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RECEIVED
OCT 22 2014
SC Court of Appeals

Erik T. Norton
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October 21, 2014

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

RE: First Citizens Bank and Trust Company, Inc. v. Clyde B. Livingston, et al.
Civil Action No. 2007-CP-38-00196 and 2007-CP-38-0201
Our File No. 00689/01777

Dear Ms. Kitchings:

We are in receipt of your letter dated October 15, 2014 requesting an update on the status of the transcripts in the above-referenced matter. We copied the Court and all parties on our correspondence dated July 30, 2014 wherein our office requested a copy of the transcripts from the court reporters, Maryann Nevers and Melissa Singletary. I have enclosed a copy of the aforementioned letters for the court's records.

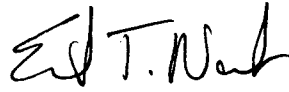
Our office contacted Ms. Nevers via email on September 17, 2014 to get a status of the transcript from the December 11, 2013 hearing. Ms. Nevers advised that she did not receive our request until August 19, 2014 due to an issue with the post office and that we should receive the transcript by October 18, 2014. We received a copy of that transcript yesterday. We have enclosed a copy of the transcript for the court's records.

Our office has made several attempts to contact Ms. Singletary via phone for a status of the transcript from the June 19, 2014 hearing. To date, we have received no response from her. Our office contacted Court Administration in an attempt to get a status. Court Administration advised that Ms. Singletary is still working on the transcript and that we should receive it soon.

The Honorable Jenny Abbott Kitchings
October 21, 2014
Page 2

Please let us know if you need any additional information.

Very truly yours,

A handwritten signature in black ink, appearing to read "Erik T. Norton". The signature is written in a cursive style with a large initial "E".

Erik T. Norton

ETN:tm6

Enclosures

cc: Andrew S. Radeker, Esquire
Desiree Allen, South Carolina Court Administration
Melissa Singletary

Nelson Mullins

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July 30, 2014

RECEIVED

OCT 22 2014

SC Court of Appeals

Melissa Singletary
2797 State Rd.
Summerville, SC 29483

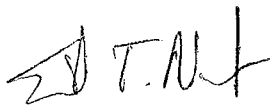
RE: First Citizens Bank and Trust Company, Inc. v. Clyde B. Livingston, et al.
Civil Action No. 2007-CP-38-00196 and 2007-CP-38-0201
Our File No. 00689/01777

Dear Ms. Singletary:

I represent the Plaintiff First Citizens Bank and Trust Company, Inc. in the above-captioned matter. First Citizens Bank and Trust Company, Inc. has filed a Notice of an Appeal of the Order Denying Motion for Reconsideration entered by the court on July 9, 2014. Pursuant to SCACR 207(a)(1), this letter is to request a copy of the hearing transcript. The hearing took place before the Honorable James B. Jackson, Jr., in Orangeburg County on June 19, 2014.

By copy of this letter to all counsel of record, the Office of Court Administration and the Clerk of the Court Carolina Court of Appeals, I am advising them of this request made pursuant to Rule 207(e), SCACR. With kind regards, I remain

Very truly yours,



Erik T. Norton

ETN:tm6

cc: Andrew S. Radeker, Esquire
Honorable Jenny Kitchings, South Carolina Court of Appeals
Desiree Allen, South Carolina Court Administration

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July 30, 2014

RECEIVED

OCT 22 2014

SC Court of Appeals

Maryann Nevers
PO Box 90202
Columbia, SC 29290

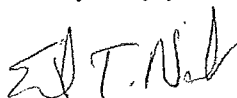
RE: First Citizens Bank and Trust Company, Inc. v. Clyde B. Livingston, et al.
Civil Action No. 2007-CP-38-00196 and 2007-CP-38-0201
Our File No. 00689/01777

Dear Ms. Nevers:

I represent the Plaintiff First Citizens Bank and Trust Company, Inc. in the above-captioned matter. First Citizens Bank and Trust Company, Inc. has filed a Notice of an Appeal of the Order Granting in Part and Denying in Part entered by the Court on April 17, 2014. Pursuant to SCACR 207(a)(1), this letter is to request a copy of the hearing transcript. The hearing took place before the Honorable James B. Jackson, Jr., in Orangeburg County on December 11, 2013.

By copy of this letter to all counsel of record, the Office of Court Administration and the Clerk of the Court Carolina Court of Appeals, I am advising them of this request made pursuant to Rule 207(e), SCACR. With kind regards, I remain

Very truly yours,



Erik T. Norton

ETN:tm6

cc: Andrew S. Radeker, Esquire
Honorable Jenny Kitchings, South Carolina Court of Appeals
Desiree Allen, South Carolina Court Administration

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<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVID.</u>
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No Exhibits Introduced.

TRANSCRIPT OF RECORD

1
2 (Whereupon, the proceeding was commenced at 1:03 p.m.)

3 THE COURT: And we got four matters to deal with ---

4 MR. NORTON: Yeah. They're ---

5 THE COURT: --- for this one?

6 MR. NORTON: They're really -- it's really two. It's
7 motion for summary judgment and motion to strike. The
8 arguments are essentially the same for both matters.

9 THE COURT: Okay.

10 MR. RADEKER: Right. And it basically could probably
11 just be heard as one hearing to avoid us having to repeat
12 ourselves on a ---

13 THE COURT: Well ---

14 MR. RADEKER: --- bunch of the same stuff.

15 MR. NORTON: I agree.

16 MR. RADEKER: So ---

17 THE COURT: That makes sense to me. All right. So
18 whose -- whose motions are they?

19 MR. NORTON: They're my motions, Your Honor.

20 THE COURT: All right. And I hadn't looked at the
21 number yet. Are these four different cases, or are they
22 just -- are they ---

23 MR. NORTON: It's two ---

24 MR. RADEKER: Two ---

25 MR. NORTON: --- cases.

1 MR. RADEKER: --- cases, four motions. But in each
2 case, there's a motion for summary judgment on the
3 counterclaims and a motion to strike the jury demand on the
4 counterclaims. And that's why there's so much similarity
5 in the issues.

6 THE COURT: Well, that's what -- it's -- and it's --
7 so it's over two different notes?

8 MR. NORTON: Yes, sir.

9 MR. RADEKER: Two notes, two mortgages, two pieces of
10 the land, so . . .

11 MR. NORTON: They just happened to go into default at
12 approximately the same time, is how I understand it.
13 They're brought as two separate actions ---

14 THE COURT: Well ---

15 MR. NORTON: --- because it ---

16 THE COURT: --- of course ---

17 MR. NORTON: --- was two separate pieces ---

18 THE COURT: --- Community ---

19 MR. RADEKER: Which is why ---

20 THE COURT: --- Resource and ---

21 MR. NORTON: --- of property.

22 MR. RADEKER: --- the numbers are on ---

23 THE COURT: --- First Citizens are the same people.

24 MR. RADEKER: So -- right.

25 MR. NORTON: That's correct.

1 THE COURT: So, I mean, I understood there. But ---

2 MR. RADEKER: Yeah.

3 THE COURT: All right. I'm ready whenever you are.

4 MR. NORTON: Thank you, Your Honor. And we'll --
5 we'll try -- try to be brief. The case has a little bit of
6 a tortured history. And I'll -- I'll lead off by saying
7 that I was substituted in fairly recently because the
8 Haynsworth firm, who had this from its inception in 2007,
9 run into a conflict problem. And so we substituted in to
10 address that conflict issue. And so ---

11 THE COURT: It took ---

12 MR. NORTON: --- the ---

13 THE COURT: --- them five years to figure out that
14 they had a conflict?

15 MR. NORTON: The conflict emerged after the fact.

16 THE COURT: I'm just kidding. I -- I'm not ---

17 MR. NORTON: Or the really slow ethics counsel.

18 THE COURT: I mean, I just -- I'm just kidding.

19 MR. NORTON: Sure, Your Honor. Thank you. The --
20 we're here -- these are foreclosure actions with
21 counterclaims. And we're here for -- with a motion for
22 summary judgment on each of them and -- as to the
23 counterclaims only. But your predecessor master-in-equity
24 previously severed this case so that only the circuit --
25 only the counterclaims are before the Circuit Court. The

1 foreclosure matters remain before the Master-in-Equity.

2 And so ---

3 THE COURT: Is that ---

4 MR. NORTON: --- we're here ---

5 THE COURT: --- was that the one that was -- that was

6 -- that it's come back on appeal -- come back from ---

7 MR. NORTON: Well, it was stayed pending appeal.

8 THE COURT: Yeah. All right.

9 MR. NORTON: It wasn't -- this was never up on appeal.

10 MR. RADEKER: No. This was -- this was never up on
11 appeal.

12 THE COURT: All right.

13 MR. RADEKER: I think you're ---

14 THE COURT: Well, there ---

15 MR. RADEKER: --- thinking of ---

16 THE COURT: --- was a ---

17 MR. RADEKER: --- another case that got ---

18 THE COURT: All right.

19 MR. RADEKER: --- appealed and got settled while it
20 was on appeal.

21 MR. NORTON: I think ---

22 THE COURT: Okay. Well, there -- there ---

23 MR. NORTON: --- Mr. ---

24 MR. RADEKER: It just ---

25 THE COURT: --- was one ---

1 MR. RADEKER: --- involves some of the same people,
2 but different ---

3 THE COURT: Well, there was ---

4 MR. RADEKER: --- land.

5 THE COURT: --- one with Mr. Livingston that when I
6 first started, I got an -- I got an opinion back from the
7 Court of Appeals that was sending that case. But that's a
8 different case than this one?

