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THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Hon. R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2015-001345

Capital Bank, N.A.,

Respondent,

v.

Charles A. Moore a/k/a
Charles A.B. Moore

Petitioner.

APPENDIX

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Cantrell Legal, PC
Post Office Box 1276
Goose Creek, South Carolina 29445-1276
(843) 797-2454
Attorney for Petitioner

Robert A. Kerr, Jr.
Christopher T. Colwell
Lesley A. Firestone
Moore & Van Allen, PLLC
78 Wentworth Street
Charleston, South Carolina 29401
(843) 579-7000
Attorneys for Respondent

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED

APR 29 2014

The Hon. R. Markley Dennis, Jr., Circuit Court Judge

SC Court of Appeals

Appellate Case No. 2013-001516
Trial Court Case No. 2011-CP-10-07407

Capital Bank, N.A.,

Respondent,

v.

Charles A. Moore a/k/a
Charles A.B. Moore

Appellant.

RECORD ON APPEAL

John R. Cantrell, Jr.
Cantrell Legal, PC
Post Office Box 1276
Goose Creek, South Carolina 29445-1276
(843) 797-2454
Attorney for Appellant

Robert A. Kerr, Jr.
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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Capital Bank, N.A.,)
Plaintiff,)
v.)
Charles A. Moore a/k/a Charles A.B. Moore,)
Defendant.)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2011-CP-10-7407

CONSENT SCHEDULING ORDER

THE PARTIES having agreed to enter into a scheduling order on the terms and conditions set forth herein; and good cause having been shown,

IT IS HEREBY ORDERED that:

1. Discovery shall be completed by March 1, 2013. All discovery requests shall be served in time for the responses thereto to be served by this deadline.
2. All depositions shall be taken by April 15, 2013.
3. All dispositive motions shall be filed on or before June 1, 2013.
4. This case is subject to being called for trial after July 1, 2013.

AND IT IS SO ORDERED.

FILED
2012 NOV -2 PM 12:49
JULIE J. ARMSTRONG
CLERK OF COURT
BY A

DL Jefferson
Honorable Deadra L. Jefferson
Circuit Court Judge

Dated: 10/25, 2012
Charleston, South Carolina

CHARLESTON612800v1

142
KA

We Consent:

Cham D. Kerr

Robert A. Kerr, Jr. (#011981)
Christopher T. Colwell (#71127)
MOORE & VAN ALLEN, PLLC
40 Calhoun Street, Suite 300
P.O. Box 22828
Charleston, South Carolina 29413-2828
Telephone: (843) 579-7000

Attorneys for Plaintiff

John R. Cantrell, Jr. (by Christopher T. Colwell, with permission)

John R. Cantrell, Jr., Esq. (#10309)
Cantrell Legal, PC
P.O. Box 1276
Goose Creek, SC 29445
Telephone: 843-797-2454

Attorney for Defendant

242
KJG

CHARLESTON512800v1

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Capital Bank, N.A.,

Plaintiff,

v.

Charles A. Moore a/k/a Charles A.B. Moore,

Defendant.

IN THE COURT OF COMMON PLEAS
CASE NO.: 2011-CP-10-7407

**ORDER GRANTING PARTIAL
SUMMARY JUDGMENT**

FILED
2013 MAR -14 PM 6:14
JULIE J. ARBON
CLERK OF COURT

THIS MATTER having been opened to the Court by the filing of a Notice of Motion and Motion for Summary Judgment ("Motion") by Capital Bank, N.A. ("Plaintiff") with respect to its cause of action against Defendant/Counter-Plaintiff Charles A. Moore a/k/a Charles A.B. Moore ("Defendant") and all of the counterclaims alleged by Defendant. After full consideration of the pleadings and arguments of counsel present at the hearing,

IT APPEARS TO THE COURT that as to the Plaintiff's Cause of Action, there are no genuine issues of material fact regarding the validity, enforceability or the Defendant's default under the promissory note (the "Note") at issue in this litigation, and that the Plaintiff is entitled to judgment as a matter of law;

IT FURTHER APPEARS TO THE COURT that there is an issue of material fact as to the amount of damages the Plaintiff is entitled to pursuant to the Defendant's default of the Note;

IT FURTHER APPEARS TO THE COURT that as to Defendant's Counterclaims there are genuine issues of material fact and that the Plaintiff is not entitled to judgment as a matter of law;

Am 7/12

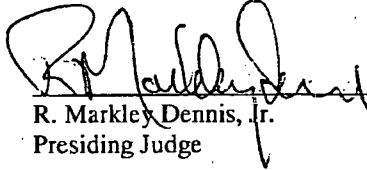
CHARLESTON\525249v3

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that as to the Plaintiff's Cause of Action, the Defendant is liable under the Note in an amount to be determined;

IT IS FURTHER ORDERED that Capital Bank, N.A. is the owner and holder of the Note at issue in this litigation and is the proper party to bring and maintain this action as Plaintiff;

IT IS FURTHER ORDERED that the Motion is hereby denied as to the Defendant's second and third counterclaims under the Fair Debt Collections Practices Act and the South Carolina Consumer Protection Code.

SO ORDERED.


R. Markley Dennis, Jr.
Presiding Judge

February 28, 2013
Charleston, South Carolina

RMD/TJ/2

CHARLESTON\525249v3

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-10-7407

Capital Bank, N.A.

Charles A. Moore aka Charles A.B. Moore

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: John R. Cantrell, Jr.

Attorney for : ☐ Plaintiff ☒ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: The current scheduling order is amended to change the deadline to complete written discovery until March 15, 2013, and Plaintiff is required to respond to pending discovery requests within 30 days after service of those requests on February 12, 2013.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

T.L. [Signature] 2008 3/6/13
Circuit Court Judge Judge Code Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of March, 2013 and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of March, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Christopher T. Colwell
Moore & Van Allen PLLC
40 Calhoun St, Ste 300, Charleston, SC 29401-3535
ATTORNEY(S) FOR THE PLAINTIFF(S)

John R. Cantrell, Jr.
Cantrell Legal, PC
PO Box 1276, Goose Creek, SC 29445-1276
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: None

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-10-7407

Capital Bank N A

PLAINTIFF(S)

Charles A Moore

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff	☒ Defendant
	or ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

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

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Defendant's Amended Motion to Alter or Amend or Reconsider was denied.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

R. Markley Perry
Circuit Court Judge

2060
Judge Code

5/28/2013
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Capital Bank, N.A.,

Plaintiff(s)

vs.

Charles A. Moore a/k/a Charles A.B. Moore,

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2011-CP - 10- 7407

(Please Print)

Submitted By: Christopher T. Colwell
Address: 654 Coleman Blvd., Suite 100
Mt. Pleasant, SC 29464

SC Bar #: 71127

Telephone #: 843-972-1000

Fax #: 843-972-1005

Other:

E-mail: ccolwell@hagoodkerr.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|--|---|---|
| ☐ Contracts
☒ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199) | ☐ Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20__-CP-_____
☐ Notice/ File Med Mal (230)
☐ Other (299) | ☐ Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399) | ☐ Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| ☐ Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | ☐ Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Other (799) | ☐ Administrative Law/Relief
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) | ☐ Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| ☐ Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in an Out-of-County Action (660)
☐ Sexual Predator (510) | | |

Submitting Party Signature:

Christopher T. Colwell

Date: October 6, 2011

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville, Hampton, Horry,
Jasper, Lexington, Pickens (Family Court Only), Richland, Union and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE
DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Capital Bank, N.A.,)
Plaintiff,)
v.)
Charles A. Moore a/k/a Charles A.B. Moore,)
Defendant.)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2011-CP-10- 7407

SUMMONS

BY _____

JULIE J. ARMSTRONG
CLERK OF COURT

2011 OCT 12 PM 2:18

FILED

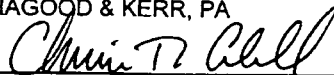
TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you and to serve a copy of your Answer to said Complaint on the subscribers at their offices, Hagood & Kerr, PA, P.O. Box 220, 654 Coleman Boulevard (29464), Mount Pleasant, South Carolina 29465, or to otherwise appear and defend, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint, or otherwise to appear and defend, within the time aforesaid, the Plaintiff in this action will obtain a judgment by default against you for the relief demanded in the Complaint.

TO MINOR(S) OVER FOURTEEN YEARS OF AGE, AND/OR TO MINOR(S) UNDER FOURTEEN YEARS OF AGE AND THE PERSON WITH WHOM THE MINOR(S) RESIDES, AND/OR TO THE PERSONS UNDER SOME LEGAL DISABILITY:

YOU ARE FURTHER SUMMONED AND NOTIFIED to apply for the appointment of a guardian ad litem within thirty (30) days after the service of this Summons and Notice upon you. If you fail to do so, application for such appointment will be made by the Plaintiff

HAGOOD & KERR, PA



Christopher T. Colwell (#71127)

654 Coleman Boulevard
P.O. Box 220 (29465)
Mt. Pleasant, SC 29464
(843) 972-1000

Attorneys for the Plaintiff

Dated: October 6, 2011
Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Capital Bank, N.A.,)
Plaintiff,)
v.)
Charles A. Moore a/k/a Charles A.B. Moore,)
Defendant.)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2011-CP-10- 7407

COMPLAINT
(Non-Jury)
(Suit on Note)

FILED
2011 OCT 12 PM 2:18
JULIE J. ARMSTRONG
CLERK OF COURT

Capital Bank, N.A. ("Plaintiff"), by and through its undersigned attorneys, complaining of the above-named Defendant, alleges and says as follows:

THE PARTIES

1. Plaintiff is a financial institution providing such services in the State of South Carolina, and is the current owner and holder of the note at issue in this litigation. Such note was assigned to NAFH National Bank pursuant to that certain Purchase and Assumption Agreement dated as of July 16, 2010 between NAFH National Bank and the Federal Deposit Insurance Corporation, as Receiver for First National Bank of the South. On June 30, 2011, NAFH National Bank merged with Capital Bank, N.A., with the resulting bank title of Capital Bank, N.A.

2. Plaintiff is informed and believes that the Defendant Charles A. Moore a/k/a Charles A.B. Moore ("**Borrower**") is individual resident of the State of Georgia, but has been transacting business in Charleston County, South Carolina and is the owner of certain real property located in Charleston County, South Carolina.

3. Venue is proper in the Court of Common Pleas for Charleston County.

4. This Court has personal jurisdiction over the parties and subject matter jurisdiction over this action.

FOR A FIRST CAUSE OF ACTION
(Suit on Promissory Note)

5. Plaintiff repeats and realleges the foregoing allegations as if set forth herein verbatim.

6. On or about February 19, 2008 the Borrower, for value received, executed and delivered to Plaintiff's predecessor in interest, First National Bank of the South, an Interest Only Home Equity Line of Credit with a credit limit of Seven Hundred Fifty Thousand and 00/100ths

11-7407

(\$750,000.00) Dollars (the "Note"). Such Note was secured by a second mortgage on certain real property owned by the Borrower and located in Charleston County, South Carolina. A copy of the Note is attached hereto as Exhibit "A" and its terms are incorporated herein by reference.

7. The maturity date of the Note is February 26, 2023.

8. Under the terms of the Note, interest was to be charged on the unpaid principal at a variable rate, all as provided in the Note.

9. Under the terms of the Note, it is provided, among other things, that a Default (as defined therein) would occur if the Borrower (a) failed to make a payment on time or in the amount due; or (b) failed to perform or observe any other term, covenant, condition and obligation contained in the Note and Guaranty (as defined herein).

10. Under the terms of the Note, among other things, the Borrower agreed that if the Note was in default and suit was brought to collect the Note, the holder of the Note would be entitled to collect all reasonable costs and expenses of suit, including, but not limited to, reasonable attorneys' fees.

11. Obligations incurred under the terms of the Note are in default, and a Default has occurred and is continuing, due to the Borrower's failure to make payment of all amounts due under the terms of the Note.

12. The Borrower was advised of his failure to repay the Note, and Borrower has failed to cure this Default.

13. There is now due and owing and unpaid upon the Note the principal sum of Seven Hundred Fifty Three Thousand Two Hundred Forty Five and 09/100ths (\$753,245.09) Dollars, together with accrued interest of Two Thousand Four Hundred Fifty Four and 13/100ths (\$2,454.13) Dollars as of August 11, 2011, together with interest accruing after that date at the per diem rate of Sixty Six and 33/100ths (\$66.33) Dollars, together with late fees of Seventeen and 00/100ths (\$17.00) Dollars, together with Plaintiff's attorneys' fees and other costs of collection.

14. Plaintiff is entitled to recover all costs and reasonable attorneys' fees with respect to this cause of action and seeks relief from the Court which is set forth hereafter. Plaintiff has retained and employed the law firm of Hagood & Kerr, PA, for the purpose of instituting and prosecuting this action.

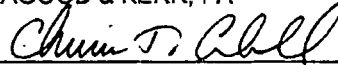
WHEREFORE, Plaintiff prays that this Honorable Court issue its Order:

A. Granting Plaintiff judgment against the Borrower in the amount of the principal sum of Seven Hundred Fifty Three Thousand Two Hundred Forty Five and 09/100ths

(\$753,245.09) Dollars, together with accrued interest of Two Thousand Four Hundred Fifty Four and 13/100ths (\$2,454.13) Dollars as of August 11, 2011, together with interest accruing after that date at the per diem rate of Sixty Six and 33/100ths (\$66.33) Dollars, together with late fees of Seventeen and 00/100ths (\$17.00) Dollars, and Plaintiff's attorneys' fees and other costs of collection in an amount to be established by this Honorable Court, plus costs accruing after the date of judgment as provided in the Note,

B. Granting Plaintiff such other and further relief as may be just and proper.

HAGOOD & KERR, PA



Christopher T. Colwell (#71127)

654 Coleman Boulevard

P.O. Box 220 (29465)

Mt. Pleasant, SC 29464

(843) 972-1000

Attorneys for the Plaintiff

Dated: October 6, 2011
Mount Pleasant, South Carolina

Exhibit "A"

Note

[See Attached]

Interest Only Home Equity Line of Credit

Lender
First National Bank of the South
P.O. Box 3508
Spartanburg, SC 29304

Borrower
CHARLES A. MOORE
61 TRADD STREET APT. A
CHARLESTON, SC 29401

Loan Number 8015662
Agreement Date 02/19/2008
Credit Limit \$750,000.00
Maturity Date 02/26/2023

Generally

Definitions. In this Agreement, these terms have the following meanings. The pronouns *you* and *your* refer to all borrowers signing this Agreement, jointly and individually, and each other person or legal entity that agrees to pay this Agreement. *We, us, and our* refer to the Lender, or any person or legal entity that acquires an interest in the Line of Credit. *Agreement* refers to this Interest Only Home Equity Line of Credit and any extensions, renewals, modifications or substitutions of it. *Automatic Withdrawal Account* means the account that you have with us from which your Minimum Payments will be automatically withdrawn. The Automatic Withdrawal Account number is N/A.

Billing Cycle means the interval between the days or dates of regular periodic statements. **Minimum Payment** means the minimum payment amount required under the Minimum Payment section. **Payment Date** is the payment due date as provided on your periodic statements. **Credit Limit** means the maximum amount of principal we will permit you to owe us under this Line of Credit at any one time. Your Credit Limit is stated at the top of this Agreement. **Line of Credit** refers to this transaction generally, including obligations and duties arising from the terms of all documents prepared or submitted for this transaction such as applications, security agreements, disclosures, and this Agreement. **Loan Account Balance** means the sum of the unpaid principal balance advanced under the terms of this Agreement, finance charges, fees, and other charges that are due, and other amounts advanced to you or others under the terms of this Line of Credit. **Property** means any real or personal property that secures your obligations under this Line of Credit. **Minimum Advance** means the smallest amount of money we will advance to you at your request.

Other important terms are defined throughout this Agreement.

Promise to Pay. You promise to pay us or our order, at our address, or at such other location as we may designate, in such of the Credit Limit as may be advanced under this Agreement, plus finance charges, fees, charges, costs, and expenses as described in this Line of Credit.

Agreement Term. This Agreement begins on the Agreement Date. The Draw Period also begins on the Agreement Date and is the 180-month period during the term of this Agreement that you may request advances.

Tax Deductibility. You should consult a tax advisor regarding the deductibility of interest and charges under this home equity plan.

Advances

Advance Methods. You may request advances by the following methods:

- You write a check.
- You request a withdrawal in person.
- You request a withdrawal by phone.

We will make the advance by advancing the amount directly to you, depositing it in your Transaction Account, or by paying a designated third person or account. We will record the amount as an advance and increase your Loan Account Balance.

Advance Limitations. We do not have to make any advances during any period in which you have a right to cancel. Your ability to request and access advances is also subject to the following additional limitations.

Minimum Advance. When you request an advance, the minimum amount we will advance will be \$100.00 (Minimum Advance). We will, subject to the limitations contained in this Agreement, advance either the Minimum Advance, or exactly the amount you request, provided the requested amount equals or exceeds the Minimum Advance.

Credit Limit. Subject to the terms and conditions of this Agreement, you may borrow on this Line of Credit up to the Credit Limit. You agree not to request or obtain an advance that will cause the unpaid principal of your Loan Account Balance to exceed the Credit Limit. You understand that we will not ordinarily grant a request for an advance that would cause the unpaid principal of your Loan Account Balance to be greater than the Credit Limit, but that we may, at our option, grant such a request without obligating ourselves to do so in the future. Your Credit Limit will not be increased if you overdraw the Line of Credit. If you exceed the Credit Limit, you agree to pay the amount by which the unpaid principal of your Loan Account Balance exceeds the Credit Limit immediately, even if we have not yet billed you. Any sums in excess of the Credit Limit will not be secured by the Property, unless they are for accrued but unpaid interest or expenditures made pursuant to the security instrument securing the Property.

Finance Charges

Computation of Finance Charges. Finance charges begin to accrue immediately when we make an advance to you. Finance charges will be computed as follows:

To figure the finance charge for each Billing Cycle, a daily periodic rate is multiplied by the Daily Balance of your Loan Account Balance each day. To figure the Daily Balance, we first take your Loan Account Balance at the beginning of each day and add any new advances, and subtract any payments or credits that apply to debt repayment, and any unpaid finance charges, fees and charges. This gives us the Daily Balance.

The periodic rate used in calculating the **FINANCE CHARGE** is 0.01663835% and the corresponding **ANNUAL PERCENTAGE RATE** is 6.000%. The annual percentage rate includes interest and not other costs.

Variable Rate. The annual percentage rate may change and will be based on the value of an index. The index is the base rate on corporate loans posted by at least 75% of the nation's 30 largest banks known as The Wall Street Prime Rate and is published in The Wall Street Journal (Index). To determine the annual percentage rate we use

the value of the index.

Rate Changes. The annual percentage rate may increase if the index rate increases. An index rate increase will result in a higher finance charge and it may have the effect of increasing your periodic Minimum Payments. A decrease in the index rate will have the opposite effect as an increase. An index rate increase or decrease will take effect on the day the index rate changes. The annual percentage rate can increase or decrease daily. If the index rate changes more frequently than the annual percentage rate, we will use the index rate in effect on the day we adjust the annual percentage rate to determine the new annual percentage rate. In such a case, we will ignore any changes in the index rate that occur between annual percentage rate adjustments.

Rate Change Limitations. Annual percentage rate changes are subject to the following limitations. The lifetime floor does not apply to any initial discount rates if applicable. Any per adjustment or annual limitations will not prevent the rates from increasing to the minimum annual percentage rate at the end of the initial discount rate period if applicable.

Lifetime Cap. The maximum **ANNUAL PERCENTAGE RATE** that can apply during the term of this Line of Credit is 18% or the maximum annual percentage rate allowed by applicable law, whichever is less.

Payment Terms

Payment Date. During the term of this Agreement, a Minimum Payment will be due on or before the Payment Date for any Billing Cycle in which there is an outstanding balance on your account. Your Minimum Payments will be due monthly.

Minimum Payment. On or before each Payment Date, you agree to make a payment of at least the Minimum Payment amount.

The Minimum Payment will equal any amount past due, any fees and charges that are due, and the following:

The amount of accrued finance charges on the last day of the Billing Cycle.

Rounding. The Minimum Payment will be rounded up to the nearest \$0.01.

Payment At Maturity. On the Maturity Date you must pay the entire outstanding Loan Account Balance.

Principal Reduction

Draw Period. During the Draw Period, the Minimum Payment ☒ will not reduce ☐ may not fully repay the principal balance outstanding on your Loan Account Balance.

Final Payment. At maturity, you must pay the amount of any remaining Loan Account Balance outstanding. The Minimum Payments will not be sufficient to fully repay the principal that is outstanding on your line; if they are not, you will be required to pay the entire outstanding balance in a single balloon payment. At that time, we may, but are not obligated to, refinance this Line of Credit. If we do refinance this Line of Credit at maturity, you understand that you may have to pay some or all of the closing costs normally associated with a new loan.

Additional Payment Terms. If your Loan Account Balance on a Payment Date is less than the Minimum Payment amount, you must pay only the amount necessary to reduce your Loan Account Balance to zero or to any required Minimum Balance. If you otherwise fail to fully pay the Minimum Payment amount, we may, but are not required to, advance money to you to make the payment. All the terms of this Agreement will apply to such an advance. Subject to any required Minimum Balance, you can pay off all or part of what you owe at any time. If you pay more than the Minimum Payment amount, you must continue to make your periodic Minimum Payments as otherwise required by this Agreement.

Unless otherwise agreed or required by applicable law, payments and other credits will be applied first to any charges you owe other than principal and finance charges, then to any finance charges that are due, and finally to principal. No late charge will be assessed on any payment when the only delinquency is due to late fees assessed on earlier payments and the payment is otherwise a full payment.

☐ **Automatic Withdrawal.** You authorize us to automatically withdraw the Minimum Payment from your Automatic Withdrawal Account on each Payment Date. If your Automatic Withdrawal Account does not have enough money in it to fully pay the Minimum Payment amount, we may, but are not required to, advance money to you to make the payment. All the terms of this Agreement will apply to such an advance. If your Loan Account Balance is less than the Minimum Payment amount, we will withdraw only the amount necessary to reduce your Loan Account Balance to zero.

CABM/OKA

Security

We have secured your obligations under this Line of Credit by taking a security interest (by way of a separate security instrument dated 02/19/2008) in the following Property:
MORTGAGE DATED FEBRUARY 19, 2008

Property securing any other loans that you have with us may also secure this Agreement.

Filing Fees \$B/A

Insurance

Property Insurance. You may buy property insurance from anyone you want who is reasonably acceptable to us. If you buy the insurance from or through us, your premium will be \$B/A for _____ of coverage.

Other Fees and Charges

You agree to pay the following additional fees and charges:

- **Late Charge.** If a payment is late you will be charged 5% of the payment but not less than \$3.80 nor more than \$15.50. We may charge the maximum late fee authorized by law. The maximum late fee will increase or decrease by \$0.20 and the maximum late fee will increase or decrease by \$0.50 on July 1st of each even numbered year corresponding to the permitted late fee changes pursuant to §§ 37-11-09 and 37-203 of the South Carolina Consumer Protection Code (if any).
- **Returned Check Charge.** A charge not to exceed \$32.00 for each check or negotiable order of withdrawal you issue in connection with this Line of Credit that is returned because it has been dishonored.

Additional Terms

Commissions. You understand and agree that we (or our affiliate) will earn commissions or fees on any insurance products, and may earn such fees on other services that you buy through us or our affiliate.

Default. You will be in default if any of the following occur:

- You fail to make a payment as required by this Agreement.
- Your action or inaction adversely affects the Property or your rights in the Property.
- You are an executive officer of us or our affiliate and you become indebted to us or another lender in an aggregate amount greater than the amount permitted under federal laws and regulations.

Suspension of Credit and Reduction of Credit Limit. We may temporarily prohibit you from obtaining additional advances or reduce your Credit Limit during any period in which any of the following are in effect:

- The value of the Property securing this Line of Credit declines significantly below its appraised value for purposes of this Line of Credit.
- We reasonably believe that you will not be able to meet the repayment requirements under your Line of Credit due to a material change in your financial circumstances.
- You are in default of a material obligation under this Line of Credit. You understand that we consider all of your obligations to be material. Categories of obligations that we consider material include, but are not limited to: your obligation to not commit fraud or misrepresentation in connection with this Line of Credit; your obligation to meet the repayment terms of this Line of Credit; your obligation to not adversely affect the Property or our rights in the Property; your obligation to pay fees and charges; your advance obligations; your obligation to fulfill the terms of the instrument securing this Agreement; and any other security instruments on the Property; your obligation to notify us, and your obligation to provide us with information.
- Government action prevents us from imposing the annual percentage rate provided for in this Agreement.
- The priority of our security interest is adversely affected by government action to the extent that the value of the security interest is less than 120 percent of your Credit Limit.
- The maximum annual percentage rate allowed under this Agreement is reached.
- We are notified by a regulatory agency that consumer advances constitute an unsafe and unsound practice.
- Any Borrower requests a suspension of credit privileges.

In order to reinstate your credit privileges under the original terms of this Agreement, you must send us a written request to that effect. Your credit privileges will only be reinstated if we determine that the condition which caused us to prohibit additional advances and/or reduce the Credit Limit no longer exists. If appraisal or credit report fees are incurred in making this determination, we may (if allowed by applicable law) charge you such fees. If credit privileges were suspended at your request, they need not be reinstated unless all Borrowers request reinstatement.

Notice of Default and Right to Cure. If this is a consumer credit transaction, we may exercise our remedies only if you fail to exercise your right to cure a default. After you are in default on this Agreement for 10 or more days because of a failure to make a payment and if you have not voluntarily surrendered possession of the collateral, we must provide you with a written notice of your default and your right to cure. You have 30 days after we mail this notice for 20

days after actual delivery if we use a means other than first class mail in which to cure the default. However, no notice of default or right to cure is necessary and we may immediately exercise any and all of our remedies if you have defaulted one or more times within the previous 12 months and you have previously been given notice of default and right to cure with respect to such default.

Remedies. After you default, and after we give you legally required notice and opportunity to cure, we may at our option do any of the following:

- We may terminate this Line of Credit and make all or any part of the amount owing by the terms of this Agreement immediately due.
- We may temporarily or permanently prohibit any additional advances.
- We may temporarily or permanently reduce the Credit Limit.
- We may demand additional security or additional parties to be obligated to pay this Agreement.
- We may make a claim for any and all insurance benefits or refunds that may be available on your default.
- We may make advances advanced on your behalf immediately due and we may add these amounts to the Loan Account Balance.
- We may use any and all remedies we have under applicable law or any agreement securing this Agreement.

Except as otherwise required by law, by choosing a remedy we do not give up our right to use another remedy. We do not waive a default if we choose not to use a remedy. By electing not to use any remedy, we do not waive our right to later consider the event a default and to use any remedies if the default continues or occurs again.

