

ORIGINAL

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Case No. 2010-CP-23-5880
Appellate Case No.: 2015-000523

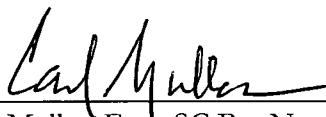
Overland, Inc., d/b/a Land Rover Greenville Appellant,

Vs.

Lara Marie Nance, Charlie Andrew Nance, Roger Fields,
Synovus Financial Corporation, d/b/a NBSC, Branch Banking
And Trust Company, Bank of America Corporation, and
SunTrust Banks, Inc. Defendants,

Of which Bank of America Corporation, and SunTrust
Banks, Inc. are the Respondents.

RECORD ON APPEAL
VOLUME I



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FILED-CLERK OF COURT
STATE OF SOUTH CAROLINA GREENVILLE CO. S.O. JUDGMENT IN A CIVIL CASE
COUNTY OF GREENVILLE PAUL B. WICKENSIMER CASE NO: 2010CP2305880
IN THE COURT OF COMMON PLEAS 2014 DEC 15 PM 4 04

Overland Inc vs. Lara Marie Nance

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; ☐ Statement of Judgment by the Court;

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 15th day of December, 2014, and a copy mailed first class this 15th day of December, 2014, to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

copy

FILED-CLERK OF COURT
STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE GREENVILLE CO. S.C. THIRTEENTH JUDICIAL CIRCUIT
PAUL D. WICKENSIMR

Overland, Inc., d/b/a Land Rover
Greenville,

Plaintiff,

v.

ORDER

Lara Marie Nance, Charlie Andrew Nance
Roger Fields, Synovus Financial
Corporation d/b/a NBSC, Branch Banking
and Trust Company, Bank of America
Corporation, and SunTrust Banks, Inc.,
Defendants.

This matter came before the Court on Plaintiff's Motion to Transfer Funds held by Defendant Bank of America; Plaintiff's Motion to Compel Discovery; Defendant Bank of America's Motion for Summary Judgment as to the 17th and the 20th Causes of Action; and Defendant SunTrust's Motion for Summary Judgment on All Claims and Defenses. A hearing on these motions was conducted on October 29, 2014 before this Court. During this hearing, Plaintiff voluntarily withdrew its 20th cause of action, which alleged a violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 to -560 (2014).

Background

This case arises out of a check fraud scheme perpetrated by Plaintiff's former employee, Defendant Lara Marie Nance. Over a period of several years, Ms. Nance embezzled at least \$1,282,000.00 from her employer, Plaintiff Overland, Inc. (Overland). (Third Am. Compl. 9, ¶ 37.) The undisputed facts are set forth below.

Ms. Nance was hired by Overland as an accounts payable clerk in 2006. (Nance Dep. 9:19-22, Jan. 15, 2014.) She eventually gained access to Overland's computerized accounting system, ADP, and began to generate checks bearing the forged signature of Overland's owner. (Third Am. Compl. 10, ¶¶ 40-41.) Each check was made payable to an actual vendor of Overland, including Taylor Enterprises, Atlantic British, and Invision Industries. (Id. at 9-10, ¶ 39.) Ms. Nance often duplicated the amount of an actual check paid to these companies that was already entered into the ADP system. (Id. at 10, ¶ 40.)

Ms. Nance opened various accounts with Defendants Bank of America and SunTrust in the names of these businesses for the purpose of depositing the forged checks. (Id.) Each check was drawn on Overland's business accounts, which it maintained with Defendants Synovus Financial Corporation d/b/a NBSC (NBSC) and Branch Banking and Trust (BB&T). (Id. at 10, ¶ 42.) Ms. Nance also opened and maintained personal checking accounts with Defendants Bank of America and SunTrust. (Id.) Ms. Nance's scheme lasted for two and one-half years before it was discovered. (Id. at 4, ¶ 14.)

Ms. Nance pled guilty to wire fraud in the United States District Court. United States v. Lara Marie Nance, No. 6:10cr634-1 (Feb. 14, 2011). As a portion of her federal sentence, Ms. Nance was ordered to pay restitution to Overland in the amount of \$1,282,749.90. Judgment in a Criminal Case, United States v. Lara Marie Nance, No. 6:10cr634-1 (Aug. 24, 2011).

Discussion

I. Defendants' Motions for Summary Judgment

During the hearing on Defendants' Motions for Summary Judgment, both Bank of America and SunTrust raised similar legal arguments. For the purposes of this Order, the Court will jointly consider their motions.



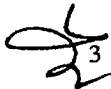
A. Standard for Summary Judgment

Summary Judgment is warranted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC. In determining whether any genuine issue of fact exists, the evidence and all inferences which can be reasonably drawn must be viewed in the light most favorable to the non-moving party. Bloom v. Ravoira, 399 S.C. 417, 421–22, 529 S.E.2d 710, 712 (2000). Where there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994).

If the moving party demonstrates an absence of evidentiary support for the opponent's case, the non-moving party must present specific facts showing that there are genuine issues necessitating a trial. Rife v. Hitachi Constr. Mach. Co., 363 S.C. 209, 213, 609 S.E.2d 565, 568 (Ct. App. 2005). The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. Grant v. Mount Vernon Mills, Inc., 370 S.C. 138, 142, 634 S.E.2d 15, 17–18 (Ct. App. 2006). However, where “triable issues” exist, those issues should be presented to a jury. Rife, 363 S.C. at 213, 609 S.E.2d at 567.

B. Merits of the Motions for Summary Judgment

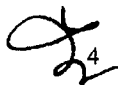
Overland asserts in its seventeenth cause of action that Bank of America and SunTrust were negligent, grossly negligent, and reckless in their handling of Ms. Nance's transactions. Particularly, Overland avers that the banks failed to exercise ordinary care in their practices for opening business checking accounts; depositing and transferring corporate checks; and employing commercially reasonable procedures for identifying forged signatures. In support of these contentions, Overland cites several portions of South Carolina's Uniform Commercial

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Code (UCC): § 36-3-404, § 36-3-405, and § 36-3-406. To the extent that Overland is attempting to assert a common law claim against the banks, this Court finds that the South Carolina UCC has displaced common law actions in this area. See Equitable Life Assur. Soc. Of U.S. v. Okey, 812 F.2d 906, 908-09 (4th Cir. 1987); Flavor Inn, Inc. v. NCNB Nat'l Bank of S.C., 309 S.C. 508, 511-12, 424 S.E.2d 534, 536 (1992).

It is well-established that banks owe a limited duty of care to their customers. Kerr v. Branch Banking & Trust Co., 408 S.C. 328, 333, 759 S.E.2d 724, 726 (April 9, 2014). This limited duty exists because the relationship between a bank and a customer is merely a lender-borrower (or creditor-debtor) relationship—it is generally not fiduciary in nature. See Burwell v. S.C. Nat'l Bank, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986); Regions Bank v. Schmauch, 354 S.C. 648, 669-70, 582 S.E.2d 432, 443-44 (Ct. App. 2003). Consequently, South Carolina has refused to extend banks' duties to non-customers, where the non-customers' claims are premised upon contractual obligations between a bank and its customer, and where the non-customer is not an intended third-party beneficiary to that contract. Kerr, 408 S.C. at 333, 759 S.E.2d at 727. In short, absent fraud or misrepresentation a non-customer does not have the right to rely on the faithful execution of a bank's duties, particularly where the non-customer is in the best position to safeguard his interests against loss. Id.; cf. Florentine Corp. v. PEDA I, Inc., 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985) (finding that the plaintiff had not shown it had a right to rely on the defendant's representation).