9 MR. NORTON: Suit with Wells Fargo?

10 THE COURT: I don't ---

11 MR. RADEKER: That -- that ---

12 THE COURT: --- remember.

13 MR. RADEKER: --- one -- that -- that -- that got --
14 because we settled that Wells Fargo v. Livingston case,
15 like settled the balance. I mean, so it's, like,
16 completely over. But that happened well before Your Honor
17 became Master-in-Equity. So you -- are you thinking of the
18 -- the *Riley v. Green* ---

19 THE COURT: No.

20 MR. RADEKER: --- quiet title ---

21 THE COURT: I -- I ---

22 MR. RADEKER: --- where it has Dennis ---

23 THE COURT: --- I tell you ---

24 MR. RADEKER: --- Catoe ---

25 THE COURT: --- what I'm ---

1 MR. RADEKER: --- on the other side?

2 THE COURT: --- thinking of. I'll tell you. It had
3 to do with the -- with Clyde's father's estate. That's
4 what -- I think that's the one it was. It was something
5 ---

6 MR. RADEKER: Oh, that ---

7 THE COURT: --- Burgdorf ---

8 MR. RADEKER: --- one is ---

9 THE COURT: --- decided.

10 MR. RADEKER: --- still -- that -- the -- the one with
11 him and his sister? That's ---

12 THE COURT: Yeah.

13 MR. RADEKER: --- that ---

14 THE COURT: Isn't that ---

15 MR. RADEKER: --- that's still ---

16 THE COURT: --- isn't that ---

17 MR. RADEKER: --- making ---

18 THE COURT: --- right, Renee?

19 MR. RADEKER: --- its way ---

20 THE COURT: Do you remember?

21 MR. RADEKER: --- through the appellate ---

22 DEPUTY CLERK OF COURT: Yeah.

23 MR. RADEKER: --- system.

24 DEPUTY CLERK OF COURT: I think that's the one that
25 they're talking about.

1 THE COURT: Yeah.

2 DEPUTY CLERK OF COURT: Yeah.

3 THE COURT: Yeah. Because I think it came back ---

4 DEPUTY CLERK OF COURT: The estate.

5 THE COURT: --- before me right when I -- from -- from
6 the Court of Appeals.

7 MR. RADEKER: That one is -- the procedural posture on
8 -- not -- not that it really has anything to do with these
9 cases, but the ---

10 THE COURT: No.

11 MR. RADEKER: --- procedural ---

12 THE COURT: I was just ---

13 MR. RADEKER: --- posture on -- on that one is that
14 we've got a pending petition for cert from the Court of
15 Appeals. So that's just hanging out.

16 THE COURT: Okay. That's what it is.

17 MR. RADEKER: Yeah.

18 THE COURT: Okay. Okay. All right. Again, I'm
19 confused. Because I forgot -- I knew -- I knew I'd got
20 some in with Clyde, and I just couldn't -- I -- I just want
21 to make sure it wasn't this. So ---

22 MR. RADEKER: Okay. Thank ---

23 THE COURT: But ---

24 MR. RADEKER: --- you, Your Honor. Yeah.

25 THE COURT: But now I remember that it's -- it has to

1 do with that estate. So it's completely different, so ---

2 MR. RADEKER: All right.

3 THE COURT: All right. Go ahead, Mr. Norton.

4 MR. NORTON: No problem, Your Honor. As I was saying,
5 what we're here on is summary judgment as to the
6 counterclaims. And to the extent necessary, we can talk
7 about whether the jury-trial request should be stricken and
8 sent back based on the procedural posture of the case.

9 In the borrower's deposition in this case, which I
10 didn't take but I've read, he really wasn't able to
11 identify anything that the bank allegedly did wrong. We're
12 here because legal arguments have been made with regard to
13 whether the bank should've used a lawyer for a closing.
14 That seems to be the gravamen of all the counterclaims in
15 the case in one way, shape, or form.

16 And I understand, from talking to Mr. Radeker just in
17 the hallway, that he might have a different view of that.
18 But I'll just let him tell you, instead of me trying to
19 guess.

20 So as -- the way I understood it coming into the
21 hearing today, really, the issues in all the counterclaims
22 was whether or not you had to have a lawyer present at
23 closing. It's undisputed in this particular matter that
24 all these loans were closed back in 2000, long before
25 *Matrix* and the rulings that said, you know, prospective

1 only as to the requirement that lawyers be present and etc.

2 And so it's our position -- and I'm glad to go into
3 that, but I have a feeling ---

4 THE COURT: It's ---

5 MR. NORTON: --- you're familiar ---

6 THE COURT: And again ---

7 MR. NORTON: --- with it.

8 THE COURT: --- it's been awhile since I've read
9 *Matrix*. But -- but you read it as being prospective?

10 MR. NORTON: Yes. In fact, in *Matrix 2*, the second
11 version of that, the actual language talked about it being
12 prospective only and applying only to loans closed prior to
13 the first *Matrix* decision issued on August 8th, 2011. So
14 -- because these were closed back in 2000, 11 ---

15 THE COURT: Okay.

16 MR. NORTON: --- years before there was any
17 requirement about having lawyers present and whatnot, we
18 believe that that really was the gravamen of the
19 counterclaims and, therefore, they should be dismissed.

20 It -- it -- as I said ---

21 THE COURT: What -- what ---

22 MR. NORTON: --- I ---

23 THE COURT: --- are the counterclaims for? What are
24 the actual causes of action?

25 MR. NORTON: The actual causes of action, although

1 some of them have been either dismissed previously or moved
2 over to ---

3 THE COURT: Well ---

4 MR. NORTON: --- defenses but ---

5 THE COURT: --- just tell me what the -- the existing
6 ones are.

7 MR. NORTON: Breach of contract, violation of the
8 attorney-preference statute ---

9 THE COURT: Wait a second. Breach of contract,
10 violation of attorney preference ---

11 MR. NORTON: --- UTPA, and libel.

12 THE COURT: Okay.

13 MR. NORTON: And that's what's pending in the -201
14 action, which has to do with, I think, the -- the Brookside
15 -- the residence.

16 MR. RADEKER: That's -196, just to ---

17 MR. NORTON: That's -196.

18 MR. RADEKER: --- be correct.

19 MR. NORTON: Sorry.

20 MR. RADEKER: Yeah.

21 MR. NORTON: I got the numbers wrong. But that's the
22 Brookside, which is the HELOC; it's the residence.

23 The second action, the -201, is the Gold Drive. And
24 it has somewhat fewer counterclaims. But it's basically
25 the same thing. It has a breach of contract and UTPA only.

1 It doesn't have the attorney ---

2 THE COURT: -196 ---

3 MR. NORTON: --- preference.

4 THE COURT: --- is the house he lives in?

5 MR. NORTON: Correct.

6 THE COURT: And what -- that's on which street?

7 MR. RADEKER: Brookside.

8 MR. NORTON: Brookside.

9 THE COURT: Brookside.

10 MR. NORTON: So that's our position, Your Honor. I --

11 I -- I don't know exactly what Mr. Radeker's position's
12 going to be ---

13 THE COURT: So you're ---

14 MR. NORTON: --- number one ---

15 THE COURT: --- simply saying they've -- they're --
16 that -- that you just had a deposition; he's stated no
17 facts that you think would uphold any of those
18 counterclaims ---

19 MR. NORTON: That's right. Because ---

20 THE COURT: --- other ---

21 MR. NORTON: --- I believe it was based on him not
22 having -- in fact, he testified that he couldn't think of
23 anything that the bank unfair or deceptive. He ---

24 THE COURT: Okay.

25 MR. NORTON: --- specifically said that, which is

1 included in the memo ---

2 THE COURT: All right.

3 MR. NORTON: --- that's been filed for ---

4 THE COURT: Okay.

5 MR. NORTON: --- a year or so.

6 THE COURT: And you think their argument is based
7 primarily on the fact there was no lawyer present at the
8 closing?

9 MR. NORTON: That's how I understand it, Your Honor.
10 So I'm ---

11 THE COURT: Okay.

12 MR. NORTON: --- I'm all a twitter to ---

13 THE COURT: Having ---

14 MR. NORTON: --- hear from ---

15 THE COURT: --- not been there.

16 MR. NORTON: I'm sorry?

17 THE COURT: Having not been there at the ---

18 MR. NORTON: That's what ---

19 THE COURT: --- taking of ---

20 MR. NORTON: --- I understand.

21 THE COURT: --- the deposition.

22 MR. NORTON: And I can't wait to hear from Mr. Radeker
23 as to what ---

24 THE COURT: Well, if I know Mr. Radeker, he'll come up
25 with something.

1 MR. NORTON: I feel confident.

2 THE COURT: All right.

3 MR. RADEKER: All right. Well, as far as what the
4 claims are that's pending, I basically agree with my
5 opposing counsel on that. I would note that we, you know,
6 definitely did plead and all the depositions that are in
7 the file show -- I know is already in the file a copy of
8 Sam Reid's deposition in which he testifies in it: "I
9 wasn't at this closing; that was just kind of the way
10 things were done with Orangeburg National Bank at that
11 time."