Collection Expenses and Attorneys' Fees. On or after default, to the extent permitted by law, you agree to pay all expenses of collection, enforcement or protection of our rights and remedies under this Line of Credit. Expenses include, but are not limited to, reasonable attorneys' fees not in excess of 15% of the unpaid debt after default and referred to an attorney who is not our salaried employee. To the extent permitted by the United States Bankruptcy Code, you agree to pay the reasonable attorneys' fees we incur to collect this debt as awarded by any court exercising jurisdiction under the Bankruptcy Code.

Set-Off. We may set-off any amount due and payable under the terms of this Agreement against your right to receive money from us, unless prohibited by applicable law.

Amendments. Generally, the terms of this Agreement cannot be changed. We may, however, make the following changes:

- We may make changes that you agree to in writing at the time of the change.
- We may make changes that will unequivocally benefit you.
- We may make insignificant changes.
- We may change the index and margin if the original index becomes unavailable. Any new index will have a historical movement substantially similar to the original index, and together with the new margin, produce an annual percentage rate substantially similar to the rate in effect at the time the original index became unavailable.

If we are required to send notice of a change in terms, we will send the notice to your address listed above. (You should inform us of any change in address).

Termination. You may terminate this Line of Credit at any time upon written notice to us. Termination by one Borrower terminates the Line of Credit for all Borrowers. Termination will not affect your obligations to repay advances made prior to the termination, nor will it affect your duties to perform under the terms of an instrument securing this Agreement until such instrument is released. Upon termination you will return to us any remaining access devices in your possession that were issued or used in connection with the Line of Credit.

Waivers and Consent. To the extent not prohibited by law and except for any required notice of right to cure for the failure to make a required payment, you waive present, procurement for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor. To the extent not prohibited by law, you and any other party to this Line of Credit, also consent in the following actions that we may take, and waive defenses that may be available based on these actions, or based on the status of a party in this Line of Credit:

- We may renew or extend payments on this Agreement, regardless of the number of such renewals or extensions.
- We may release any Borrower or other person who may be liable for the indebtedness under this Agreement.
- We may release, substitute or replace any Property securing this Agreement.
- We may invoke our right of set-off.
- We may enter into any sales or repurchases of this Agreement to any person in any amounts and you waive notice of such sales or repurchases.
- You agree that any Borrower is authorized to modify the terms of this Agreement or any other Line of Credit document.
- We may inform any party who guarantees this Line of Credit of any loan accommodations, renewals, extensions, modifications, substitutions, or future advances.
- No duty or forbearance on our part in exercising any of our rights or remedies will be construed as a waiver by us, unless such waiver is in writing and is signed by us.

Periodic Statements. If you have an outstanding balance on your account or have any account activity, we will send you a periodic statement at the end of each Billing Cycle. This periodic statement will reflect, among other things, credit advances, finance charges, other charges, payments made, other credits, your previous account balance and your new account balance. The periodic statement will also identify your Minimum Payment for the cycle and the Payment Due.

Joint and Individual Liability and Successors. Your obligation to pay this Line of Credit is independent of the obligation of any other person who has also agreed to pay it. We may sue you alone or anyone else who is obligated on this Line of Credit, or any member of you together, to collect on this Line of Credit. Extending this Line of Credit or new obligations under this Line of Credit, will not affect your duty under this Line of Credit and you will still be obligated to pay this Line of Credit. The duties and benefits of this Line of Credit will bind and benefit the successors and assigns of you and us.

Waters Blower
Page 2 of 3

Integration and Severability. This Agreement is the complete and final expression of the agreement. If any provision of this Agreement is unenforceable, then the unenforceable provision will be severed and the remaining provisions will be enforceable.

Interpretation. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Agreement.

Notices, Financial Reports, and Additional Documents. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address above, or to any other address designated in writing. Notice to one Borrower will be deemed to be notice to all Borrowers. You will inform us in writing of any change in your name, address or other applicable information. You will provide us any financial statements or information we request. All financial statements and information you give us will be correct and complete. You agree to sign, deliver, and file any additional documents or certifications that we may consider necessary to perfect, continue, and preserve our obligations under this Line of Credit and to confirm our lien status on any Property. Time is of the essence.

Credit Information. You agree to supply us with whatever information we reasonably feel we need to decide whether to continue this Line of Credit. We will make requests for this information without undue frequency, and will give you reasonable time in which to supply the information.

Applicable Law. This Agreement is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located.

YOUR BILLING RIGHTS

KEEP THIS NOTICE FOR FUTURE USE

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

Notify Us in Case of Errors or Questions About Your Bill

If you think your bill is wrong, or if you need more information about a transaction on your bill, write us at the address listed on your bill. Write to us as soon as possible. We must hear from you no later than 60 days after we sent you the first bill on which the error or problem appeared. You can telephone us, but doing so will not preserve your rights.

In your letter, give us the following information:

- Your name and account number.
- The dollar amount of the suspected error.
- Describe the error and explain, if you can, why you believe there is an error. If you need more information, describe the items you are not sure about.

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

Your Rights and Our Responsibilities After We

Receive Your Written Notice

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

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

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

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

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

Signatures

You understand that terms following a ☐ only apply if checked. By signing under seal, you agree to the terms of this Agreement. You also acknowledge receipt of a copy of this Agreement on today's date.

Charles A. Moore (Seal)
X *Charles A. Moore* (Seal)

CHARLES A. MOORE &/K/S CHARLES A. B. MOORE

BY DAVID B. CRAWFORD HIS ATTORNEY IN FACT

X *David B. Crawford* (Seal)

X _____ (Seal)

(Optional)

X *Charles Gumble* For Lender
Charles Gumble
Title Branch Manager

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

CAPITAL BANK, N.A.

Plaintiff,

v.

CHARLES A. MOORE a/k/a CHARLES
A.B. MOORE,

Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2011-CP-10-7407

ANSWER and
COUNTERCLAIM

JURY TRIAL DEMANDED

2012 MAY 29 PM 4:20
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

NOW COMES defendant herein, by and through counsel, and in Answer to plaintiff's
complaint and alleges and says as follows:

Each and every allegation of the Complaint not herein specifically admitted, qualified, or
explained is denied.

FIRST DEFENSE

That plaintiff's complaint fails to state a claim upon which relief can be granted and
should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

SECOND DEFENSE

That defendant alleges and asserts that such claim is barred by the applicable Statute of
Limitations and the same is hereby pled in complete bar thereto.

THIRD DEFENSE

That plaintiff's claim should be barred by the doctrine of laches and the same is pled in
bar thereto.

FOURTH DEFENSE

That plaintiff is not a real party in interest and is not authorized to maintain this action in its own name and such action should be dismissed under Rule 17(a) of the South Carolina Rules of Civil Procedure.

FIFTH DEFENSE

That plaintiff asserts that it is an assignee of another entity as previously denied but does not attach any evidence of assignment or ownership of such claim or a chain of title indicating how it acquired any interest in such claim so that plaintiff's complaint should be dismissed.

SIXTH DEFENSE

That plaintiff, and/or, any predecessor in interest of plaintiff has failed to mitigate its damages and such is pled in complete bar to any claim raised by plaintiff.

SEVENTH DEFENSE

1. Defendant is without sufficient information to confirm or deny the allegations of Paragraph 1 of plaintiff's complaint, and therefore denies the same.
2. That the allegations in Paragraph 2 of plaintiff's complaint are admitted.
3. That the allegations in Paragraph 3 of plaintiff's complaint are admitted.
4. That the allegations in Paragraph 4 of plaintiff's complaint are admitted.
5. That the allegations in Paragraph 5 are not required to be admitted or denied.
6. Defendant admits making a secured Note to First National Bank of the South with the credit limit as stated, but denies that this entity is Plaintiff's predecessor in interest and demands proof thereof.
7. That the terms of the Note speak for itself, so nothing is required to be admitted or denied regarding the allegations of Paragraph 7-10.
8. The allegations of Paragraphs 11-14 are denied.

9. Denied.

EIGHTH DEFENSE
COUNTERCLAIM FOR DECLARATORY JUDGMENT

10. That the allegations as alleged in Defenses 1 through 7 are realleged and incorporated by reference as if set forth fully herein.

11. That an actual controversy exists between plaintiff and defendant as to whether plaintiff actually owns or is authorized to pursue any claim against defendant, and whether defendant is liable at law or equity for any charges made on such credit card account or, if so, in what amount.

12. That such controversy is genuine as plaintiff has commenced litigation against defendant and, upon information and belief, reports to national credit bureaus that defendant is liable on an alleged debt.

13. That, upon information and belief, if the Court does not adjudicate the controversy in this case, plaintiff may seek to avoid adjudication by filing a Voluntary Dismissal and seek to commence litigation or undertake other collection activity which may include selling the account to another entity, continuing to report such debt to credit bureaus in an effort to extract payment, or other collection activities while avoiding judicial resolution of the underlying controversy.

14. That such controversy should be resolved by way of a declaratory judgment.

NINTH DEFENSE and
MOTION TO STRIKE VERIFICATION

15. That the allegations as set forth above are realleged and incorporated by reference as if set forth fully herein.

16. That, pursuant to Rule 12(f) of the South Carolina Rules of Civil Procedure, defendant moves to strike plaintiff's "Verification" attached to plaintiff's complaint.

17. That the affidavit attached to plaintiff's complaint states that Nikki C. Meekins is a Special Assets Officer of plaintiff and has knowledge of the allegations contained therein; however, the affiant makes this verification upon information and belief, which is not a sufficient basis for such an affidavit.

18. That by the plaintiff's own admissions, as alleged assignee of another entity, some of the records regarding this Note were created prior to any alleged acquisition of this Note so that the affiant cannot have personal knowledge of those records of another entity.

19. That plaintiff's affidavit is an attempt to introduce inadmissible hearsay evidence into its complaint and such affidavit should be stricken under Rule 12(f) of the South Carolina Rules of Civil Procedure.

TENTH DEFENSE and
COUNTERCLAIM

20. That the allegations as contained in the foregoing paragraphs are realleged and incorporated by reference as if set forth fully herein.

21. That defendant is a "consumer" within the meaning of 15 U.S.C. § 1692a(3) in that he is a natural person allegedly obligated to pay a debt.

22. That plaintiff (and counterclaim defendant hereinafter referred to as "plaintiff") is a "debt collector" in that plaintiff uses instrumentalities of interstate commerce and regularly collects debts and accepts assignments of debts in default at the time of assignment.

23. That plaintiff violated the Fair Debt Collections Practices Act by commencing litigation on a time-barred alleged debt which misrepresents the legal status of the debt and violates 15 U.S.C. § 1692e.

24. That upon information and belief, plaintiff is attempting to collect fees and costs that are not authorized under any alleged credit documents and/or is attempting to collect fees and costs without being entitled to such or without a court order awarding fees and costs to plaintiff.

25. That, upon information and belief, plaintiff violated 15 U.S.C. § 1692f of the Fair Debt Collections Practices Act by utilizing unfair and deceptive practices in collecting or in attempting to collect a debt by allowing such alleged debt to accumulate interest at an excessive rate for an extended period of time without seeking redress prior to the filing of this complaint when plaintiff has a duty to mitigate its damages and should promptly seek redress within a reasonable time after an alleged default.

26. That plaintiff, upon information and belief, is further attempting to collect additional fees, including late fees, over-the-limit fees, charges, interest or other sums that are either not authorized under any contract or are not permitted by applicable law or are otherwise unconscionable, deceptive or unfair in violation of 15 U.S.C. § 1692f.

27. That, upon information and belief, plaintiff violated the Fair Debt Collections Practices Act by attempting to collect on a time-barred debt in violation of 15 U.S.C. § 1692f.

28. That, upon information and belief, plaintiff, either itself or through agents retained for the purpose of collecting a debt, violated the Fair Debt Collections Practices Act in other such manners and through utilizing such methods as may be shown through discovery and proved at trial.

29. That as a direct and proximate cause of plaintiff's actions, defendant has suffered anxiety and emotional distress over this matter; including excessive worry and anxiety over being served with plaintiff's complaint, has had to incur legal fees in order to defend this

unwarranted lawsuit, and has incurred such other damages as may be shown through discovery and proved at trial.

30. That defendant is entitled to recover her actual damages in an amount of not less than \$10,000.00 or proved at trial and \$1,000.00 in statutory damages along with her attorney's fees and the costs incurred in pursuing this action as authorized pursuant to 15 U.S.C. § 1692k(a).

ELEVENTH DEFENSE and
COUNTERCLAIM

31. That each and every allegation and defense as set forth above is realleged and incorporated by reference as if set forth fully herein.

32. That defendant is a "consumer" and this credit transaction is a "consumer credit transaction" within the meaning of S.C. Code 37-1-201.

33. That S.C. Code 37-5-108 prohibits unconscionable agreements or conduct in regards to a consumer credit transaction.

34. That plaintiff has failed to comply with any statutory notice requirement prior to accelerating the debt and filing this suit, and has failed to comply with SC Code 37-5-110 and 111.

35. That plaintiff is using unconscionable means by seeking an acknowledgement or affirmation of a debt barred by the applicable statute of limitations without disclosing the nature or consequences of such affirmation or waiver where an agent of plaintiff sought payment from defendant in violation of S.C. Code 37-5-108.

36. That upon information and belief, plaintiff is attempting to collect fees, expenses or other charges that are not authorized under law or by any applicable credit document to the alleged credit transaction in violation of S.C. Code 37-5-108.

37. That plaintiff violated S.C. Code 37-5-108 by utilizing unconscionable means in collecting or in attempting to collect a debt by allowing such alleged debt to accumulate interest at an excessive rate for an extended period of time without seeking redress prior to the filing of this complaint when plaintiff has a duty to mitigate its damages and should promptly seek redress within a reasonable time after an alleged default..

38. That, upon information and belief, plaintiff is engaging in such other and further practices that violate S.C. Code 37-5-108 as may be shown through discovery and proved at trial.

39. That as a direct and proximate cause of plaintiff's actions, defendant has suffered anxiety over this matter; emotional distress, and has had to incur legal fees in order to defend this unwarranted lawsuit and such other damages as may be shown through discovery and proved at trial.

40. That defendant is entitled to recover her actual damages in an amount of not less than \$10,000.00 and \$1,000.00 in statutory damages per violation along with her attorney's fees and the costs incurred in pursuing this action as authorized pursuant to S.C. Code 37-5-108.

TWELFTH DEFENSE and
COUNTERCLAIM

41. That defendant expressly reserves the right to assert any other defenses that may be available at law or equity.

WHEREFORE, having fully responded to plaintiff's complaint, defendant prays this Court for the following relief:

1. That plaintiff's complaint be dismissed;
2. That plaintiff have and recover nothing from defendant;
3. That the costs of this action be cast upon plaintiff;

4. That this Court enter a judgment in favor of defendant ruling that defendant is not indebted to plaintiff;

5. That this matter be tried before a jury as by law allowed;

6. That defendant have and recover from plaintiff the sum of \$10,000.00 for actual damages and \$1,000.00 for statutory damages for violations of the Fair Debt Collections Practices Act;

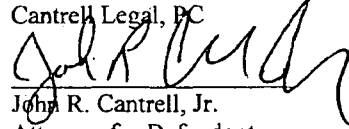
7. That defendant have and recover from plaintiff the sum of \$10,000.00 for actual damages from violations of S.C. Code 37-5-108;

8. That defendant have and recover from plaintiff the sum of \$1,000.00 in statutory damages for each violation of S.C. Code 37-5-108;

9. For such other and further relief as this Court deems just and proper.

Dated this May 24, 2012.

Cantrell Legal, PC



John R. Cantrell, Jr.

Attorney for Defendant

P.O. Box 1276

Goose Creek, SC 29445

Telephone: (843) 797-2454

Facsimile: (309) 213-0922

Email: lawyer@cantrellclan.com

SC Bar # 10309

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the attached ANSWER and COUNTERCLAIM(s) on all the parties to this cause by depositing a copy hereof, first-class postage prepaid, in the United States mail, addressed to the party or the attorney for each said party as follows:

Christopher T. Colwell, Esq.
654 Coleman Blvd., Suite 100
Mt. Pleasant, SC 29464

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Capital Bank, N.A.,)

Plaintiff,)

v:)

Charles A. Moore a/k/a Charles A.B. Moore,)

Defendant.)

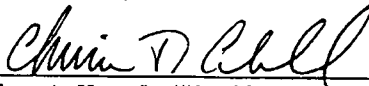
IN THE COURT OF COMMON PLEAS
CASE NO.: 2011-CP-10-7407

NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT

FILED
SEP 28 AM 11:55
JULIE J. ARMSTRONG
CLERK OF COURT

COMES NOW, Plaintiff/Counter-Defendant Capital Bank, N.A. ("Plaintiff"), by and through its undersigned counsel, and hereby moves (this "Motion"), pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, for entry of an order granting it summary judgment on (i) all of its causes of action against Defendant/Counter-Plaintiff Charles A. Moore a/k/a Charles A.B. Moore ("Defendant") and (ii) all of the counterclaims alleged by Defendant; because there are no genuine issues of material fact in dispute and Plaintiff is entitled to judgment as a matter of law.

This Motion is supported by the Affidavit of Randy Foster attached hereto as Exhibit "A" and incorporated herein by reference, the pleadings filed in this case, the arguments of counsel, applicable case law and any affidavits and/or memoranda of law which may be provided to the Court prior to a hearing of this motion.



Robert A. Kerr, Jr. (#011981)
Christopher T. Colwell (#71127)
MOORE & VAN ALLEN, PLLC
40 Calhoun Street, Suite 300
P.O. Box 22828
Charleston, South Carolina 29413-2828
Telephone: (843) 579-7000
Attorneys for Plaintiff

Dated: September 27, 2012
Charleston, South Carolina

CHARLESTON\509008v1

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Capital Bank, N.A.,)
Plaintiff,)
v.)
Charles A. Moore a/k/a Charles A.B. Moore,)
Defendant.)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2011-CP-10-7407

**AFFIDAVIT OF RANDY FOSTER
IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

FILED
2012 SEP 28 AM 11:55
JULIE J ARMSTRONG
CLERK OF COURT

Randy Foster, being duly sworn, deposes and says:

1. I am employed by Capital Bank, N.A. (the "Plaintiff"), and I have knowledge of the records for this matter. I am authorized to make this affidavit on behalf of the Plaintiff and have knowledge of the facts set forth herein.

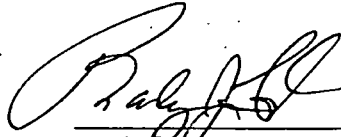
2. For value received, Charles A. Moore a/k/a Charles A.B. Moore (the "Borrower") made, executed and delivered to Plaintiff's predecessor in interest, First National Bank of the South, an Interest Only Home Equity Line of Credit with a credit limit of Seven Hundred Fifty Thousand and 00/100ths (\$750,000.00) Dollars (the "Note"). A true and correct copy of the Note was attached to the Complaint as Exhibit "A" and is therefore part of the record in this case.

3. The Note was assigned to NAFH National Bank pursuant to that certain Purchase and Assumption Agreement dated as of July 16, 2010 between the Federal Deposit Insurance Corporation, as Receiver for First National Bank of the South and NAFH National Bank. A true and correct copy of an Assignment of the Note, is attached hereto and incorporated herein as Exhibit "A".

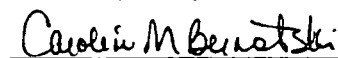
4. On June 30, 2011, NAFH National Bank merged with Capital Bank, N.A., with the resulting bank title of Capital Bank, N.A. Such merger was effective as of June 30, 2011, as evidenced by that certain certification letter dated June 30, 2011 from the Comptroller of the Currency Administrator of National Banks. A true and correct copy of such certification letter is attached hereto and incorporated herein as Exhibit "B". Such certification letter was made in the ordinary course of business, at or near the time of the events detailed therein, and have been kept and maintained by the Plaintiff in the ordinary course of its business.

CHARLESTON09017v1

5. The maturity date of the Note is February 26, 2023.
6. Under the terms of the Note, interest was to be charged on the unpaid principal at a variable rate, all as provided in the Note.
7. Under the terms of the Note, it is provided, among other things, that a Default (as defined therein) would occur if the Borrower failed to make a payment as required by the terms of the Note.
8. The Borrower drew down on the entire line of credit, and there is now due and owing and unpaid upon the Note the principal sum of Seven Hundred Fifty Three Thousand Two Hundred Forty Five and 09/100ths (\$753,245.09) Dollars, together with accrued interest of Two Thousand Four Hundred Fifty Four and 13/100ths (\$2,454.13) Dollars as of August 11, 2011, together with interest accruing after that date at the per diem rate of Sixty Six and 33/100ths (\$66.33) Dollars, together with late fees of Seventeen and 00/100ths (\$17.00) Dollars, together with Plaintiff's attorneys' fees and other costs of collection.
9. The Borrower's last payment on the Note was made on May 5, 2011. The Borrower is in default in the performance of the terms, covenants and provisions of the Note by his failure to make payments as called for by the terms of the Note.
10. The Borrower was advised of such default and the Borrower has failed to remit the sums due under the Note despite being sent multiple notices of such default and notice of acceleration of the Note. True and correct copies of such notices sent by the Plaintiff and Plaintiff's counsel are attached hereto and incorporated herein as Exhibit "C".


Randy Foster

Sworn to before me this
25th day of September, 2012


Notary Public for the State of South Carolina
My Commission Expires: 2-5-17

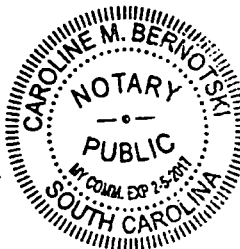


Exhibit A
Assignment of Note
[See Attached]

CHARLESTON509017v1

ASSIGNMENT OF PROMISSORY NOTE AND MORTGAGE

NOW THEREFORE, FOR VALUABLE CONSIDERATION RECEIVED, Federal Deposit Insurance Corporation, as Receiver for First National Bank of the South does hereby grant, bargain, sell, assign, transfer and set over unto Capital Bank, N.A., 215 N. Pine Street, Spartanburg, South Carolina 29302-1665, Attn: Chief Financial Officer, without recourse, that certain Interest Only Equity Line of Credit given by Charles A. Moore to First National Bank of the South dated February 19, 2008, together with that certain Mortgage given by Charles A. Moore a/k/a Charles A.B. Moore to First National Bank of the South dated February 19, 2008 and recorded February 26, 2008, Charleston County RMC Office at Book E652, Page 258, and together with all loan documents associated therewith and the money due and to become due thereon. This Assignment shall have an effective date of July 16, 2010.

This instrument is made without recourse, representation or warranty, express or implied, by the FDIC in its corporate capacity or as Receiver.

IN WITNESS WHEREOF, it has set its hand and seal this 25th day of September, 2012.

WITNESSES:

Caroline M. Bernatke
[Signature]

Federal Deposit Insurance Corporation,
as Receiver for First National Bank
of the South

BY: [Signature] (SEAL)

Name: Robert Hintelmann
Attorney in fact for Federal Deposit Insurance
Corporation pursuant to Power of Attorney
Recorded with the Charleston County RMC
simultaneously herewith.

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me this 25th day of September, 2012 by Robert Hintelmann, Attorney-in-fact for Federal Deposit Insurance Corporation, as Receiver for First National Bank of the South, on behalf of said Corporation.

[Signature]
Notary Public for South Carolina
My Commission Expires: 10/24/14

CHARLESTON509140v1

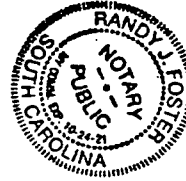


Exhibit B
Certification Letter
[See Attached]

CHARLESTON509017v1



Comptroller of the Currency
Administrator of National Banks

Southern District Licensing
500 North Akard, Suite 1600
Dallas, Texas 75201-3323

June 30, 2011

Kenneth Posner
Chief of Investment Analytics & Research
North American Financial Holdings, Inc.
667 Madison Avenue, 10th Floor
New York, NY 10065

Re: Affiliated Merger of Capital Bank, Raleigh, North Carolina with and into NAFH National Bank, Miami, Florida, (2011-SO-02-0011) with the Resulting Bank Title of Capital Bank, National Association

Dear Mr. Posner:

This letter is the official certification of the Comptroller of the Currency (OCC) to merge Capital Bank, Raleigh, North Carolina with and into NAFH National Bank, Miami, Florida, effective June 30, 2011. The resulting bank title is Capital Bank, National Association, and will be located in Miami, Florida, charter number 24976.

This letter is also the official authorization given to Capital Bank, National Association to operate the main office and the branches of Capital Bank as branches. A listing of each newly authorized branch and its assigned OCC branch number is attached.

Sincerely,

Brenda E. McNeese

Brenda E. McNeese
NBE/Senior Licensing Analyst

Enclosure

cc: Chris Primrose, EIC, Midsize Bank Supervision
Christopher Marshall, Capital Bank, National Association
Richard Kim, WLRK

NAFH National Bank
Capital Bank Merger
(Resulting Bank: Capital Bank, National Association)
Branch Listing

Branch No.	Branch Location
150007A	333 Fayetteville Street, Suite 102, Raleigh, NC
150008A	445 S. Main Street, Burlington, NC
150009A	227 S. Main Street, Graham, NC
150010A	503 Huffman Mill Road, Burlington, NC
150011A	200 Williamsboro Street, Oxford, NC
150012A	300 E. Raleigh Street, Siler City, NC
150013A	8816 Six Forks Road, Raleigh, NC
150014A	130 N. Steele Street, Sanford, NC
150015A	1201 Kildaire Farm Road, Cary, NC
150016A	3466 South Church Street, Burlington, NC
150017A	2127 Clark Avenue, Raleigh, NC
150018A	4901 Glenwood Avenue, Raleigh, NC
150019A	12217 Capital Blvd., Wake Forest, NC
150020A	9632 Chapel Hill Road, Morrisville, NC
150021A	918 Merrimon Avenue, Asheville, NC
150022A	929 S. McPherson Church Road, Fayetteville, NC
150023A	225 Green Street, Fayetteville, NC
150024A	102 E. Washington Street, Mebane, NC
150025A	225 4 th Street, NW, Hickory, NC
150026A	1310 Hendersonville Road, Asheville, NC
150027A	37 Hillsboro Street, Pittsboro, NC
150029A	1260 N. Arendell Avenue, Zebulon, NC
150030A	462 New Leicester Hwy, Asheville, NC
150031A	2222 Jefferson Davis Hwy, Sanford, NC
150032A	12701 US Hwy 70 W, Clayton, NC
150033A	4841 Ramsey Street, Fayetteville, NC
150034A	11 N. Market Street, Asheville, NC
150035A	5070 Kentworth Drive, Holly Springs, NC
150036A	7705 Carpenter Fire Station Road, Cary, NC
150037A	2917 S. Homer Blvd., Sanford, NC
150038A	3310 S. Peak Drive, Hope Mills, NC
150039A	6501 Falls of Neuse Road, Raleigh, NC

Exhibit C
Notices of Default and Demand Letters
[See Attached]

CHARLESTON509017v1

NAFH NATIONAL BANK

NOTICE OF CONSUMER RIGHT TO CURE

June 2, 2011

CHARLES A MOORE
1045 APPLECROSS DR
ROSWELL GA 30075

Via Certified Mail and U.S. Mail

Re: Loan #8015662

Please be advised that the above referenced account is past due.