Other courts have found that a bank does not owe a duty to a non-customer, even where the non-customer was defrauded by the bank's customer through the use of the bank's services. See Eisenberg v. Wachovia Bank, N.A., 301 F.3d 220, 225-26 (4th Cir. 2002). For example, in McCallum v. Rizzo the defendant solicited donations for a presidential campaign, deposited the

4

donations into a campaign account, and then converted the funds to his own use. No. 942878, 1995 WL 114812 (Mass. Super. Ct. Oct. 13, 1995). Though the defendant's bank may have considered the his activities suspicious, the bank did not investigate the activity. Id. at *1. The court determined that, in spite of its defendant's suspicious banking activities, the bank could not be found negligent because it did not owe a duty to the victims of the scheme. Id. at *2-3. Similarly, in Eisenberg v. Wachovia Bank, the plaintiff sued the bank that maintained the account in which fraudulently-obtained funds were deposited. 301 F.3d at 223. Though the plaintiff was the victim of the fraudulent scheme, he was unable to demonstrate that the bank owed him any duty, either in opening or maintenance of the account, because he was not the bank's customer. Id. Therefore, the non-customer plaintiff was not able to maintain a viable action against the bank. Id. at 225, 227.

The South Carolina UCC contemplates a possible cause of action by a drawee against a depository bank, where the depository bank taking a check might have detected the fraud and thus have prevented the loss by the exercise of ordinary care. See S.C. Code Ann. § 36-3-404, Comment 3. However, the law also states that where a bank processes checks by automated means, "reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage." S.C. Code Ann. § 36-3-103(a)(9). This effectively creates a presumption of reasonable care in automated check processing systems. Therefore, if the bank in question utilizes automated check processing, the sole avenue for demonstrating a lack of ordinary care must be based upon a different procedure or activity by the bank. There will be no liability on the instrument itself.

JS

Read v. First National Bank of Habersham is factually similar to the case at bar. 286 S.C. 534, 335 S.E.2d 359 (1985). However, on the question of the existence of a duty or the creation of a direct cause of action, it is not instructive because it was a suit between a customer and his bank, Read at 353, 335 S.E.2d at 360, whereas Overland is a third party suing its former employee's bank.

In the present matter, Overland only maintained accounts with NBSC and BB&T. Ms. Nance opened each account at Bank of America and SunTrust. Additionally, Overland has not alleged that either Bank of America or SunTrust committed fraud or made a misrepresentation to it regarding these accounts. Therefore, Overland is unable to demonstrate that Bank of America or SunTrust owed it any duty regarding these matters.

Furthermore, Overland has not demonstrated that Bank of America or SunTrust failed to exercise ordinary care in their check-processing procedures. At the hearing on the summary judgment motions, the parties agreed that these two banks utilize automated check processing. Overland has failed to show that Defendant banks' procedures varied in any way from general banking usage. Further, Overland has not provided any evidence that Bank of America or SunTrust failed to exercise ordinary care in their maintenance of Ms. Nance's accounts.

Therefore, the Defendants' Motions for Summary Judgment as to the Seventeenth Cause of Action should be GRANTED.

II. Plaintiff's Motion to Transfer Funds

Overland additionally submits a Motion to Transfer Funds Held by Bank of America. The funds in question are those which still remain in Ms. Nance's personal checking account (ending in -6180). (Overland Mot. to Compel 1, ¶ 2.a.) The current balance of the account is \$28,645.59. (Id. at 2, ¶ 2.b.) Bank of America has placed this account in a litigation freeze.

Overland asserts that it is entitled to these funds as part of Ms. Nance's restitution order imposed by the United States District Court. (*Id.* at 2, ¶ 2.c.) Overland also requests interest accrued upon this account beginning on February 4, 2010. (*Id.* at 2, ¶ 3.)

On November 11, 2014, the Court received communication from Ms. Nance's attorney regarding these funds. (Letter of James H. Price, III, Esquire, Nov. 11, 2014.) Ms. Nance stated that she desires the money in her Bank of America account be transferred to Overland and applied to the United States District Court's restitution order. (*Id.*)

This Court finds that the funds held in Ms. Nance's Bank of America account (ending in - 6180) must be transferred immediately to Overland as partial satisfaction of its outstanding civil judgment. These funds are to be transferred with interest beginning on February 4, 2010.

III. Plaintiff's Motion to Compel Discovery

In light of this Court's decision to grant Defendants Bank of America and SunTrust summary judgment as to the seventeenth cause of action, the Court finds Overland's Motion to Compel Discovery moot.

Conclusion

For the foregoing reasons, this Court GRANTS Defendants' Motions for Summary Judgment as to Plaintiff's seventeenth cause of action and GRANTS Plaintiff's Motion to Transfer Funds. Additionally, Plaintiff's Motion to Compel Discovery is moot.

It is so ordered.

This 8 day of December, 2014.



Letitia H. Verdin
Circuit Judge
Thirteenth Judicial Circuit



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

FORM 4

JUDGMENT  CIVIL CASE

CASE NO. 2010 CP-23-5880

Comp
Verdin

FILED - CLERK OF COURT
OVERLAND, INC., D.B.A LAND ROVER GREENVILLE GREENVILLE CO. S.C. LARA MARIE NANCE, CHARLIE ANDREW NANCE;
PAUL B. WICKENSIMER ROGER FIELDS, SYNOVUS FINANCIAL CORPORATION
D/B/A NBSC, BRANCH BANKING AND TRUST
COMPANY, BANK OF AMERICA CORPORATION, AND
SUNTRUST BANKS, INC.

2015 FEB 5 PM 12 23

PLAINTIFF(S)

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. ☐ See Page 2 for additional information.
- ☐ **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:

This matter came before the Court on Plaintiff's Motion to Alter or Amend Judgment, or in the alternative to Reconsider Pursuant to Rule 59(e), SCRPC. Defendants Bank of America Corporation and SunTrust Banks, Inc. submitted responses and memoranda in opposition to Plaintiff's Motion.

Plaintiff's Motion is respectfully 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.

[Signature]
Circuit Court Judge

2162
Judge Code

2/5/15
Date

For Clerk of Court Office Use Only

This judgment was entered on the 5th day of Feb 20 15 and a copy mailed first class or placed in the appropriate attorney's box on this 5th day of Feb 20 15 to attorneys of record or to parties (when appearing pro se) as follows:

James Walter Foyssouy

ATTORNEY(S) FOR THE PLAINTIFF(S)

James H. Price III

David L Moore Jr

Bruce A Byrholdt

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Attys

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Andrew A Mathias

Martin Mason Tomlinson

Joshua L Howard

James W Sheedy

Susan Elizabeth Driscoll

Howard W Boyd, Jr

Ammon Tice Leshner

Sima Bhakta Patel

Lauren Thorne Maxwell

Hunter Reid

From: Verdin, Letitia H. Secretary (Angela G. Hyder)
Sent: Monday, December 29, 2014 3:21 PM
To: Jim Sheedy; hunter@fayssouxlaw.com; sdriscoll@driscollsheedy.com
Subject: RE: Overland's Rule 59(e) motion, request for extension

Hunter,
Judge Verdin grants a ten-day extension for you to file your Motion.

Thank you,
Angie Hyder
Administrative Specialist for
Letitia H. Verdin
Greenville County Courthouse
305 East North Street, Suite 318
Greenville, SC 29601-2120
(864)467-8448 Office
(864)467-8504 Fax

From: Jim Sheedy [mailto:jimsheedy@driscollsheedy.com]
Sent: Monday, December 29, 2014 2:47 PM
To: Verdin, Letitia H. Secretary (Angela G. Hyder)
Subject: Overland's Rule 59(e) motion, request for extension

Pls. see below (which bounced back).

From: Jim Sheedy
Sent: Monday, December 29, 2014 2:38 PM
To: lverdinsc@scurts.org
Cc: 'Hunter Reid'; Susan Driscoll; 'Verdin, Letitia H. Law Clerk (Virginia Rogers)'
Subject: Overland's Rule 59(e) motion, request for extension

Judge Verdin,

Actually, I said to Hunter it was my belief upon review of Rules 6(b) and 59(e) that I do not have the power to extend, and the ten (10) day time limit is non-discretionary, i.e., "not later than", "shall", nor am I aware of any cases allowing for extensions under Rule 59(e).

But I was also unaware of any Rule or decisional law prohibiting an amended Rule 59(e) so long as the amendment is not tantamount to a new motion (beyond the time limit).