12 And Linda O'Dell's deposition is in the file. And
13 I've got a copy of Clyde Livingston's because I don't know
14 whether it's in the file. And I'll be ---

15 THE COURT: Okay.

16 MR. RADEKER: --- happy to hand that ---

17 THE COURT: Well, I see ---

18 MR. RADEKER: --- up just to make sure.

19 THE COURT: I see a couple of great big, fat files
20 here, and ---

21 MR. RADEKER: So ---

22 THE COURT: --- I'm not sure what all ---

23 MR. RADEKER: And it's ---

24 THE COURT: --- is in ---

25 MR. RADEKER: --- probably these.

1 THE COURT: --- them, so ---

2 MR. RADEKER: And I ---

3 THE COURT: Okay.

4 MR. RADEKER: --- don't know -- it's a ---

5 MR. NORTON: Your Honor, I -- and I -- I would just --
6 you know, I'm not sure exactly what's in the file. So I --
7 I would object to the extent that, you know, this doesn't
8 comply with Rule 56 obligation to come forward with
9 affidavits in a timely manner. I believe it's okay. But I
10 don't think he's going to assert anything affirmative, so I
11 think it's all right. But ---

12 MR. RADEKER: Well ---

13 MR. NORTON: --- you know ---

14 MR. RADEKER: --- I would say this: What -- what Rule
15 56 requires is that stuff be served two days in advance of
16 -- of the hearing. They've had a copy of the -- I mean,
17 they took ---

18 THE COURT: I mean, I ---

19 MR. RADEKER: --- this deposition.

20 THE COURT: --- I would ---

21 MR. RADEKER: They've had a copy of it forever.

22 THE COURT: I wouldn't ---

23 MR. RADEKER: They obviously do. They attach excerpts
24 of it to the motion.

25 MR. NORTON: I agree, Your Honor. I just ---

1 THE COURT: I'm not ---

2 MR. RADEKER: And so ---

3 THE COURT: --- going to ---

4 MR. NORTON: --- want to make ---

5 MR. RADEKER: Yeah.

6 THE COURT: No. It doesn't ---

7 MR. NORTON: --- sure I -- I ---

8 MR. RADEKER: Yeah.

9 MR. NORTON: --- I'm not sure of what ---

10 THE COURT: Far as I'm ---

11 MR. NORTON: --- it ---

12 THE COURT: --- concerned, it doesn't apply to.
13 depositions.

14 MR. RADEKER: Yeah. Yeah. There's ---

15 MR. NORTON: Okay.

16 MR. RADEKER: Yeah. And there's certainly no surprise
17 or anything ---

18 MR. NORTON: It's fine ---

19 MR. RADEKER: --- to them.

20 MR. NORTON: --- with me. I agree with that, Your
21 Honor.

22 MR. RADEKER: So -- all right. Basically, they say
23 that the *Matrix Financial* decision means that that throws
24 our violation of the attorney-preference claim out of the
25 water. It's violation of the attorney-preference claim.

1 And since the other allegations are incorporated then, it
2 incorporates that the loan was closed with no attorney at
3 all and that that's the unauthorized practice of law.

4 And the *Wachovia v. Coffey* case states that that's
5 inherently prejudicial conduct. And that was cited by the
6 Supreme Court in *Matrix*. And so one of the things that you
7 can allege and prove and obtain relief under for violation
8 of the attorney-preference statute is violation of the
9 attorney-preference statute, plus inducement alone by
10 unconscionable conduct.

11 There's two ways that we have that here. One is
12 there's no attorney at closing. And another one that's
13 kind of connected to that, and that's that it's pretty
14 clear from Mr. Livingston's deposition that although this
15 loan says on its face that it's a home equity line of
16 credit for \$57,000, that it was only made for a maximum of
17 40 to 45 thousand dollars -- Clyde could not remember the
18 exact figure at the deposition -- and that the reason for
19 that is because it was not included in the documents or
20 anything at all. There was basically, like, a little side
21 understanding that they had that once the house was
22 painted, that the rest of the line of credit would become
23 available.

24 This was long before any default on this home equity
25 line of credit. Clyde paints the house. They don't extend

1 him the rest of the line of credit. And they tell him no;
2 this was done at \$45,000, pound of sand.

3 So they're in violation of -- of their own contract,
4 definitely, when they say, you know, "Hey, long as you
5 maintain your end of the agreement, you can borrow up to
6 \$57,000 on this line of credit." They didn't let him do
7 that.

8 Also, it's unconscionable because the terms of the
9 loan are supposed to be for \$57,000. But they've just
10 arbitrarily decided no, we're not going to extend you more
11 credit than that. Further, I mean, I think it's, you know,
12 inducement by unconscionable conduct anyway when you've got
13 no lawyer there at closing.

14 Now, how does that tie into the *Matrix* case, from
15 which the plaintiff argues? All -- it really doesn't. All
16 that *Matrix Financial* really says is that if you had a
17 mortgage loan where the mortgage was recorded after August
18 8th, 2011, and that closing was not supervised by an
19 attorney, just for that reason alone, it's not enforceable.

20 Before that, just for that reason alone doesn't make
21 it unenforceable. And that's all it says. It doesn't
22 change the -- any substantive law about what's actionable
23 under the attorney-preference statute in any way.

24 So we've talked about the breach of contract. And
25 we've talked about violation of the attorney-preference

1 statute.

2 And they say we -- in their written motion, they say:
3 Hey, we complied with the attorney preference because we
4 gave Mr. Livingston a form that he signed. And he did sign
5 the form. But certainly, a scintilla -- and I think more
6 -- evidence from his deposition and affidavits are in the
7 file indicate that it was just one of the many forms that
8 was provided to him at closing, not three days before it,
9 as was required by the statute.

10 And there's already a case, *King v. American* -- I
11 think it's *King v. American General Finance*. But in any
12 event, one of the parties' name is King and the other one
13 has American General in it.

14 And what -- what it says is that to provide the party
15 with the form to select their attorney at closing can never
16 be compliance with the attorney-preference statute. And
17 that makes sense. I mean, you sit down at closing and
18 they're, like, "Here you go. Select this guy. He's
19 sitting right across from your right now. Just sign this."

20 Because if you look at Clyde's affidavit, he says:
21 "Orangeburg National Bank never provided me with any form
22 to sign in advance of the closing, selecting any attorney
23 to represent me or inform me of my right to be represented
24 in the closing by an attorney of my own choosing."

25 And if you look in the deposition, he's shown two

1 pieces of paper. One of them has the typewritten --
2 obvious inference is pretypewritten -- date of November 6th
3 on it. And he's shown another one that's November 9th, the
4 date of the -- the closing.

5 And he says: These documents look like they were
6 signed at the same time because my signature is so similar
7 on both of them and didn't appear to have changed jibe.
8 And that would be consistent with what's in his affidavit:
9 that basically, all the documents were signed at the same
10 time.

11 There's no question that it was no lawyer there. And
12 there's no question that that was generally Orangeburg
13 National Bank's practice when they did refinance or home
14 equity line-of-credit loans at ---

15 THE COURT: Let me ---

16 MR. RADEKER: --- that time.

17 THE COURT: --- ask you this. You -- you said you all
18 ---

19 MR. RADEKER: So ---

20 THE COURT: --- took Sam Reid's deposition.

21 MR. RADEKER: We did. So ---

22 THE COURT: Why -- why'd you take Sam's deposition if
23 no lawyer was there?

24 MR. RADEKER: So -- to establish that fact just so
25 that it was clear to everyone that he wasn't there; he

1 wasn't saying he was there. You know ---

2 THE COURT: Okay.

3 MR. RADEKER: --- they were not ---

4 THE COURT: All right. Well, that just seems ---

5 MR. RADEKER: --- he -- when we made that allegation,
6 they denied that in the pleadings that it wasn't closed by
7 an attorney, which is what caused us to have to ---

8 THE COURT: Okay.

9 MR. RADEKER: --- go establish ---

10 THE COURT: Okay.

11 MR. RADEKER: --- that ---

12 THE COURT: Okay.

13 MR. RADEKER: --- you know, yeah, it wasn't closed by
14 an attorney and he said, like, "Yeah. My name is
15 referenced in some of these documents, but I wasn't there."