You are hereby notified that you have ten (10) days from today's date to bring your account current. The total amount necessary to bring your account current is \$4,052.84. If this amount is not paid by the close of business on the tenth calendar day after the date of this letter, we will proceed to exercise our rights under the law. Your immediate attention to this matter will be greatly appreciated.

Partial payments less than the amount due will not be accepted nor will any inadvertent acceptance of the arrears constitute a waiver of any right of NAFH National Bank.

You may cure this default by paying the past due amount to:

NAFH National Bank
6435 Naples Blvd
Naples, FL 34109
Attn: Special Assets Department

If NAFH National Bank is not in receipt of the payment of the past due amount on or before the tenth calendar day after the date of this letter, you will have failed to cure the default. Such action will result in acceleration of the sums secured by the note and NAFH National Bank will proceed to take legal action. If you disagree with the assertion for curing that a default has occurred you may contact:

Special Assets Department
NAFH National Bank
6435 Naples Blvd
Naples, FL 34109
1.800.233.6330 ext 66899

MEMBER
FDIC

N221

Consumer Lending | 12195 Metro Parkway | Suite 6 | Fort Myers, FL 33866
Customer Service: 239.768.7130
www.nafhnb.com



NAFH NATIONAL BANK

This letter should not be construed as a waiver of any other defaults that might exist, and without prejudice to any and all remedies of NAFH National Bank.

Fair Debt Collection Practices Notice

This notice is required by the Fair Debt Practices Act (the "Act") 15 U.S.C., 1601 et seq., as amended.

NAFH is the creditor to whom the debt is owed. The debt described in this letter will be assumed to be valid by the creditor, unless the debtor, within 30 days after receipt of this notice, disputes, in writing, the validity of the debt of some portion thereof.

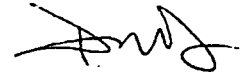
If the debtor notifies the creditor in writing within 30 days of the receipt of this notice that the debt or any portion thereof is disputed, the creditor will obtain a verification of the debt and a copy of the verification will be mailed to the debtor by the creditor.

Written request(s) required by this act should be addressed to:
Special Assets Department
NAFH National Bank
6435 Naples Blvd
Naples, FL 34109

Please govern yourself accordingly.

This letter is being sent Certified, Return Receipt Requested and by regular mail.

Sincerely,



NAFH National Bank Collections Department

Certified Mail # 7007 1490 0003 3377 4225

If you are experiencing financial hardship beyond your control, we are here to help you through this difficult period. You may qualify for a modification program if you own and occupy your home as a primary residence. Please give us a call to discuss your options.

MEMBER
FDIC N2231

Consumer Lending | 12195 Metro Parkway | Suite 6 | Fort Myers, FL 33966
Customer Service: 238.768.7130
www.nafhnb.com



HAGOOD & KERR, P.A.

ATTORNEYS & COUNSELORS AT LAW

Christopher T. Colwell
ccolwell@hagoodkerr.com

August 12, 2011

Via First Class Mail

Charles A. B. Moore
1045 Applecross Drive
Roswell, GA 30075

Re: Home Equity Line of Credit dated February 19, 2008, with a credit limit of \$750,000.00 (the "Note"), as secured by that certain Mortgage dated February 19, 2008 and recorded with the Charleston County RMC Office on February 26, 2008 in Book E652, Page 258 (the "Mortgage")
Loan No.: 8015662

Dear Mr. Moore:

This firm has been retained to represent Capital Bank, N.A. ("Capital Bank"), the current owner and holder of the above-referenced Note and Mortgage. All further communications with respect to this matter should be directed to me.

The loan is in default due to your failure to make timely payments of principal and interest, and all principal, accrued interest and other charges due under the terms of the loan are past due and immediately repayable. As of August 12, 2011, the following amounts are required to pay off this loan:

1. Current past unpaid balance: \$753,245.09;
2. Capitalized Fees: \$8,331.83;
3. Secondary Interest: \$2,454.13
4. Unpaid late charges: \$17.00
5. Total: \$755,716.22.

Interest continues to accrue on the outstanding balance at the rate of \$66.32 per day.

Please be advised that if the Note has not been in full within twenty (20) days of the date of this letter, the lender will take such steps as it deems necessary to protect its interests including, but not limited to seeking judgment under terms of the Note and foreclosure of the Mortgage.

[Remainder of Page Left Blank Intentionally]

Post Office Box 220
Mount Pleasant, South Carolina 29465

654 Coleman Blvd.
Mount Pleasant, South Carolina 29464
www.HagoodKerr.com

Telephone: 843-972-1000
Facsimile: 843-972-1005

HAGOOD & KERR, PA
ATTORNEYS & COUNSELORS AT LAW
August 12, 2011
Page 2

Nothing herein should be construed as a waiver of any rights that Capital Bank may have under the loan documents, at law or in equity.

Sincerely yours,

HAGOOD & KERR, PA



Christopher T. Colwell

cc: Nikki C. Meekins (via email)

**NOTICE REQUIRED BY THE FAIR DEBT
COLLECTION PRACTICES ACT
15 U.S.C. §1601, As Amended**

1. The amount of the debt is stated in the letter attached hereto.
2. The Capital Bank, N.A. is the creditor to whom the debt is owed.
3. If the original creditor is different from the current creditor, the creditor's law firm will provide the debtor with the name and address of the original creditor if requested by the debtor, in writing, within thirty (30) days of the receipt of this notice.
4. The debt described in the letter attached hereto and evidenced by the Agreement described therein will be assumed to be valid by the creditor's law firm unless the debtor, within thirty (30) days after the receipt of this notice, disputes the validity of the debt or some portion thereof.
5. If the debtor notifies the creditor's law firm in writing within thirty (30) days of the receipt of this notice that the debt or any portion thereon is disputed, the creditor's law firm will obtain a verification of the debt, and a copy of the verification will be mailed to the debtor by the creditor's law firm.
6. Written requests should be addressed to Christopher T. Colwell, Esq., Hagood & Kerr, PA, P.O. Box 220, Mount Pleasant, SC 29465.

**THIS IS AN ATTEMPT TO COLLECT A DEBT, AND ANY INFORMATION OBTAINED
WILL BE USED FOR THAT PURPOSE**

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Capital Bank, N.A.,)

Plaintiff,)

v.)

Charles A. Moore a/k/a Charles A.B. Moore,)

Defendant.)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2011-CP-10-7407

AFFIDAVIT OF
CHRISTOPHER T. COLWELL

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2013 FEB 12 AM 8:55

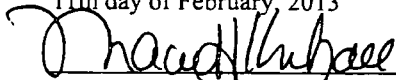
FILED

Christopher T. Colwell, being duly sworn, deposes and says:

1. I am counsel for Capital Bank, N.A. (the "Plaintiff") and I have knowledge of the records for this matter.
2. On or about July 27, 2012, Charles A. Moore a/k/a Charles A.B. Moore (the "Defendant") served responses to Plaintiff's First Set of Interrogatories. True and correct copies of the Defendant's responses to Plaintiff's First Set of Interrogatories are attached hereto and incorporated herein as Exhibit A.
3. Plaintiff's Interrogatory No. 2 requested that the Defendant state the factual and legal bases for the Defendant's defenses and counterclaims.
4. The Defendant's response to Plaintiff's Interrogatory No. 2 fails to state any factual or legal basis for the Defendant's counterclaims.
5. Plaintiff's Interrogatory No. 13 requests that the Defendant identify each communication between or involving the Plaintiff and the Defendant.
6. The Defendant's response to Plaintiff's Interrogatory No. 13 does not identify any communications between the Plaintiff and Defendant other than standard notices of default and loan statements delivered by the Plaintiff to the Defendant.


Christopher T. Colwell

Sworn to before me this
11th day of February, 2013


Notary Public for the State of South Carolina
My Commission Expires: 11/28/11

CHARLESTON524998v1

Exhibit A

Defendant's responses to Plaintiff's First Set of Interrogatories

[See Attached]

CHARLESTON524998v1

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Capital Bank, N.A.,)
Plaintiff,)
v.)
Charles A. Moore a/k/a Charles A.B. Moore,)
Defendant.)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2011-CP-10-7407

**DEFENDANT'S RESPONSES TO
PLAINTIFF'S FIRST SET OF
INTERROGATORIES**

TO: CHRISTOPHER T. COLWELL, ESQ., ATTORNEY FOR THE PLAINTIFF

The undersigned Defendant hereby answers Plaintiff's First Set of Interrogatories and incorporates below Plaintiff's instructions, definitions and interrogatories, after which Defendant's responses are stated.

Plaintiff, Capital Bank, N.A. ("Plaintiff"), by and through its undersigned attorneys, requires Defendant Charles A. Moore a/k/a Charles A.B. Moore (the "Defendant"), within thirty (30) days after service hereof, to answer under oath the Interrogatories hereinafter set forth, in accordance with Rule 33(b) of the South Carolina Rules of Civil Procedure.

GENERAL INSTRUCTIONS AND DEFINITIONS

(a) These Interrogatories are continuing in character, so as to require you to file supplementary answers if you obtain further or different information.

(b) Where the name or identity of a person is required, state the person's full name, age, home and business addresses, and home and business telephone numbers.

(c) Where the identity of an organization is requested, state the name under which it customarily does business, its address, and if known, the identity of the person in such

CHARLESTON496277v1

organization who is believed to have the greatest knowledge with respect to the matters referred to in these Interrogatories.

(d) Where you are asked to identify a document, state (i) the name of the person who prepared it or over whose signature it was issued; (ii) the name of each person to whom it was addressed or distributed; (iii) the nature and substance of the writing with sufficient particularity to enable it to be identified; (iv) its date and, if it bears no date, the date when it was prepared; (v) the physical location of it and the name and address of its custodian; and (vi) whether it will be voluntarily made available to Plaintiff for inspection and copying. If so, please attach copies of your answers to these Interrogatories.

(e) "Persons" shall mean any natural persons, proprietorships, partnerships, firms, corporations, joint ventures, independent establishments, government agencies or corporations, any divisions or subsidiaries thereof, and any other group or combination acting as an entity.

(f) "Document" shall mean and include the original, each nonidentical copy (whether different from the original by means of notes made on such copy or otherwise) and if the original is not in existence or subject to your control, each copy, regardless of origin or location, of any handwritten, typewritten, printed, recorded, transcribed, punched, taped, photocopied, photostatic, "telexed," filmed, microfilmed or otherwise prepared matter, however produced or reproduced, which is in your possession, custody, or control, including but not limited to all letters, correspondence, memoranda, telegrams, telexes, cables, memoranda or minutes of meetings or conversations (in person or telephonic), reports, notes, legal documents, and writings of every description.

(g) "Communication" means any transmission, conveyance, or exchange of information whether by written, oral, or other means.

(h) Unless otherwise indicated, these Interrogatories refer to the time, place, and circumstances of the allegations contained in the pleadings.

(i) Where these Interrogatories call for knowledge or information of a party, the request includes the knowledge of a party's agents, representatives and, unless privileged, their attorneys.

(j) The pronoun "you" refers to each of the parties to whom the Interrogatories are addressed, and the persons mentioned in clause (e).

(k) The request to "describe" and to "explain" includes an identification of all relevant circumstances including but not limited to identification of persons and dates.

(l) If you refuse to provide any of the requested information on the grounds that it is embodied in communications or documents protected by the attorney-client privilege or work product immunity, identify specifically each communication or document embodying the allegedly protected information and provide sufficient information about the content of the communication or document to permit objective verification of the claim of privilege or immunity, including but not limited to the identity of the persons involved.

(m) Whenever appropriate in these Interrogatories, the singular form shall be interpreted as plural and vice versa, the male gender shall be interpreted as the male, female, or neutral gender, and "and" or "or" shall be construed either disjunctively or conjunctively to bring within the scope of these Interrogatories any information that might otherwise be construed to be outside their scope.

(n) If an Interrogatory is objected to in part, a complete answer to all portions of that Interrogatory not objected to should be provided.

(o) Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in Plaintiff's Complaint filed in this action.

INTERROGATORIES

1. Identify any and all accounting records or documents in your possession or in the possession of a third party pertaining to the financial condition of the Defendant since February 19, 2008.

RESPONSE: Defendant believes that it is not necessary to respond to this request, since it has been withdrawn by Plaintiff by agreement with Defendant.

2. State the factual and legal bases relating to the defenses and counterclaims set forth in your Answer.

RESPONSE: Since under Rule 33(a) an interrogatory may only be directed to and answered under oath by a party, and since the undersigned Defendant is not the attorney of record in this case, the Defendant can only answer regarding the factual bases in the Answer. In that regard, Defendant has alleged that Plaintiff is not the real party in interest to pursue this collection action, since Plaintiff is not the original lender under the Note upon which Plaintiff is suing, and Plaintiff has not at this point produced proof of being entitled to enforce the Note in this matter. In regards to failing to mitigate any damages that Plaintiff might have in this action, Defendant notes that Defendant has attempted in good faith to negotiate with Defendant regarding foreclosure intervention attempts, but Plaintiff has so far rejected Defendant's attempts, thereby potentially increasing any damages that Plaintiff may be able to prove that it has suffered. Plaintiff may also have failed to mitigate its damages, if any, by failing to file a Complaint in this matter sooner than it did, thereby increasing any amounts that Plaintiff may prove to be owing under the Note. Since Plaintiff has not proven that it is the proper person to enforce Defendant's

Note, Plaintiff is not required to cure any default that Plaintiff may be able to prove in regards to Defendant's obligations under the Note. In that regard, Defendant does not believe that Plaintiff's Verification that was attached to Plaintiff's Complaint is competent to verify the amounts that may be owed under the Note.

3. Identify each person who provided information or was otherwise consulted or assisted you in connection with providing answers to these interrogatories (other than your attorney) and identify the specific interrogatories for which each such person supplied information or was consulted or assisted, the nature of any such consultation or assistance, and whether the information supplied was based on personal knowledge.

RESPONSE: Not applicable.

4. Identify all persons known to Defendant to be witnesses concerning the facts of the case. Please indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

RESPONSE: The Defendant is a witness concerning the facts of this case, and he may be contacted through his attorney of record. In addition, Defendant closed the loan in question using the services of local attorney David H. Crawford, as his attorney-in-fact. Defendant is not aware of his home address or contact information, but his business address is listed in the most current version of the South Carolina Lawyers Desk Book, which is published by the South Carolina Bar. Also, it appears that Nikki C. Meckins, who signed Plaintiff's Verification in Plaintiff's Complaint, and who claims to be an Officer of Plaintiff, may also be a witness concerning the facts of this case. Defendant is not aware of her contact information. No written or recorded statements have been taken from any of these witnesses at this time.

5. Set forth a list of photographs, videotapes, tape recordings, diagrams, plats,

sketches, memoranda, cancelled checks, account statements, receipts, correspondence or other documents in your possession that relate to a defense or claim in the case.

RESPONSE: See Defendant's responses to Plaintiff's requests for production, being sent simultaneously herewith.

6. Identify any expert witnesses whom Defendant proposes to use as a witness at any of the hearings or at the trial of this case, and for each expert listed, identify the area of expertise and subject matter on which each is expected to testify, set forth in detail all opinions held by such experts as they relate to the issues in this case, and set forth the factual basis for any expert opinion rendered by such experts. Identify all documents used by any expert witness to formulate his or her opinion.

RESPONSE: Not applicable at this time.

7. Identify each person whom you have retained or specially employed in anticipation of litigation or in preparation for trial and whom you do not expect to call as a witness.

RESPONSE: Not applicable at this time.

8. For each person known to Defendant or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witness.

RESPONSE: In regards to the Defendant, the Defendant would be aware of all facts regarding this case other than the conduct of the loan closing, since the loan was closed via power of attorney. In regards to David H. Crawford, he would be aware of the conduct of the loan closing, to the extent that he is able to remember that event at this time. Defendant is not aware of what

facts, if any, Nikki C. Meekins may be knowledgeable concerning. No statements have been taken from any witness at this time.

9. Name any other person known to Defendant or counsel to have discoverable information or knowledge of facts which could lead to discoverable information.

RESPONSE: In Defendant's responses to Plaintiff's request for production, Plaintiff will find a copy of an email to Defendant from Licia J. Lott, who was at that time an employee of First National Bank of the South, with whom Defendant had some communications. In addition, Scott Warren was another employee of First National Bank of the South with whom Defendant had some communications.

10. Please set forth a list of all documents evidencing the amounts owing under the Note.

RESPONSE: Defendant is not aware of such documents. Defendant has produced copies of some payments and billing statements in Defendant's responses to Plaintiff's request for production of documents. Defendant is aware of a loan payment history produced by Plaintiff during this case, but is not aware whether or not that document is accurate and complete.

11. Please provide evidence of all payments made by or on behalf of Defendant to Plaintiff since the subject loan was originated, and identify the corresponding billing statement from Plaintiff to which such payment relates.

RESPONSE: See Defendant's responses to Plaintiff's request for production of documents being transmitted simultaneously herewith. Defendant has only produce the records in Defendant's possession. Defendant does not have all payment records or billing statements for this loan.

12. Identify any and all tax returns, financial statements, profit and loss statements

and loan applications prepared by you or on your behalf and used for any purpose since February 19, 2008.

RESPONSE: Defendant believes that it is not necessary to respond to this request, since it has been withdrawn by Plaintiff by agreement with Defendant.

13. Please describe each communication between or involving the Plaintiff and the Defendant, including the date of any communication, the medium of such communication (i.e., if orally, whether the same was conducted by telephone or in person; if by written communication, whether the same was transmitted by email, hand delivery, or posted by certified, register or regular mail), the individual to whom the communication was directed, and the substance of the communication.

RESPONSE: Defendant is not aware of any such communications, except any written communications that may be included in Defendant's responses to Plaintiff's request for production of documents, which is being produced simultaneously herewith.

14. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the Defendant.

RESPONSE: Defendant believes that any damages for emotional distress would be included under pain and suffering, and so does not quantify that in this response. Regarding financial damages, Defendant has incurred attorney fees in an approximate current amount of over \$4,500.00, plus amounts that will accrue prior to the resolution of this matter. Defendant also claims statutory damages as listed in his Answer of \$1,000.00 in regards to the alleged FDCPA violation and \$1,000.00 per violation for the alleged South Carolina Consumer Protection Code violation.

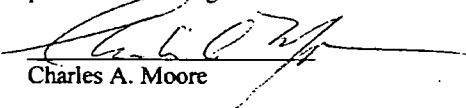
15. For each of the foregoing Interrogatories, please identify and (pursuant to the

Plaintiff's Requests for Production of even date herewith) produce copies of all documents that set forth, support, refer or relate to the facts or matters set forth in your answers to these Interrogatories or your Answer filed in this action.

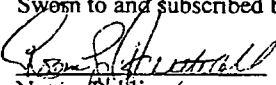
RESPONSE: Please see Defendant's responses to Plaintiff's request for production of documents produced simultaneously herewith.

Dated this 21st day of July, 2012.

I declare under penalty of perjury that the above responses are true and correct to the best of my personal knowledge.


Charles A. Moore

Sworn to and subscribed before me this 27th day of July, 2012.


Notary Public



STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

CAPITAL BANK, N.A.

Plaintiff,

v.

CHARLES A. MOORE a/k/a CHARLES
A.B. MOORE,

Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2011-CP-10-7407

**OBJECTION TO
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

2013 FEB 12 AM 9:19
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

Comes now the Defendant, Charles A. Moore, by and through his undersigned counsel, and objects to Plaintiff's pending motion for summary judgment ("Motion") dated September 27, 2012 since there are material questions of fact, which make summary judgment inappropriate at this time.

The time period for discovery under the current scheduling order is not yet complete, and Defendant intends to serve Plaintiff with discovery requests tomorrow in person at the hearing on the Motion. Incomplete discovery, by itself, normally precludes summary judgment under established state law.

Plaintiff requests summary judgment not only on Plaintiff's claims in its Complaint, but also on all of Defendant's counterclaims. However, Plaintiff's Affidavit in Support of its Motion makes no reference to Defendant's counterclaims. Plaintiff is therefore not entitled to summary judgment on Defendant's counterclaims and defenses.

Defendant objects to the court's consideration of Plaintiff's Affidavit in Support of its Motion. Defendant believes that the affidavit is facially defective, and cannot support Plaintiff's Motion. In addition, Defendant believes that the Plaintiff's Affidavit is substantively defective, and insufficient to grant summary judgment under the standards required by South Carolina Rule

of Civil Procedure 56, since material questions of fact remain that have not been properly addressed by Plaintiff's Affidavit.

This Objection is supported by the Affidavit of Defendant attached hereto and incorporated herein by reference, the pleadings filed in this case, the arguments of counsel, and applicable case law.

Dated this February 11, 2013.

Cantrell Legal, PC



John R. Cantrell, Jr.

Attorney for Defendant

P.O. Box 1276

Goose Creek, SC 29445

Telephone: (843) 797-2454

Facsimile: (309) 213-0922

Email: lawyer@cantrellclan.com

SC Bar # 10309

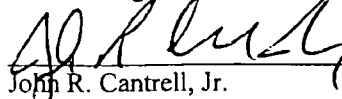
CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the attached OBJECTION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT on all the parties to this cause by depositing a copy hereof, first-class postage prepaid, in the United States mail, addressed to the party or the attorney for each said party as follows:

Christopher T. Colwell, Esq.
Moore & Van Allen, PLLC
PO Box 22828
Charleston, SC 29413-2828

Dated this February 11, 2013.

Cantrell Legal, PC



John R. Cantrell, Jr.

Attorney for Defendant

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
CAPITAL BANK, N.A.

Plaintiff,

v.

CHARLES A. MOORE a/k/a CHARLES
A.B. MOORE,
Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2011-CP-10-7407

**AFFIDAVIT IN SUPPORT OF
DEFENDANT'S OBJECTION TO
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

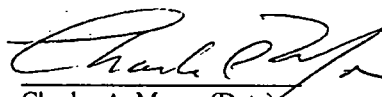
2013 FEB 12 AM 9:19
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

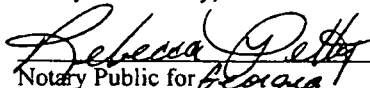
Comes now the undersigned Charles A. Moore, and being first duly sworn, deposes and swears under penalty of perjury that the following facts are true based on his personal knowledge:

1. I am the Defendant in the above matter.
2. The affidavit submitted by Plaintiff in support of its Motion for Summary Judgment ("Motion") does not state anything regarding Defendant's defenses and counterclaims and Defendant therefore believes that material issues of fact remain on those defenses and counterclaims.
3. A material question of fact remains regarding payments made to First National Bank of the South, since accounting records received on this account indicate that advances were made under a line of credit at times in lieu of payments from Defendant. Therefore, it is uncertain, absent further proof of how those payments were applied to the account, what the outstanding balance due on this loan might be. It is also uncertain when the last payment was made on this loan for purposes of establishing when the statute of limitations has run. There is also a question of fact regarding whether loan payments made by way of lender advances were authorized by Defendant.

4. As the promissory note in question is a variable rate note, there has been no showing by Plaintiff that any payments due under the note were calculated using the correct interest rate at the time the payments came due.
5. Defendant disputes that Plaintiff has shown that it is the owner and holder of the note or that it is entitled to collect on the note.
6. Defendant disputes that he drew down the entire line of credit on this loan and believes that lender made unauthorized advances on this loan.


Charles A. Moore (Date) 2/8/13

Sworn to and subscribed before me this
8th day of February, 2013.


Notary Public for Georgia
My Commission expires: May 18, 2014



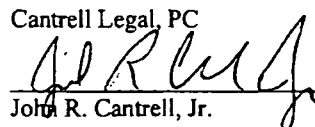
CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the attached AFFIDAVIT on all the parties to this cause by depositing a copy hereof, first-class postage prepaid, in the United States mail, addressed to the party or the attorney for each said party as follows:

Christopher T. Colwell, Esq.
Moore & Van Allen, PLLC
PO Box 22828
Charleston, SC 29413-2828

Dated this February 8, 2013.

Cantrell Legal, PC


John R. Cantrell, Jr.
Attorney for Defendant

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Capital Bank, NA

Plaintiff,

vs.

Charles A. Moore aka Charles A.B. Moore

Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2011-CP-10-7407

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:
Christopher T. Colwell, Bar No. 71127
Address:
PO Box 22828, Charleston, SC 29413-
2828
Phone: 843-579-7000 Fax
E-mail: christophercolwell@mvalaw.com

Defendant's Attorney:
John R. Cantrell, Jr., Bar No. 10309
Address:
PO Box 1276, Goose Creek, SC 29445
Phone: 843-797-2454 Fax 309-213-0922
E-mail: lawyer@cantrellclan.com Other: _____

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed:

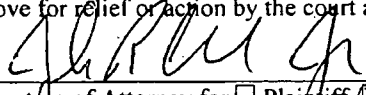
Court Reporter Needed: ☐ YES ☒ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff ☒ Defendant

March 20, 2013

Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT: \$ _____

☒ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☒ Other: Amended prior motion already paid

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

CAPITAL BANK, N.A.

Plaintiff,

v.

CHARLES A. MOORE a/k/a CHARLES
A.B. MOORE,

Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2011-CP-10-7407

AMENDED RULE 59(E) MOTION

BY
[Signature]

JULIE J. ARMS-STRONG
CLERK OF COURT

2013 MAR 20 AM 9:18

FILED

TO: Christopher T. Colwell, Attorney for Plaintiff and the Hon. R. Markley Dennis, Jr.

Comes now the Defendant, Charles A. Moore, by and through his undersigned counsel, and moves the Court pursuant to South Carolina Rule of Civil Procedure (SCRCP) 59(e) to alter, amend, or reconsider the final Order Granting Partial Summary Judgment (Order) dated February 22, 2013, filed with this Court on March 4, 2013, and notice of entry of which was received by the undersigned attorney for the Defendant on March 11, 2013. The original Rule 59(e) Motion (Motion) was served upon the above parties on March 6, 2013, which is being amended by this Amended Motion (Motion) to include the information above regarding the final Order, since the prior Motion only referenced the interim form Order, due to the fact the notice of entry of the final Order had not yet been received by the undersigned when the original Motion was served. This Motion will be supported with a Brief to be filed shortly by the Defendant with more detail on the grounds for the Motion as set forth below. Pursuant to Rule 59(f), Defendant consents to having this Motion heard upon submission of briefs only by the parties without oral argument, if it please the court.

