in dispute in the present case. Moreover, it is puzzling why Plaintiff would retain the archaic language, "lawful money of the United States of America," in its otherwise modern-seeming Note. It is possible that this language is merely a legacy from the pre-1933 era. Modern credit agreements might include repayment language such as, "The repayment obligation under this agreement shall continue until payment is received *in fully and finally collected funds*," which avoids the entire question of "In what form of money or credit is the repayment obligation due?"

6. Legal tender, a related concept but one that is economically inferior to *lawful money* because it allows payment in instruments that cannot be redeemed for gold or silver on demand, has been the form of money of exchange commonly used in the United States since 1933, when domestic private gold transactions were suspended (until 1974).. Basically, legal tender is whatever the government says that it is. The most common form of legal tender today is Federal Reserve notes, which by law cannot be redeemed for gold since 1934 or, since 1964, for silver. *See, 31 U.S.C. Sections 5103, 5118 (b), and 5119 (a).*

Note: I question the statement that fed reserve notes cannot be redeemed for silver since 1964. It was Johnson who declared on 15 March 1967 that after 15 June 1967 that Fed Res Notes would not be exchanged for silver and the practice did stop on 15 June

1967 – not 1964. I believe this to be error in the text of the author’s affidavit.

7. *Legal tender under the Uniform Commercial Code (U.C.C.),* Section 1-201 (24) (Official Comment), is a concept that sometimes surfaces in cases of this nature. The referenced Official Comment notes that the definition of money is not limited to legal tender under the U.C.C. Money is defined in Section 1-201 (24) as “a medium of exchange authorized or adopted by a domestic or foreign government and includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more nations.” The relevant Official Comment states that “The test adopted is that of sanction of government, whether by authorization before issue or adoption afterward, which recognizes the circulating medium as a part of the official currency of that government. The narrow view that money is limited to legal tender is rejected.” Thus, I conclude that the U.C.C. tends to validate the classical theoretical view of money.

HOW BANKS BEGAN TO LEND THEIR OWN CREDIT INSTEAD OF REAL MONEY

8. In my opinion, the best sources of information on the origins and use of credit as money are in Alfred Marshall, *MONEY, CREDIT & COMMERCE* 249-251 (1929) and Charles P. Kindleberger, *A FINANCIAL HISTORY OF WESTERN EUROPE* 50-53 (1984). A synthesis of these sources, as applied to the facts of the present case, is as follows: As commercial banks and discount houses (private bankers) became established in parts of Europe (especially Great Britain) and North America, by the mid-nineteenth century they commonly made loans to borrowers by extending their own credit to the borrowers or, at the borrowers’ direction, to third parties. The typical form of such extensions of credit was drafts or bills of exchange drawn upon themselves (claims on the credit of the drawees) instead of disbursements of bullion,

coin, or other forms of money. In transactions with third parties, these drafts and bills came to serve most of the ordinary functions of money. The third parties had to determine for themselves whether such “credit money” had value and, if so, how much. The Federal Reserve Act of 1913 was drafted with this model of the commercial economy in mind and provided at least two mechanisms (the discount window and the open-market trading desk) by which certain types of bankers’ credits could be exchanged for Federal Reserve credits, which in turn could be withdrawn in lawful money. Credit at the Federal Reserve eventually became the principal form of monetary reserves of the commercial banking system, especially after the suspension of domestic transactions in gold in 1933. Thus, credit money is not alien to the current official monetary system; it is just rarely used as a device for the creation of Federal Reserve credit that, in turn, in the form of either Federal Reserve notes or banks’ deposits at Federal Reserve Banks, functions as money in the current monetary system. In fact, a means by which the Federal Reserve expands the money supply, loosely defined, is to set banks’ reserve requirements (currently, usually ten percent of demand liabilities) at levels that would encourage banks to extend new credit to borrowers on their own books that third parties would have to present to the same banks for redemption, thus leading to an expansion of bank-created credit money. In the modern economy, many non-bank providers of credit also extend book credit to their customers without previously setting aside an equivalent amount of monetary reserves (credit card line of credit access checks issued by non-banks are a good example of this type of credit), which also causes an expansion of the aggregate quantity of credit money. The discussion of money taken from Federal Reserve and other modern sources in paragraphs 11 et seq. is consistent with the account of the origins of the use of bank credit as money in this paragraph.