16 And it's just -- at the time that was just normally
17 the way it was done. We haven't sued Mr. Reid and don't
18 plan to. But, you know, I mean, he is a fact witness to
19 this case to say: I didn't ---

20 THE COURT: Well ---

21 MR. RADEKER: --- supervise this.

22 THE COURT: --- I -- I just wondered. Because ---

23 MR. RADEKER: Yeah.

24 THE COURT: --- again, I -- it didn't make much sense
25 why you would depose somebody who wasn't there.

1 MR. RADEKER: Right. To show he wasn't there.

2 THE COURT: Yeah.

3 MR. RADEKER: That's why that's ---

4 THE COURT: All right.

5 MR. RADEKER: --- such a short ---

6 THE COURT: All right.

7 MR. RADEKER: --- deposition. So ---

8 THE COURT: All right.

9 MR. RADEKER: So that's what's at issue there, is, you
10 know, the Unfair Trade Practices Act claim. I mean, one,
11 you know, they tell a guy in the documents for one, you're
12 \$57,000. And, you know, and they said -- later say: No.
13 We're just going put this arbitrary limit on that, even
14 though you've done the thing that we said you had to do to
15 get loaned more money.

16 And that was their regular practice, to close loans
17 without an attorney. And it certainly can't be -- even if
18 this thing were signed on November 6th, it certainly can't
19 be compliance with the attorney-preference statute to
20 provide the borrower with the form and which they sign,
21 saying: I want so-and-so to represent me in the closing
22 and then just say: No. Come on down to the bank; we're
23 just going do this with no lawyer there and just ignore,
24 you know, the preference information that the borrower has
25 given.

1 And so we would note there's a genuine issue of
2 material fact on every one of the claims. You know, they
3 say in their motion that -- you know, they say pleadings
4 are absolutely privileged. I guess -- and they argued this
5 before. There were motions for summary judgment, you know,
6 directed at these same claims, some of which were granted
7 as to some claims that are not at issue here in front of
8 Judge Goodstein.

9 And they said: Well, pleadings are absolutely
10 privileged. Well, our allegations of libel aren't based on
11 the fact that they brought the lawsuit. They're based on
12 the credit reporting that they made to credit-reporting
13 agencies.

14 And let me say this too: They say in their written
15 motion -- and then, they cite a case, probably correctly,
16 based on what I've read from. It's a old case, not the
17 easiest to interpret: *Parks v. Lyons*. And they say *Parks*
18 *v. Lyons* says: If you're in breach first, you can't
19 complain about the other party's breach later. Well, yeah.
20 You can't.

21 You know what? Who was in breach first was Orangeburg
22 National Bank. They can't complain about Mr. Livingston's
23 later breach. They can't go say: Hey, you're not in
24 compliance with this agreement and go report him to credit-
25 reporting agencies as being delinquent on it.

1 They didn't fulfill their end of the bargain.

2 THE COURT: Yeah.

3 MR. RADEKER: They breached first.

4 On what we've been kind of calling the -201 case, or
5 the -201 action, because of the numbers at the end of it,
6 they say in their motion: He hasn't identified one, you
7 know, incorrect representation as to the loan that they --
8 that we've ever made. Well, sure we have. Let's look at
9 his -- look at his affidavit and look at his deposition.

10 In his affidavit it says: Hey, attached is a copy of
11 a notice of past-due payment I got from what was at that
12 time Community Resource Bank, now merged into First
13 Citizens plan. And it says the total amount that he owes
14 is \$2,860.86, not the money that they claim that he's owed
15 that's involved in the case. So there you go. There is
16 the misrepresentation.

17 And they keep saying, like, Hey, if you pay this, you
18 know, we'll -- you know, you're good with us. But -- and
19 then they maintain this action, saying, No. You owe us a
20 whole lot more money and now you got to pay that.

21 And so kind of in a nutshell, I would say that's the
22 -- the basis of our opposition here. On their motion to --
23 to strike the jury demand and return the case to the jury
24 docket, I guess they hadn't really argued that yet. And
25 I'm happy to let ---

1 MR. NORTON: Yeah.

2 MR. RADEKER: --- you know, Mr. Norton argue it before
3 I respond to what he says. I think that's probably only
4 fair for him to get the first word on his motion. So --
5 but that's ---

6 THE COURT: Okay.

7 MR. RADEKER: --- basically what I've got on the
8 motion for summary judgment.

9 THE COURT: Okay.

10 MR. NORTON: Thank you, Your Honor. If it -- if it
11 does please you, what I was hoping to do is to argue the
12 summary judgment first and then deal with ---

13 THE COURT: And that's fine.

14 MR. NORTON: --- this motion to strike ---

15 THE COURT: That's fine.

16 MR. NORTON: --- just to ---

17 THE COURT: That's fine.

18 MR. NORTON: --- try to not get it all ---

19 THE COURT: All right. So you got anything you want
20 to respond to his ---

21 MR. NORTON: Just ---

22 THE COURT: --- his ---

23 MR. NORTON: --- just very briefly. First of all,
24 that was all very enlightening. It's -- it's interesting
25 how things morph. And it -- it -- it -- it's a little bit

1 different case than I thought it was, certainly 72 hours
2 ago.

3 But one -- a couple things I will say: First of all,
4 on the -- I'll -- I'll go backwards a little bit. On the
5 libel, credit reporting wouldn't matter, because credit-
6 reporting claims are preempted by the FCRA. And in order
7 to survive summary judgment for a credit-reporting claim,
8 you have to show that you filed a complaint. You have to
9 come forward with affirmative evidence that you filed a
10 complaint with a credit-reporting agency.

11 And there is plenty of case law on that. I'll be glad
12 to provide that to Your Honor. I don't have it with me,
13 because I didn't know it was at issue.

14 But that is something that we've dealt with in other
15 cases before. And it's pretty well established. So I
16 don't think a credit-reporting claim, you know, survives
17 summary judgment here.

18 Plus, there's no evidence that his credit report ever
19 even went down or up. I'm not aware of any evidence in the
20 record on -- on credit reporting. But certainly, I'm not
21 aware of any evidence that he filed a complaint with the
22 credit-reporting agency and gave the bank a chance to
23 correct, as is required by the FCRA and which preempts
24 common law claims.

25 The second thing I would say as to the UTPA is that,

1 you know, with regard to the HELOC, clearly, it -- this is
2 a contract between two parties. Whether they gave him the
3 amount of money or not on the side deal that wasn't in
4 writing anywhere about whether he painted his house, that's
5 pretty clearly between two parties. And it is -- under the
6 UTPA, you've got to show some sort of capability of
7 repetition. Under *Jefferies v. Phillips*, you got to have
8 something other than the parties involved.

9 As to the bank's practices, as to, I guess, the second
10 piece of that as to whether as -- again, you know, what we
11 have in the record before Your Honor is a -- is a signed
12 document and nothing more than conclusory statement that --
13 of the affiant, the party in this case, that contradicts
14 his deposition testimony and says he doesn't remember. And
15 again, I'm not trying not to get too much in the weeds
16 here.

17 But, I mean, he's got an affidavit that says one
18 thing. And his deposition says, Well, they look like
19 they're the same signature, but I don't really remember.
20 That's a lot different than saying I remember being at
21 closing.

22 And I don't think that that's enough to survive
23 summary judgment when the person bringing a claim -- again,
24 as a defense it might be different. But as an affirmative
25 claim against somebody, if you aren't even sure, it's like

1 saying, I'm not sure the light was red, but I think it was.
2 It doesn't get you past summary judgment, in my view.

3 The breach-of-contract claim as to whether money was
4 disbursed or not disbursed, I -- again, I'll stand to be
5 corrected if Mr. Radeker can point it to me. But I'm not
6 aware of anything in the record that shows an actual
7 request by the borrower to get this money. I'm aware of
8 statements that, Hey, I thought it was going to be this and
9 it was that. And there was some back and forth.

10 I'm aware of there being some issues about whether he
11 was or was not in default at a particular time. But I'm
12 not aware of any actual request where he said, in writing
13 or otherwise, Hey, please disburse the remainder of that
14 money. Now, it may have happened after the fact, after he
15 was already in default and he was trying to use money that
16 he borrowed to pay back other money that he borrowed. But
17 I'm not aware of any legitimate request to -- to do that --
18 or, in fact, any.

19 So those -- those causes of action are there. And as
20 to the attorney preference, I mean, I think the disclosure
21 is provided. Again, whether or not he did or not, he's got
22 to do more ---

23 THE COURT: What ---

24 MR. NORTON: --- than just ---

25 THE COURT: --- what did ---

1 MR. NORTON: --- say ---

2 THE COURT: --- what did ---

3 MR. NORTON: --- I think.

4 THE COURT: --- the attorney preference -- from
5 hearing from Mr. Radeker, there were two of them. What do
6 they say? Who -- who -- what lawyer did he -- did he
7 prefer?