Pursuant to the standards set forth in *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 602 S.E. 2D 772 (SC 2004), a party may ask the court to alter,

amend or reconsider a prior order entered in a case, all of which relief Defendant requests in this Motion. The original hearing on Plaintiff's summary judgment motion held on February 12, 2013 was very brief, lasting less than 15 minutes, and did not afford Defendant sufficient time to be heard on all issues and arguments in response to Plaintiff's summary judgment motion. Defendant believes that procedural due process requires that Defendant be allowed to be heard in full on those issues and arguments, and requests to be heard on those issues and arguments through this Motion and any subsequently filed Brief in support of this Motion, plus oral arguments if the court finds that is necessary. To the extent that the court believes that it would not be appropriate for the Defendant to be heard in full on those issues and arguments through this Motion and any subsequently filed Brief, then Defendant requests a new trial on the summary judgment motion during which time Defendant can be fully heard on Plaintiff's summary judgment motion. The court granted partial summary judgment to Plaintiff only as to liability on a debt owed by Defendant to Plaintiff, and not as to the amount of any damages. Defendant is requesting that the court alter, amend or reconsider only that part of the court's order granting summary judgment to Plaintiff establishing liability on that debt to Plaintiff, including whether or not Plaintiff is the owner and holder of the Note in this case, and whether Plaintiff has standing to bring the debt collection lawsuit in this case.

Contested Issues

1. Plaintiff's summary judgment motion was premature since discovery was not complete, and Plaintiff's motion should therefore either have been denied without prejudice or continued until such time as discovery was complete. As stated to the court at the hearing, written discovery requests to Plaintiff were pending at the time of the hearing, and pursuant to the consent scheduling order submitted to the

court at the hearing, the time for further discovery had not yet expired. The deadline to file dispositive motions pursuant to that consent scheduling order is not until June 1, 2013. Defendant therefore believes that he has not had a full and fair opportunity to complete discovery in reliance upon that consent scheduling order.

2. The affidavit submitted in support of Plaintiff's motion for summary judgment was incompetent and ineffective for that purpose and the documents attached or referenced in support of that affidavit were inadmissible. When this issue was raised at the hearing on this matter, the court stated that the affidavit had been read by the court, and that the court found it to be competent. Due to that conclusion by the court, Defendant was not provided a full and fair opportunity to be heard on Defendant's arguments regarding why Defendant believes that the affidavit was incompetent to support Plaintiff's summary judgment motion, and why the exhibits referenced in that affidavit were inadmissible to support Plaintiff's motion. Defendant therefore raises those arguments in this Motion, as will be more fully detailed in Defendant's Brief in support of this Motion to be filed shortly in this matter.

A. The party filing a motion for summary judgment bears the initial burden of showing an absence of evidentiary support for the opponent's case. Defendant does not believe that Plaintiff met that burden on its summary judgment motion due to the issues regarding Plaintiff's affidavit being incompetent and its evidentiary exhibits inadmissible.

B. In order to be competent to support a motion for summary judgment, the affidavit must be proper in form. Plaintiff's affidavit was not proper in form for the following reasons:

1. The affidavit's jurat section does not comply with the form as suggested by the South Carolina Secretary of State on its website in its 2012 version of the SC Notary Public Reference Manual (see page 13). Note that the notary does not state that the affidavit was "subscribed" before the notary as the official form requires. Also note that there is no indication as to how the notary identified the affiant.
2. Although the notary's jurat section is dated, there is no date in the body of the affidavit indicating what date the affiant signed the affidavit.
3. Although at the beginning of the affidavit the affiant states that he was "duly sworn", there is no indication as to what the affiant was swearing. The affiant does not swear that the allegations made in the affidavit are "true and correct" or that the affidavit is being made under penalty of perjury. This failure renders the affidavit unreliable, since essentially the affiant is swearing to nothing at all, and is not agreeing to any penalty that will be imposed for a failure to tell the complete truth.

C. In order to be competent to support a motion for summary judgment, an affidavit must be made on personal knowledge, pursuant to Rule 56(e). Plaintiff's affidavit alleges only that the affiant has "knowledge", not personal knowledge, which is required. Personal knowledge cannot be assumed if the affiant doesn't even allege it, but even a bare allegation of personal knowledge is not sufficient

unless the affidavit states facts which would tend to show that the affiant does indeed have any personal knowledge that might be alleged. Further, based on the language in the affidavit, the affiant's knowledge appears to be based on some indeterminate records the affiant has consulted, and is therefore not personal knowledge as required by Rule 56(e).

D. In order to be competent to support a motion for summary judgment, an affidavit must show affirmatively that the affiant is competent to testify to the matters alleged therein, pursuant to Rule 56(e). In this affidavit, the affiant alleges that he is an employee of the Plaintiff. That is insufficient to show competency to testify for the Plaintiff. We do not know whether the affiant is the President and CEO of the Plaintiff, or perhaps its janitor. Even if a title were given, that would not necessarily show the employee's competence to testify to the facts alleged in the affidavit, but the failure to do so certainly makes that employee's competency an unresolved question of material fact. The affiant also claims to be authorized to make the Affidavit on behalf of the Plaintiff, which means essentially that the affiant is claiming to be acting as an authorized agent of the Plaintiff; however, other than this self-serving statement of agency, there is no other indication (such as a corporate resolution) that any such authority has been given to the affiant by the Plaintiff. The mere statement of agency authority by a purported agent, standing alone, is insufficient to establish agency as a matter of law.

E. Rule 56(e) also requires that the affidavit set forth only facts that would be admissible in evidence, including a requirement that sworn or certified copies of

all papers referred to in the affidavit be attached to the affidavit. The Plaintiff has also failed to follow this portion of the Rule, so the affidavit is defective for this reason and the attached or referenced exhibits should be disregarded. The exhibits referenced in the affidavit are defective as follows:

1. The first document referenced in the affidavit is the promissory Note at issue in this case. The affiant claims that a true and correct copy of the Note was attached to Plaintiff's Complaint; however, the affiant does not state how the affiant knows that the Note copy attached was true and correct. Indeed, the Note was not even made payable to Plaintiff, so it is unlikely that an employee of Plaintiff would have personal knowledge of the signing of the Note or would have been present at the closing on the loan when the Note was signed. The affiant makes no claim to even having seen the original Note, so the affiant has not shown affirmatively that the affiant is competent to testify regarding the authentication of the copy of the Note attached to the Complaint.

2. In paragraph 3 of Plaintiff's Affidavit, the affiant references two separate documents, but in a way that causes the reader to be misled into thinking only one document is at issue. The first document referenced in this paragraph is next document that the affiant attempts to authenticate is a Purchase and Assumption Agreement dated July 16, 2010 between the FDIC and NAFH National Bank; however, a sworn or certified copy of this document is not attached to the Affidavit as is required of documents referenced in the Affidavit pursuant to Rule 56(e), so this document cannot be considered in support of Plaintiff's summary judgment motion. This omission is critical, since this document is an essential

link in the chain of assignments of this Note. Further, the affiant has not demonstrated competence to authenticate this FDIC Agreement, since the affiant does not claim to be any employee of either party to that Agreement, and does not otherwise demonstrate personal knowledge of that Agreement. The affiant's statements that the Note was assigned pursuant to this Agreement are therefore conclusory, and should be disregarded. The affiant attempts in vain to draw attention away from this omitted Agreement by referencing another document in paragraph 3, which is a "true and correct copy of an assignment of the Note" (emphasis added) attached as Exhibit A to the Affidavit. One might think that the referenced exhibit is the same missing assignment being referenced earlier in that same paragraph, but that is not the case. As can be seen from viewing Exhibit A, that purported Assignment is dated September 25, 2012, which is well after the Plaintiff commenced this litigation, and this Assignment is worthless and appears to have been manufactured by Plaintiff for the sole purpose of perpetrating a fraud upon the court by creating standing for the Plaintiff where none exists. Note first that this fraudulent Assignment purports to have a retroactive effective date of July 16, 2010, which might mislead one to believe that it is the same Assignment referenced earlier in paragraph 3, but that is not the case, since the parties to the two Assignments are different. The July 16, 2010 assignment is alleged to have been given from the FDIC to NAFH National Bank. The September 25, 2012 assignment purports to have been given from the FDIC to Capital Bank, N.A, but effective as of July 16, 2010, which is impossible for a couple of reasons, and further evidence of fraud. The affiant states in paragraph 4

of the Affidavit that NAFH National Bank didn't merge with Capital Bank, NA until June 30, 2011, so Capital Bank, NA couldn't possibly have received an assignment of this Note on July 16, 2010, since that is prior to the date of the merger. It appears that the person creating this fraudulent September 25, 2012 assignment overlooked that fact. Another significant reason why the September 25, 2012 assignment is legally worthless, and further evidence of fraud upon the court, is that the affiant claims that the promissory Note was assigned by the July 16, 2010 Purchase and Assumption Agreement from the FDIC to NAFH National Bank. If this is true, then the FDIC had no beneficial interest left to convey to Capital Bank, NA on September 25, 2012, which makes the second purported assignment legally worthless. Its only logical purpose is to mislead the court and the Defendant into thinking that the Plaintiff's chain of title to this promissory Note is complete, even though the July 16, 2010 Purchase and Assumption Agreement is completely missing from the record properly before this court. Further, Plaintiff's failure to produce the July 16, 2010 Agreement creates a question of material fact as to whether that Agreement actually exists, which should preclude summary judgment from being given to Plaintiff on its Complaint on the issue of whether Defendant owes a debt to Plaintiff or not. In addition, Plaintiff's use of the fraudulent September 25, 2012 Assignment to support its claims should cause the court to issue a Rule to Show Cause why Plaintiff should not be sanctioned for introducing a fraudulent document into the record of this case in support of Plaintiff's Complaint. Upon information and belief, Robert Hintelmann, who signed the fraudulent Assignment on behalf of

the FDIC is also employed by Plaintiff, thereby creating an apparent conflict of interest from representing both parties to this Assignment; however, Defendant is awaiting confirmation of this belief from Plaintiff's pending discovery responses, which is a further reason why summary judgment is premature at this time. The Defendant further believes that assignments cannot be made retroactive as a matter of law, and Plaintiff's attempt to do so should be disregarded by the court, except to the extent the court finds Plaintiff's conduct in creating the fraudulent Assignment to be sanctionable. If the court were for some reason to find that the September 25, 2012 assignment to be effective as of that date, then it would be clear that Plaintiff lacked standing to file the Complaint in this case when it was originally filed, so Plaintiff's summary judgment motion should be denied for lack of standing to have filed the Complaint in the first place. Defendant further alleges that Plaintiff is aware of this defect in its litigation, which is why the fraudulent retroactive September 25, 2012 assignment appears to have been created. Even if the court were to find that the September 25, 2012 Assignment were proper evidence in this case, Plaintiff has not submitted a sworn or certified copy of this document as an attachment to this Affidavit, so it is inadmissible for that reason as well.

3. The affiant next attempts to authenticate Exhibit B attached to the Affidavit, which the affiant claims to be a true and correct copy of a certification letter sent by the Comptroller of the Currency Administrator of National Banks to a representative of North American Financial Holdings, Inc.. However, the affiant neither claims to have sent the letter nor to have received the letter, and

there is no evidence as to how the affiant can have personal knowledge of this letter. Indeed the affiant doesn't even claim to have been employed by either of the parties to this letter, and there are no other facts to show that the affiant is competent to testify as to the authenticity of this letter. In addition, no sworn or certified copy of this letter in admissible form has been produced by the affiant, so the court should disregard this Exhibit B as well. Of course, this doesn't stop the affiant from claiming in paragraph 4 that this letter (to which the affiant was not a party) was made in the ordinary course of the Comptroller's business (which appears to be mere speculation without foundation), including the time that it was made, or that it was kept or maintained by the Plaintiff herein (even though the letter was not addressed to the Plaintiff and it is simply hearsay). The affiant's willingness to make such obviously unfounded statements should cause the court to mark the affiant as an unreliable witness as to other statements made by the affiant as well. The court should also disregard the affiant's conclusory statements regarding the fact of any merger between NAFH National Bank and Capital Bank, NA, since the affiant shows no basis for this belief other than the inadmissible certification letter attached as Exhibit B to the Affidavit.

4. Plaintiff's Exhibit C attempts to authenticate default notices sent by Plaintiff to Defendant on June 2, 2011 and August 12, 2011. However, Plaintiff has not complied with Rule 56(e) by attaching sworn or certified copies of these referenced documents, so they should be disregarded as well. In addition, the June 2, 2011 letter purports to be sent from NAFH National Bank to Defendant, not from Plaintiff to Defendant as the affiant claims, so there is no reason to

believe that the affiant, as an employee of Plaintiff, would have any personal knowledge of the mailing of either the June 2, 2011 letter or the letter affiant claims was sent by Plaintiff's counsel to Defendant. The affiant's willingness to testify to matters about which it appears he could have no personal knowledge further erode affiant's credibility. These letters are also hearsay, and inadmissible both due to that fact and lack of proper authentication.

F. The affiant makes other allegations regarding the amount of debt that affiant claims is due from Defendant, but the Defendant does not address those allegations at this time, since the court has already ruled that Plaintiff is not entitled to summary judgment on the issue of the amount of any debt that may be owed.

G. The affiant makes some allegations in paragraph 9 of the Affidavit regarding the date of Defendant's last payment on the Note, but the affiant alleges no personal knowledge of that payment, and sets forth no facts that would allow the court to conclude that the affiant has shown affirmatively that the affiant is competent to testify to those allegations. Similarly, the affiant makes allegations about the Defendant being in default under the terms of the Note, but likewise fails to establish the basis for that allegation or show competence to testify to that allegation. Defendant therefore asks that the court disregard these allegations as well, since they fail to meet the standards of Rule 59(e).

Wherefore, Defendant prays that the Court alter, amend, and reconsider the partial summary judgment Order entered in this case, and reverse that Order, based on the arguments above and

the Brief in support of this Motion to be filed shortly in this matter, and Defendant consents to having this matter heard upon submission of Briefs by the parties only, and without oral argument, if it please the court.

Dated this March 20, 2013.

Cantrell Legal, PC



John R. Cantrell, Jr.

Attorney for Defendant

P.O. Box 1276

Goose Creek, SC 29445

Telephone: (843) 797-2454

Facsimile: (309) 213-0922

Email: lawyer@cantrellclan.com

SC Bar # 10309

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the attached Amended Rule 59(e) Motion on all the parties to this case by serving the judge named above at his address of record and the below named attorney for Plaintiff by first class mail with sufficient postage attached to the address below:

Christopher T. Colwell, Esq.

Moore & Van Allen, PLLC

PO Box 22828

Charleston, SC 29413-2828

Dated this March 20, 2013.

Cantrell Legal, PC



John R. Cantrell, Jr.

Attorney for Defendant

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

CAPITAL BANK, N.A.

Plaintiff,

v.

CHARLES A. MOORE a/k/a CHARLES
A.B. MOORE,
Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2011-CP-10-7407

BRIEF IN SUPPORT OF
AMENDED RULE 59(E) MOTION

FILED
2013 MAY 28 PM 3:15
JULIE J. HESTER
CLERK OF COURT
BY [Signature]

TO: Christopher T. Colwell, Attorney for Plaintiff and the Hon. R. Markley Dennis, Jr.

Comes now the Defendant, Charles A. Moore, by and through his undersigned counsel,
and files this Brief in Support of the Amended Rule 59(e) Motion filed with this court on March
20, 2013.

Contested Issues

Plaintiff's summary judgment motion was premature since discovery was not complete, and
Plaintiff's motion should therefore either have been denied without prejudice or continued until
such time as discovery was complete. As the Supreme Court stated in *Baughman v. AT&T*, 306
S.C. 101, 112-114, 410 S.E.2d 537 (1991), "Since it is a drastic remedy, summary judgment
"should be cautiously invoked so that no person will be improperly deprived of a trial of the
disputed factual issues." [citations omitted]. This means, among other things, that summary
judgment must not be granted until the opposing party has had a full and fair opportunity to
complete discovery [citations omitted]." It is worth noting that in the *Baughman* case, more than
three years had elapsed between the filing of the action and the premature grant of summary
judgment. Also, in evaluating whether discovery was complete in the case of *Robertson v. First
Union National Bank*, 350 S.C. 339, 565 S.E.2d 309 (2002), our Court of Appeals stated,

"Generally, it is not premature for the trial court to grant summary judgment after all relevant parties have been deposed because the litigants have had a full and fair opportunity to develop the record in the case [citations omitted]." In this case, the time frame between the initial filing of the action and the court's grant of summary judgment was much shorter than the time allowed in *Baughman*. In addition, the parties have a scheduling order in effect (which is of record in this case and of which the defendant asks the court to take judicial notice), which allowed more time for discovery, including both outstanding responses to the defendant's written discovery requests and further time for the parties to take depositions. As of the time that the court granted partial summary judgment in this case, only the plaintiff had taken a deposition, thereby putting the defendant at a disadvantage in spite of defendant's reliance upon the current scheduling order. The defendant still wishes to be able to take depositions in this case, including deposition questions related to whether or not defendant is liable on plaintiff's claims.

The affidavit submitted in support of Plaintiff's motion for summary judgment was incompetent and ineffective for that purpose and the documents attached or referenced in support of that affidavit were inadmissible.

A. "Under Rule 56(c), SCRPC, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. [citations omitted].

Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, [emphasis added] the opponent cannot simply rest on mere allegations or denials contained in the pleadings." *Schmidt v.*

Courtney, 357 S.C. 310, 317, 592 S.E.2d 326 (S.C. App., 2003). It is clear that the movant has the initial burden of proof. If the movant does not carry the burden of proof to show the absence of a genuine issue of material fact, then the opposing party may prevail without even having to raise a defense.

B. In order to be competent to support a motion for summary judgment, the affidavit must be proper in form. Plaintiff's affidavit was not proper in form for the following reasons:

1. The affidavit's jurat section does not comply with the form as suggested by the South Carolina Secretary of State on its website in its 2012 version of the SC Notary Public Reference Manual. This manual is a state government public record and can be found online at <http://www.sos.sc.gov/forms/Notary/NotaryPublicReferenceManual.PDF>, and relevant excerpts are also attached to this brief as Exhibit A. Note that the notary does not state that the affidavit was "subscribed" before the notary as the official form requires. Also note that there is no indication as to how the notary identified the affiant.
2. Although the notary's jurat section is dated, there is no date in the body of the affidavit indicating what date the affiant signed the affidavit.
3. Although at the beginning of the affidavit the affiant states that he was "duly sworn", there is no indication as to what the affiant was swearing. The affiant does not swear that the allegations made in the affidavit are "true and correct" or that the affidavit is being made under penalty of perjury. This failure renders the affidavit unreliable, since essentially the affiant is swearing to nothing at all, and is not agreeing to any penalty that will be imposed for a failure to tell the complete truth. See *Nissho-Iwai American Corp. v. Kline*, 845 F. 2d 1300 (5th Cir. 1988), where the court found that an affidavit offered in defense of summary judgment motion

was incompetent since it was "neither sworn nor its contents stated to be true and correct nor stated under penalty of perjury."

C. In order to be competent to support a motion for summary judgment, an affidavit must be made on personal knowledge, pursuant to Rule 56(e). See also, *Dawkins v. Fields*, 354 S.C. 58, 64, 580 S.E.2d 433 (S.C., 2003). Plaintiff's affidavit alleges only that the affiant has "knowledge", not personal knowledge, which is required. Personal knowledge cannot be assumed if the affiant doesn't even allege it, but even a bare allegation of personal knowledge is not sufficient unless the affidavit states facts which would tend to show that the affiant does indeed have any personal knowledge that might be alleged. (*Antonio v. Barnes*, 464 F. 2d 584 (4th Cir. 1972)). Further, based on the language in the affidavit, the affiant's knowledge appears to be based on some indeterminate records the affiant has consulted, and is therefore not personal knowledge as required by Rule 56(e).

D. In order to be competent to support a motion for summary judgment, an affidavit must show affirmatively that the affiant is competent to testify to the matters alleged therein, pursuant to Rule 56(e). In this affidavit, the affiant alleges that he is an employee of the Plaintiff. That is insufficient to show competency to testify for the Plaintiff. We do not know whether the affiant is the President and CEO of the Plaintiff, or perhaps its janitor. Even if a title were given, that would not necessarily show the employee's competence to testify to the facts alleged in the affidavit, but the failure to do so certainly makes that employee's competency an unresolved question of material fact. The affiant also claims to be authorized to make the Affidavit on behalf of the Plaintiff, which means essentially that the affiant is claiming to be acting as an authorized agent of the Plaintiff; however, other than this self-serving statement of agency, there is no other indication

(such as a corporate resolution) that any such authority has been given to the affiant by the Plaintiff. *Klippel v. Mid-Carolina Oil, Inc.*, 399 S.E.2d 163, 303 S.C. 127 (S.C. App., 1990) stated that “[t]he law is clear in this state that statements made by an agent concerning the existence or extent of his authority are insufficient standing alone to establish agency.” There is no statement by the Plaintiff itself that the affiant was an authorized agent of Plaintiff for the purpose of executing this affidavit.

E. Rule 56(e) also requires that the affidavit set forth only facts that would be admissible in evidence (*Hall v. Fedor*, 349 S.C. 169, 175-176, 561 S.E.2d 654 (S.C. App. 2002)), including a requirement that sworn or certified copies of all papers referred to in the affidavit be attached to the affidavit. The Plaintiff has also failed to follow this portion of the Rule, so the affidavit is defective for this reason and the attached or referenced exhibits should be disregarded. The exhibits referenced in the affidavit are defective as follows:

1. The first document referenced in the affidavit is the promissory Note at issue in this case. The affiant claims that a true and correct copy of the Note was attached to Plaintiff's Complaint; however, the affiant does not state how the affiant knows that the Note copy attached was true and correct. Indeed, the Note was not even made payable to Plaintiff, so it is unlikely that an employee of Plaintiff would have personal knowledge of the signing of the Note or would have been present at the closing on the loan when the Note was signed. The affiant makes no claim to even having seen the original Note, so the affiant has not shown affirmatively that the affiant is competent to testify regarding the authentication of the copy of the Note attached to the Complaint.

2. In paragraph 3 of Plaintiff's Affidavit, the affiant references two separate documents, but in a way that causes the reader to be misled into thinking only one document is at issue. The first document referenced in this paragraph is next document that the affiant attempts to authenticate is a Purchase and Assumption Agreement dated July 16, 2010 between the FDIC and NAFH National Bank; however, a sworn or certified copy of this document is not attached to the Affidavit as is required of documents referenced in the Affidavit pursuant to Rule 56(e), so this document cannot be considered in support of Plaintiff's summary judgment motion. This omission is critical, since this document is an essential link in the chain of assignments of this Note. Further, the affiant has not demonstrated competence to authenticate this FDIC Agreement, since the affiant does not claim to be any employee of either party to that Agreement, and does not otherwise demonstrate personal knowledge of that Agreement. The affiant's statements that the Note was assigned pursuant to this Agreement are therefore conclusory, and should be disregarded. The affiant attempts in vain to draw attention away from this omitted Agreement by referencing another document in paragraph 3, which is a "true and correct copy of an assignment of the Note" (emphasis added) attached as Exhibit A to the Affidavit. One might think that the referenced exhibit is the same missing assignment being referenced earlier in that same paragraph, but that is not the case. As can be seen from viewing Exhibit A, that purported Assignment is dated September 25, 2012, which is well after the Plaintiff commenced this litigation, and this Assignment is worthless and appears to have been manufactured by Plaintiff for the sole purpose of perpetrating a

fraud upon the court by creating standing for the Plaintiff where none exists. Note first that this fraudulent Assignment purports to have a retroactive effective date of July 16, 2010, which might mislead one to believe that it is the same Assignment referenced earlier in paragraph 3, but that is not the case, since the parties to the two Assignments are different. The July 16, 2010 assignment is alleged to have been given from the FDIC to NAFH National Bank. The September 25, 2012 assignment purports to have been given from the FDIC to Capital Bank, N.A, but effective as of July 16, 2010, which is impossible for a couple of reasons, and further evidence of fraud. The affiant states in paragraph 4 of the Affidavit that NAFH National Bank didn't merge with Capital Bank, NA until June 30, 2011, so Capital Bank, NA couldn't possibly have received an assignment of this Note on July 16, 2010, since that is prior to the date of the merger. It appears that the person creating this fraudulent September 25, 2012 assignment overlooked that fact. Another significant reason why the September 25, 2012 assignment is legally worthless, and further evidence of fraud upon the court, is that the affiant claims that the promissory Note was assigned by the July 16, 2010 Purchase and Assumption Agreement from the FDIC to NAFH National Bank. If this is true, then the FDIC had no beneficial interest left to convey to Capital Bank, NA on September 25, 2012, which makes the second purported assignment legally worthless. Its only logical purpose is to mislead the court and the Defendant into thinking that the Plaintiff's chain of title to this promissory Note is complete, even though the July 16, 2010 Purchase and Assumption Agreement is completely missing from the record properly before this court.

Further, Plaintiff's failure to produce the July 16, 2010 Agreement creates a question of material fact as to whether that Agreement actually exists, which should preclude summary judgment from being given to Plaintiff on its Complaint on the issue of whether Defendant owes a debt to Plaintiff or not. In addition, Plaintiff's use of the fraudulent September 25, 2012 Assignment to support its claims should cause the court to issue a Rule to Show Cause why Plaintiff should not be sanctioned for introducing a fraudulent document into the record of this case in support of Plaintiff's Complaint. Upon information and belief, Robert Hintelmann, who signed the fraudulent Assignment on behalf of the FDIC was also employed by Plaintiff at the time this document was executed, thereby creating an apparent conflict of interest from representing both parties to this Assignment; however, Defendant is awaiting confirmation of this belief from Plaintiff's pending discovery responses, which is a further reason why summary judgment is premature at this time. The Defendant further believes that assignments cannot be made retroactive as a matter of law (see attached Exhibit B, which is an unpublished case, *OneWest v. Cullen*), and Plaintiff's attempt to do so should be disregarded by the court, except to the extent the court finds Plaintiff's conduct in creating the fraudulent Assignment to be sanctionable. If the court were for some reason to find that the September 25, 2012 assignment to be effective as of that date, then it would be clear that Plaintiff lacked standing to file the Complaint in this case when it was originally filed (see attached Exhibit C, unpublished case, *OneWest v. Torrence*), so Plaintiff's summary judgment motion should be denied for lack of standing to have filed the Complaint in the

first place. Defendant further alleges that Plaintiff is aware of this defect in its litigation, which is why the fraudulent retroactive September 25, 2012 assignment appears to have been created. Even if the court were to find that the September 25, 2012 Assignment were proper evidence in this case, Plaintiff has not submitted a sworn or certified copy of this document as an attachment to this Affidavit, so it is inadmissible for that reason as well.