While I am willing to be accommodating, I cannot do more than what the law allows me to do.

Jim

From: Hunter Reid [mailto:hunter@fayssouxlaw.com]
Sent: Monday, December 29, 2014 2:29 PM
To: lverdinsc@scurts.org

1

Cc: Jim Sheedy
Subject: FW: Overland's Rule 59(e) motion, request for extension

Judge Verdin,

Good afternoon. I am writing you to request an extension of time to file a Rule 59(e) Motion in the Overland v. Nance lawsuit. I was out of the state all of last week for Christmas holidays, and I have been sick as well. If your Honor believes it cannot grant me an extension until the end of this week under these circumstances, then would your Honor please also consider allowing me to submit an Amended Motion at a later date?

I have conferred with opposing counsel, Jim Sheedy, and he doesn't have any objections to this request.

Thank you,

Hunter Reid



T. Hunt "Hunter" Reid

209 EAST WASHINGTON STREET (29601)
POST OFFICE BOX 10207
GREENVILLE, SC 29603
864.233.0445
864.672.3706 FAX
WWW.FAYSSOUXLAW.COM

From: Jim Sheedy [mailto:jimsheedy@driscollsheedy.com]
Sent: Monday, December 29, 2014 2:16 PM
To: Hunter Reid
Cc: Susan Driscoll
Subject: Overland's Rule 59(e) motion, request for extension

Hunter, look at Rule 6(b) and Rule 59(e). I don't think we can consent or that Judge Verdin has the discretion to extend, i.e. "shall be served not later than 10 days ..." If you have a case that says I can do this, I'm happy to oblige, but I honestly don't think there is one under Rule 59(e). Rather, the time is mandatory, I believe.

From: Hunter Reid [mailto:hunter@fayssouxlaw.com]
Sent: Monday, December 29, 2014 2:08 PM
To: Jim Sheedy; Susan Driscoll
Subject: Overland's Rule 59(e) motion, request for extension

Guys,

Do you have any problem if I seek an extension of time to file my Rule 59e motion with Judge Verdin? I have been out of town for Christmas and sick the whole time. I would like more time to submit a motion.

Let me know as soon as you can.

Thanks,

Hunter

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

# The South Carolina Court of Appeals

Overland, Inc., d/b/a Land Rover Greenville, Appellant,

v.

Lara Marie Nance, Charlie Andrew Nance, Roger Fields,  
Synovus Financial Corporation d/b/a NBSC, Branch  
Banking and Trust Company, Bank of America  
Corporation, and SunTrust Banks, Inc., Defendants,

Of Whom Lara Marie Nance, Charlie Andrew Nance,  
Roger Fields, Bank of America Corporation, and  
SunTrust Banks, Inc. are the Respondents.

Appellate Case No. 2015-000523

---

## ORDER

---

The motions to dismiss are denied. However, nothing in this order prevents the parties from arguing the issue of the timeliness of the appeal in their briefs.

  
FOR THE COURT

Columbia, South Carolina

cc:

T. Hunt Reid, Esquire  
James W. Sheedy, Esquire  
Susan Elizabeth Driscoll, Esquire  
W. Howard Boyd, Jr., Esquire  
Lauren Thorne Maxwell, Esquire  
James H. Price, III, Esquire

**FILED**  
6/4/15



Bruce A. Byrholdt, Esquire  
David L. Moore, Jr., Esquire  
James Walter Fayssoux, Jr., Esquire  
Carl F. Muller, Esquire

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

FILED-CLERK OF COURT  
GREENVILLE, SC  
PAUL B. WICKENSIMMER  
JUDGMENT IN A CIVIL CASE  
CASE NO: 2010CP2305880  
2014 OCT 30 PM 2 15

**Overland Inc vs. Lara Marie Nance**

**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; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter: \_\_\_\_\_

\_\_\_\_\_  
PRESIDING JUDGE -

This judgment was entered on the 30th day of October, 2014, and a copy mailed first class this 30th day of October, 2014, to attorneys of record or to parties (when appearing pro se) as follows:

James Walter Fayssoux Jr. 209 E. Washington St.  
Greenville, SC 29601

James H. Price III  
David L. Moore Jr.  
Bruce A. Byrholdt

CPFORM4M  
SCCA SCRCP Form 4 Revised 06/2008

Elbert Stockman Dorn Sr.  
Andrew A. Mathias  
Joshua L. Howard  
James W. Sheedy  
Susan Elizabeth Driscoll  
W. Howard Boyd Jr.  
Ammon Tice Leshner  
Sima Bhakta Patel  
Lauren Thorne Maxwell

---

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

---

**ATTORNEY(S) FOR THE DEFENDANT(S)**

---

Paul B. Wickensimer    Greenville County Clerk Of Court  
- Clerk of Court

Comp  
Verdin

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMER

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

Overland, Inc., d/b/a Land Rover Greenville,)

Plaintiff,

vs.

C.A. No.: 2010-CP-23-5880

Lara Marie Nance; Charlie Andrew Nance; )  
Roger Fields; Synovus Financial )  
Corporation d/b/a NBSC; Bank of America )  
Corporation; and SunTrust Banks, Inc., )

Defendants.

**CONSENT ORDER SUBSTITUTING PARTY DEFENDANT**

This matter came before me upon joint motion of Plaintiff and defendant Bank of America Corporation (BAC). With the consent of BAC and Plaintiff, the Court hereby finds and concludes as follows.

Under Rule 15(c), SCRCP, a party defendant may be substituted as long as the substitution will not prejudice the substituted party defendant and, "but for a mistake concerning the identity of the proper party, the action would have been brought against [it]." See also *Byrant v. Waste Management, Inc.*, 342 S.C. 159, 536 S.E.2d 380 (Ct. App. 2000), citing *Superscope, Inc. v. Benjamin Co.*, 276 S.C. 231, 234, 277 S.E.2d 596, 598 (1981) (finding that a trial court has the discretionary power to grant amendments, including substitution of parties, if it does not bring about "a substantial change in the nature of the action or deprive[ ] a party of a substantial right") and *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 356 S.E.2d 123 (Ct. App. 1987) (affirming substitution of party defendant who knew the factual situation of the case, was not taken by surprise,

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and had no need to change the nature of his defense).

BAC is the holding or parent company for Bank of America, N.A. (B of A), among other subsidiary and affiliate corporations. BAC does not process checks; it is B of A that processes checks, including the ones put in issue in this case by the Third Amended Complaint. B of A is the operating bank. B of A has participated in the above captioned matter since service upon its registered agent for service of process, and will not be prejudiced by the substitution of it in the place of BAC. Plaintiff named BAC by mistake and consents and agrees that B of A is the proper party defendant. B of A should be substituted as party defendant in the place and stead of BAC. All orders, pleadings, papers and other matters in this case referencing BAC are deemed to refer to B of A upon entry of this Order.

**NOW, THEREFORE,** it is hereby

**ORDERED** that Bank of America, N.A. is substituted as party defendant in the place and stead of Bank of America Corporation.

**AND IT IS SO ORDERED.**

Greenville, S.C.

Date: 10/29/14



Honorable Letitia Verdin  
Circuit Court Judge

00100569.2



WE SO CONSENT:

Date: 10/20/14

DRISCOLL SHEEDY, P.A.

By: [Signature]  
James W. Sheedy  
Susan E. Driscoll  
11520 N. Community House Road  
Suite 200  
Charlotte, N.C. 28277  
Telephone - (704) 341-2101  
Facsimile - (704) 341-2105  
jimsheedy@driscollsheedy.com  
sdriscoll@driscollsheedy.com

ATTORNEYS FOR B OF A and BAC

Date: 10/20/14

FAYSSOUX LAW FIRM, P.A.

By: [Signature]  
T. Hunt Reid  
209 East Washington Street  
Greenville, S.C. 29601  
Telephone - (864) 558-7196  
Facsimile - (864) 233-4781  
hunter@fayssouxlaw.com

ATTORNEYS FOR PLAINTIFF

00100569.2

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Overland, Inc., d/b/a Land Rover Greenville

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.