8 MR. NORTON: Sure.

9 THE COURT: And ---

10 MR. NORTON: It's attached ---

11 MR. RADEKER: It ---

12 THE COURT: --- and ---

13 MR. NORTON: --- as ---

14 MR. RADEKER: There's only one. I'm ---

15 MR. NORTON: --- this ---

16 MR. RADEKER: --- sorry if ---

17 MR. NORTON: There's only ---

18 MR. RADEKER: --- that was ---

19 MR. NORTON: --- one.

20 MR. RADEKER: --- not clear. He's ---

21 THE COURT: You said ---

22 MR. RADEKER: --- we were ---

23 THE COURT: --- there were ---

24 MR. RADEKER: --- talking about ---

25 THE COURT: --- two dates.

1 MR. RADEKER: --- another document, not an attorney-
2 preference-disclosure ---

3 THE COURT: Oh, okay.

4 MR. RADEKER: --- form ---

5 THE COURT: Okay. I'm sorry.

6 MR. RADEKER: --- that was ---

7 THE COURT: Okay.

8 MR. RADEKER: --- dated ---

9 THE COURT: All right. I ---

10 MR. RADEKER: --- November 9th ---

11 THE COURT: --- I understood ---

12 MR. RADEKER: --- as opposed ---

13 THE COURT: --- you to ---

14 MR. RADEKER: --- to the 6th.

15 THE COURT: --- say two.

16 MR. RADEKER: So ---

17 THE COURT: Okay.

18 MR. NORTON: Right. I mean ---

19 MR. RADEKER: Yeah.

20 MR. NORTON: --- the document in the record, Your
21 Honor, is -- it -- it -- it identifies Horger Barnwell &
22 Reid as -- as attorney that he preferred.

23 THE COURT: But -- but they weren't there?

24 MR. NORTON: They were ---

25 THE COURT: Because it ---

1 MR. NORTON: --- not there.

2 THE COURT: --- that's conceded?

3 MR. NORTON: --- I -- and for ---

4 THE COURT: Is that correct?

5 MR. NORTON: For purposes of this motion, unless
6 something -- you know, something changes dramatically, they
7 weren't there. That's why Mr. ---

8 THE COURT: All right. So ---

9 MR. NORTON: --- Reid's deposition ---

10 THE COURT: --- if Sam Reid says ---

11 MR. NORTON: --- was taken.

12 THE COURT: --- he wasn't there, I can promise you, he
13 wasn't there.

14 MR. NORTON: He ---

15 MR. RADEKER: Right.

16 MR. NORTON: --- he wasn't there. Right.

17 THE COURT: But -- so what -- what effect does that
18 have, in your opinion? I mean, if you -- you know, you --
19 you -- you issue a preference but they're not there. I
20 mean, is that a violation?

21 MR. NORTON: I think ---

22 THE COURT: I mean ---

23 MR. NORTON: --- that that's ---

24 THE COURT: --- I'm not ---

25 MR. NORTON: --- an issue ---

1 THE COURT: --- real familiar with that statute. But
2 -- and I'll look at it.

3 MR. NORTON: I -- in -- in my view, that's an issue
4 between the borrower and his lawyer. You know, in -- in
5 the old regime, when this was done more commonly without
6 having lawyers present, you know, I think that -- again,
7 remember, this is 2000 that we're talking about.

8 THE COURT: Oh, I understand that.

9 MR. NORTON: And so I think that under the attorney-
10 preference statute, that essentially what occurs in that
11 case is, you know, a borrower indicates his preference for
12 an attorney; he has the right to have that attorney there.
13 But if, at the end of the day, he decides he doesn't want
14 to pay that attorney or the attorney just doesn't show and
15 he elects to go forward, then that's ---

16 THE COURT: He's ---

17 MR. NORTON: --- between those two.

18 THE COURT: He's waived it.

19 MR. NORTON: It's what I would say.

20 THE COURT: What -- what's -- what's the statute of
21 the attorney preference with the number? Do you -- if
22 y'all ---

23 MR. NORTON: Sure.

24 THE COURT: --- know it.

25 MR. NORTON: It's ---

1 MR. RADEKER: Oh. It's -- I -- I think I know them
2 off the top of my head. 37-10-102 is the one that spells
3 out what the requirements are. 37-10-105 is the one that
4 spells out what the remedies are.

5 MR. NORTON: That -- I agree ---

6 MR. RADEKER: So ---

7 MR. NORTON: --- with that.

8 MR. RADEKER: Yeah.

9 THE COURT: Okay.

10 MR. NORTON: It's -- that's right.

11 THE COURT: I -- I just -- that -- that ---

12 MR. RADEKER: We had a ---

13 THE COURT: --- helps me from ---

14 MR. RADEKER: --- trial ---

15 THE COURT: --- having to ---

16 MR. RADEKER: --- about that. So I'll just ---

17 THE COURT: Yeah.

18 MR. RADEKER: --- probably know ---

19 THE COURT: Right.

20 MR. RADEKER: --- it forever, you know.

21 THE COURT: That -- that just helps me -- helps me
22 from not having to -- to hunt ---

23 MR. RADEKER: Right.

24 THE COURT: --- the one ---

25 MR. NORTON: Absolutely.

1 THE COURT: --- because I need to look at that.

2 MR. NORTON: Absolutely. And ---

3 THE COURT: Okay.

4 MR. NORTON: --- and, Your -- Your Honor, I think --
5 you know, I -- I -- I think the real issue here -- because
6 we're on summary judgment, and -- and -- and, you know, I
7 acknowledge it's -- it's a high burden that we have to meet
8 in these ever-shifting sands of what's a fact and what's
9 not a fact. And I think that -- my position on this would
10 be that the libel art claim should certainly be dismissed.
11 I -- I just don't see that it has any merit at all. It --
12 it's --- as a matter of law, should be dismissed, based on
13 the FCRA and on the basis of -- of absolute privilege on
14 pleadings.

15 I really do believe the UTPA claim should be dismissed
16 as well, because there's really no evidence here of
17 anything outside the very convoluted dealings of this
18 borrower and his lenders. And I just don't think that the
19 UTPA gets into situations -- gets into a situation where --
20 or it's not intended to get into situations where you have
21 side deals with borrowers and all kinds of that thing.
22 It's really meant to deal with things that are more
23 generalized than those particular issues.

24 And I think, finally, it -- you know, as to the breach
25 of contract on the attorney preference, he just really

1 hasn't met his burden. I mean, this case is from 2007.
2 And we don't have -- you know, we're -- we're sitting here
3 talking in generalities and "I might remember" and "I
4 could've remembered" and "I don't think it is but my
5 signature looks kind of the same."

6 I just don't think it's enough to get you before a
7 jury trial -- or get you before a jury on a trial. And I
8 don't think it's enough to get you past summary judgment.

9 THE COURT: Okay.

10 MR. RADEKER: If I could just speak to a couple of new
11 issues that kind of got raised in the reply: One is that
12 I'm looking at this; I don't see what's contradictory
13 between the two affidavits that Clyde gave in the case and
14 in the deposition. I just -- I don't ---

15 THE COURT: Well ---

16 MR. RADEKER: --- see it.

17 THE COURT: --- I -- I agree --- I agreed that ---

18 MR. RADEKER: Yeah.

19 THE COURT: --- it was some.

20 MR. RADEKER: You know, as far as the preemption in
21 the Fair Credit Reporting Act, as you -- I didn't come
22 prepared to argue that because that's not in their written
23 motion. And so that would exceed the scope of Rule 7(b)
24 for them to argue that as a basis for summary judgment
25 today. I wasn't put on notice that they were seeking

1 summary judgment on that basis.

2 And I understand Mr. Norton didn't write the motion
3 and they were done by predecessor counsels. And I'm not,
4 like, angry with him about it. I'm just saying: I don't
5 think that's a proper issue for consideration on the
6 posture of what's brought us here.

7 THE COURT: Well, let me -- let me ---

8 MR. RADEKER: So ---

9 THE COURT: But let me ---

10 MR. RADEKER: Yeah.

11 THE COURT: --- ask you, just in terms of the libel, I
12 mean, what -- what -- what do you claim is the libel that
13 ---

14 MR. RADEKER: It's -- it's the statements to ---

15 THE COURT: Credit reporting?

16 MR. RADEKER: --- to credit-reporting agencies. You
17 know ---

18 THE COURT: Well ---

19 MR. RADEKER: --- we're not ---

20 THE COURT: --- well ---

21 MR. RADEKER: --- saying, you know ---

22 THE COURT: --- did they ---

23 MR. RADEKER: --- you have ---

24 THE COURT: --- report ---

25 MR. RADEKER: --- libel that we sued us.

1 THE COURT: What did they report that was wrong or ---

2 MR. RADEKER: So ---

3 THE COURT: --- or ---

4 MR. RADEKER: So they reported that he was ---

5 THE COURT: --- libelous?

6 MR. RADEKER: --- you know, delinquent and then in
7 foreclosure and the inference is that, you know, he's in
8 breach of the contract. But they can't complain about that
9 breach.