3. The affiant next attempts to authenticate Exhibit B attached to the Affidavit, which the affiant claims to be a true and correct copy of a certification letter sent by the Comptroller of the Currency Administrator of National Banks to a representative of North American Financial Holdings, Inc.. However, the affiant neither claims to have sent the letter nor to have received the letter, and there is no evidence as to how the affiant can have personal knowledge of this letter. Indeed the affiant doesn't even claim to have been employed by either of the parties to this letter, and there are no other facts to show that the affiant is competent to testify as to the authenticity of this letter. In addition, no sworn or certified copy of this letter in admissible form has been produced by the affiant, so the court should disregard this Exhibit B as well. Of course, this doesn't stop the affiant from claiming in paragraph 4 that this letter (to which the affiant was not a party) was made in the ordinary course of the Comptroller's business (which appears to be mere speculation without foundation), including the time that it was made, or that it was kept or maintained by the Plaintiff herein (even though the letter was not addressed to the Plaintiff and it is simply hearsay). The affiant's willingness to make such obviously unfounded statements should cause the court

to mark the affiant as an unreliable witness as to other statements made by the affiant as well. "The absence of an affirmative showing of personal knowledge of specific facts vitiates the sufficiency of the affidavits and, accordingly, summary disposition based thereon was improper." (*Antonio* at 585) The court should also disregard the affiant's conclusory statements regarding the fact of any merger between NAFH National Bank and Capital Bank, NA, since the affiant shows no basis for this belief other than the inadmissible certification letter attached as Exhibit B to the Affidavit.

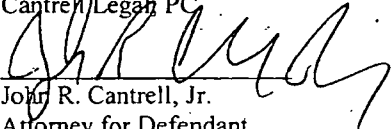
4. Plaintiff's Exhibit C attempts to authenticate default notices sent by Plaintiff to Defendant on June 2, 2011 and August 12, 2011. However, Plaintiff has not complied with Rule 56(e) by attaching sworn or certified copies of these referenced documents, so they should be disregarded as well. In addition, the June 2, 2011 letter purports to be sent from NAFH National Bank to Defendant, not from Plaintiff to Defendant as the affiant claims, so there is no reason to believe that the affiant, as an employee of Plaintiff, would have any personal knowledge of the mailing of either the June 2, 2011 letter or the letter affiant claims was sent by Plaintiff's counsel to Defendant. The affiant's willingness to testify to matters about which it appears he could have no personal knowledge further erode affiant's credibility. These letters are also hearsay, and inadmissible both due to that fact and lack of proper authentication.

F. The affiant makes other allegations regarding the amount of debt that affiant claims is due from Defendant, but the Defendant does not address those allegations at this time, since the court has already ruled that Plaintiff is not entitled to summary judgment on the issue of the amount of any debt that may be owed.

G. The affiant makes some allegations in paragraph 9 of the Affidavit regarding the date of Defendant's last payment on the Note, but the affiant alleges no personal knowledge of that payment, and sets forth no facts that would allow the court to conclude that the affiant has shown affirmatively that the affiant is competent to testify to those allegations. Similarly, the affiant makes allegations about the Defendant being in default under the terms of the Note, but likewise fails to establish the basis for that allegation or show competence to testify to that allegation. Defendant therefore asks that the court disregard these allegations as well, since they fail to meet the standards of Rule 59(e).

Wherefore, Defendant prays that the Court alter, amend, and reconsider the partial summary judgment Order entered in this case, and reverse that Order, based on the Amended Rule 59(e) Motion that Defendant has filed, and this Brief in support of that motion.

Dated this May 28, 2013.

Cantrell Legal PC

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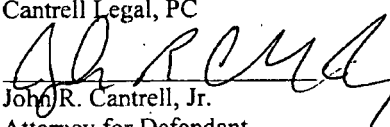
2011-CP-10-7407

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day personally served the attached Brief in Support of Amended Rule 59(e) Motion on all the parties to this case by hand delivery of a copy of this Brief in court on the judge named above and on Christopher T. Colwell, attorney of record for Plaintiff.

Dated this March 28, 2013.

Cantrell Legal, PC


John R. Cantrell, Jr.

Attorney for Defendant

FILED

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JULIE J. ARMSTRONG
CLERK OF COURT

BY _____

EXHIBIT A

Chapter 4

Sample Notarial Ceremonies and Forms

There is no specific language required to perform notarial "ceremonies." However, the scenarios following should assist you.

Sample Script for Taking an Affidavit

Notary: Do you have some forms of photo identification showing your name, address, and signatures that I could use to verify your identity?

Signing Party: Yes. I have a driver's license and my government identification card.

Notary: (Examines IDs, compares signatures, matches photos to person, and returns IDs.) Thank you. Please don't put your IDs away. I'll need to look at them again later. Would you please show me the document you would like to swear to and have notarized?

Signing Party: Here.

Notary: Thank you. In order to notarize this, I will need to have you specifically swear to me that the statements made in it are true. Are you willing to do that?

Signing Party: Yes. (If, as a matter of conscience, a party says "no" because he or she is unwilling to "swear" or take an oath, the party may instead "affirm" to the truth of his or her statements, "under penalty of perjury". If that is the party's choice, the words "affirm under penalty of perjury" may be substituted for the word "swear" in the following statement, and the words "so help you God" eliminated.)

Notary: Would you please raise your right hand. Now, do you solemnly swear that the statements in the document you have asked me to notarize are the truth, the whole truth, and nothing but the truth, so help you God?

Party: Yes, I do.

Notary: Please sign here. (Notary witnesses signing.) Now, may I please see your IDs again? (Notary verifies that signature on document matches the signatures on the IDs.)

The notary then completes the notarization certificate, signs and seals it. The text on the following page is an example of appropriate language to use in an affidavit.

Sample Affidavit

State of South Carolina
County of Richland

Justin Case personally appears before me, the undersigned officer duly authorized by the laws of South Carolina to administer oaths, and now on this 25th day of June, in the year of 2015 at 10:21 pm/am of said day, being by me first duly sworn on his/her oath/affirmation, deposes and says:

(Signature of Affiant)

(Printed name of Affiant)

Sworn/affirmed to and subscribed before me
On this 25th day of June, 2015
Personally known ☐ or Produced identification ☐
Type of Identification produced _____

(signature of Notary Public)

(printed name of Notary Public), Notary Public
Richland County, South Carolina
My commission expires February 23, 2019
(Notary Seal)

EXHIBIT B

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ULSTER

ONEWEST BANK, FSB.

Plaintiff,

-against-

SCOTT CULLEN; DONNA GREENFIELD; INDYMAC
BANK, F.S.B.; "JOHN DOE" AND "JANE DOE", said names
being fictitious, it being the intention of Plaintiff to designate
any and all occupants of premises being foreclosed herein,

Defendants.

All Purpose Term

Hon. Henry F. Zwack, Acting Supreme Court Justice Presiding
RJ1: 55-09-02155 Index No. 09-5421

Appearances: Fein, Such & Crane, LLP
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Attorneys for Defendants
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Kingston, New York 12402

DECISION/ORDER

Zwack, J.:

In this mortgage foreclosure proceeding, defendants Scott Cullen and Donna Greenfield (collectively "Cullen") have moved to dismiss the complaint pursuant to CPLR 3211, asserting plaintiff OneWest Bank, FSB ("OneWest") was not the owner of the mortgage and note at issue when this action was commenced, and thus lacks standing. OneWest opposes the motion.

On October 26, 2009, OneWest commenced the present mortgage foreclosure proceeding by filing of the Summons, Verified Complaint and Notice of Pendency with the Ulster County Clerk. Defendant Scott Cullen was served on November 5, 2009, with the Affidavit of Service filed with the Ulster County Clerk on November 9, 2009. OneWest has not submitted proof of service on defendant Donna Greenfield.

On May 8, 2006, Cullen signed a note with IndyMac Bank, F.S.B. ("IndyMac"), promising to pay IndyMac \$64,910.00, and to secure the note signed a mortgage which stated: IndyMac is the lender; that Mortgage Electronic Registration Systems, Inc. ("MERS") is the "mortgagee of record" for purposes of recording the Cullen mortgage; that MERS "is a separate corporation that is acting solely as nominee for Lender and Lender's successors and assigns"; and, that "MERS (as nominee for Lender and Lender's successors and assigns) has the right: (A) to exercise any or all those rights, including, but not limited to, the right to foreclose..." While mortgage assignments are traditionally publicly recorded

with the County Clerk, under the MERS system, the Cullen note and mortgage could instead be transferred electronically to any entity participating in the MERS system and tracked electronically only by MERS (*see, Mercorp, Inc. v Romaine*, 8 NY3d 90). On November 11, 2009, MERS assigned the subject mortgage to OneWest, stating the assignment was effective as of September 18, 2009.

On March 19, 2009, OneWest purchased IndyMac from the Federal Deposit Insurance Corporation ("FDIC") out of an FDIC receivership of IndyMac. FDIC's limited power of attorney designated the attorneys in fact authorized to execute on behalf of FDIC all "endorsement of promissory notes or allonges to promissory notes". As a negotiable note secured by a note (*see*, UCC-3-104), in order to effect a valid assignment of the entire instrument, the Cullen note must be indorsed on the instrument itself or an attached paper (*see*, UCC-3-302[3],[4]). Cullen has placed the assignment of the note and mortgage, and thus the effectiveness of the indorsement on the note, in issue. To the extent OneWest claims the rights of a holder in due course of the note, it has the burden of showing the authority of the indorsement on the note and to establish that it is a holder in due course of the note (*see*, UCC 3-307). The note offered by OneWest is not indorsed by the FDIC; it bears only an unexplained, undated indorsement in blank by IndyMac, the original lender and holder of the note. OneWest has not submitted proof in evidentiary form that establishes that IndyMac held the note at the time of its receivership, or that the FDIC sold, assigned or transferred the note and mortgage to OneWest prior to the commencement of the foreclosure proceeding.

The only proof OneWest offers that it is the holder and owner of the subject note and mortgage is its possession of the note and the November 11, 2009 MERS assignment of the mortgage to OneWest, which states the assignment to be effective as of September 18, 2009.¹

In the absence of evidentiary proof that the FDIC transferred the note to OneWest (i.e., indorsement of the note by the FDIC), the gap in time between when OneWest acquired ownership of IndyMac assets (March 19, 2009) and when the November 11, 2009 MERS assignments states the actual assignment took effect (September 18, 2009), supports one conclusion, namely the note and mortgage remained within the MERS system and was only assigned by the written MERS assignment.

Absent standing, OneWest may not seek judicial relief (*Saratoga County of Chamber of Commerce v Putaki*, 100 NY2d 801). As OneWest is not the original mortgagee or lender of the Cullen note and mortgage, to have standing to commence the foreclosure action it must prove that the assignment of the note and mortgage was completed prior to the commencement of the action. An assignment of the note and mortgage may be effected by delivery alone, or by a writing (see, e.g., *Curtis v Moore*, 152 NY 159, 162 [1897]; *Flyer v Sullivan*, 284 AD 697, 699-[1st Dept 1954]), and may be effectuated by delivery alone (see *id.*). "Where plaintiff is the assignee of a mortgage at the time of service of the complaint,

¹ OneWest did submit a copy of the FDIC Bill of Sale, without the schedule or list which identified the IndyMac assets transferred to it. Also, although it submitted a list of attorneys in fact authorized to indorse the notes transferred by the FDIC, the Cullen note was not indorsed by the FDIC. The statements of OneWest's attorneys in its Affirmation in Opposition are conclusory only, and thus fail to establish that the FDIC actually transferred the Cullen note and mortgage as part of its receivership of IndyMac.

plaintiff has standing and is entitled to commence a proceeding its own name (citation omitted)..." (*Bankers Trust Co. v Hoovis*, 263 AD2d 937, 938 [3d Dept 1999]). As in this matter, when a retroactive written assignment is executed after the commencement of the action, in the absence of proof of actual delivery of the note and mortgage prior to the commencement of the action, the retroactive assignment is insufficient to confer standing upon the assignee (OneWest) in a foreclosure action ((*LaSalle Bank National Association v Ahearn*, 59AD3d 911 [3d Dept 2009]; *Wells Fargo Bank, N.A. v Marchione*, 887 NYS2d 615 [2nd Dept 2009])). Clearly, the assignment by MERS is a retroactive assignment executed after the commencement of the foreclosure action and insufficient alone to confer standing upon OneWest in this foreclosure action.

To support it having standing to foreclose the Cullen mortgage, notwithstanding its retroactive written assignment executed after the commencement of this action, OneWest states it purchased the assets of IndyMac on March 19, 2009, and it then became and remains the owner and holder of the Cullen note and mortgage. However, as previously noted, OneWest has not submitted proof in evidentiary form to establish that the Cullen note and mortgage was included in the IndyMac assets sold and delivered by the FDIC to OneWest on or about March 19, 2009. The Cullen note indorsement is unexplained, undated, in blank by IndyMac, and not by the FDIC. Beyond possession of the note indorsed in blank (which can be presumptive evidence of its ownership [see *Glynn v. United Steel Works Corp.*, 160 Misc 495]), the only evidentiary proof submitted by OneWest that it is also the owner and

holder of the Cullen mortgage is the November 19, 2009 MERS assignment, which is stated to be effective as of September 18, 2009.

In the absence of an indorsement of the Cullen note by the FDIC, or other evidentiary proof establishing that the subject note and mortgage was assigned to OneWest by the FDIC, the November 11, 2009 MERS assignment is controlling. OneWest's unsubstantiated claim that it acquired the Cullen note and mortgage as part of its March 19, 2009 purchase of IndyMac assets from the FDIC is insufficient to establish that OneWest became the holder of the subject note and mortgage prior to the commencement of the foreclosure action.

For the foregoing reasons, the Court finds that OneWest has failed to establish it has standing in this proceeding (CPLR 3211), and dismisses the complaint in this proceeding.

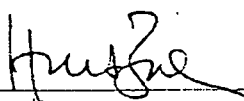
Accordingly, it is

ORDERED that defendants Scott Cullen and Donna Greenfield's motion to dismiss is granted, as set forth above.

This constitutes the Decision and Order of the Court. This Decision and Order is returned to the attorneys for the defendants. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision and Order

shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

Dated: March 3, 2010
Troy, New York


Henry F. Zwack
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion to Dismiss dated November 17, 2009; Affirmation of Jason J. Kovacs, Esq. dated November 17, 2009; together with Exhibit "A";
2. Affirmation in Opposition of David P. Case, Esq. dated December 7, 2009; together with Exhibits "A" through "J";
3. Reply Affirmation of Jason J. Kovacs, Esq. dated December 14, 2009; together with Exhibit "A".

EXHIBIT C

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

One West Bank, FSB,) Case No. 2010-CP-32-4954
Plaintiff,)
v.)
Jason E. Torrence and Salina R.)
Torrence,)
Defendants.)

ORDER OF DISMISSAL

This case came before me for hearing on July 3, 2012 on only one issue. The defendants challenge the standing of the plaintiff to pursue this foreclosure.

Standing has been described as a "party's right to make a legal claim or seek judicial enforcement of a duty or right." Powell ex rel. Keiley v. Bank of America, 665 S.E.2d 237 (2008) @ 241 – quoting Black's Law Dictionary).

Standing is determined by looking at the facts as they exist at the time the suit is commenced. American Agricultural Chemical Co. v. Thomas, 34 S.E. 2d 592@ 594 (SC, 1945.); See also, Brock v. Bennett 443 S.E. 2d 409 (SC Ct. App. 1994 – Dispute over church property. Court looked at plaintiff's standing at the time the suit commenced.)

Here's the sequence of events that form the basis of the defendants' challenge:

- Nov 10, 2010: One West attorneys complete and sign Complaint.
- Nov 16, 2010: Complaint is filed by Lexington Clerk
- Nov 17, 2010: Mortgage Electronic Registration Systems, Inc (MERS) as Nominee for GMS Funding, assigns mortgage to One West.
- Nov 30, 2010: Mortgage assignment is recorded by the Lexington Clerk.

It is beyond dispute, that at the time One West Bank sued, it did not own the mortgage. One West's counsel argued that ownership of the note alone was sufficient. However, this suit is not simply to collect on the note, it also seeks a foreclosure.

The Greenville County Master in Equity dismissed a foreclosure on similar facts.

1102

LaSalle Bank v. Boston (Case # 2008 CP 23 08659; Order dated March 13, 2009, filed March 31, 2009). Courts in other states consistently have held that unless the plaintiff owns the note and mortgage at the time it commences the foreclosure, the case should be dismissed. See e.g., Bank of N.Y. v. Silverberg, 86 A.3d, 274, 279 – must have note and mortgage at the time the suit is commenced.

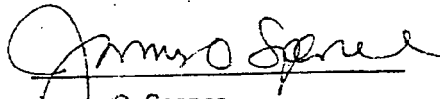
However, the dismissal is without prejudice. The plaintiff may re-file.

IT IS THEREFORE ORDERED:

This foreclosure is dismissed. The Plaintiff lacked standing to file it.

Plaintiff is granted leave to re-file.

SO ORDERED:



James O. Spence
Master in Equity for Lexington County

Dated: 3.7.27, 2012

FILED
MAR 27 2012
CLERK OF COURT
LEXINGTON COUNTY
SOUTH CAROLINA

212

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

COURT OF COMMON PLEAS

Capital Bank, N.A.,

PLAINTIFF,

v.

Charles Moore,

DEFENDANT.

TRANSCRIPT OF HEARING
C/A #:2011-CP-10-7407

Charleston County Courthouse
February 12, 2013

BEFORE:

HONORABLE R. MARKLEY DENNIS, JR., PRESIDING JUDGE.

APPEARANCES:

Christopher T. Colwell, Esquire
Attorney for Plaintiff, Capital Bank

John R. Cantrell, Jr., Esquire
Attorney for Charles A. Moore

TAKEN BY MELISSA R. SINGLETARY
CERTIFIED VERBATIM REPORTER

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1 The Court: Okay, if you'll identify yourselves and
2 the party you represent, please.

3 Mr Colwell: Thank you, Your Honor. Christopher
4 Colwell appearing on behalf of the Plaintiff, Capital
5 Bank.

6 The Court: Okay.

7 Mr. Cantrell: Your Honor, John Cantrell, here on
8 behalf of the Defendant, Mr. Moore.

9 The Court: Okay.

10 Mr. Cantrell: This is opposing counsel's motion,
11 Your Honor.

12 The Court: Thank you, sir. I'll hear from him and
13 then I'll hear from you, sir.

14 Mr. Cantrell: There's a preliminary motion, due to a
15 last minute thing that happened yesterday. I'd like to
16 raise, Your Honor

17 The Court: I'll be happy to hear from you later,
18 sir.

19 Mr Cantrell: Okay, very well.

20 The Court: It's not on my docket.

21 Mr. Cantrell: Okay. We move to disqualify, but very
22 well, Your Honor.

23 The Court: Sir?

24 Mr. Cantrell: I'm going to move to disqualify
25 opposing counsel and I believe that an oral motion is

1 proper under Rule 7.

2 The Court: I'll be happy to hear from you at the
3 appropriate time.

4 Mr. Cantrell: Very well, Your Honor.

5 The Court: Thank you, sir..

6 Mr. Cantrell: Yes, Your Honor.

7 The Court: You may take your seat.

8 Mr. Cantrell: Thank you.

9 The Court: And then I'll call on you.

10 Mr. Cantrell: Yes Your Honor.

11 The Court: Thank you, sir. I'll be happy to hear
12 from you.

13 Mr. Colwell: Thank you, Your Honor. May it please
14 the Court? Your Honor this is a straight forward debt
15 collection action. We're requesting summary judgment on
16 our verified complaint. This case has been pending for
17 over a year. Discovery is complete under a consent
18 scheduling order. We filed our motion with supporting
19 affidavit, asking the Court for summary judgment on our
20 claims as well as the Defendant's counterclaims. Just
21 yesterday I received the Defendant's objection and
22 opposing affidavit, excuse me. Your Honor, these are
23 wholly insufficient to establish any material fact that
24 needs to be decided at trial in this case. In
25 furtherance of that Your Honor, I'd like to pass up for

1 the Court's review, if I may approach.

2 The Court: Sure.

3 Mr. Colwell: I believe I emailed to your clerk last
4 night. This is for the Court's review and consideration.
5 The Defendant's responses to the Plaintiff's
6 interrogatories, specifically, Your Honor, I would point
7 you to interrogatory number 2 where we ask the Defendant
8 to state the factual and legal basis for the defenses and
9 their counterclaims, which they provide none. And we
10 believe summary judgment is appropriate here because
11 there are no material issues that need to be decided at
12 trial. We request that the Court grant our motion and
13 order the Plaintiff judgment for the principal amount due
14 under the loan, interest, attorney's fees and cost.

15 The Court: Okay, now Mr. Cantrell, I'll be happy to
16 hear from you, sir.

17 Mr. Cantrell: Thank you, Your Honor. I apologize
18 for not being very familiar with your court procedure.
19 I'm primarily a bankruptcy court attorney. Your Honor,
20 late yesterday afternoon opposing counsel sent a copy to
21 me and to your law clerk a copy of a supplemental
22 affidavit, which was just filed this morning. I think he
23 handed it up to Your Honor, the supplemental affidavits,
24 so there are two affidavits. There's the affidavit of an
25 employee of the Plaintiff and then his affidavit. And

1 that affidavit was signed by Mr. Colwell. Your Honor,
2 Mr. Colwell has just entered my witness list in this
3 case. He is now a witness in this case. I want to
4 direct Your Honor to the copy of the rule that I handed
5 up regarding disqualification of a lawyer as a witness.
6 I'm handing Mr. Colwell a copy of that as well. Rule 3.7
7 of the Code of Professional Responsibility says that a
8 lawyer shall not act as an advocate in a trial in which
9 the lawyer is likely to be a necessary witness. By his
10 own action, yesterday he made himself a witness, now the
11 exceptions to that ...

12 The Court: Thank you. Your objection is noted and I
13 appreciate that. You've preserved it. I don't need to
14 hear any more argument on that.

15 Mr. Cantrell: Thank you, Your Honor.

16 The Court: That affidavit deals with a matter that
17 only he would know as an attorney, so thank you very
18 much. I appreciate --- the affidavit really --- I
19 appreciate your position, but it's protected from further
20 review. Thank you. Now any objections to the summary
21 judgment based on --- what's the issue of fact.

22 Mr. Cantrell: Thank you, Your Honor.

23 The Court: I deny that so ...

24 Mr. Cantrell: Thank you, Your Honor.

25 The Court: Okay.

1 Mr. Cantrell: The next matter is that summary
2 judgment is premature due to incomplete discovery. As
3 you heard Mr. Colwell a few minutes ago, he said very
4 clearly, the discovery was complete due to the fact that
5 there is a scheduling order that is completed. That is a
6 false statement. I'm handing up a copy of that
7 scheduling order for Your Honor to look at it. It's a
8 very simple order. As you can see, written discovery
9 doesn't even end until March the first. We have served
10 opposing counsel with discovery. That discovery is now
11 pending and ...

12 The Court: An action was filed in 2011, sir?

13 Mr. Cantrell: It was Your Honor and I'm going to
14 site Your Honor to a South Carolina Supreme Court case,
15 Bahm versus AT&T. In that case it was pending for more
16 than three years and the Supreme Court said since it is a
17 drastic remedy summary judgment should be cautiously
18 invoked so that no person will be improperly deprived of
19 a trial ...

20 The Court: Really, really ...

21 Mr. Cantrell: I'm sorry, Judge.

22 The Court: You think I've heard --- in nineteen
23 years, you think I haven't heard a few summary judgment
24 motions?

25 Mr. Cantrell: You've heard way more than I have,

1 Your Honor.

2 The Court: So, I don't need you tell me the law
3 about the drastic remedy. I understand that and I know
4 there are cases that have said that, yes, discovery
5 should --- had not been completed but there are a lot of
6 cases that say to the contrary; that discovery, what had
7 been completed in the length of time and the fact that
8 there were things remaining. What, what is it that
9 you've presented to me that creates a scintilla regarding
10 the loan and what is owed?

11 Mr. Cantrell: That's a good question Your Honor. We
12 have also handed up to you this morning a counter
13 affidavit.

14 The Court: I've read it. What is it about that,
15 that says it. It just said I'm not sure what the
16 payments were basically.

17 Mr. Cantrell: Well, we do dispute their standing,
18 Your Honor. Plaintiff is not the original lender on his
19 loan. They claim to own it by way of assignment.

20 The Court: Yes.

21 Mr. Cantrell: And that is, that is, that is not
22 true. At least it hasn't been proven true at this point.
23 It certainly is a question of material fact; whether they
24 do own it. The assignment that they rely on are, are,
25 are faulty, Your Honor.

1 The Court: Based on what?

2 Mr. Cantrell: Well, let's look at, well, let's look
3 at, let's look at the, the primary affidavit from the
4 employee, Your Honor, which was attached to opposing
5 counsel's motion.

6 The Court: Where's the affidavit that raises an
7 issue that creates the issue that counters the affidavit
8 of Randy Foster where he sets forth how the loan was
9 transferred? How it all came about to this Plaintiff?

10 Mr. Cantrell: Your Honor, that affidavit of Randy
11 Foster which I'm having a little trouble putting my ...

12 The Court: Where's the counter affidavit?

13 Mr. Cantrell: The counter affidavit is on the issue
14 of standing. Is that what Your Honor ...

15 The Court: That's what you just raised and that set
16 forth specifically how they had a right to do that.

17 Mr. Cantrell: Yes, Your Honor. I did file a counter
18 affidavit and I do have it here. Oh, here we go, okay.
19 The counter affidavit says in regard to the standing
20 issue, Your Honor. Defendant disputes that Plaintiff has
21 shown this the owner and the holder of the note ...

22 The Court: All you're doing is saying I dispute
23 that, but that doesn't, that's not a counter affidavit.
24 It just says that you dispute it.

25 Mr. Cantrell: Your Honor, he also disputed the

1 payments made to the bank and the, in the original
2 affidavit, he says that, that the Defendant drew down all
3 of the advances on this loan, specifically, in our point
4 3 in our counter affidavit, it says, let's see, oh, I'm
5 sorry. That was actually on point 6. The Defendant
6 disputes that he drew down the entire line of credit on
7 this loan, believes the lender made unauthorized advances
8 on this loan. This loan was in the principal, it was a
9 line of credit an home equity line of credit and it was
10 in the principal amount of seven hundred and fifty
11 thousand. Yet in the Randy Foster affidavit, he claims
12 that the principal balance on this interest only loan is
13 now seven hundred fifty three thousand dollars. Well how
14 did that happen Your Honor? That's in addition to
15 interest, so how did this principal balance of the loan
16 go over the amount of the line of credit? There are
17 questions of material fact regarding the amount that's
18 due on this loan and more importantly I think, there's a
19 question as to whether Mr. Foster's affidavit is even
20 admissible. We don't believe that it satisfies the
21 initial standard that a, that one must make in order to
22 acquire summary judgment. In particular, the form
23 itself. Initial burden is on the movant Your Honor,
24 pursuant to Smith vs. Courtney. It says the party
25 seeking summary judgment has the initial burden of

1 demonstrating absence of genuine issue material fact.

2 Once the party makes that standard, then the burden
3 shifts. We believe that this affidavit submitted by Mr.
4 Foster is incompetent. First of all, you'll notice that
5 it doesn't talk about what is being ...