PAUL B. WICKENS, CLERK

IN THE COURT OF COMMON PLEAS

CASE NO.

☐ Plaintiff

2014 OCT 30 PM 2 15

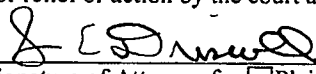
10-CP-23-5880

v.

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET

Lara Marie Nance, Et Al.

☒ Defendant.

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |  |                                                                                                                                                                                                                                                                 |  |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| <b>Plaintiff's Attorney:</b><br>Bar No.<br>Address:<br>phone: fax:<br>e-mail: other:                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |  | <b>Defendant's Attorney:</b><br>James W. Sheedy, Bar No. 5052<br>Address:<br>Driscoll Sheedy, P.A.<br>11520 N. Community House Road, Suite 200<br>Charlotte, N.C. 28277<br>phone: 704 341 2101 fax: 704 341 2105<br>e-mail: jimsheedy@driscollsheedy.com other: |  |
| <input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III).<br><input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)<br><input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |  |                                                                                                                                                                                                                                                                 |  |
| <b>SECTION I: Hearing Information</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |  |                                                                                                                                                                                                                                                                 |  |
| Nature of Motion:<br>Estimated Time Needed: Court Reporter Needed: <input type="checkbox"/> YES / <input type="checkbox"/> NO                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |  |                                                                                                                                                                                                                                                                 |  |
| <b>SECTION II: Motion/Order Type</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |  |                                                                                                                                                                                                                                                                 |  |
| <input type="checkbox"/> Written motion attached<br><input checked="" type="checkbox"/> Form Motion/Order<br>I hereby move for relief or action by the court as set forth in the attached proposed order.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |  |                                                                                                                                                                                                                                                                 |  |
| <br>Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |  | October 29, 2014<br>Date submitted                                                                                                                                                                                                                              |  |
| <b>SECTION III: Motion Fee</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |  |                                                                                                                                                                                                                                                                 |  |
| <input checked="" type="checkbox"/> PAID - AMOUNT: 25.00<br><input type="checkbox"/> EXEMPT: (check reason)<br><input type="checkbox"/> Rule to Show Cause in Child or Spousal Support<br><input type="checkbox"/> Domestic Abuse or Abuse and Neglect<br><input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party<br><input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief<br><input type="checkbox"/> Motion for Stay in Bankruptcy<br><input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC)<br><input type="checkbox"/> Proposed order submitted at request of the court; or,<br>reduced to writing from motion made in open court per judge's instructions<br>Name of Court Reporter:<br><input type="checkbox"/> Other: |  |                                                                                                                                                                                                                                                                 |  |
| <b>JUDGE'S SECTION</b><br><input type="checkbox"/> Motion Fee to be paid upon filing of the attached order.<br><input type="checkbox"/> Other:                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |  | JUDGE<br>CODE: Date:                                                                                                                                                                                                                                            |  |
| <b>CLERK'S VERIFICATION</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |  |                                                                                                                                                                                                                                                                 |  |
| Collected by: <u>D. Jones</u>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |  | Date Filed:                                                                                                                                                                                                                                                     |  |

00099171.4SCCA/233 (11-03)

☒ MOTION FEE COLLECTED: \$25.00 5581 Driscoll Sheedy  
☐ CONTESTED - AMOUNT DUE: \_\_\_\_\_



Comp  
Verdin

FORM 4

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

JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2010CP235880

Overland, Inc., d/b/a Land  
Rover Greenville

Lara Marie Nance,  
Charlie Andrew Nance,  
Roger Fields, ADP  
Dealer Services Group,  
Piedmont Automotive of  
Anderson South  
Carolina, LLC d/b/a  
Apex Automotive,  
Synovus Financial  
Corporation d/b/a  
NBSC, Branch Banking  
and Trust Company,  
Bank of America  
Corporation, and  
Suntrust Banks, Inc.

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMER  
2019 MAY 22 PM 12 33

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: The Court

Attorney for: ☐ Plaintiff ☐ Defendant  
☐ 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:

This matter comes before the Court on Defendants' (Bank of America and SunTrust) Motion for Judgment on the Pleadings as to the seventeenth cause of action alleged in the complaint, pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure. The seventeenth cause of action alleges negligence, gross negligence, and recklessness by Bank of America and

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*[Signature]*

SunTrust (the depository banks) in allowing Defendant Lara Nance to open accounts without proper identification and permission and deposit forged checks into and withdraw money from the accounts. This Court held a hearing on this motion on April 23, 2014, at which counsel for Plaintiff and Defendants Bank of America and SunTrust were present.

A judgment on the pleadings will be granted "where there is no issue of fact raised by the complaint that would entitle the plaintiff to judgment if resolved in plaintiff's favor." *Home Builders Ass'n of S. Carolina v. Sch. Dist. No. 2 of Dorchester Cnty.*, Op. No. 27314 (S.C. Sup. Ct. filed Sept. 11, 2013) (Shearouse Adv. Sh. No. 40 at 28) quoting *Sapp v. Ford Motor Co.*, 386 S.C. 143, 687 S.E.2d 47 (2009). This Court finds there are issues involving the seventeenth cause of action which could entitle the Plaintiff to judgment; therefore, Defendants' motion is DENIED as to the seventeenth cause of action alleged in the complaint.

### ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

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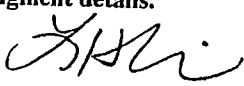


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| INFORMATION FOR THE JUDGMENT INDEX                                                                                                                                                                           |                                          |                                                          |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------|----------------------------------------------------------|
| 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<br>(List name(s) below)                                                                                                                                                                 | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(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.**

  
Circuit Court Judge

2162

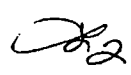
Judge Code

5/21/14

Date

CPFORM4M

SCCA SCRCP Form 4C (Revised 12/2011)



**For Clerk of Court Office Use Only**

5/22/14  
This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on, to attorneys of record or to parties (when appearing pro se) as follows:

James W. Fayssoux, Jr.  
T. Hunt Reid  
Post Office Box 10207  
Greenville, SC 29603

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**Court Reporter**

James W. Sheedy  
Susan E. Driscoll  
11520 N. Community House Road, Suite 200  
Charlotte, NC 28277

**ATTORNEY(S) FOR THE DEFENDANT(S)**  
James H Price III

Paul B. Wickensimer Greenville County Clerk Of  
Court - Clerk of Court

David L Moore Jr  
Bruce A Byrholdt  
Elbert Stockman Dorn Sr.  
Gregory Jacobs English  
Martin Mason Tomlinson  
Joshua L Howard  
Brent O E Clinkscale  
Howard W Boyd Jr  
Ammon Tice Leshner  
Sima Bhakta Patel  
Lauren Thorne Maxwell

Complex case

FORM 4

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

JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2010CP235880

Overland, Inc., d/b/a Land  
Rover Greenville

Lara Marie Nance,  
Charlie Andrew Nance,  
Roger Fields, ADP  
Dealer Services Group,  
Piedmont Automotive of  
Anderson South  
Carolina, LLC d/b/a  
Apex Automotive,  
Synovus Financial  
Corporation d/b/a  
NBSC, Branch Banking  
and Trust Company,  
Bank of America  
Corporation, and  
Suntrust Banks, Inc.

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMER  
2013 DEC 19 5 AM 9 18

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Court

Attorney for: ☐ Plaintiff ☐ Defendant  
☐ 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: \_\_\_\_\_
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☐ 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:  
This matter comes before the Court on Defendant Bank of America's Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure. Bank of America seeks dismissal of the nineteenth cause of action alleged in the complaint. A judgment on the pleadings will be granted "where there is no issue of fact raised by the complaint

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SCCA SCRPC Form 4C (Revised 12/2011)

*Am*

that would entitle the plaintiff to judgment if resolved in plaintiff's favor." *Home Builders Ass'n of S. Carolina v. Sch. Dist. No. 2 of Dorchester Cnty.*, Op. No. 27314 (S.C. Sup. Ct. filed Sept. 11, 2013) (Shearouse Adv. Sh. No. 40 at 28) quoting *Sapp v. Ford Motor Co.*, 386 S.C. 143, 687 S.E.2d 47 (2009). Defendant Bank of America's Rule 12(c) motion is granted as to the nineteenth cause of action alleged in the complaint.

### ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

---



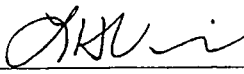
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**INFORMATION FOR THE JUDGMENT INDEX**  
 (Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate N/A in one of the boxes below.)

| Judgment in Favor of<br>(List name(s) below) | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(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.

  
 Circuit Court Judge

2162

Judge Code

12/17/13

Date

### For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on<sup>3</sup>, to attorneys of record or to parties (when appearing pro se) as follows:

CPFORM4M  
 SCCA SCRCP Form 4C (Revised 12/2011)



James W. Fayssoux, Jr.  
T. Hunt Reid  
Post Office Box 10207  
Greenville, SC 29603

---

ATTORNEY(S) FOR THE PLAINTIFF(S)

James W. Sheedy  
Susan E. Driscoll  
11520 N. Community House Road, Suite 200  
Charlotte, NC 28277

---

ATTORNEY(S) FOR THE DEFENDANT(S)

---

Paul B. Wickensimer Greenville County Clerk Of  
Court - Clerk of Court

Court Reporter

*Dr 3*

## FORM 4

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

## JUDGMENT IN A CIVIL CASE

CASE NO. 2010 CP-235880

Overland, Inc., d/b/a Land Rover Greenville

Lara Marie Nance, Charlie Andrew Nance,  
Roger Fields, ADP Dealer Services Group,  
Piedmont Automotive of Anderson South Carolina, LLC  
d/b/a Apex Automotive, Synovus Financial  
Corporation d/b/a NBSC, Branch Banking  
and Trust Company, Bank of America Corporation,  
and SunTrust Banks, Inc.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Lauren T. Maxwell, Gallivan, White &amp; Boyd, P.A.

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. ☐ See Page 2 for additional information.
- ☐ **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: This matter comes before the Court on Defendant SunTrust Banks, Inc.'s Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure. SunTrust Banks, Inc. seeks dismissal of the eighteenth (18) cause of action alleged in the complaint. A judgment on the pleadings will be granted "where there is no issue of fact raised by the complaint that would entitle the plaintiff to judgment if resolved in plaintiff's favor." Home Builders Ass'n of S.C. v. Sch. Dist. No. 2 of Dorchester Cnty. Op. No. 27314 (S.C. Sup. Ct. filed Sept. 11, 2013) (Shearhouse Adv. Sh. No. 40 at 28) quoting Sapp v. Ford Motor Co., 386 S.C. 143, 687 S.E.2d 47 (2009). Defendant SunTrust Banks, Inc.'s Rule 12(c) motion is granted as the eighteenth (18) cause of action alleged in the complaint.

## 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<br>(List name(s) below) | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|----------------------------------------------|------------------------------------------|----------------------------------------------------------|
|                                              |                                          | \$                                                       |
|                                              |                                          | \$                                                       |
|                                              |                                          | \$                                                       |





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## FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE

(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.
2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).
4. The "Information for the Judgment Index" section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the "Judgment in Favor of" column, enter the name of the party to whom the judgment is awarded. In the "Judgment Against" column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the "Judgment Amount" column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate "N/A" in one of the boxes in this section of the form.
5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.
6. The section "For the Clerk of Court Office Use Only" should be completed by the clerk as it has been with the previous version of Form 4.
7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.
8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.

9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.
10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.
11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.
12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.
13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.
14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment:

Comp

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

FORM 4  
FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMER

JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2010CP235880

Overland, Inc., d/b/a Land  
Rover Greenville

2014 JAN 22 PM 2 04

Lara Marie Nance,  
Charlie Andrew Nance,  
Roger Fields, ADP  
Dealer Services Group,  
Piedmont Automotive of  
Anderson South  
Carolina, LLC d/b/a  
Apex Automotive,  
Synovus Financial  
Corporation d/b/a  
NBSC, Branch Banking  
and Trust Company,  
Bank of America  
Corporation, and  
Suntrust Banks, Inc.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Court

Attorney for: ☐ Plaintiff ☐ Defendant  
☐ 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:

This matter comes before the Court on Defendant SunTrust's Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure. SunTrust seeks dismissal of the nineteenth cause of action alleged in the complaint. A judgment on the pleadings will be granted "where there is no issue of fact raised by the complaint that would

entitle the plaintiff to judgment if resolved in plaintiff's favor." *Home Builders Ass'n of S. Carolina v. Sch. Dist. No. 2 of Dorchester Cnty.*, Op. No. 27314 (S.C. Sup. Ct. filed Sept. 11, 2013) (Shearouse Adv. Sh. No. 40 at 28) quoting *Sapp v. Ford Motor Co.*, 386 S.C. 143, 687 S.E.2d 47 (2009). Defendant SunTrust's Rule 12(c) motion is granted as to the nineteenth cause of action alleged in the complaint.

### 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<br>(List name(s) below)                                                                                                                                                                 | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(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.**

  
Circuit Court Judge

2162

Judge Code

1/21/14  
Date

### For Clerk of Court Office Use Only

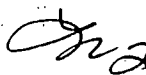
1/22/14

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

1/22/14

CPFORM4M

SCCA SCRCF Form 4C (Revised 12/2011)



James W. Fayssoux, Jr.  
T. Hunt Reid  
Post Office Box 10207  
Greenville, SC 29603

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**Court Reporter**

James W. Sheedy ✓  
Susan E. Driscoll ✓  
11520 N. Community House Road, Suite 200  
Charlotte, NC 28277

**ATTORNEY(S) FOR THE DEFENDANT(S)**

James H Price III ✓  
David L Moore Jr ✓

Paul B. Wickensimer Greenville County Clerk Of  
Court - Clerk of Court

Bruce A Byrhold +  
Elbert Stockman Dorn Jr ✓

Andrew A Mathias

Martin Mason Tomlinson

Joshua L Howard

Brent O E Clinkscale

James W Sheedy

Howard Boyd

Ammon Tice Leshner

Sima Bhakta Patel

Lauren Thorne Maxwell

Bregory Jacobs English

3

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

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMMER

FORM 4

JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2010CP235880

Overland, Inc., d/b/a Land  
Rover Greenville

2013 OCT 22 PM 3

Lara Marie Nance,  
Charlie Andrew Nance,  
Roger Fields, ADP  
Dealer Services Group,  
Piedmont Automotive of  
Anderson South  
Carolina, LLC d/b/a  
Apex Automotive,  
Synovus Financial  
Corporation d/b/a  
NBSC, Branch Banking  
and Trust Company,  
Bank of America  
Corporation, and  
Suntrust Banks, Inc.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Court

Attorney for: ☐ Plaintiff ☐ Defendant  
☐ 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:

This matter comes before the Court on Defendant Bank of America's Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure. Bank of America seeks dismissal of the eighteenth (18) cause of action alleged in the complaint. A judgment on the pleadings will be granted "where there is no issue of fact raised by the complaint



that would entitle the plaintiff to judgment if resolved in plaintiff's favor." *Home Builders Ass'n of S. Carolina v. Sch. Dist. No. 2 of Dorchester Cnty.*, Op. No. 27314 (S.C. Sup. Ct. filed Sept. 11, 2013) (Shearouse Adv. Sh. No. 40 at 28) quoting *Sapp v. Ford Motor Co.*, 386 S.C. 143, 687 S.E.2d 47 (2009). Defendant Bank of America's Rule 12(c) motion is granted as to the eighteenth (18) cause of action alleged in the complaint.

# ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

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| 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<br>(List name(s) below)                                                                                                                                                                 | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|                                                                                                                                                                                                              |                                          |                                                          |
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|                                                                                                                                                                                                              |                                          |                                                          |

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.**



Circuit Court Judge

2162

Judge Code

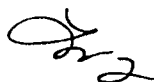
10/22/13

Date

## For Clerk of Court Office Use Only

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

CPFORM4M  
SCCA SCRCP Form 4C (Revised 12/2011)





**James W. Fayssoux, Jr.**  
**T. Hunt Reid**  
Post Office Box 10207  
Greenville, SC 29603

---

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**James W. Sheedy**  
**Susan E. Driscoll**  
11520 N. Community House Road, Suite 200  
Charlotte, NC 28277

---

**ATTORNEY(S) FOR THE DEFENDANT(S)**

---

**Paul B. Wickensimer** Greenville County Clerk Of  
Court - Clerk of Court

**Court Reporter**



FILED - CLERK OF COURT  
STATE OF SOUTH CAROLINA  
GREENVILLE CO. S.C.  
COUNTY OF GREENVILLE PAUL B. WICKENHILL

IN THE COURT OF COMMON PLEAS

Case No. 2010-CP-23-5880

2014 OCT 30 PM 2 19

Overland, Inc., d/b/a Land Rover of  
Greenville,

Plaintiffs,

vs.

Lara Marie Nance, Charlie Andrew  
Nance, Roger Fields, Synovus Financial  
Corporation d/b/a NBSC, Branch Banking  
and Trust Company, Bank of America  
Corporation, and SunTrust Banks, Inc.,

Defendants.

**CONSENT SCHEDULING ORDER - SECOND AMENDED**

This matter is before the Court, with the consent of all the Parties who have appeared in this matter, to set forth a Scheduling Order to facilitate the completion of discovery and other pre-trial matters. Pursuant to South Carolina Rule of Civil Procedure 40(e)(2), the following Scheduling Order is entered in this case:

1. Defendants shall identify experts following the deposition of Plaintiff's experts. Defendants shall make experts available for deposition at a time and place as agreed to among the Parties following production of the expert's report.
2. Any rebuttal experts shall be named by any Party within 15 days following deposition of Defendants' experts, and the Party naming such experts shall present them for depositions within 30 days from the date of identification if requested.
3. Discovery shall be completed by January 12, 2015. Discovery requests shall be served in such a manner and time so that the response is due on or before January 12, 2015. The Parties may extend this deadline by mutual, written agreement.

ENTERED COMPUTER

4. All Motions, except (a) those relating to the admissibility of evidence at trial and (b) those to compel discovery, shall be filed no later than February 13, 2015.
5. Mediation will be held on or before March 13, 2014 before a mediator to be agreed upon by the Parties.
6. The date this case may be called for trial will be the later of the following dates: (1) May 4, 2015; or (2) thirty (30) days after the Court has ruled on any dispositive motions (except those relating to the admissibility of evidence at trial or to compel discovery) timely filed on or before the deadline set forth under Paragraph 4 above.

In addition to the schedule above, the Court orders as follows:

- A. Service shall henceforth be by electronic means. Each Party shall promptly designate the persons and email addresses to be used by the other Parties for service of process, including any staff who should receive copies of any filings. Unless waived in writing, a courtesy copy of each document served by electronic means shall be sent by First Class mail, or hand delivered, the lead counsel for a Party within one day of electronic service. Notice of any hearings in the case shall be provided to all Parties through their respective counsel.
- B. The Parties shall respond to all written discovery served as of the date of this Order within 45 days from the date of this Order. All subsequently served, non repetitive discovery shall be responded to in accordance with and in the time set forth in the South Carolina Rules of Civil Procedure.
- C. Expert designations shall set forth the name of the expert, employer's name (if appropriate), complete contact information, and the subject matter upon which the expert is expected to testify.
- D. Each expert shall be made available for deposition at a mutually convenient time within a reasonable time after service of the expert's disclosure.
- E. The Parties shall cooperate on the scheduling of fact and expert depositions and make reasonable efforts to schedule depositions to minimize travel requirements.
- F. The dates and provisions above may be modified by the Court, for good cause shown. The Parties may modify the dates by agreement, other than the dates for dispositive motions, and trial.
- G. A representative of each Party authorized with full settlement authority shall personally attend any mediation conferences.
- H. The Parties may, with the consent of all counsel, conduct discovery up to the time of trial, provided the other deadlines in this order are not affected.

AND IT IS SO ORDERED.

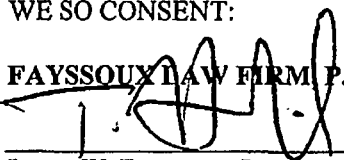
Dated: 10/29/14  
Greenville, South Carolina

  
\_\_\_\_\_  
Honorable Letitia H. Verdin,  
Thirteenth Judicial Circuit Court Judge

[Consent Below]

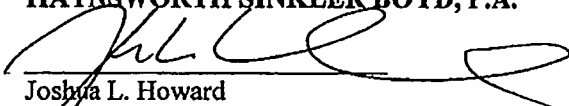


WE SO CONSENT:

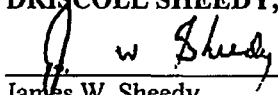
  
FAYSSOUX LAW FIRM, P.A.

James W. Fayssoux, Jr.  
T. Hunter Reid  
209 E. Washington Street  
Greenville, S.C. 29601  
T: 864-558-7196  
F: 864-233-4781  
*Attorneys for Plaintiff*

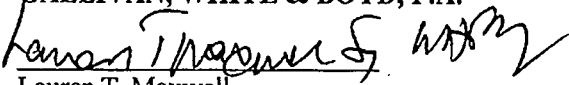
HAYNSWORTH SINKLER BOYD, P.A.

  
Joshua L. Howard  
Haynsworth Sinkler Boyd, P.A.  
P. O. Box 2048  
Greenville, SC 29602  
T: 864-240-3200  
F: 864-240-3300  
*Attorneys for Synovus Financial Corporation d/b/a NBSC*

DRISCOLL SHEEDY, P.A.

  
James W. Sheedy  
Susan E. Driscoll  
11520 N. Community House, Suite 200  
Charlotte, NC 28927  
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F: 704-341-2105  
*Attorneys for Bank of America Corporation*

GALLIVAN, WHITE & BOYD, P.A.

  
Lauren T. Maxwell  
55 Beattie Place, Suite 1200  
Greenville, South Carolina 29601  
*Attorneys for SunTrust Banks, Inc.*

**BYRHOLDT DRAWDY, LLC**

Bruce A. Byrholdt

Bruce A. Byrholdt

2ND HANDED SCH. ORDER

Suite 117

2315 North Main Street

Anderson, S.C. 29621

T: 864-261-3977

F: 864-261-3978

*Attorneys for Charlie Andrew Nance*

**NEXSEN PRUET, LLC**

DLM th/f for

David L. Moore, Jr.

55 East Camperdown Way (29601)

Post Office Box 10648

Greenville, SC 29603-0648

T: 864-282-1173

F: 864-477-2635

*Attorneys for Defendant Roger Fields*

**LAW OFFICES OF JAMES H. PRICE, III, P.A.**

JHP th/f for

James H. Price, III, Esq.

644 E. Washington Street

Greenville, S.C. 29601

T: 864-271-3535

F: 864-242-6560

*Attorneys for Defendant Lara Marie Nance*

25

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

Case No. 2010-CP-23-5880

Overland, Inc., d/b/a Land Rover of  
Greenville,

Plaintiffs,

vs.

Lara Marie Nance, Charlie Andrew  
Nance, Roger Fields, Synovus Financial  
Corporation d/b/a NBSC, Branch Banking  
and Trust Company, Bank of America  
Corporation, and SunTrust Banks, Inc.,

Defendants.