10 THE COURT: Because ---

11 MR. RADEKER: They breached first, you know.

12 THE COURT: And their breach was not loaning him up to

13 ---

14 MR. RADEKER: Up to ---

15 THE COURT: --- \$57,000?

16 MR. RADEKER: --- \$57,000. And ---

17 THE COURT: That's your ---

18 MR. RADEKER: --- I'll -- I'll ---

19 THE COURT: --- argument?

20 MR. RADEKER: --- point this too: You know, he says
21 there's no evidence of any request in writing or anything.
22 I'm not really sure that there would have to be. But on
23 page 64 of his deposition, Clyde says: "Anyway, when I got
24 the house painted and went back" -- the clear implication
25 to go back to the bank. And he explains that later on in a

1 separate answer.

2 So that's obviously where he went back to and said
3 something about it. (As read): "I was told that, you
4 know, 'Well, the line of credit was done for \$45,000.' I
5 believe it was somewhere in that neighborhood. And that's
6 what it was. And there wasn't any extra, you know, that
7 could be borrowed."

8 So he doesn't have to submit a written request. I
9 mean, that's an anticipatory repudiation right there to
10 say: We -- we're not going to loan you more money than
11 this.

12 MR. NORTON: When ---

13 MR. RADEKER: You know ---

14 MR. NORTON: --- when -- when ---

15 MR. RADEKER: Yeah.

16 THE COURT: And when -- when was that?

17 MR. RADEKER: So -- it's -- the implication is -- is
18 shortly after the closing. Now, the date is not given.

19 It's a ---

20 MR. NORTON: Like in ---

21 MR. RADEKER: --- when ---

22 MR. NORTON: Like in ---

23 MR. RADEKER: --- the ---

24 MR. NORTON: --- 2000?

25 MR. RADEKER: So ---

1 MR. NORTON: You mean like 11 years ago?

2 MR. RADEKER: I'm not sure who I'm supposed to be
3 talking to.

4 MR. NORTON: I mean ---

5 MR. RADEKER: But -- but ---

6 THE COURT: Right.

7 MR. RADEKER: --- but in ---

8 THE COURT: Again -- and I agree ---

9 MR. RADEKER: --- any event ---

10 THE COURT: --- you don't ---

11 MR. RADEKER: --- yeah.

12 THE COURT: --- get to ask ---

13 MR. RADEKER: And that would've ---

14 THE COURT: --- him questions.

15 MR. RADEKER: --- been ---

16 MR. NORTON: I -- I ---

17 MR. RADEKER: --- shortly after ---

18 MR. NORTON: I'm just ---

19 THE COURT: I mean ---

20 MR. RADEKER: If they're arguing a -- a ---

21 THE COURT: Whatever it says ---

22 MR. RADEKER: --- a ---

23 THE COURT: --- in the deposition -- and I'm looking
24 at page 64, and it doesn't give a date.

25 MR. RADEKER: No. It doesn't give a -- it ---

1 THE COURT: I mean, at ---

2 MR. RADEKER: --- just doesn't ---

3 THE COURT: --- least in ---

4 MR. RADEKER: --- say.

5 THE COURT: --- that little section ---

6 MR. RADEKER: Yeah.

7 THE COURT: --- that he's quoting doesn't have a date
8 on it.

9 MR. RADEKER: Right. It's just ---

10 THE COURT: But -- but I ---

11 MR. RADEKER: It wasn't asked ---

12 MR. NORTON: We ---

13 THE COURT: --- but it would ---

14 MR. RADEKER: --- what day ---

15 THE COURT: --- would implies to me ---

16 MR. RADEKER: --- was it.

17 THE COURT: --- that it was right after he painted the
18 house. And I don't know when the -- y'all may know when
19 that was. I don't.

20 MR. NORTON: Yeah. Your Honor, I think the pretty
21 clear implication is it's right after the loan was closed
22 in 2000. So to the extent that that is something that is
23 being injected into the case now, I think, certainly, the
24 statute of limitations would've long run on any claim about
25 whether that money should've been disbursed in 2000 or

1 shortly thereafter. So I don't know why we'd be arguing
2 about that.

3 THE COURT: Well ---

4 MR. RADEKER: Two points about that: One ---

5 THE COURT: Well -- well, you got to ---

6 MR. RADEKER: --- not a basis ---

7 THE COURT: --- raise ---

8 MR. RADEKER: --- in their motion.

9 THE COURT: Well ---

10 MR. RADEKER: Second ---

11 THE COURT: --- you got to raise it.

12 MR. RADEKER: It -- right. Exactly.

13 And the second is for violation of the attorney-
14 preference statute, plus inducement by unconscionable
15 conduct, it's -- the statute of limitations is much longer.
16 It's, you know, got to be brought before the maturity date
17 of the loan. So ---

18 MR. NORTON: You know, Your Honor ---

19 MR. RADEKER: Yeah.

20 MR. NORTON: --- I think, based on this and based on
21 the information I'm hearing, you know, what I think would
22 be wise to do is to allow us to either rebrief these or I
23 can refile motions or whatever has -- because it's obvious
24 that there are issues in the case that I wasn't aware of.
25 And so rather than ask Your Honor maybe to argue on an

1 incomplete record or have some procedural issues, I think
2 it might be better, you know, based on what I now
3 understand the arguments are to -- to let us go ahead -- I
4 think Mr. Radeker makes a fair point. I mean, we didn't
5 raise the FCRA stuff because I didn't know credit reporting
6 was going to be what we're talking about. I was going on
7 what we were -- there. So I'm happy to do that if you
8 think that that makes sense, Your Honor, at -- at -- rather
9 than have to ---

10 THE COURT: Well, all -- all I want ---

11 MR. NORTON: Yeah.

12 THE COURT: --- to do is I want to get y'all in the
13 position where you're going to try your case in front of
14 somebody, the ---

15 MR. NORTON: Right.

16 THE COURT: --- a judge or a jury or a master or
17 somebody. That -- the -- this stuff is going -- is --
18 you're on track for a jury trial; is that correct?

19 MR. NORTON: Right. And -- and so maybe it's best ---

20 THE COURT: Right.

21 MR. NORTON: --- to move and talk about the motion to
22 ---

23 THE COURT: I mean ---

24 MR. NORTON: --- strike.

25 THE COURT: --- is that -- and y'all are going to --

1 going to insist on -- and -- and I don't -- and I -- that
2 sounds like I'm ---

3 MR. RADEKER: Saying we ---

4 THE COURT: --- making light ---

5 MR. RADEKER: --- shouldn't it or ---

6 THE COURT: --- of that. But ---

7 MR. RADEKER: Yeah. I know ---

8 THE COURT: --- but you -- you want ---

9 MR. RADEKER: --- you're not.

10 THE COURT: --- your jury trial on those issues;
11 you're not willing to ---

12 MR. RADEKER: Right.

13 THE COURT: --- to ---

14 MR. RADEKER: And I'd love it if masters-in-equity
15 could conduct jury trials because you'd probably be the
16 perfect judge in this county to do it, but that's not the
17 law. So ---

18 THE COURT: Well ---

19 MR. RADEKER: --- we can't have ---

20 THE COURT: Well -- well, and I don't ---

21 MR. RADEKER: --- we can't do both. So ---

22 THE COURT: Well, I -- and frankly, I don't want to do
23 both. I like being -- I like being the judge and the jury.

24 MR. RADEKER: So ---

25 THE COURT: But my point -- my point was, Mr. Radeker,

1 it'd be a lot easier if we could just try all this in front
2 of me and I could make some decisions, you know, in a
3 sense.

4 MR. RADEKER: So ---

5 THE COURT: But my point was, Mr. Radeker ---

6 MR. RADEKER: Uh-huh.

7 THE COURT: --- it's a lot easier to try all this in
8 front of me and I could make some decisions, you know, in
9 sense.

10 MR. RADEKER: And in any event, I don't have ---

11 THE COURT: But -- but you ---

12 MR. RADEKER: --- any authority ---

13 THE COURT: --- but I'm not ---

14 MR. RADEKER: --- to waive it.

15 THE COURT: --- asking you waive your rights.

16 MR. RADEKER: So ---

17 THE COURT: I mean, I don't ---

18 MR. RADEKER: Yeah.

19 THE COURT: --- don't understand that.

20 MR. RADEKER: Yeah.

21 THE COURT: You're entitled to -- you're entitled to a
22 jury trial on those matters. So ---

23 MR. NORTON: Well, Your Honor, I don't know if I agree
24 with that. I think that's the point of our motion to
25 strike. I'm not sure he's entitled to a jury trial on --

1 on all these matters. And ---

2 THE COURT: Well, somebody's made that decision
3 already, hadn't they?

4 MR. NORTON: Well, I don't -- I don't -- I don't think
5 so. I don't think anybody's ruled on a motion to strike.
6 There was a ruling, based on the summary judgment, to sever
7 the claims. And then subsequent to that, there was a
8 motion to strike filed.