6 The Court: Based on what your statement?

7 Mr. Cantrell: No, Your Honor. I've got a lot of
8 cases here.

9 The Court: No sir, you can argue that up the road.
10 I think it's sufficient, so I differ with you.

11 Mr. Cantrell: Your Honor ...

12 The Court: You've raised the sufficiency of it, so
13 you've raised that issue for review. Thank you, sir. I
14 think it is. Thank you. Okay, what's the next issue?

15 Mr. Cantrell: The affiant, Your Honor, has no
16 personal knowledge. If you'll look at the ...

17 The Court: You can challenge that. I've read the
18 affidavit and I disagree with you. I think it's
19 sufficient.

20 Mr. Cantrell: Okay, Your Honor. Okay. I've got a
21 number of affidavit related points I'm skipping through
22 those as Your Honor's indicated ...

23 The Court: I think the affidavit's fine. You can
24 challenge that affidavit at any basis you want to. I
25 think it's fine. Based on the affidavits I have there's

1 no genuine issue of fact of the debt. I want to hear the
2 response from counsel as to the amount that you claim.
3 Why, why isn't that a material issue.

4 Mr. Colwell: Your Honor?

5 The Court: Yes.

6 Mr. Colwell: Your Honor, we've established by
7 affidavit that the amounts that the Defendant ...

8 The Court: About his assertions that they were
9 authorized advances?

10 Mr. Colwell: Your Honor, I would refer you to a true
11 and correct copy of the home equity line of credit was
12 attached to our ...

13 The Court: I understand that, but doesn't he raises
14 that issue of scintilla by saying I didn't authorize the
15 advances?

16 Ms. Colwell: Under the agreement between the
17 parties, the bank can advance those without request or
18 consent from the defendant.

19 The Court: I'm going to grant your summary judgment
20 as to the debt. I think the amount has to be determined,
21 there's some issues as to what's owed.

22 Mr. Colwell: And with regard to the Defendant's
23 counterclaims, Your Honor?

24 The Court: The counterclaims are that you did
25 something that you shouldn't have done, so there's an

1 issue there. So, I'm not granting summary judgment as to
2 the counterclaims. Thank you, sir.

3 Mr. Colwell: Thank you, Your Honor.

4 The Court: You're entitled to the debt.

5 Mr. Colwell: Thank you, Your Honor.

6 The Court: But the amount is to be determined at a
7 hearing.

8 Mr. Cantrell: Thank you Your Honor.

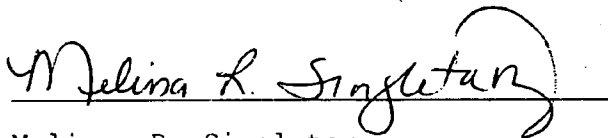
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CERTIFICATE

This is to certify that the transcript in the matter of Capital Bank, N.A. vs. Charles Moore, consisting of Thirteen (13) pages is a true and correct transcript; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am not employed by any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal
this 12th day of November, 2013. (Resent 2-14-14)



Melissa R. Singletary
Certified Court Reporter

Notary Public for South Carolina
My Commission Expires: 3-5-2014

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
Capital Bank,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 11-CP-10-7407
	)	
Charles A. Moore,	)	
	)	
Defendant.	)	

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned case was heard on May 28, 2013, before The Honorable R. Markley Dennis, Jr., in Courtroom 3E of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by counsel, as follows:

APPEARANCES:

Christopher Colwell, Esq.
 (contact information not provided)
 Appearing for Plaintiff

John Cantrell, Esq.
 (contact information not provided)
 Appearing for Defendant

DEBORAH GARRISON
Circuit Court Reporter - 9th Judicial Circuit
 Post Office Box 901
 Johns Island, South Carolina 29457
dGarrison@sccourts.org

1 THE COURT: The next one we have is
2 Capital Bank versus Charles A. Moore, motion to
3 reconsider.

4 MR. CANTRELL: May I hand up a
5 memo?

6 THE COURT: Is this the original or
7 the ---

8 MR. CANTRELL: That's your copy,
9 Your Honor.

10 THE COURT: All memoranda are
11 incorporated for the purposes of review.

12 MR. CANTRELL: Thank you, Your
13 Honor.

14 THE COURT: All right. Yes, sir?

15 MR. CANTRELL: Yes, sir. This is
16 our motion to reconsider Your Honor's previous
17 judgment, granting partial summary judgment for,
18 uh, the plaintiff -- representing, the debt--,
19 -- I apologize, the bankruptcy court (phonetic).
20 I represent the defendants, Your Honor. John
21 Cantrell, here for the defendants.

22 MR. COLWELL: Christopher Colwell
23 here on behalf of the plaintiff.

24 THE COURT: Yes, sir.

25 MR. COLWELL: Your Honor, I

1 believe between the motion to reconsider and the
2 brief that we've submitted that we've pretty
3 well, fairly completely, briefed our arguments.
4 Our problem with the original hearing, Your
5 Honor, is very short and -- although Your Honor
6 said that we made our point, that the affidavit
7 was incompetent (sic), we didn't really have a
8 chance to give you a sufficient argument. My
9 understanding of appellate cases leads me to
10 believe that both of those must be present at
11 the trial level for purposes of review. So
12 we've attempted in ---

13 THE COURT: Excuse me. Wait a
14 minute. You have a case that says your argument
15 is part of the record? I'd like to see that
16 one, unless you're arguing something that's new.
17 I'd love to see that, because attorneys
18 arguments are not.

19 MR. CANTRELL: No, Your Honor.

20 THE COURT: Okay.

21 MR. CANTRELL: I am saying that
22 we didn't have a full and fair opportunity to
23 present our arguments.

24 THE COURT: Oh, I think you did. But
25 you -- let's go to why you think that there was

1 a mistake.

2 MR. CANTRELL: Well, it's a fairly
3 long, uh, argument, Your Honor. It's in the
4 briefs and ---

5 THE COURT: Well, then, you don't
6 need -- you need to just highlight it, don't
7 you, Mr. Cantrell?

8 MR. CANTRELL: Yes, Your Honor.
9 And I can -- I could do that.

10 THE COURT: All right.

11 MR. CANTRELL: I guess one thing
12 that I want to highlight, this -- the plaintiff
13 in this case is not the original lender on this
14 loan. They claim to have -- they claim to have
15 received this by virtue of an assignment. The
16 problem is that there is a critical link in that
17 chain that is missing. Their summary judgment
18 did not attach a copy of the purported purchase
19 and sale agreement dated back on July 10th, 2010.
20 They made some allusion to it but there is no
21 authenticated copy of that in there at all.
22 Instead, they have an affidavit dated back in
23 2012, which was after this litigation was
24 commenced that purports to ---

25 THE COURT: Are you saying that

1 affidavit that you -- you have something that
2 says that's a lie?

3 MR. CANTRELL: Well, there are two
4 -- there's ---

5 THE COURT: No. I'm asking you
6 whether you have something as an officer of
7 this court that says that is incorrect?

8 MR. CANTRELL: It is impossible,
9 Your Honor, and I have -- I have ---

10 THE COURT: What is impossible?

11 MR. CANTRELL: For there to be
12 separate transfers into the same entity ---

13 THE COURT: Yeah. Well, you can
14 appeal that. You've preserved that for appeal,
15 haven't you?

16 MR. CANTRELL: Well, everything, I
17 don't believe, is preserved properly now, that
18 is in front of you, Your Honor.

19 THE COURT: No, I am saying my ruling
20 -- if that was in error, then you've already
21 preserved that. We don't need a motion to
22 reconsider that. Do we? I mean, you've raised
23 it. So let's move on to something else.

24 MR. CANTRELL: Your Honor, that
25 argument, as I said, is quite detailed.

1 THE COURT: Well, you briefed it.
2 So you've covered that. I am not concerned
3 about that issue.

4 MR. CANTRELL: And I wanted to
5 highlight that because I thought that was
6 essentially a problem. Apparently the court
7 doesn't see it that way.

8 THE COURT: No, it doesn't. Thank
9 you.

10 MR. CANTRELL: Very good. Thank
11 you, Your Honor.

12 THE COURT: Is that the basis of your
13 argument?

14 MR. CANTRELL: Your Honor, I would
15 refer again to the very detailed ---

16 THE COURT: Well, I understand --
17 well, tell me why -- why my finding that your
18 client was responsible for the debt, I didn't
19 find an amount, I think I left that open for
20 trial.

21 MR. CANTRELL: Correct, Your Honor.

22 THE COURT: So I found that there
23 was an obligation to pay. What amount, I don't
24 know.

25 MR. CANTRELL: That's correct, you

1 did find that, Your Honor.

2 THE COURT: All right. So tell me
3 what's wrong, other than the fact that you
4 allege that the affidavit doesn't carry the day.

5 MR. CANTRELL: Well, first of all,
6 Your Honor, we believe that discovery was not
7 completed in this case. At that last hearing,
8 I handed up a consent scheduling order. At the
9 time, we -- we still had time left to complete
10 finalizing their responses to our written
11 discovery. There was also time left for us to
12 conduct depositions. They had an opportunity to
13 conduct depositions in that scheduling order.
14 Our time wasn't yet up, so basically the court
15 put us in a very unfair advantage. There is a
16 Supreme Court case that says once both parties
17 have had an opportunity to conduct depositions,
18 that may be an appropriate time to ---

19 THE COURT: Did you file any counter
20 or opposing affidavits?

21 MR. CANTRELL: Yes, Your Honor, we
22 did.

23 THE COURT: What is the affidavit
24 that you filed that says the debt is not owed?

25 MR. CANTRELL: Well, Your Honor, it

1 went to the issues of damages. That's why Your
2 Honor held ---

3 THE COURT: That's correct. I mean,
4 what affidavits did you have concerning the
5 issue that you've raised?

6 MR. CANTRELL: That is a legal
7 issue about when -- affidavits are supposed to
8 contain facts and this is a legal argument that
9 discovery is not -- that summary judgment is
10 premature if discovery is not complete.

11 THE COURT: Oh, no. That's an
12 incorrect statement, just a blanket statement.
13 I would like to see that. There are cases that
14 have held that. But there are tons of cases
15 that have held that it is plenty -- because the
16 issue wasn't that complicated. The issue of
17 whether or not there is a debt owed.

18 MR. CANTRELL: This is not the ---

19 THE COURT: Thank you, sir. Your
20 motion is -- what is your position concerning
21 the assignment?

22 MR. COLWELL: Thank you, Your
23 Honor. You are correct that it is a fairly
24 straightforward case. This is one of the
25 institutions, like many I am sure you have dealt

1 with, that was taken over by the FDIC and its
2 assets sold. The assignment that he is
3 referring to was a memorialization of that
4 assignment. In fact, the Bank was taken over by
5 the FDIC, its assets sold and that subsequently
6 acquiring bank then merged into a subsequent
7 bank. I think our affidavit went into the full
8 litany of this, detailing the facts.

9 THE COURT: It did.

10 MR. COLWELL: I would also like to
11 point out that Mr. Cantrell filed a Motion to
12 dismiss initially after receiving our Complaint,
13 raising these same facts and issues; which was
14 also denied by the court. So we are here again
15 addressing the same issues for, I'd say, a third
16 time on something that is relatively straight-
17 forward and clear here, Your Honor. The
18 affidavit was sworn by an employee of the Bank
19 who in a position and had knowledge of the
20 transfer of the assets.

21 I think your order was clear that this
22 was just a straightforward case as to liability.

23 There are some questions as to what the
24 actual debt is and if there were any improper
25 behavior on behalf of the Bank, which speaks to

1 Mr. Cantrell's counterclaims, which are still
2 left.

3 THE COURT: Correct. Absolutely.
4 I mean, those are issues to be litigated, no
5 question about that. So any recourse that your
6 client is seeking for improper handling is
7 available to you. So, thank you.

8 Do you wish to reply any further, other
9 than your brief being incorporated?

10 MR. CANTRELL: It is incorporated.

11 THE COURT: That's great. Then I
12 deny your motion to reconsider. Thank you, sir.

13 MR. COLWELL: Thank you, Your
14 Honor.

15 THE COURT: Thank you.

16 (HEARING CONCLUDED)
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CERTIFICATE OF REPORTER

I, the undersigned, Deborah Garrison,
official court reporter for the 9th Judicial
Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true,
accurate and complete transcript of the hearing
held before The Honorable R. Markley Dennis,
Jr., on May 28, 2013;

I further certify that I am neither kin nor
counsel to any of the parties and have no
interest in the outcome of this action.



Deborah Garrison
Circuit Court Reporter
9th Judicial Circuit

Charleston, South Carolina
July 16, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2011-CP-10-7407

Capital Bank, N.A.,

Respondent,

v.

Charles A. Moore,

Appellant.

NOTICE OF APPEAL

Charles A. Moore appeals the Order Granting Partial Summary Judgment of the Honorable R. Markley Dennis, Jr. filed March 4, 2013 and the Judgment of the same judge filed May 29, 2013 Denying Defendant's Amended Motion to Alter or Amend or Reconsider. Appellant received written notice of entry of the March 4, 2013 Order on March 11, 2013 and received written notice of entry of the May 29, 2013 Judgment on June 6, 2013.

July 5, 2013


John R. Cantrell, Jr.
Cantrell Legal, PC
Post Office Box 1276
Goose Creek, South Carolina 29445-1276
(843) 797-2454
Attorney for Appellant

Other Counsel of Record:
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Post Office Box 22828
Charleston, South Carolina 29413-2828
Attorney for Respondent
(843) 579-7000

FILED
2013 JUL -8 PM 2:04
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED

The Hon. R. Markley Dennis, Jr., Circuit Court Judge APR 29 2014

SC Court of Appeals

Appellate Case No. 2013-001516
Trial Court Case No. 2011-CP-10-07407

Capital Bank, N.A.,

Respondent,

v.

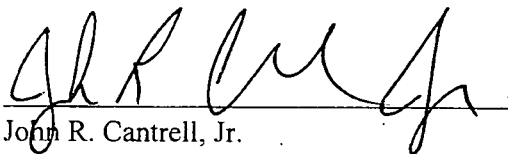
Charles A. Moore a/k/a
Charles A.B. Moore

Appellant...

CERTIFICATE OF APPELLANT

The undersigned hereby certifies that the Record on Appeal contains all
material proposed to be included by any of the parties and not any other material.

April 8, 2014



John R. Cantrell, Jr.
Cantrell Legal, PC
Post Office Box 1276
Goose Creek, South Carolina 29445-1276
(843) 797-2454
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Hon. R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2013-001516
Trial Court Case No. 2011-CP-10-07407

Capital Bank, N.A.,

Respondent,

v.

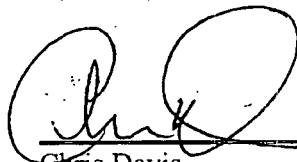
Charles A. Moore a/k/a
Charles A.B. Moore

Appellant.

PROOF OF SERVICE

I certify that I have personally served the Record on Appeal upon Capital Bank, N.A. by personal service upon the office of its attorneys of record on April 8, 2014, who are located at Moore & Van Allen, PLLC, 78 Wentworth Street, Charleston, South Carolina 29401.

April 8, 2014



Chris Davis
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SC Court of Appeals

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Hon. R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2013-001516
Trial Court Case No. 2011-CP-10-07407

Capital Bank, N.A.,

Respondent,

v.

Charles A. Moore a/k/a
Charles A.B. Moore

Appellant.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN GRANTING PARTIAL SUMMARY JUDGMENT TO RESPONDENT PREMATURELY BEFORE THE APPELLANT HAD BEEN GIVEN A FULL AND FAIR OPPORTUNITY TO COMPLETE DISCOVERY?
2. DID THE CIRCUIT COURT ERR IN GRANTING PARTIAL SUMMARY JUDGMENT TO RESPONDENT BASED ON INCOMPETENT OR INADMISSIBLE EVIDENCE AND RESPONDENT'S RESULTING FAILURE TO CARRY ITS BURDEN OF PROOF TO SHOW AN ABSENCE OF MATERIAL FACT REGARDING APPELLANT'S ALLEGED LIABILITY TO RESPONDENT ?

STATEMENT OF THE CASE

This is an appeal from a circuit court order in a collection case granting partial summary judgment to Respondent as to the issue of liability only, and not as to the amount of damages owed. This is also an appeal from the circuit court order denying Appellant's motion to alter, amend or reconsider that prior order.

Plaintiff/Respondent Capital Bank, N.A. commenced this collection action for suit on a promissory note with an alleged principal balance due of \$753,245.09, plus fees and costs, by filing a summons and complaint in the Charleston County Court of Common Pleas on October 12, 2011, which was duly served on Defendant/Appellant Charles A. Moore in a timely manner (R. pp. 9-18). Appellant filed a timely Answer to the Complaint raising defenses and counterclaims on May 29, 2012 (R. pp. 19-26). Appellant's Answer disputed both that Appellant was liable to Respondent and the amount of Respondent's claim (R. pp. 20, 25). Respondent then filed a timely Reply to Appellant's counterclaims, but the counterclaims are not relevant to this appeal, so Respondent's Reply is not part of the record on appeal.

On September 28, 2012, Respondent filed a Motion for Summary Judgment ("MSJ") seeking summary judgment against Appellant on Respondent's Complaint and on Appellant's counterclaims (R. p. 27). Respondent simultaneously filed an Affidavit of Randy Foster in support of the MSJ (Foster Affidavit, R. pp. 28-40) and later on February 12, 2013 filed an Affidavit of Christopher T. Colwell (Colwell Affidavit, R. pp. 41-51), who is Respondent's attorney of record. Appellant filed a timely Objection to Respondent's MSJ on February 12, 2013 (Objection, R. pp. 52-53) and simultaneously filed an Affidavit of Charles A. Moore (Moore Affidavit, R. pp. 54-55) in support of that Objection.

A Consent Scheduling Order (Scheduling Order, R. p. 1) was filed with the court on November 2, 2012, and was later amended by court order on March 13, 2013 to extend the time to complete written discovery from the prior deadline of March 1, 2013 until March 15, 2013 (Amended Scheduling Order, R. pp. 5-6).

On February 12, 2013, Judge R. Markley Dennis, Jr. held a hearing on the MSJ (MSJ Transcript, R. pp. 95-108). By order filed March 4, 2013, the court granted partial summary judgment to Respondent as to liability only, and denied summary judgment to Respondent as to both the amount of damages and Appellant's counterclaims (MSJ Order, R. pp. 3-4).

Appellant filed a timely Rule 59(e) motion on March 7, 2013 to alter, amend or reconsider the MSJ Order, which was later amended on March 20, 2013 (Amended Rule 59(e) Motion, R. pp. 56-68). Only the Amended Rule 59(e) Motion is included in the Record on Appeal, since the original motion would be unnecessarily duplicative since only minor changes were made, and the changes are not in dispute. A hearing before Judge Dennis on the motion to reconsider was held on May 28, 2013 (MTR Transcript, R. pp. 109-119). Appellant's Brief in support of the motion to reconsider was also filed on May 28, 2013 (MTR Brief, R. pp. 69-80). By a Form 4 Judgment filed May 29, 2013, the court summarily denied this motion (MTR Order, R. pp. 7-8).

Appellant filed a timely Notice of Appeal of both the MSJ Order and the MTR Order on July 8, 2013 (Notice of Appeal, R. p.120).

ARGUMENTS

I. SUMMARY JUDGMENT WAS IMPROPERLY GRANTED PREMATURELY BEFORE THE APPELLANT HAD A FULL AND FAIR OPPORTUNITY TO CONDUCT DISCOVERY.

Respondent will be identified as Plaintiff in this argument section, since that was the proper designation for Respondent at the time of the hearings in this matter.

Appellant will likewise be identified as Defendant for the same reason.

Plaintiff's summary judgment motion was premature since discovery was not complete, and Plaintiff's motion should therefore either have been denied without prejudice or continued until such time as discovery was complete. As the Supreme Court stated in *Baughman v. AT&T*, 306 S.C. 101, 112-114, 410 S.E.2d 537 (1991), "Since it is a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." [citations omitted]. This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery [citations omitted]." It is worth noting that in the *Baughman* case, more than three years had elapsed between the filing of the action and the premature grant of summary judgment. Also, in evaluating whether discovery was complete in the case of *Robertson v. First Union National Bank*, 350 S.C. 339, 565 S.E.2d 309 (Ct. App., 2002), our Court of Appeals stated, "Generally, it is not premature for the trial court to grant summary judgment after all relevant parties have been deposed because the litigants have had a full and fair opportunity to develop the record in the case [citations omitted]." In this case,

the time frame between the initial filing of the action and the court's grant of summary judgment was much shorter than the time allowed in *Baughman*. In addition, the parties have a scheduling order in effect (Scheduling Order, R. p. 1), which allowed more time for discovery. The MSJ hearing was held on February 12, 2013. As can be seen from the referenced one page Scheduling Order (R. p. 1), written discovery did not have to be completed until March 1, 2013, which deadline was later extended on March 13, 2013 until March 15, 2013 (Amended Scheduling Order, R. p. 5). At the time of the MSJ hearing in this case, Defendant had served Plaintiff with pending written discovery requests which had not yet been answered by Defendant. In addition, the deadline to take depositions did not expire until April 15, 2013. As of the time that the trial court denied defendant's Amended Rule 59(e) Motion in this case, only the plaintiff had taken a deposition, thereby putting the defendant at a disadvantage in spite of defendant's reliance upon the current scheduling order. The defendant still wishes to be able to take depositions in this case, including deposition questions related to whether or not plaintiff has admissible evidence proving plaintiff's standing to collect this debt and showing that defendant is liable on plaintiff's claims and also regarding plaintiff's conflicting documents regarding the two different chains of assignments alleged in this case, as will be more fully detailed below regarding the next issue, all of which create material issues of fact that cannot be resolved without allowing further discovery. Also, although the consent order stated that the deadline to file dispositive motions was June 1, 2013, the MSJ hearing was held over three months prior to that time.

**II. SUMMARY JUDGMENT WAS IMPROPERLY GRANTED BASED
ON INCOMPETENT AND INADMISSIBLE EVIDENCE WHICH DID
NOT SATISFY RESPONDENT'S BURDEN OF PROOF TO SHOW
THE ABSENCE OF A GENUINE ISSUE OF MATERIAL FACT
REGARDING APPELLANT'S ALLEGED LIABILITY TO
RESPONDENT.**

The affidavits submitted in support of Plaintiff's motion for summary judgment were incompetent or ineffective for that purpose and the documents attached or referenced in support of the Foster Affidavit were inadmissible.

A. "Under Rule 56(c), SCRPC, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. [citations omitted]. Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, [emphasis added] the opponent cannot simply rest on mere allegations or denials contained in the pleadings." *Schmidt v. Courtney*, 357 S.C. 310, 317, 592 S.E.2d 326 (Ct. App., 2003). It is clear that the movant has the initial burden of proof. If the movant does not carry the burden of proof to show the absence of a genuine issue of material fact, then the opposing party may prevail without even having to raise a defense (*Standard Fire v. Marine Contracting*, 301 S.C. 418, 421, 392 S.E.2d 460, 462 (1990)).

B. In order to be competent to support a motion for summary judgment, the affidavit must be proper in form. Plaintiff's Foster Affidavit was not proper in form for the following reasons:

1. The Foster Affidavit's jurat section does not comply with the form as suggested by the South Carolina Secretary of State on its website in its 2012 version of the South Carolina Notary Public Reference Manual. This manual is a state government public record and can be found online at <http://www.sos.sc.gov/forms/Notary/NotaryPublicReferenceManual.PDF>, and relevant excerpts are also attached to Respondent's MTR Brief as Exhibit A (R. p. 83). Note that the notary does not state that the affidavit was "subscribed" before the notary as the official form requires. Also note that there is no indication as to how the notary identified the affiant.
2. Although the notary's jurat section is dated, there is no date in the body of the Foster Affidavit indicating what date the affiant signed the affidavit.
3. Although at the beginning of the Foster Affidavit the affiant states that he was "duly sworn", there is no indication as to what the affiant was swearing. The affiant does not swear that the allegations made in the affidavit are "true and correct" or that the affidavit is being made under penalty of perjury. This failure renders the affidavit unreliable, since essentially the affiant is swearing to nothing at all, and is not agreeing to any penalty that will be imposed for a failure to tell the complete truth. See *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300 (5th Cir., 1988), where the court found that an affidavit offered in defense of

summary judgment motion was incompetent since it was “neither sworn nor its contents stated to be true and correct nor stated under penalty of perjury.” Regarding the importance of the form of the oath in the affidavit, see also *Searcy v. SC Dept Education*, 303 S.C. 544, 547-48, 402 S.E.2d 486 (Ct. App., 1991).

C. In order to be competent to support a motion for summary judgment, an affidavit must be made on personal knowledge, pursuant to Rule 56(e). See also, *Dawkins v. Fields*, 354 S.C. 58, 64, 580 S.E.2d 433 (2003). Plaintiff's Foster Affidavit alleges only that the affiant has “knowledge”, not personal knowledge, which is required (R. p. 28). Personal knowledge cannot be assumed if the affiant doesn't even allege it, but even a bare allegation of personal knowledge is not sufficient unless the affidavit states facts which would tend to show that the affiant does indeed have any personal knowledge that might be alleged. (*Antonio v. Barnes*, 464 F. 2d 584 (4th Cir., 1972)). Further, based on the language in the affidavit, the affiant's knowledge appears to be based on some indeterminate records the affiant has consulted, and is therefore not personal knowledge as required by Rule 56(e), SCRCPP.

D. In order to be competent to support a motion for summary judgment, an affidavit must show affirmatively that the affiant is competent to testify to the matters alleged therein, pursuant to Rule 56(e), SCRCPP. In the Foster Affidavit, the affiant alleges that he is an employee of the Plaintiff (R. p. 28, ¶ 1). That is insufficient to show competency to testify for the Plaintiff. We do not know whether the affiant is the President and CEO of the Plaintiff, or perhaps its janitor. Even if a title were given, that would not necessarily show the employee's

competence to testify to the facts alleged in the affidavit, but the failure to do so certainly makes that employee's competency an unresolved question of material fact. The affiant also claims to be authorized to make the Affidavit on behalf of the Plaintiff, which means essentially that the affiant is claiming to be acting as an authorized agent of the Plaintiff; however, other than this self-serving statement of agency, there is no other indication (such as a corporate resolution) that any such authority has been given to the affiant by the Plaintiff. *Klippel v. Mid-Carolina Oil, Inc.*, 399 S.E.2d 163, 303 S.C. 127 (Ct. App., 1990) stated that "[t]he law is clear in this state that statements made by an agent concerning the existence or extent of his authority are insufficient standing alone to establish agency." There is no statement by the Plaintiff itself that the affiant was an authorized agent of Plaintiff for the purpose of executing this affidavit.