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL S. WICKENS  
2013 OCT 23 PM 4 43

**CONSENT SCHEDULING ORDER**

This matter is before the Court, with the consent of all the Parties who have appeared in this matter, to set forth a Scheduling Order to facilitate the completion of discovery and other pre-trial matters. Pursuant to South Carolina Rule of Civil Procedure 40(e)(2), the following Scheduling Order is entered in this case:

1. Defendants shall identify experts following the deposition of Plaintiff's experts. Defendants shall make experts available for deposition at a time and place as agreed to among the Parties following production of the expert's report.
2. Any rebuttal experts shall be named by any Party within 15 days following deposition of Defendants' experts, and the Party naming such experts shall present them for depositions within 30 days from the date of identification if requested.
3. Discovery shall be completed by July 31, 2014. Discovery requests shall be served in such a manner and time so that the response is due on or before July 31, 2014. The Parties may extend this deadline by mutual, written agreement.

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4. All Motions, except (a) those relating to the admissibility of evidence at trial and (b) those to compel discovery, shall be filed no later than August 8, 2014.
5. Mediation will be held on or before August 2, 2014 before a mediator to be agreed upon by the Parties.
6. The date this case may be called for trial will be the later of the following dates: (1) September 8, 2014; or (2) thirty (30) days after the Court has ruled on any dispositive motions (except those relating to the admissibility of evidence at trial or to compel discovery) timely filed on or before the deadline set forth under Paragraph 4 above.

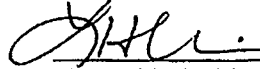
In addition to the schedule above, the Court orders as follows:

- A. Service shall henceforth be by electronic means. Each Party shall promptly designate the persons and email addresses to be used by the other Parties for service of process, including any staff who should receive copies of any filings. Unless waived in writing, a courtesy copy of each document served by electronic means shall be sent by First Class mail, or hand delivered, the lead counsel for a Party within one day of electronic service. Notice of any hearings in the case shall be provided to all Parties through their respective counsel.
- B. The Parties shall respond to all written discovery served as of the date of this Order within 45 days from the date of this Order. All subsequently served, non repetitive discovery shall be responded to in accordance with and in the time set forth in the South Carolina Rules of Civil Procedure.
- C. Expert designations shall set forth the name of the expert, employer's name (if appropriate), complete contact information, and the subject matter upon which the expert is expected to testify.
- D. Each expert shall be made available for deposition at a mutually convenient time within a reasonable time after service of the expert's disclosure.
- E. The Parties shall cooperate on the scheduling of fact and expert depositions and make reasonable efforts to schedule depositions to minimize travel requirements.
- F. The dates and provisions above may be modified by the Court, for good cause shown. The Parties may modify the dates by agreement, other than the dates for dispositive motions, and trial.
- G. A representative of each Party authorized with full settlement authority shall personally attend any mediation conferences.
- H. The Parties may, with the consent of all counsel, conduct discovery up to the time of trial, provided the other deadlines in this order are not affected.



AND IT IS SO ORDERED.

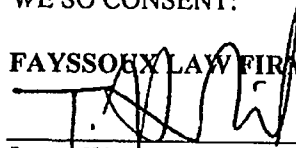
Dated: 10/22/13  
Greenville, South Carolina

  
\_\_\_\_\_  
Honorable Letitia H. Verdin,  
Thirteenth Judicial Circuit Court Judge

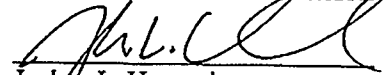
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WE SO CONSENT:

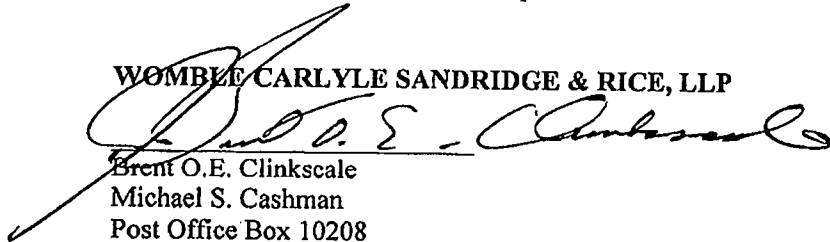
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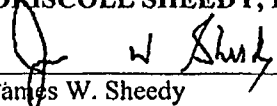
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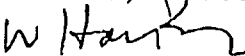
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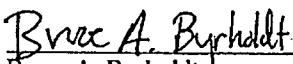
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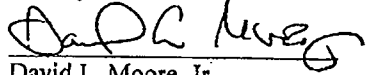
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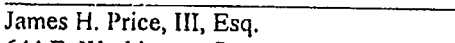
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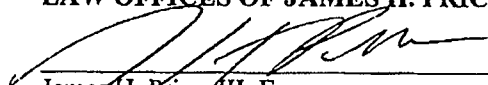
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10/18/13

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

FILED MAR 26 2013  
CLERK OF COURT  
GREENVILLE, SC

JUDGMENT IN A CIVIL CASE

2013 MAR 26 P 1:02 CASE NO: 2010CP2305880

Overland Inc vs. Lara Marie Nance

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: \_\_\_\_\_

NOTICE

This is a notice to you that a Consent Scheduling Order in this case has been filed in the Clerk of Court's Office. To obtain a certified copy, you may contact our office by phone (864) 467-8551 or email a request to [cnoblitt@greenvillecountv.org](mailto:cnoblitt@greenvillecountv.org). If you would like a copy via email, please provide a valid email address.

Dated at Greenville, South Carolina, this 26th day of March, 2013.

PRESIDING JUDGE -

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court  
- Clerk of Court

CPFORM4M  
SCCA SCRPC Form 4 Revised 06/2008

3/29/13  
CMA # 06765-0688  
Dated: \_\_\_\_\_  
FILED: \_\_\_\_\_

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

2013 MAR 26 P 1:13

Case No. 2010-CP-23-5880

Overland, Inc.. d/b/a Land Rover of  
Greenville.

Plaintiffs.

vs.

Lara Marie Nance, Charlie Andrew  
Nance, Roger Fields, ADP Dealer  
Services Group, Piedmont Automotive of  
Anderson, Inc. d/b/a Piedmont Chrysler  
Jeep Dodge. Piedmont Automotive of  
Anderson South Carolina. LLC d/b/a  
Apex Automotive and Synovus Financial  
Corporation d/b/a NBSC. Branch Banking  
and Trust Company, Bank of America  
Corporation, and SunTrust Banks, Inc.,

Defendants.

**CONSENT SCHEDULING ORDER**

This matter is before the Court, with the consent of all the parties who have appeared in this matter, to set forth a Scheduling Order to facilitate the completion of discovery and other pre-trial matters. On August 10, 2012, Plaintiff filed its Third Amended Complaint adding parties Synovus Financial Corporation d/b/a NBSC, Branch Banking and Trust Company, Bank of America Corporation, and SunTrust Banks, Inc. to the pending litigation. Service on all new parties was had thereafter. With the filing of SunTrust Banks, Inc.'s answer on or about November 21, 2012, all new parties have now appeared. In accordance with Rule 40(b) SCRPC, this matter is not subject to a transfer to the trial roster until the running of 180 days from last service on a newly added party. The 180 day period set forth in Rule 40(b) continues this matter

beyond the present scheduling order, which presently sets a trial date on or after December 17, 2012. The newly added parties therefore necessitate the entry of a revised scheduling order in this matter. Pursuant to South Carolina Rule of Civil Procedure 40(e)(2), the following Scheduling Order is entered in this case:

1. Plaintiffs shall identify experts by April 12, 2013, and shall present them for depositions within 30 days from the date of identification if requested.
2. Defendants shall identify experts by June 14, 2013, and shall present them for depositions within 30 days from the date of identification if requested.
3. Any rebuttal experts shall be named by either party by July 19, 2013, and the party naming such experts shall present them for depositions within 30 days from the date of identification if requested.
4. Discovery shall be completed by September 13, 2013. Discovery requests shall be served in such a manner and time so that the response is due on or before September 13, 2013. The parties may extend this deadline by mutual, written agreement.
5. All Motions, except (a) those relating to the admissibility of evidence at trial and (b) those to compel discovery, shall be filed no later than September 27, 2013.
6. Mediation will be held on or before October 11, 2013 before a mediator to be agreed upon by the parties.
7. The date this case may be called for trial <sup>after</sup> ~~will be the later of the following dates: (1) January 20, 2014; or (2) thirty (30) days after the Court has ruled on any motions (except those relating to the admissibility of evidence at trial or to compel discovery) timely filed on or before the deadline set forth under Paragraph 6, above.~~ DEH

In addition to the schedule above, the Court orders as follows:

- A. Service shall henceforth be by electronic means. Each party shall promptly designate the persons and email addresses to be used by the other parties for service of process, including any staff who should receive copies of any filings. Unless waived in writing, a courtesy copy of each document served by electronic means shall be sent by First Class mail, or hand delivered, the lead counsel for a Party within one day of electronic service.
- B. The Parties shall respond to all written discovery served as of the date of this Order within 45 days from the date of this Order. All subsequently served, non



repetitive discovery shall be responded to in accordance with and in the time set forth in the South Carolina Rules of Civil Procedure .