ADVANCES OF BANK CREDIT AS THE EQUIVALENT OF MONEY

9. Plaintiff apparently asserts that the Defendants signed a promise to pay, such as a note(s) or credit application (collectively, the “Note”), in exchange for the Plaintiff’s advance of funds, credit, or some type of money to or on behalf of Defendant. However, the bookkeeping entries required by application of GAAP and the Federal Reserve’s own writings should trigger close scrutiny of Plaintiff’s apparent assertions that it lent its funds, credit, or money to or on behalf of Defendants, thereby causing them to owe the Plaintiff \$400,000. According to the bookkeeping entries shown or otherwise described to me and application of GAAP, the Defendants allegedly were to tender some form of *money* (“lawful money of the United States of America” is the type of money explicitly called for in the Note), securities or other capital equivalent to money, funds, credit, or something else of value in exchange (money of exchange, loosely defined), collectively referred to herein as “money,” to repay what the Plaintiff claims was the *money* lent to the Defendants. It is not an unreasonable argument to state that Plaintiff apparently changed the economic substance of the transaction from that contemplated in the credit application form, agreement, note(s), or other similar instrument(s) that the Defendants executed, thereby changing the costs and risks to the Defendants. At most, the Plaintiff extended its own *credit* (money of account), but the Defendants were required to repay in *money* (money of exchange, and *lawful money* at that), which creates at least the inference of inequality of obligations on the two sides of the transaction (*money*, including *lawful money*, is to be exchanged for *bank credit*).

MODERN AUTHORITIES ON MONEY

11. To understand what occurred between Plaintiff and Defendants concerning the alleged loan of *money* or, more accurately, *credit*, it is helpful to review a modern Federal Reserve description of a bank's lending process. See, David H. Friedman, MONEY AND BANKING (4th ed. 1984)(apparently already introduced into this case): "The commercial bank lending process is similar to that of a thrift in that the receipt of cash from depositors increases both its assets and its deposit liabilities, which enables it to make additional loans and investments. . . . When a commercial bank makes a business loan, it accepts as an asset the borrower's debt obligation (the promise to repay) and creates a liability on its books in the form of a demand deposit in the amount of the loan." (Consumer loans are funded similarly.) Therefore, the bank's original bookkeeping entry should show an increase in the amount of the asset credited on the asset side of its books and a corresponding increase equal to the value of the asset on the liability side of its books. This would show that the bank received the customer's signed promise to repay as an asset, thus monetizing the customer's signature and creating on its books a liability in the form of a demand deposit or other demand liability of the bank. The bank then usually would hold this demand deposit in a transaction account on behalf of the customer. Instead of the bank lending its *money* or other assets to the customer, as the customer reasonably might believe from the face of the Note, the bank *created* funds for the customer's transaction account without the customer's permission, authorization, or knowledge and delivered the *credit* on its own books representing those funds to the customer, meanwhile alleging that the bank lent the customer *money*. If Plaintiff's response to this line of argument is to the effect that it acknowledges that it lent credit or issued credit instead of money, one might refer to Thomas P. Fitch, BARRON'S

BUSINESS GUIDE DICTIONARY OF BANKING TERMS, "Credit banking," 3. "Bookkeeping entry representing a deposit of funds into an account." But Plaintiff's loan agreement apparently avoids claiming that the bank actually lent the Defendants *money*. They apparently state in the agreement that the Defendants are obligated to repay Plaintiff principal and interest for the "Valuable consideration (money) the bank gave the customer (borrower)." The loan agreement and Note apparently still delete any reference to the bank's receipt of actual cash value from the Defendants and exchange of that receipt for actual cash value that the Plaintiff banker returned.

12. According to the Federal Reserve Bank of New York, money is anything that has value that banks and people accept as money; money does not have to be issued by the government. For example, David H. Friedman, I BET YOU THOUGHT. . . . 9, Federal Reserve Bank of New York (4th ed. 1984)(apparently already introduced into this case), explains that banks create new money by depositing IOUs, promissory notes, offset by bank liabilities called checking account balances. Page 5 says, **"Money doesn't have to be intrinsically valuable, be issued by government, or be in any special form. . . ."**

13. The publication, Anne Marie L. Gonczy, MODERN MONEY MECHANICS 7-33, Federal Reserve Bank of Chicago (rev. ed. June 1992)(apparently already introduced into this case), contains standard bookkeeping entries demonstrating that *money* ordinarily is recorded as a bank *asset*, while a bank *liability* is evidence of *money* that a bank owes. **The bookkeeping entries tend to prove that banks accept cash, checks, drafts, and promissory notes/credit agreements (assets) as money deposited to create credit or checkbook money that are bank liabilities, which shows that, absent any right of setoff, banks owe money to persons who deposit money.** **Cash (money of**

exchange) is money, and credit or promissory notes (money of account) become money when banks deposit promissory notes with the intent of treating them like deposits of cash. See, 12 U.S.C. Section 1813 (l)(1) (definition of “deposit” under Federal Deposit Insurance Act). The Plaintiff acts in the capacity of a lending or banking institution, and the newly issued credit or money is similar or equivalent to a promissory note, which may be treated as a deposit of money when received by the lending bank.. Federal Reserve Bank of Dallas publication MONEY AND BANKING, page 11, explains that when banks grant loans, they create new money. The new money is created because a new “loan becomes a deposit, just like a paycheck does.” MODERN MONEY MECHANICS, page 6, says, “What they [banks] do when they make loans is to accept promissory notes in exchange for credits to the borrowers’ transaction accounts.” The next sentence on the same page explains that the banks’ assets and liabilities increase by the amount of the loans.