E. Rule 56(e), SCRCP also requires that the affidavit set forth only facts that would be admissible in evidence (*Hall v. Fedor*, 349 S.C. 169, 175-176, 561 S.E.2d 654 (Ct. App. 2002)), including a requirement that sworn or certified copies of all papers referred to in the affidavit be attached to the affidavit. The Plaintiff has also failed to follow this portion of the Rule, so the Foster Affidavit is defective for this reason and the attached or referenced exhibits should be disregarded. The exhibits referenced in the Foster Affidavit are defective as follows:

1. The first document referenced in the Foster Affidavit is the promissory Note at issue in this case (R. p. 28). The affiant claims that a true and correct copy of the Note was attached to Plaintiff's Complaint; however, the affiant does not state how the affiant knows that the Note

copy attached was true and correct. Indeed, the Note was not even made payable to Plaintiff, so it is unlikely that an employee of Plaintiff would have personal knowledge of the signing of the Note or would have been present at the closing on the loan when the Note was signed. The affiant makes no claim to even having seen the original Note, so the affiant has not shown affirmatively that the affiant is competent to testify regarding the authentication of the copy of the Note attached to the Complaint.

2. In paragraph 3 of Plaintiff's Foster Affidavit (R. p. 28), the affiant references two separate documents, but in a way that causes the reader to be misled into thinking only one document is at issue. The first document referenced in this paragraph that the affiant attempts to authenticate is a Purchase and Assumption Agreement dated July 16, 2010 between the FDIC and NAFH National Bank; however, a sworn or certified copy of this document is not attached to the affidavit as is required of documents referenced in the affidavit pursuant to Rule 56(e), so this document cannot be considered in support of Plaintiff's summary judgment motion. This omission is critical, since this document is an essential link in the chain of assignments of this Note. Further, the affiant has not demonstrated competence to authenticate this FDIC Agreement, since the affiant does not claim to be an employee of either party to that Agreement, and does not otherwise demonstrate personal knowledge of that Agreement. The affiant's statements that the Note was assigned pursuant to this Agreement are therefore conclusory, and should be disregarded (*Dawkins v. Fields* at 68). The affiant attempts in vain to draw attention away from this omitted

Agreement by referencing another document in paragraph 3, which is a "true and correct copy of an assignment of the Note" (emphasis added) attached as Exhibit A to the Foster Affidavit (R. p. 31). One might think that the referenced exhibit is the same missing assignment being referenced earlier in that same paragraph, but that is not the case. As can be seen from viewing Exhibit A, that purported Assignment is dated September 25, 2012, which is well after the Plaintiff commenced this litigation in 2011. This Assignment is worthless and appears to have been manufactured by Plaintiff for the sole purpose of perpetrating a fraud upon the court by attempting to create standing for the Plaintiff where none exists. Note first that this fraudulent Assignment purports to have a retroactive effective date of July 16, 2010, which might mislead one to believe that it is the same Assignment referenced earlier in paragraph 3, but that is not the case, since the parties to the two Assignments are different. The July 16, 2010 assignment is alleged to have been given from the FDIC to NAFH National Bank. The September 25, 2012 assignment purports to have been given from the FDIC to Capital Bank, N.A, but effective as of July 16, 2010, which is impossible for the reasons indicated below, and further evidence of fraud. The affiant states in paragraph 4 of the Foster Affidavit (R. p. 28) that NAFH National Bank didn't merge with Capital Bank, NA until June 30, 2011, so Capital Bank, NA couldn't possibly have received an assignment of this Note on July 16, 2010, since that is prior to the date of the merger. (It appears that the person creating this fraudulent September 25, 2012 assignment

overlooked that fact.) Another significant reason why the September 25, 2012 assignment is legally worthless, and further evidence of fraud upon the court, is that the affiant claims that the promissory Note was assigned by the July 16, 2010 Purchase and Assumption Agreement from the FDIC to NAFH National Bank. If this is true, then the FDIC had no beneficial interest left to convey to Capital Bank, NA on September 25, 2012, which makes the second purported assignment legally worthless. Its only logical purpose is to mislead the court and the Defendant into thinking that the Plaintiff's chain of title to this promissory Note is complete, even though the July 16, 2010 Purchase and Assumption Agreement is completely missing from the record properly before this court. In any event, Plaintiff's two different versions of the chain of title of this Note create a conflict on a genuine issue of material fact, which should not be resolved by summary judgment (*Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, 396 S.C. 338, 343, 721 S.E.2d 455, 458 (Ct. App., 2011)). Further, Plaintiff's failure to produce the July 16, 2010 Agreement creates a question of material fact as to whether that Agreement actually exists, which should preclude summary judgment from being given to Plaintiff on its Complaint on the issue of whether Defendant owes a debt to Plaintiff or not. In addition, Plaintiff's use of the fraudulent September 25, 2012 Assignment to support its claims should cause the court to issue a Rule to Show Cause why Plaintiff should not be sanctioned for introducing a fraudulent document into the record of this case in support of Plaintiff's Complaint. Upon information and belief, Robert

Hintelmann, who signed the fraudulent Assignment on behalf of the FDIC, was also employed by Plaintiff at the time this document was executed, thereby creating an apparent conflict of interest by representing both parties to this Assignment; however, Defendant is awaiting confirmation of this belief from Plaintiff's responses to pending discovery requests, which is a further reason why summary judgment is inappropriate at this time. The Defendant further believes that assignments cannot be made retroactive as a matter of law (see Exhibit B attached to Defendant's MTR Brief, which is an unpublished case, *OneWest v. Cullen*), and Plaintiff's attempt to do so should be disregarded by the court, except to the extent the court finds Plaintiff's conduct in creating the fraudulent Assignment to be sanctionable. If the court were for some reason to find that the September 25, 2012 assignment to be effective as of that date, then it would be clear that Plaintiff lacked standing to file the Complaint in this case when it was originally filed, so Plaintiff's summary judgment motion should be denied for lack of standing to have filed the Complaint at that time. (*Wells Fargo Bank, NA v. Marchione*, 69 A.D.3d 204, 887 N.Y.S. 2d 615 (2d Dept., 2009) (*Beaumont v. Bank of New York Mellon*, 81 So.3d 553 (Fla. 5th DCA, 2012) (*Vidal v. Liquidation Properties, Inc.*, 104 So.3d 1274, 1276 (Fla. 4th DCA, 2013)). Defendant further alleges that Plaintiff is aware of this defect in its litigation, which is why the fraudulent retroactive September 25, 2012 assignment appears to have been created. Even if the court were to find that the September 25, 2012 Assignment were proper evidence in

this case, Plaintiff has not submitted a sworn or certified copy of this document as an attachment to this Affidavit as is required by Rule 56(e), SCRCP, so it is inadmissible for that reason as well.

3. The affiant next attempts to authenticate Exhibit B attached to the Foster Affidavit, which the affiant claims to be a true and correct copy of a certification letter sent by the Comptroller of the Currency Administrator of National Banks to a representative of North American Financial Holdings, Inc. (R. pp. 33-34). However, the affiant neither claims to have sent the letter nor to have received the letter, and there is no evidence as to how the affiant can have personal knowledge of this letter. Indeed the affiant doesn't even claim to have been employed by either of the parties to this letter, and there are no other facts to show that the affiant is competent to testify as to the authenticity of this letter. In addition, no sworn or certified copy of this letter in admissible form has been produced by the affiant, so the court should disregard this Exhibit B as well. Of course, this doesn't stop the affiant from claiming in paragraph 4 that this letter (to which the affiant was not a party) was made in the ordinary course of the Comptroller's business (which appears to be mere speculation without foundation), including the time that it was made, or that it was kept or maintained by the Plaintiff herein (even though the letter was not addressed to the Plaintiff and it is simply hearsay). The affiant's willingness to make such obviously unfounded statements should cause the court to mark the affiant as an unreliable witness as to other statements made by the affiant as well. "The absence of an affirmative

showing of personal knowledge of specific facts vitiates the sufficiency of the affidavits and, accordingly, summary disposition based thereon was improper.” (*Antonio* at 585) The court should also disregard the affiant's conclusory statements regarding whether there was any merger between NAFH National Bank and Capital Bank, NA, since the affiant shows no basis for this belief other than the inadmissible certification letter attached as Exhibit B to the Foster Affidavit.

4. Plaintiff's Exhibit C attempts to authenticate default notices sent by Plaintiff to Defendant on June 2, 2011 and August 12, 2011 (R. pp. 36-40). However, Plaintiff has not complied with Rule 56(e), SCRCP by attaching sworn or certified copies of these referenced documents, so they should be disregarded as inadmissible as well. In addition, the June 2, 2011 letter purports to be sent from NAFH National Bank to Defendant, not from Plaintiff to Defendant as the affiant claims, so there is no reason to believe that the affiant, as an employee of Plaintiff, would have any personal knowledge of the mailing of either the June 2, 2011 letter or the letter affiant claims was sent by Plaintiff's counsel to Defendant. The affiant's willingness to testify to matters about which it appears he could have no personal knowledge further erodes affiant's credibility. These letters are also hearsay, and inadmissible both due to that fact and lack of proper authentication.

F. The affiant makes other allegations regarding the amount of debt that affiant claims is due from Defendant, but the Defendant does not address those allegations at this time, since the court has already ruled that Plaintiff is not

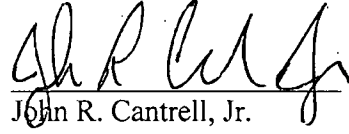
entitled to summary judgment on the issue of the amount of any debt that may be owed.

G. The affiant makes some allegations in paragraph 9 of the Foster Affidavit (R. p. 29) regarding the date of Defendant's last payment on the Note, but the affiant alleges no personal knowledge of that payment, and sets forth no facts that would allow the court to conclude that the affiant has shown affirmatively that the affiant is competent to testify to those allegations. Similarly, the affiant makes allegations about the Defendant being in default under the terms of the Note, but likewise fails to establish the basis for that allegation or show competence to testify to that allegation. Defendant therefore asks that the court disregard these allegations as well, since they fail to meet the standards of Rule 59(e), SCRCP.

III. CONCLUSION

Summary judgment was improperly granted prematurely in this case since Appellant did not have a full and fair opportunity to complete discovery in order to properly examine and counter Respondent's allegations in its Complaint. In addition, summary judgment was improperly granted in this case since Respondent failed to meet its burden of proof to show by competent and admissible evidence that there was no genuine question of material fact regarding Appellant's alleged liability to Plaintiff on this debt. As a result, this court should reverse the trial court's improper grant of partial summary judgment, and remand the case to the trial court for further proceedings consistent with this court's opinion.

Dated this April 28, 2014.

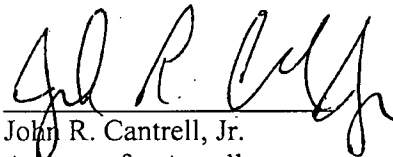


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CERTIFICATE OF COUNSEL

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

Dated this April 28, 2014.



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The Hon. R. Markley Dennis, Jr., Circuit Court Judge

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Appellant.

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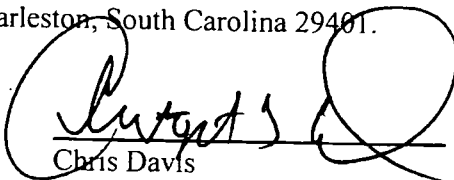
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SC Court of Appeals

PROOF OF SERVICE

I certify that I have personally served the final Brief of Appellant and final Reply Brief of Appellant upon Capital Bank, N.A. by personal service upon the office of its attorneys of record on April 28, 2014, who are located at Moore & Van Allen, PLLC, 78 Wentworth Street, Charleston, South Carolina 29401.

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.....Respondent,

v.

Charles A. Moore a/k/a
Charles A.B. Moore,

.....Appellant.

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENT AS TO THE ISSUE OF LIABILITY?
- II. WHETHER APPELLANT'S ARGUMENT THAT SUMMARY JUDGMENT WAS PREMATURE BECAUSE DISCOVERY WAS NOT COMPLETE IS NOT PRESERVED AND WITHOUT MERIT?
- III. WHETHER RESPONDENT SET FORTH ADMISSIBLE EVIDENCE TO PROVE THERE WAS NO GENUINE ISSUE OF MATERIAL FACT REGARDING WHETHER APPELLANT WAS LIABLE UNDER THE NOTE?

STATEMENT OF THE CASE

Respondent Capital Bank brought suit against Appellant Charles A. Moore to collect amounts owed under a promissory note. (R. pp. 12-14). Appellant filed an answer and counterclaims. (R. pp. 19-26). Subsequently, Respondent moved for summary judgment on its causes of action and Appellant's counterclaims. (R. p. 27). The trial court partially granted Respondent's motion as to the issue of liability and denied Respondent's motion as to the amount of damages and Appellant's counterclaims. (R. pp. 3-4). Appellant's motion to reconsider the partial grant of summary judgment in favor of Respondent was also denied. (R. p. 7). Appellant appeals the trial court's grant of partial summary judgment in favor of Respondent and the denial of Appellant's motion to reconsider. (R. p. 120).

STATEMENT OF THE FACTS

On February 19, 2008, Appellant executed and delivered to Respondent's predecessor in interest, First National Bank of the South, an interest only home equity line of credit with a credit limit of Seven Hundred Fifty Thousand dollars (\$750,000.00) (the "Note"). (R. p. 12). Subsequently, the Note was assigned to NAFH National Bank pursuant to a certain Purchase and Assumption Agreement dated July 16, 2010, between NAFH National Bank and the Federal Deposit Insurance Corporation, as Receiver for First National Bank of the South. (R. pp. 12, 28, & 31). On June 30, 2011, NAFH National Bank merged with Capital Bank, N.A., with the resulting bank title of Capital Bank, N.A. (R. pp. 12, 28, & 33). Accordingly, Respondent is the current owner and holder of the Note.¹ (R. pp. 12 & 28-40).

¹ Pursuant to federal and state law, when a merger takes effect, the title to all real estate and other property owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment. S.C. Code Ann. § 33-11-106 (2012); 12 U.S.C. § 215(e) (2012). Further, by virtue of such merger, title to all real estate and other property is vested in the surviving corporation without any deed or other transfer. 12 U.S.C. § 215(e).

Respondent initiated this collection action with the filing of the Summons and Complaint on October 12, 2011. (R. pp. 11-18). Appellant filed a Motion to Dismiss the Complaint on the grounds that Respondent lacked standing to sue on the Note. Appellant's Motion to Dismiss was denied. Appellant filed an Answer and Counterclaims, disputing Appellant's liability to Respondent, the amount of Respondent's claim, and asserting certain violations of the Fair Debt Collection Practices Act and the South Carolina Consumer Protection Code. (R. pp. 19-26).

Respondent filed a Motion for Summary Judgment on its causes of action and Appellant's Counterclaims. (R. p. 27). In support of its motion, Respondent attached the following exhibits: the affidavit of Randy Foster², an assignment of the Note to Respondent, a certification letter of the merger between NAFH National Bank and Capital Bank, and default notices that had been sent to Appellant. (R. pp. 27-40). Appellant filed an Objection to Respondent's Motion for Summary Judgment. (R. pp. 52-53). In support of his objection, Appellant filed an affidavit of Charles A. Moore. (R. pp. 54-55).

The trial court granted partial summary judgment in favor of Respondent at a hearing held on February 12, 2013. (R. pp.106-07). In its Order Granting Partial Summary Judgment, the trial court held that Appellant was liable under the Note in an amount to be determined and that Respondent was the owner and holder of the Note and the proper party to bring and maintain this action. (R. pp. 3-4).

Appellant filed a motion to reconsider, which he later amended. (R. pp. 57-68). On May 28, 2013, the trial court held a hearing on Appellant's motion to reconsider. (R. pp. 109-18). The trial court denied Appellant's motion to reconsider by filing of a form order. (R. p. 7). This appeal followed.

² Randy Foster is the Vice President – OREO (Other Real Estate Owned) Officer of Respondent.

STANDARD OF REVIEW

“An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRPC.” *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC. “In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009). A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. *David v. McLeod Reg’l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

ARGUMENTS

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO THE ISSUE OF LIABILITY.

The trial court properly granted summary judgment as to liability in favor of Respondent. Through its summary judgment motion and attached exhibits, Respondent established that it was the proper party to bring this action against Appellant as the owner and holder of the Note, and that Appellant was in default of his obligations under the Note. (R. pp. 27-40). Respondent established that there was no genuine issue as to whether Appellant was liable to Respondent under the Note. Further, while Appellant disputed that Respondent was the owner and holder of

the Note, he offered no evidence to support this contention. Rather, Appellant relied on the following general allegation contained in Charles Moore's affidavit in an attempt to create a genuine issue: "[Appellant] disputes that [Respondent] has shown that it is the owner and holder of the note or that it is entitled to collect on the note." (R. p. 55). This generic statement was simply not enough to refute the fact that Respondent was the owner and holder of the note. *See Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003). ("When opposing a summary judgment motion, the nonmoving party must do more than simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial." (internal quotation marks and citation omitted)); *see also David* at 250, 626 S.E.2d at 5 (providing summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner). Accordingly, the trial court properly granted Respondent summary judgment as to the issue of liability under the Note.

II. APPELLANT'S ARGUMENT THAT SUMMARY JUDGMENT WAS PREMATURE BECAUSE DISCOVERY WAS NOT COMPLETE IS NOT PRESERVED AND IS WITHOUT MERIT.

Appellant contends that summary judgment on the liability issue was premature because discovery had not yet been completed. *See App. Br. p. 6*. Appellant's argument is not preserved and is wholly meritless.

"The rulings of a trial [court] in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001). An abuse of discretion occurs when the trial court's ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support. *Id.*

Initially, Respondent notes that Appellant did not move for a continuance in which to pursue further discovery at the summary judgment hearing. Therefore, this issue is not preserved for review on appeal. *See Pryor v. Northwest Apartments, Ltd.*, 321 S.C. 524, 529, 469 S.E.2d 630, 633 (Ct. App. 1996) (holding that the issue as to whether the trial court erred in granting summary judgment because discovery requests were outstanding was not preserved where appellant did not ask court to continue the case so discovery could be completed).

Even if this issue were preserved, it is without merit. Although discovery was outstanding at the time of the summary judgment hearing, the record does not establish that further discovery would uncover any evidence to refute the fact that Respondent is the owner and holder of the Note or that Appellant was in default thereunder. Appellant claims that summary judgment was premature because he did not have the opportunity to conduct depositions for the purpose of asking witnesses questions regarding Respondent's assertion that it is the owner and holder of the Note.³ However, Appellant did not demonstrate that there was any likelihood that these depositions would uncover evidence to refute the fact that Respondent is the owner and the holder of the Note. *See Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659, 660 (Ct. App. 1994) (affirming grant of summary judgment when plaintiff did not demonstrate likelihood that further discovery would produce additional relevant evidence). Accordingly, the trial court properly found that discovery was complete for purposes of summary judgment as to Appellant's liability to Respondent under the Note. *See Bayle*, at 128, 542 S.E.2d at 742 ("The rulings of a trial [court] in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion.").

³ At the time of the summary judgment hearing, Appellant had not noticed any depositions in this case.

III. RESPONDENT SET FORTH ADMISSIBLE EVIDENCE TO PROVE THERE WAS NO GENUINE ISSUE OF MATERIAL FACT REGARDING APPELLANT'S LIABILITY UNDER THE NOTE.

Appellant raises at least half a dozen intertwined and muddled arguments relating to the admissibility of the affidavit of Randy Foster. In addition to being unpreserved and meritless, several of these arguments are inscrutable.⁴ For brevity's sake, Respondent has attempted to summarize those arguments and will address each in turn to the extent it is possible.⁵

A. Appellant's Affidavit and Exhibit Related Arguments Are Not Preserved.

Appellant contends that summary judgment was improperly granted because Foster's affidavit was insufficient and the exhibits attached to the affidavit were inadmissible. All of Appellant's arguments relating to the insufficiency of the affidavit and inadmissibility of the exhibits, with the exception of Appellant's argument regarding Foster's personal knowledge, are unpreserved for appellate review.

In Appellant's Objections to Respondent's Motion for Summary Judgment and at the summary judgment hearing, Appellant raised only a generic argument contending that the Foster affidavit was facially and substantively defective. (R. pp. 52-53); (R. p. 104, lines 19-25–p. 105, lines 1-5). During the hearing, Appellant advanced only one specific reason why the affidavit was allegedly defective— he asserted Foster lacked personal knowledge of the matters stated in the affidavit. (R. p. 105, lines 15-16). Appellant provided no other specific reasons or argument, either in his objections or at the hearing, that support his assertion that the affidavit was defective.

⁴ As an aside, Appellant's brief appears to be entirely cut and pasted from his Brief in Support of Amended Rule 59(E) Motion. (R. pp. 69-79).

⁵ Further, Respondent asserts that this Court will ordinarily not consider any point of an appellant's brief which is not set forth in the statement of the issues on appeal. Rule 208(b)(1)(B), SCACR.

In his motion to reconsider, Appellant confirmed that he did not raise specific arguments regarding the insufficiency of the affidavit or the inadmissibility of the exhibits during the summary judgment motion hearing. (R. p. 59). In fact, Appellant stated that his purpose for filing the motion for reconsideration was to raise specific affidavit and exhibit related arguments for the first time.⁶ (R. p. 59). Accordingly, all of Appellant's affidavit and exhibit related arguments, with the exception of the argument relating to Foster's personal knowledge, are not preserved for appellate review. *See Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) (providing an issue raised for the first time in a motion to reconsider is not preserved for review).

B. Even if Appellant's Arguments Are Preserved, They Are Without Merit.

Even if Appellant's arguments are preserved, they are without merit. Respondent submitted a sufficient affidavit and admissible exhibits to prove there was no genuine issue of material fact regarding the issue of liability.

1. The Facts Stated in Foster's Affidavit Were Based on Foster's Personal Knowledge.

Rule 56(e), SCRCP, provides that supporting and opposing affidavits must be made on personal knowledge. "To comply with Rule 56(e), there must be a showing that the statements made in the affidavits were made on personal knowledge." *Catawba Indian Tribe v. South Carolina*, 978 F.2d 1334, 1342 (4th Cir. 1992). Further, corporate officers are assumed to have personal knowledge of the acts of their corporations. *Id.*

⁶ In Appellant's motion for reconsideration, he stated, "[Appellant] was not provided a full and fair opportunity to be heard on [Appellant's] arguments regarding why [Appellant] believes that the affidavit was incompetent . . . and why the exhibits referenced in the affidavit were inadmissible [Appellant] therefore raises those arguments in this Motion" (R. p. 59).

Appellant contends that Foster's affidavit is insufficient because it was not made on personal knowledge. *See* App. Br. p. 10. Specifically, Appellant contends that Foster's affidavit alleges only that Foster has "knowledge," not personal knowledge. *See* App. Br. p. 10. Contrary to Appellant's assertion, the facts included in Foster's affidavit are based on his personal knowledge. Foster's affidavit established that he had personal knowledge of the facts contained in the affidavit and that the basis for his knowledge was obtained from reviewing the records in regard to the Note. (R. pp. 28-29). *See Englert, Inc. v. Neth. Ins. Co.*, 315 S.C. 300, 303, 433 S.E.2d 871, 873 (Ct. App. 1993) (providing for purposes of Rule 56(e), SCRCF, the affidavit must establish that the affiant has knowledge of the facts therein or has a basis for such knowledge); *see also S. Bank & Trust Co. v. Praestans One, LLC*, No. 2:12-cv-450, 2013 WL 1155526, at *22 (E.D. Va. Mar. 19, 2013) ("[A]n affiant who reviews the business records of the organization that he or she is affiliated with, and who testifies on the basis of information acquired through the performance of his or her official duties, may be deemed competent by the court to testify as to those records."). Further, as a corporate officer of Respondent, Foster is assumed to have personal knowledge of the acts of Respondent. (R. p. 28). *See Catawba*, 978 F.2d at 1342. Accordingly, this argument is without merit.

2. Foster Is Competent to Testify to the Matters Stated in His Affidavit.

Appellant next argues that Foster's affidavit fails to show that he is competent to testify to the matters alleged therein. In addition to being unpreserved, this argument is also without merit.

Rule 56(e), SCRCF, provides that supporting and opposing affidavits for summary judgment "shall show affirmatively that the affiant is competent to testify to the matters stated therein." The rules and South Carolina state case law do not specify what is required to

affirmatively show that the affiant is competent to testify to the matters stated in the affidavit. The district court of South Carolina, however, has provided guidance on this topic. In *United States v. Tejada-Ramirez*, the court provided that the rule would be satisfied if the affidavit was “executed by a person who would be competent to testify as to matters contained in the affidavit if he or she were called to the witness stand.” Cr. No. 6:06-393-HMH, 2011 U.S. Dist. LEXIS 79837, at *2 (D.S.C. July 21, 2011). Rule 601, SCRE, provides that “[e]very person is competent to be a witness except as otherwise provided by statute or these rules.” A witness must have personal knowledge of the matter and must swear or affirm to tell the truth. Rule 602 & 603, SCRE. Further, “an affiant who reviews the business records of the organization that he or she is affiliated with, and who testifies on the basis of information acquired through the performance of his or her official duties, may be deemed competent by the court to testify as to those records.” *S. Bank & Trust Co., LLC*, No., at *8.

Foster’s affidavit affirmatively shows that he is competent to testify to the matters stated within his affidavit. As stated above, the affidavit shows that Foster has personal knowledge of the facts contained in the affidavit from his review of the records in regard to the Note and from his position as a corporate officer of Respondent. (R. pp. 28-29). Thus, Foster would be competent to testify to the matters contained in his affidavit if he was called to testify at trial because he has personal knowledge of such. See *United States v. Tejada-Ramirez*, at *2 (providing that the affiant is competent to testify to the matters stated in the affidavit if the affiant would be competent to testify to those matters if he or she was called to the witness stand). Accordingly, Foster’s affidavit satisfies the competency requirement in Rule 56(e), SCRCF, and Appellant’s arguments are without merit.

3. Foster's Affidavit and Attached Exhibits Are Admissible.

Appellant argues that certain aspects of the testimonial evidence provided by Foster in his affidavit are inadmissible. Regarding the affidavit, Appellant appears to contend that the testimonial evidence regarding the Note, an assignment of the Note, the certification letter regarding the merger, and the default notices is inadmissible because Foster lacks personal knowledge of such. Appellant's arguments are unpreserved and baseless.

Affidavits submitted by a party must set forth facts that would be admissible in evidence. Rule 56(e), SCRPC. All of the facts contained in Foster's affidavit are admissible because he has personal knowledge of such. As stated above, Foster had personal knowledge of the matters contained in the affidavit because he reviewed the records regarding the Note and from his position as a corporate officer. Thus, if Foster was called to the witness stand, he would properly be able to testify to the facts stated within the affidavit. Accordingly, the facts stated within the affidavit are admissible.

Additionally, Appellant contends that the exhibits attached to the affidavit are inadmissible. This argument is unpreserved and meritless. An assignment of the Note, a certification letter from the Comptroller of the Currency Administrator of National Banks of the merger between NAFH National Bank and Capital Bank, and the default notices sent to Appellant are all admissible under the business records exception to the hearsay rule.