9 And I think that, you know, there is some authority
10 that would be informative to the Court about some of these
11 claims, particularly the attorney-preference issue, which
12 seems to be the gravamen, really, of what we're fighting
13 about. It certainly seems to be the most we've talked
14 about.

15 There is case law on point in the *Wells Fargo v. Smith*
16 case in which the Court finds that attorney-preference
17 violations don't get a jury trial. It -- the -- the -- the
18 language is very clear. And ---

19 THE COURT: Well ---

20 MR. NORTON: --- it's discussed ---

21 THE COURT: --- but your ---

22 MR. NORTON: --- in ---

23 THE COURT: --- motion to -- motion to strike, I've
24 never quite figured out what that is. Well ---

25 MR. NORTON: It's -- we're ---

1 THE COURT: For my practice, I mean, what are you
2 trying to strike?

3 MR. NORTON: The jury demand. They've demanded a jury
4 trial, and we are seeking ---

5 THE COURT: Oh.

6 MR. NORTON: --- to strike it.

7 THE COURT: I mean, the -- there's -- there's case law
8 on -- and -- you know, and I forget the language. But
9 there's case law on what's -- what you get a jury trial
10 for, equitable and nonequitable, and all that kind of
11 stuff. And I'd -- then I'd have to look at that case
12 again. I mean ---

13 MR. NORTON: Yeah.

14 THE COURT: --- those are ---

15 MR. NORTON: Yeah. Sure. It ---

16 THE COURT: --- the issues. And whether it's a motion
17 to strike is proper not, I don't know.

18 MR. NORTON: Well ---

19 THE COURT: But I ---

20 MR. NORTON: --- and I've just -- if you want to
21 -- if I can refer you to the *Wells Fargo v. Smith* case, 398
22 S.C. 487. Actually, I have a copy of it if you'd like it.

23 THE COURT: That'd be great.

24 MR. NORTON: With your permission?

25 THE COURT: Sure. Thank you.

1 MR. NORTON: I'm sure you have a copy, but I'll be
2 glad to ---

3 MR. RADEKER: Yeah. I've read that. So ---

4 MR. NORTON: I -- I felt confident.

5 MR. RADEKER: Yeah.

6 MR. NORTON: If you -- if -- if you look here, Your
7 Honor, what Mr. Radeker's really talked about is two
8 things. He's talked about the attorney-preference statute,
9 and he's talked about unconscionability as a means for
10 relief under a variety of theories. And if you look at the
11 *Wells Fargo v. Smith* case, it finds that both
12 unconscionability theories and attorney preference are
13 permissive claims that should be referred to the master;
14 that there is no right to a jury trial.

15 It -- I mean, it's very specific as to the attorney-
16 preference statute because violation of the attorney-
17 preference statute would not affect the enforceability of
18 the note and mortgage. It's very straightforward.

19 THE COURT: Well, I'm -- all right. I'll look at all
20 that. But ---

21 MR. NORTON: Okay.

22 THE COURT: --- but let me -- in -- in -- in terms of
23 his proposal to rebrief or reargue or whatever, I mean,
24 what -- what are your thoughts on that? I mean, it -- are
25 ---

1 MR. RADEKER: I mean, I think they could probably make
2 a summary judgment motion on a different basis anyway, even
3 if the Court weren't inclined ---

4 THE COURT: Well -- but ---

5 MR. RADEKER: --- to let him ---

6 THE COURT: --- I don't ---

7 MR. RADEKER: --- do that.

8 THE COURT: --- want to ---

9 MR. RADEKER: I don't -- really don't have a problem
10 with them doing ---

11 THE COURT: I don't ---

12 MR. RADEKER: --- that.

13 THE COURT: --- I don't want to -- I don't want to
14 have to come back up here with it ---

15 MR. RADEKER: So ---

16 THE COURT: --- a couple -- three or four summary
17 judgment motions on the same cause of action ---

18 MR. RADEKER: Right.

19 THE COURT: --- you know.

20 MR. RADEKER: And I --- and I -- you know ---

21 THE COURT: And -- and ---

22 MR. RADEKER: --- my -- yeah. Again, my only concern
23 is -- like yours, is, you know, we come back again to have,
24 you know, more summary judgment motions. I really don't
25 have a problem with him doing that if you're inclined to

1 let him do it.

2 THE COURT: Well, I just ---

3 MR. RADEKER: I mean ---

4 THE COURT: --- want to ---

5 MR. RADEKER: --- in fairness to him, he -- he didn't
6 make these motions. And his argument might be different
7 from what's asserted in the motions. And in -- you know,
8 and he also understands that in fairness to us, you know,
9 we didn't come ready to argue about -- arguments other than
10 what's presented in the motion.

11 MR. NORTON: Right.

12 MR. RADEKER: And ---

13 THE COURT: All right.

14 MR. RADEKER: --- so, you know, I think that ---

15 THE COURT: So ---

16 MR. RADEKER: --- fine with me if they want to ---

17 MR. NORTON: Could ---

18 MR. RADEKER: --- do that that way.

19 THE COURT: Well, how about we do this: Mr. Norton,
20 why -- why don't you just send me a letter or a brief or
21 something, making -- making the arguments you want to make;
22 send a copy to Mr. Radeker. And -- and -- and, Mr.
23 Radeker, you respond to that.

24 MR. RADEKER: Okay.

25 MR. NORTON: Sure.

1 THE COURT: It -- or we can have another hearing. But
2 I -- I mean, I -- I don't know that I see great need for
3 that.

4 MR. RADEKER: I -- I don't ---

5 THE COURT: Do you?

6 MR. RADEKER: --- I don't see a need for it ---

7 MR. NORTON: I don't ---

8 MR. RADEKER: --- unless ---

9 MR. NORTON: --- either.

10 MR. RADEKER: --- you determine that there is a need
11 for it.

12 THE COURT: No.

13 MR. NORTON: I'm happy to ---

14 THE COURT: Okay. And I ---

15 MR. NORTON: --- defer to you.

16 THE COURT: --- I just want to ---

17 MR. RADEKER: So ---

18 THE COURT: --- get y'all to a position where ---

19 MR. NORTON: Okay.

20 THE COURT: --- you're ready to go forward and get
21 your case heard.

22 MR. RADEKER: Sure.

23 MR. NORTON: That -- that sounds good to me. I think

24 ---

25 THE COURT: And ---

1 MR. NORTON: --- Mr. Radeker and I can work on a time
2 frame and a ---

3 THE COURT: What -- what -- well, what do -- what do
4 you need?

5 MR. NORTON: I -- we can have it turned around in ten
6 days.

7 MR. RADEKER: So ten days from today, because ---

8 THE COURT: Well -- but ---

9 MR. RADEKER: --- Christmas is ---

10 THE COURT: --- it's ---

11 MR. RADEKER: --- coming up. I'm ---

12 MR. NORTON: Oh.

13 MR. RADEKER: --- thinking about ---

14 MR. NORTON: Right.

15 MR. RADEKER: --- when ---

16 THE COURT: --- it's Christmas ---

17 MR. RADEKER: --- that might be.

18 THE COURT: --- and New Year's. I mean ---

19 MR. NORTON: Yeah. I mean ---

20 MR. RADEKER: Today's ---

21 MR. NORTON: --- it's pretty ---

22 MR. RADEKER: --- the 11th.

23 MR. NORTON: --- I mean, it's -- I mean, it's -- it's
24 not complicated. It's -- this is ---

25 THE COURT: Well, but ---

1 MR. NORTON: --- you know, it's ---

2 THE COURT: --- why don't you get something to me by
3 December 31st.

4 MR. NORTON: Okay.

5 THE COURT: And, Drew, why don't you respond by
6 January 14th? I mean, is two weeks enough?

7 MR. RADEKER: I think that would be fine. I'm trying
8 to remember what day of the week that is. But ---

9 THE COURT: All right.

10 MR. NORTON: Yeah.

11 MR. RADEKER: So -- or the next business day if it's a
12 ---

13 MR. NORTON: Yeah.

14 MR. RADEKER: --- weekend, I suppose, but ---

15 THE COURT: Yeah.

16 MR. RADEKER: --- you know -- yeah.

17 THE COURT: Yeah. I mean ---

18 MR. NORTON: It's okay with me.

19 MR. RADEKER: Okay.

20 THE COURT: Yeah.

21 MR. NORTON: Good.

22 THE COURT: 15th, whatever. I mean, you know, again,
23 I'm -- but y'all understand what I'm doing. I -- I --
24 again ---

25 MR. NORTON: I do.

1 THE COURT: --- I -- I think -- I work better with
2 deadlines; maybe y'all ---

3 MR. NORTON: I certainly do.

4 THE COURT: --- y'all -- y'all probably are better
5 self-motivated than me.

6 MR. NORTON: No. I'm -- I'm -- I'm not, Your Honor

7 THE COURT: Again ---

8 MR. NORTON: --- I'm sorry to say.

9 THE COURT: --- I -- I -- again, if I could put it off
10 another day, I tend to do that. I ---

11 MR. RADEKER: Not ---

12 THE COURT: And I -- and I ---

13 MR. RADEKER: I -- I have -- actually have a ---

14 THE COURT: --- know a lot of lawyers that are the
15 same way, so ---

16 MR. RADEKER: I'll actually create events, like set
17 meetings with clients so that I'll accomplish the things I
18 need to do in the case before the meeting so I can say I've
19 done them. So ---

20 THE COURT: Yeah.

21 MR. RADEKER: --- like -- I would say this, so just
22 one thing before we go. I just want to make sure it's in
23 the record in case there's more squabbling about it later,
24 is I think Judge Burgdorf actually already has ruled on
25 this issue.