COMMENTARY AND SUMMARY OF ARGUMENT

14. Plaintiff apparently accepted the Defendants’ Note and credit application (money of account) in exchange for its own credit (also money of account) and deposited that credit into an account with the Defendants’ names on the account, as well as apparently issuing its own credit for \$95,905.16 to Michigan National Bank for the account of the Defendants. One reasonably might argue that the Plaintiff recorded the Note or credit application as a loan (money of account) from the Defendants to the Plaintiff and that the Plaintiff then became the borrower of an equivalent amount of money of account from the Defendants.

15. The Plaintiff in fact never lent any of its own pre-existing money,

credit, or assets as consideration to purchase the Note or credit

agreement from the Defendants. (Robertson Notes: I add that when the bank

does the forgoing, then in that event, there is an utter *failure of consideration* for the “loan contract”.) When the Plaintiff deposited the Defendants’ \$400,000 of newly issued credit into an account, the Plaintiff created from \$360,000 to \$400,000 of new money (the nominal principal amount less up to ten percent or \$40,000 of reserves that the Federal Reserve would require against a demand deposit of this size). The Plaintiff received \$400,000 of credit or money of account from the Defendants as an asset. GAAP ordinarily would require that the Plaintiff record a liability account, crediting the Defendants’ deposit account, showing that the Plaintiff owes \$400,000 of money to the Defendants, just as if the Defendants were to deposit cash or a payroll check into their account.

16. The following appears to be a disputed fact in this case about which I have insufficient information on which to form a conclusion: I infer that it is alleged that Plaintiff refused to lend the Defendants Plaintiff’s own money or assets and recorded a \$400,000 loan from the Defendants to the Plaintiff, which arguably was a \$400,000 deposit of money of account by the Defendants, and then when the Plaintiff repaid the Defendants by paying its own credit (money of account) in the amount of \$400,000 to third-party sellers of goods and services for the account of Defendants, the Defendants were repaid their loan to Plaintiff, and the transaction was complete.

17. I do not have sufficient knowledge of the facts in this case to form a conclusion on the following disputed points: None of the following material facts are disclosed in the credit application or Note or were advertised by Plaintiff to prove that the

Defendants are the true lenders and the Plaintiff is the true borrower. The Plaintiff is trying to use the credit application form or the Note to persuade and deceive the Defendants into believing that the opposite occurred and that the Defendants were the borrower and not the lender. The following point is undisputed: The Defendants' loan of their credit to Plaintiff, when issued and paid from their deposit or credit account at Plaintiff, became money in the Federal Reserve System (subject to a reduction of up to ten percent for reserve requirements) as the newly issued credit was paid pursuant to written orders, including checks and wire transfers, to sellers of goods and services for the account of Defendants.

CONCLUSION

18. Based on the foregoing, Plaintiff is using the Defendant's Note for its own purposes, and it remains to be proven whether Plaintiff has incurred any financial loss or actual damages (I do not have sufficient information to form a conclusion on this point). In any case, the inclusion of the "lawful money" language in the repayment clause of the Note is confusing at best and in fact may be misleading in the context described above.

AFFIRMATION

19. I hereby affirm that I prepared and have read this Affidavit and that I believe the foregoing statements in this Affidavit to be true. I hereby further affirm that the basis of these beliefs is either my own direct knowledge of the legal principles and historical facts involved and with respect to which I hold myself out as an expert or statements made or documents provided to me by third parties whose veracity I reasonably assumed.

Further the Affiant sayeth naught.

At Chagrin Falls, Ohio

December 5, 2003

WALKER F. TODD (Ohio bar no. 0064539)
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NOTARY'S VERIFICATION

At Chagrin Falls, Ohio

December 5, 2003

On this day personally came before me the above-named Affiant, who proved his identity to me to my satisfaction, and he acknowledged his signature on this Affidavit in my presence and stated that he did so with full understanding that he was subject to the penalties of perjury.

Notary Public of the State of Ohio

Note: Emphasis added.