Rule 803(6), SCRE, provides that business records may be given by a "custodian or other qualified witness." Further, the business records must be "made . . . by a person with knowledge" or "made . . . from information transmitted by a person with knowledge." Rule 803(6), SCRE. Additionally, the business records must have been made as part of the regular

practice of that business activity, kept in the course of a regularly conducted business activity, and made at or about the time described. *Id.*

The trial court has broad discretion in deciding whether to admit evidence, and its decision will be overturned only for an abuse of discretion. *Clark v. Cantrell*, 339 S.C. 369, 385, 529 S.E.2d 528, 537 (2000). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. *Fields v. Reg'l Med. Ctr.*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). Further, to warrant reversal based on the admission of evidence, the appellant must prove both the error of the ruling and the resulting prejudice. *Id.*

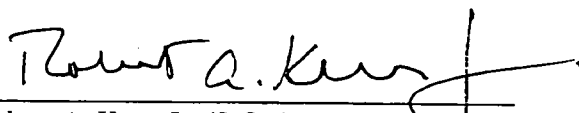
Foster is the Vice President OREO Officer of Respondent. As the Vice President OREO Officer, Foster makes and maintains business records regarding loans in the regular course of his business, which included the making and maintaining of the records regarding this Note. Additionally, Foster attested that all of the exhibits were made on the respective dates as reflected on the exhibits. (R. pp. 28-29). Accordingly, these exhibits are admissible as business records through Foster. *See* Rule 803(6), SCRE.

Further, the trial court made a discretionary determination that the exhibits were admissible. *See Clark*, 339 S.C. at 385, 529 S.E.2d at 537 (providing that the trial court has broad discretion in deciding whether to admit evidence). Moreover, even if the trial court erred in ruling the exhibits were admissible, Appellant was not prejudiced because Foster's testimonial evidence which established that Respondent was the owner and holder of the Note would still be admissible. *See Fields*, 363 S.C. at 26, 609 S.E.2d at 509 (providing appellant must prove both error and resulting prejudice from the admission of evidence to warrant reversal). Accordingly, Appellant's argument that the trial court improperly granted summary judgment because its decision was based on inadmissible evidence is without merit.

CONCLUSION

For the foregoing reasons, the trial court's order granting summary judgment as to liability in favor of Respondent and the order denying Appellant's motion for reconsideration should be affirmed.

Respectfully submitted,



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April 25, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2011-CP-10-7407

Capital Bank, N.A.,

.....Respondent,

v.

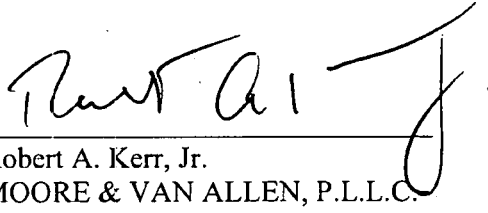
Charles A. Moore a/k/a Charles A.B. Moore,

.....Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on April 25, 2014, true and correct copies of the **Final Brief of Respondent** in the above-referenced matter were served on the parties listed below, by United States mail, proper postage prepaid addressed as follows:

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Hon. R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2013-001516
Trial Court Case No. 2011-CP-10-07407

Capital Bank, N.A.,

Respondent,

v.

Charles A. Moore a/k/a
Charles A.B. Moore

Appellant.

REPLY BRIEF OF APPELLANT

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COUNTER STATEMENT OF FACTS

Respondent's Statement of Facts appears on pages 2-3 of its Brief, and contains certain matters that are disputed. In particular, Appellant has disputed the following facts as stated by Respondent, all of which Respondent attempted to establish by the Foster Affidavit, concerning which Appellant has already provided detailed arguments in Appellant's initial Brief:

1. Appellant disputes that Respondent has proven that First National Bank of the South is Respondent's predecessor in interest.
2. Appellant disputes that the July 16, 2010 Purchase and Assumption Agreement assigned the Note to Respondent. This alleged agreement is not part of the record in this case.
3. Appellant disputes the alleged merger, since no sworn or certified copies of any documents proving the merger were attached to Respondent's Motion for Summary Judgment (MSJ, R. pp. 27-40).
4. Appellant disputes that Respondent is the current owner and holder of the Note. This statement is a legal conclusion concerning the application of the law of negotiable instruments to a question of ultimate fact. In addition, no sworn or certified copy of the Note was attached to the MSJ, and no allegation about Respondent being the owner and holder of the Note was made in Respondent's affidavits.
5. On page 3 of Respondent's Brief, Respondent improperly introduces new factual allegations that are not part of the record in this case. In particular, Respondent

claims that Randy Foster is the Vice President for Other Real Estate Owned for the Respondent. This factual allegation was not contained in the Foster Affidavit, which only alleged that Randy Foster was an unspecified employee of Respondent (R. p. 28, ¶ 1). This factual allegation was therefore not submitted to the trial judge in the first instance, so could not have been relied upon by him in his ruling, and should be disregarded by the appellate court.

6. None of the documents that were attached to the Foster affidavit, which are being relied upon by Respondent, were properly submitted to the trial court, since they were not sworn or certified copies of the original documents.

STANDARD OF REVIEW

Appellant adopts Respondent's Standard of Review section of Respondent's Brief, as it appears to properly state the law on this issue.

ARGUMENTS CONCEDED BY RESPONDENT

Subject to Respondent's argument that Appellant's arguments were not properly preserved, there are numerous arguments of Appellant that Respondent does not address, and therefore concedes. In particular, Respondent fails to counter the following arguments made in Appellant's Brief concerning the competency and admissibility of the Foster Affidavit and the attached documents:

1. Burden of proof. Respondent does not contest Appellant's argument that Respondent is the one that bears the burden of proof upon bringing a summary

judgment motion in establishing the absence of a genuine issue of material fact.

2. Improper affidavit form. Respondent does not contest Appellant's argument that the alleged Foster Affidavit fails to meet the format requirements of a proper affidavit. In other words, it is not really an affidavit at all due to the alleged defects. This failure is critical, since Respondent cannot win on summary judgment without a proper affidavit establishing the facts alleged by Respondent.
3. No proof of agency. Respondent does not contest Appellant's argument, based on binding South Carolina appellate law, that Respondent did not establish Randy Foster's authorization to act as Respondent's agent in preparing and submitting the Foster Affidavit in this case. Although Randy Foster made a self-serving statement that he was authorized to make the affidavit for the Respondent, there is nothing in the record showing that Respondent itself acted to establish Randy Foster's authority to make the affidavit on Respondent's behalf.

ARGUMENTS CONTESTED BY RESPONDENT

The statement of issues of Appellant and Respondent differ. Respondent did not file a cross appeal. Respondent identifies three issues, and Appellant states only two. Essentially, Appellant deals with whether or not Appellant is liable to Respondent in Appellant's second issue, while Respondent deals with this question in Respondent's first

and third issues. Appellant requests that the court deal with the issues as framed by the Appellant.

Appellant's first issue concerns whether the granting of summary judgment to the Respondent was premature, due to incomplete discovery in this case. In addressing this issue, Respondent first claims that Appellant has failed to properly preserve this argument for appellate review. Respondent's position is based on the fact that Appellant did not move that the trial judge continue the summary judgment hearing until such time as discovery could be completed. Respondent cites *Pryor v. Northwest Apartments, Ltd.*, 321 S.C. 524, 529, 469 S.E.2d 630,633 (Ct. App. 1996) in support of this contention. However, Appellant believes that the facts of this case are distinguishable from the *Pryor* case. In the present case, unlike the *Pryor* case, there exists a consent discovery scheduling order, which was relied upon by the Appellant, and which provided additional time to complete discovery (R. p. 1). That scheduling order was entered by another judge, with the consent of both parties, and the trial court was without authority to modify it without proper notice and hearing, which did not occur. Appellant should have been able to rely upon that scheduling order, especially since Respondent consented to it, and Appellant believes that the trial court abused its discretion by terminating discovery prior to the terms of that order.

Appellant's next issue concerns whether or not summary judgment was proper based on what Appellant alleges is incompetent and inadmissible evidence, primarily in the form of the Foster Affidavit, which does not satisfy Respondent's burden of proof to demonstrate the absence of a genuine issue of material fact. Respondent first addresses this issue in Respondent's issue number one concerning whether or not Respondent

proved that there was no genuine issue of material fact regarding Appellant's liability under the Note.

Respondent first claims that Appellant did not properly preserve his arguments on this issue, except for arguments regarding Randy Foster's personal knowledge.

Respondent's allegations are not accurate on this issue. As can be seen from the transcript of the February 12, 2013 summary judgment hearing (R. p. 102, lines 17-25), Appellant also addressed the issue of alleged faulty assignment of the Note. On pages 10-11 of the MSJ Transcript (R. p. 104, lines 18-25 through p. 105, lines 1-3), Appellant addressed the issue of the improper form of the alleged affidavit, as well as the burden of proof argument. On page 11 of that same transcript (R. p. 105, lines 3-14), Appellant attempted to argue about the competency of the Foster Affidavit, but the court did not allow it, due to the trial judge's having read the Foster Affidavit and finding that it was competent. This is the same page where the Appellant raises the issue regarding Randy Foster's lack of personal knowledge to make the affidavit, which Respondent concedes was properly preserved. It is true that Appellant was not allowed to raise all of the reasons at the MSJ hearing about why the Foster Affidavit was incompetent and inadmissible, but the argument on that issue was properly made and ruled upon by the trial judge. As a matter of fact, on page 11 of the MSJ Transcript (R. p. 105, lines 17-25), the trial judge stated:

"The Court: You can challenge that. I have read the affidavit and I disagree with you. I think it's sufficient.

Mr. Cantrell: Okay, Your Honor. Okay. I've got a number of affidavit related points I'm skipping through those as Your Honor's indicated...

The Court: I think the affidavit's fine. You can challenge that affidavit at [sic] any basis you want to. I think it's fine. ..."

It would be unfair for the appellate court to require the Appellant to risk contempt of court to pursue an issue that the trial judge had properly ruled was preserved for appellate review upon any basis that the Appellant chose to contest it. It appears that the trial judge also disagrees with the Respondent that Appellant's arguments regarding the competency and admissibility of the Foster Affidavit and its attached exhibits were not properly preserved.

Respondent next claims that even if Appellant's arguments relating to the Foster Affidavit were properly preserved, that they are without merit. Respondent's first claim in support of this argument concerns whether or not Randy Foster had the necessary personal knowledge, as required by Rule 56(e), SCRC, to make the affidavit. It is unclear how Respondent's counsel knows that the affiant had personal knowledge, when the most the affiant stated in his alleged affidavit was that he had only "knowledge" of unspecified "records" (R. p. 28, ¶ 1), as previously pointed out by Appellant in his initial Brief (Brief App., p. 10). Mr. Foster did not allege personal knowledge, and also did not allege that the records consulted were business records of the Respondent, let alone alleging that the business records met the standard as required by Rule 803(6), SCRE. The affiant neither claims to be a document custodian for Respondent, nor does he establish the necessary qualifications to be an "other qualified witness" under that Rule. At most, he claims to be an unspecified employee of Respondent, which is not sufficient to meet the burden required to introduce the alleged business records, some of which are not even records created by Respondent, and therefore constitute nothing more than

hearsay. Appellant objects to Respondent's counsel merely assuming that these facts are true, even though not alleged by the affiant. Respondent cites a case for the proposition that corporate officers are assumed to have personal knowledge of the acts of their corporations, but Respondent ignores the fact that Randy Foster was never identified as a corporate officer in his alleged affidavit. That alleged additional fact has been supplied by Respondent's counsel, and was never properly brought before the trial judge, and should therefore be ignored by the appellate court as well.

Interestingly, on page 10 of Respondent's Brief, Respondent concedes that a "witness must have personal knowledge of the matter and must swear or affirm to tell the truth", neither of which occurred in this case, since the affiant alleged only "knowledge" obtained from unspecified "records", and there is nowhere in the affidavit where the affiant swears or affirms that the statements made are the truth, which is one of the reasons why Appellant claims that he alleged affidavit is not really an affidavit at all, and incompetent to support the granting of summary judgment against Appellant.

Respondent next claims that the Foster Affidavit and its attached exhibits are admissible for the purpose of granting summary judgment. Respondent bases this claim on the alleged existence of Randy Foster's "personal knowledge", although he never alleges such, and also upon Respondent's counsel's alleged additional factual supplementation that Randy Foster is actually a corporate officer of Respondent, which in itself is an inadmissible and unpreserved factual allegation that does not appear in the appellate record, and was never presented to the trial court.

Appellant respectfully disagrees that the Foster Affidavit exhibits are admissible as business records of Respondent, for the reasons already stated, including the fact that

some of them are not even records of the Respondent, which casts great doubt on Randy Foster's credibility; since he was willing to try to introduce them as records of the Respondent. Although the trial court does have discretion in admitting evidence, there must be some basis upon which to do that, and when the necessary foundation for the personal knowledge of the affiant and for the alleged business records has not been produced to the trial court, then admitting such evidence is an abuse of discretion, which should be reversed by the appellate court.

Respondent's counsel continues on page 12 of Respondent's Brief to make up more alleged facts concerning Randy Foster's position with Respondent, but there is no support for these allegations in the record on appeal.

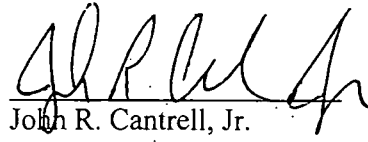
Respondent claims that the Appellant was not prejudiced by the admission of these alleged business record exhibits attached to the Foster Affidavit. However, without these exhibits, which are necessary to satisfy Rule 56(e), SCRCP's requirement that "sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith", Respondent would not have been able to acquire an order from the trial court, which currently establishes Appellant's liability to Respondent under the Note, thereby prejudicing Appellant, and also depriving Appellant of a trial on disputed genuine issues of material fact, as has more fully been alleged in Appellant's initial Brief. Appellant disagrees that the Foster Affidavit allegations in the main body of the affidavit would have established Appellant's liability to Respondent independently from the alleged business record exhibits attached to the Foster Affidavit, both due to the requirement noted above in Rule 56(e), SCRCP about having to attach those documents to the affidavit, and also due to the fact that nowhere in the Foster

Affidavit (R. pp. 28-29) does Randy Foster even allege that Respondent is the owner or holder of the Note in question, contrary to Respondent's contention otherwise in the last paragraph of Respondent's Brief (Brief Resp., p. 12). To be certain, Randy Foster does allege in paragraph 3 of the Foster Affidavit that the Note was assigned from the FDIC to NAFH National Bank pursuant to a July 16, 2010 assignment, but this is far from alleging that Capital Bank, N.A. was the owner and holder of the Note on the date when Respondent's collection action was filed on October 12, 2011. Indeed, even this assignment allegation fails, both due to the fact that a sworn or certified copy of the alleged assignment was not attached to the Foster Affidavit as required by Rule 56(e), SCRCP, but also due to the fact that the question of whether or not the Note was properly assigned to the Respondent's alleged predecessor in interest is a question of law, which means that it was an inappropriate conclusory allegation made by a non-lawyer in an affidavit of fact.

CONCLUSION

Wherefore, having fully addressed Respondent's allegations in its Brief, Appellant respectfully requests that the appellate court find in Appellant's favor, and reverse the trial court's grant of partial summary judgment as to liability against the Appellant, and remand the case to the trial court for trial on these issues, after Appellant has been provided with sufficient time to complete the discovery process.

Dated this April 28, 2014.

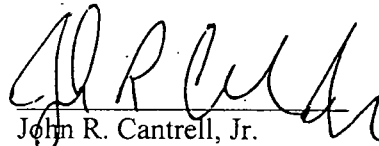


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CERTIFICATE OF COUNSEL

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

Dated this April 28, 2014.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Hon. R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2013-001516
Trial Court Case No. 2011-CP-10-07407

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SC Court of Appeals

Capital Bank, N.A.,

Respondent,

v.

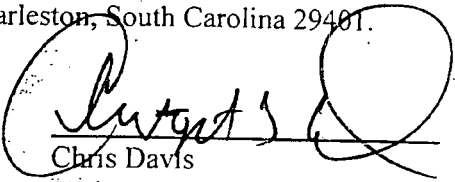
Charles A. Moore a/k/a
Charles A.B. Moore

Appellant.

PROOF OF SERVICE

I certify that I have personally served the final Brief of Appellant and final Reply Brief of Appellant upon Capital Bank, N.A. by personal service upon the office of its attorneys of record on April 28, 2014, who are located at Moore & Van Allen, PLLC, 78 Wentworth Street, Charleston, South Carolina 29401.

April 28, 2014


Chris Davis

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519 East Bay Street
Charleston, South Carolina 29403

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Capital Bank, N.A., Respondent,

v.

Charles A. Moore a/k/a Charles A. B. Moore, Appellant.

Appellate Case No. 2013-001516

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Unpublished Opinion No. 2015-UP-152
Submitted January 1, 2015 – Filed March 18, 2015

AFFIRMED

John R. Cantrell, Jr., of Cantrell Legal, PC, of Goose
Creek, for Appellant.

Robert A. Kerr, Jr., Christopher Tradd Colwell, and
Lesley Anne Firestone, all of Moore & Van Allen,
PLLC, of Charleston, for Respondent.

PER CURIAM: Charles A. Moore appeals the trial court's order granting partial summary judgment to Capital Bank, N.A. (Capital Bank) in its collection action against Moore, arguing the trial court erred by (1) basing its ruling on incompetent

and inadmissible evidence and (2) granting summary judgment before Moore had a full and fair opportunity to complete discovery. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to issue one, we find the affidavit submitted in support of Capital Bank's summary judgment motion sufficiently demonstrated the affiant's personal knowledge; the trial court did not err in considering the affidavit and its attached exhibits; and this evidence was sufficient to support a grant of partial summary judgment regarding Moore's liability. *See Busillo v. City of N. Charleston*, 404 S.C. 604, 610, 745 S.E.2d 142, 146 (Ct. App. 2013) ("The admission of evidence is within the discretion of the trial court, and the court's decision will not be reversed on appeal absent an abuse of that discretion."); Rule 56(e), SCRCP ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."); *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 304, 433 S.E.2d 871, 874 (Ct. App. 1993) (finding an affiant's status as vice-president of the general contractor alone did not make him competent to testify regarding job specifications where the affidavit did not also demonstrate that he had personal knowledge of the job specifications at issue); *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 219, 746 S.E.2d 478, 480 (Ct. App. 2013) ("When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."); *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004) ("Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial."); *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009) ("[A]ssertions as to liability must be more than mere bald allegations made by the non-moving party in order to create a genuine issue of material fact.").

2. As to issue two, we find the trial court did not abuse its discretion in granting summary judgment prior to the completion of discovery because the record does not demonstrate that further discovery would have contributed to the resolution of the issue of Moore's liability. *See Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001) ("The rulings of a trial [court] in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion."); *id.* ("An abuse of discretion occurs when the trial [court's]

ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support."); *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) ("[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery."); *George v. Empire Fire & Marine Ins. Co.*, 344 S.C. 582, 594, 545 S.E.2d 500, 506 (2001) (stating it is not premature for the trial court to grant summary judgment where the party had a full and fair opportunity to develop the record on an issue but failed to do so); *Bayle*, 344 S.C. at 128-29, 542 S.E.2d at 743 (stating that in considering whether summary judgment was prematurely granted, the court should consider whether the record in the case demonstrates further discovery would have contributed to the resolution of the issues involved); *Baughman*, 306 S.C. at 112, 410 S.E.2d at 544 (stating the person asserting the need for further discovery must demonstrate the likelihood that further discovery will uncover additional relevant evidence).

AFFIRMED.¹

FEW, C.J., and THOMAS and LOCKEMY, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Hon. R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2013-001516
Trial Court Case No. 2011-CP-10-07407

Capital Bank, N.A.,

Respondent,

v.

Charles A. Moore a/k/a
Charles A.B. Moore

Appellant.

PETITION FOR REHEARING OR REHEARING *EN BANC*

Appellant, Charles A. Moore, hereby moves and petitions, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an order granting rehearing or rehearing *en banc* in this case. Appellant believes that important issues of first impression are presented in this appeal in regards to evidentiary standards for the admissibility of affidavits submitted in support of summary judgment motions, which issues merit *en banc* review. Appellant incorporates by reference the Record filed in this appeal and both of Appellant's final briefs, including the issues and arguments raised therein. In addition, Appellant respectfully submits that the court may have overlooked or misapprehended certain material facts or arguments raised in this case, in the following sections of its Order affirming the trial court's decision:

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SC Court of Appeals

1. MISSING PROOF OF AFFIANT'S PERSONAL KNOWLEDGE

The court's Order finds that "the affidavit submitted in support of Capital Bank's summary judgment motion sufficiently demonstrated the affiant's personal knowledge." However, this finding is conclusory. The court does not state the facts in the Foster Affidavit (R. pp. 28-29) which the court believes demonstrate personal knowledge on behalf of the affiant. The court's failure to find these specific facts makes it impossible for a higher court to review this court's factual determination for potential error. The trial court also made similar conclusory findings regarding the affiant's personal knowledge (R. p. 105, lines 15-19). So far no court in this judicial process has been willing to identify the specific facts in the Foster Affidavit which prove that the affiant had the personal knowledge necessary to make that affidavit competent for purposes of granting partial summary judgment against the Appellant.

The court notes that Rule 56(e) requires that an affidavit "show affirmatively that the affiant is competent to testify to the matters stated therein." This requires more than the mere allegation of "knowledge of the records" (R. p. 28, par. 1), which is not even an allegation of personal knowledge, that the affiant makes in the Foster Affidavit. Indeed, even a mere allegation of personal knowledge itself would not be sufficient under Rule 56(e) without stating facts tending to prove that personal knowledge exists (see cases cited at App. Brief p. 10).

The court cites the *Englert, Inc. v. Netherlands Ins. Co.* case in its Order for the proposition that an affiant's status as a vice-president alone was insufficient to prove that he had the necessary personal knowledge to make his affidavit competent. However, the court overlooks the fact that in this case the affiant claims only that he is an unspecified

"employee" of Capital Bank, N.A., which is far less than claiming to be an officer of the company as did the affiant in the *Englert* case. Therefore, the *Englert* case actually supports Appellant's case on our facts, not Respondent's case.

The court cites the *Sides v. Greenville Hosp. Sys.* case for the proposition that "[o]nce the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." However, as this case states, until such time as the moving party (here the Respondent) carries its burden (such as by presenting a competent affidavit in support of its summary judgment motion), no duty to respond applies to the opposing party and the opposing party may prevail without even having to raise a defense (see case cited at App. Brief p. 8). If the Foster Affidavit does not allege facts that prove that the affiant had the personal knowledge necessary to make the affidavit, then the trial court abused its discretion in granting partial summary judgment to the Respondent.

2. PREMATURE SUMMARY JUDGMENT

The court's Order finds that "the trial court did not abuse its discretion in granting summary judgment prior to the completion of discovery because the record does not demonstrate that further discovery would have contributed to the resolution of the issue of Moore's liability." However, the court overlooks the fact that it appears that the sole reason that the trial court found that summary judgment was not premature was the fact that this matter had been pending on the court's docket since 2011 (R. p. 101, line 12). However, the record reveals that there was a controlling scheduling order which showed that the time allowed to complete discovery had not yet expired (R. p. 1), including time reserved to take depositions of Respondent's affiants and witnesses. The *Baughman v. Am. Tel. & Tel. Co.* case cited by the court provides that a party opposing summary

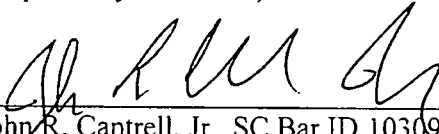
judgment should be given a "full and fair opportunity to complete discovery." Appellant believes that it was fundamentally unfair for the trial court to grant summary judgment before the Appellant's full time to complete discovery under the scheduling order was finished, since this prejudiced Appellant's ability to verify the facts alleged by Respondent in its Complaint and in the Foster Affidavit, which was used against Appellant in Respondent's summary judgment motion.

Regarding the record demonstrating that further discovery would have contributed to the issue of Appellant's liability, the court overlooks several arguments in this regard. These arguments were detailed in Appellant's Final Brief at pages 7 and 15.

WHEREFORE, Appellant requests that this court issue an order granting rehearing or rehearing *en banc* in this case.

Dated April 1, 2015.

Respectfully submitted,



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Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Hon. R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2013-001516
Trial Court Case No. 2011-CP-10-07407

Capital Bank, N.A.,

Respondent,

v.

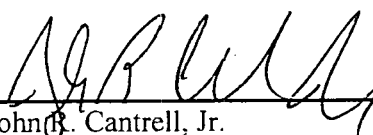
Charles A. Moore a/k/a
Charles A.B. Moore

Appellant.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing or Rehearing En Banc on Capital Bank, N.A. by depositing a copy of it in the United States Mail, postage prepaid, on April 1, 2015, addressed to its attorney of record, Christopher T. Colwell, Post Office Box 22828, Charleston, South Carolina 29413-2828.

April 1, 2015


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SC Court of Appeals

April 1, 2015

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

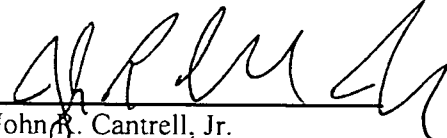
RE: Capital Bank. N.A., Respondent v. Charles A. Moore, Appellant, Appeal
Case No. 2013-001516

Dear Miss Kitchings:

Enclosed for filing in the above case are the following original documents:

Petition for Rehearing or Rehearing En Banc with 6 copies

Also enclosed is our filing fee check in the amount of \$25.00.


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Attorney for Appellant

cc:
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The South Carolina Court of Appeals

Capital Bank, N.A., Respondent,

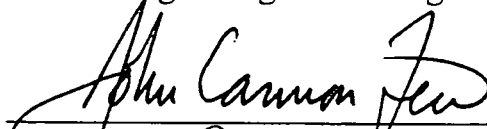
v.

Charles A. Moore a/k/a Charles A. B. Moore, Appellant.

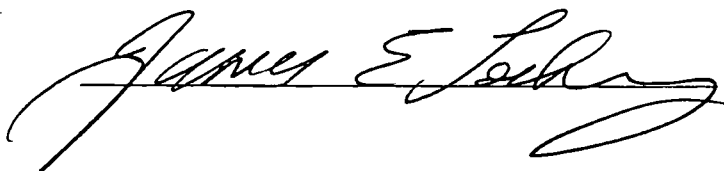
Appellate Case No. 2013-001516

ORDER

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

 CJ.

 J.

 J.

Columbia, South Carolina

FILED

cc: John R Cantrell, Jr., Esquire
Christopher Tradd Colwell, Esquire
Robert A. Kerr, Jr., Esquire
Lesley Anne Firestone, Esquire
The Honorable R. Markley Dennis, Jr.

May 27, 2015