1 You know, in a previous order he said that our amended
2 answer and counterclaim, which isn't much different from
3 the one that came -- it's essentially the same claim; it's
4 the one that came after their amended complaint -- asserts
5 counterclaims on which my client has the right to a trial
6 by jury and returns them to the circuit court.

7 So I think this -- we got a law-of-the-case issue.
8 And we'll be happy to deal with it in the briefs ---

9 THE COURT: Well ---

10 MR. RADEKER: --- about what the *Smith* ---

11 MR. NORTON: You can ---

12 MR. RADEKER: --- case ---

13 THE COURT: Why don't ---

14 MR. NORTON: --- brief it.

15 THE COURT: --- you do that.

16 MR. RADEKER: --- means and all that.

17 THE COURT: Why don't you ---

18 MR. RADEKER: So ---

19 THE COURT: --- do that.

20 MR. NORTON: Okay.

21 MR. RADEKER: Yeah.

22 THE COURT: Because again ---

23 MR. NORTON: It's fine ---

24 THE COURT: --- I -- I don't ---

25 MR. NORTON: --- Your Honor.

1 THE COURT: --- I'm not -- I'm not willing to overrule
2 Judge Burgdorf and -- or Judge Dixon or anybody else. I do
3 what I'm told. And -- and so ---

4 MR. NORTON: It's fine ---

5 THE COURT: --- it may ---

6 MR. NORTON: --- Your Honor.

7 THE COURT: --- be -- it may be that you're stuck with
8 that from the previous lawyers, so ---

9 MR. NORTON: Well, that would be -- I -- I -- we'll
10 deal with that in the briefs as well.

11 THE COURT: Yeah.

12 MR. NORTON: And ---

13 MR. RADEKER: Yeah. I ---

14 MR. NORTON: --- we would ---

15 THE COURT: Yeah.

16 MR. RADEKER: --- certainly ---

17 MR. NORTON: --- and we'll ---

18 MR. RADEKER: --- don't mind that being addressed ---

19 THE COURT: All right.

20 MR. RADEKER: --- in the briefs too ---

21 THE COURT: Yeah.

22 MR. RADEKER: --- so ---

23 THE COURT: Okay.

24 MR. NORTON: We'll certainly ---

25 MR. RADEKER: Yeah.

1 MR. NORTON: --- defer Your Honor to -- to the
2 question of whether you want to have another hearing after
3 you read the briefs. If -- if you don't want to -- if you
4 want to rule on the paper, it's fine with us.

5 MR. RADEKER: Us too.

6 THE COURT: Oh, I -- I'm going to -- that -- that's --
7 that's my goal. Okay?

8 MR. NORTON: Okay.

9 MR. RADEKER: All right.

10 MR. NORTON: But we'll try to write it ---

11 THE COURT: If I ---

12 MR. NORTON: --- with that in mind.

13 THE COURT: If I -- if I need something further, I'll
14 let you know. I mean, I -- again, I'm not -- you know, I
15 -- I don't have what -- everything y'all think I need to
16 have to make a decision and then ---

17 MR. NORTON: Right.

18 THE COURT: --- rightly or wrongly ---

19 MR. NORTON: And I guess ---

20 THE COURT: --- I'm going to make a decision. So ---

21 MR. NORTON: And I guess I will ask Your Honor -- I
22 mean, I've had other judges ask -- tell -- say this. I
23 mean, do you -- since you mentioned a letter or brief, I
24 mean, would you rather have it in the form of proposed
25 orders?

1 THE COURT: No.

2 MR. NORTON: Okay.

3 MR. RADEKER: All right.

4 THE COURT: One -- one of -- one of my biggest beefs
5 with the practice of law is to -- is when the judge makes
6 everybody do a proposed order and he's not going to -- and
7 he's going to sign one of them and not -- and more often
8 than not, neither one of them have what you really want to
9 -- I mean, you know, I -- I ---

10 MR. NORTON: Whatever -- however ---

11 THE COURT: --- hate proposed ---

12 MR. NORTON: --- you want to ---

13 THE COURT: --- orders so ---

14 MR. NORTON: --- do it is fine.

15 THE COURT: So ---

16 MR. NORTON: I just want to give you what you want,
17 Your Honor. I ---

18 THE COURT: Yeah.

19 MR. NORTON: --- I do not like ---

20 THE COURT: Yeah.

21 MR. NORTON: --- competing proposed orders.

22 THE COURT: Well ---

23 MR. RADEKER: I also don't ---

24 THE COURT: --- I don't either.

25 MR. RADEKER: --- like them. So ---

1 THE COURT: I -- I -- that never made any sense to me.
2 I will -- you know, I will send you -- what I've been doing
3 is I send letters out with some what I call instructions
4 on, you know, I -- the minimum I want in the order is this,
5 and you add to it and send it to the other lawyer, and then
6 I go from there. So ---

7 MR. NORTON: Only like those competing proposed orders
8 when I'm on the losing side, because it almost guarantees
9 an appeal issue. Because somebody go -- overreaches every
10 time. If you're on the ---

11 THE COURT: Sure.

12 MR. NORTON: --- wrong side ---

13 THE COURT: Sure.

14 MR. NORTON: --- it just -- it never fails.

15 THE COURT: And, I mean ---

16 MR. RADEKER: Uh-huh.

17 THE COURT: --- you don't ---

18 MR. NORTON: That's right.

19 THE COURT: --- know how to do one. I mean, I've had
20 -- I've -- you know, I mean, we all make arguments that we
21 -- we ---

22 MR. NORTON: That's right.

23 THE COURT: --- you know, we make the argument; we're
24 pretty sure we're going to lose it. And so we think we
25 probably ought to lose it. And so what do you -- what do

1 And so -- and we just -- she signed the one that didn't and
2 sent them back. So ---

3 MR. NORTON: Good enough.

4 MR. RADEKER: But at -- what always bothered me about
5 it is, you know, a memorandum and a proposed order are not
6 the same thing. You know, you're trying to do different
7 things with these documents.

8 MR. NORTON: That's right.

9 THE COURT: Well ---

10 MR. RADEKER: You know ---

11 THE COURT: --- well, I want ---

12 MR. RADEKER: Yeah.

13 THE COURT: --- y'all to send me ---

14 MR. NORTON: Okay.

15 MR. RADEKER: I ---

16 THE COURT: --- something where you are trying to
17 convince me of your point.

18 MR. NORTON: Sure.

19 THE COURT: Okay?

20 MR. NORTON: Okay.

21 THE COURT: And that's why I think it needs to be a --
22 a -- a -- a brief, but it -- in -- in the form of a letter
23 is fine with me. You know, I -- and you don't have to put
24 all the headings and all that kind of stuff on it. So ---

25 MR. RADEKER: Just write it in English.

1 THE COURT: --- you know ---

2 MR. NORTON: Good.

3 THE COURT: --- I'm -- I'm fairly informal. Write it
4 in English. And -- and -- and I'm going to send you a
5 letter back pretty much in English, telling you this is --
6 this is how I'm going to rule on it and -- and have one of
7 you prepare an order.

8 MR. RADEKER: All right.

9 THE COURT: All right?

10 MR. NORTON: Thank you, Your Honor.

11 MR. RADEKER: Thank you ---

12 MR. NORTON: We really ---

13 MR. RADEKER: --- Your Honor.

14 THE COURT: Thank you.

15 MR. NORTON: --- appreciate it.

16 THE COURT: Sure.

17 MR. RADEKER: Yeah.

18 (Whereupon, the proceeding was concluded at 1:45 p.m.)

19 --- END OF TRANSCRIPT OF RECORD ---

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23

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25

CERTIFICATE

I, THE UNDERSIGNED MARYANN S. NEVERS, CERTIFIED
VERBATIM REPORTER - MASTER, CERTIFICATE OF MERIT,
OFFICIAL COURT REPORTER FOR THE EIGHTH JUDICIAL
CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY
CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND
COMPLETE TRANSCRIPT OF RECORD IN THE HEARING OF THE
CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT
COURT FOR ORANGEBURG COUNTY, SOUTH CAROLINA, ON THE
11TH DAY OF DECEMBER, 2013.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.



MARYANN S. NEVERS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

OCTOBER 18, 2014

BOROUGH, L.L.P.

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