- C. Expert designations shall set forth the name of the expert, employer's name (if appropriate), complete contact information, and the subject matter upon which the expert is expected to testify.
- D. Each expert shall be made available for deposition at a mutually convenient time within a reasonable time after service of the expert's disclosure.
- E. The parties shall cooperate on the scheduling of fact and expert depositions and make reasonable efforts to schedule depositions to minimize travel requirements.
- F. The dates and provisions above may be modified by the Court, for good cause shown. The parties may modify the dates by agreement, other than the dates for dispositive motions, and trial.
- G. A representative of each party authorized with full settlement authority shall personally attend any mediation conferences.
- H. The parties may, with the consent of all counsel, conduct discovery up to the time of trial, provided the other deadlines in this order are not affected.

AND IT IS SO ORDERED.

S/D. Garrison Hill  
The Honorable D. Garrison Hill  
Thirteenth Judicial Circuit Court Judge

Dated: 3. 22. 13  
Greenville, South Carolina

[Consent Below]

WE SO CONSENT:

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d/b/a Apex Automotive*

WYCHE, P.A.

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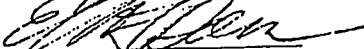
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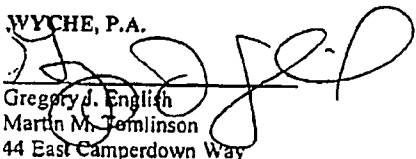
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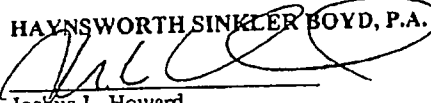
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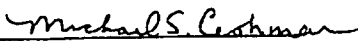
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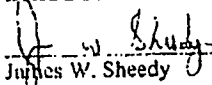
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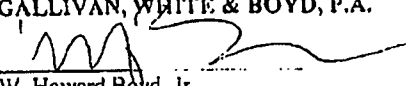
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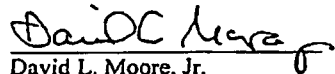


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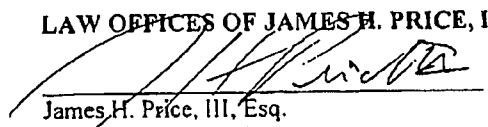
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STATE OF SOUTH CAROLINA )

COUNTY OF GREENVILLE )

Overland, Inc., d/b/a Land Rover  
Greenville, )

Plaintiff, )

v. )

Lara Marie Nance, Charlie Andrew Nance )  
Roger Fields, Synovus Financial )  
Corporation d/b/a NBSC, Branch Banking )  
and Trust Company, Bank of America )  
Corporation, and Suntrust Banks, Inc. )

Defendants. )

IN THE COURT OF COMMON PLEAS  
THIRTEENTH JUDICIAL CIRCUIT  
C.A. No.: 2010-CP-23-5880

**PLAINTIFF'S MOTION TO ALTER /  
AMEND OR RECONSIDER  
PURSUANT TO RULE 59(e), SCRPC**

By Order dated December 15, 2014, which was received by the undersigned counsel on December 17, 2014, the Court granted summary judgment for Defendants Bank of America Corporation and Suntrust Banks, Inc. on the Plaintiff's Seventeenth Cause of Action for negligence. Among other relief the Court also found that Plaintiff's Motion to Compel Discovery from Defendant Bank of America was mooted by its summary judgment. Plaintiff respectfully asks the Court to alter or amend its Order to address certain arguments raised at the hearing, to reconsider its rulings adverse to Overland, Inc., and to deny Bank of America Corporation and Suntrust Banks, Inc.'s motion for summary judgment.

#### SUMMARY OF GROUNDS

1. The Court should reconsider its judgments on the ordinary care standard.
  - A. Overland did present sufficient evidence that Defendants Bank of America and Suntrust failed its' duty of ordinary care in their check-processing procedures.

- B. Whether the Defendant/Depository Banks employed ordinary care when it deposited Nance's checks remains a Question of Fact despite the use of automation.
- 2. Whether the Defendant/Depository Banks lacked ordinary and reasonable care when it opened a new business checking account for Nance in November 2009 is a Question of Fact.
  - A. Fraud and Misrepresentation are not necessary elements under the Code.
  - B. Defendants failed to use ordinary care when it opened new accounts for Nance.
- 3. The Court should reconsider dismissing Plaintiff's Motion to Compel as moot.
  - A. This Court should not reward Defendants' withholding of discoverable and material evidence.
- 4. Five more reasons for the Court to alter, amend or reconsider its Order for Summary Judgment as to Plaintiff's Seventeenth Cause of Action.
  - A. Defendant Bank of America's Motion for Summary Judgment Purely on the Law should be limited to legal theories only, and not weight of evidence.
  - B. The Court's finding that Overland's negligence cause of action was displaced by the Commercial Code is erroneous.
  - C. The Court's order contradicts the May 22, 2014 Order in this case finding that Plaintiff may be entitled to judgment on its Seventeenth Cause of Action.
  - D. The Court's order has confused Drawers versus Drawees.
  - E. The Court failed to address whether or not Plaintiff has a Cause of Action for negligence pursuant to §§3-405 and 3-406.

## ARGUMENTS

### 1. Duty of Ordinary Care in Check Processing.

- A. Overland did present sufficient evidence that Defendants Bank of America and Suntrust failed its' duty of ordinary care in their check-processing procedures.

The order finds that “*Overland has not demonstrated that Bank of America or SunTrust failed to exercise ordinary care in their check processing procedures.*” This conclusion is the result of a two-pronged test used by the Court for Depository Banks who collect their checks by automated means. It stated that “. . . *the sole avenue for demonstrating lack of ordinary care must be based upon a different procedure or activity by the bank. There will be no liability on the instrument itself.*” As a preliminary matter, Overland disagrees that the Court’s use of a limited “sole avenue” approach because it is inconsistent with the South Carolina’s UCC (for the reasons explained in subsection B, hereinbelow); and therefore, Overland moves to alter or amend based upon an error of law. The Official Comments and South Carolina Reporter’s Comments to S.C. Code Ann. §§36-3-404, 405 and 406, each discuss additional avenues beyond collection procedures and activities that may be used to demonstrate unreasonable conduct by depository bank using automated check processing. See, Official Comment 4 to §3-405; See also, Official Comment 4 to §3-406 (extending ordinary care to the following activities: opening accounts, collections, deposits, credits and withdrawals).

Regardless, Overland has cleared both prongs of the Court’s test by presenting it with overwhelming evidence that both Defendants Bank of America and Suntrust breached the duty of ordinary care. First of all, Bank of America and SunTrust deviated from its own prescribed procedures when it took for collection the Nance checks (Affidavit of Peter Seitz, Para. 3 – 7). The checks bore fraudulent endorsements and were not even payable to her (they were payable to a third person). During the majority of all deposits Lara Nance didn’t even pose to the banks

as an authorized depositor. So, she could not have made these deposits without a bank neglecting to follow internal bank protocols. *Id.* Bank of America even wrote Lara Nance a letter explaining that it could not accept these kinds of checks for deposit. (*Id.* at *Exhibit A*). Yet, they did it anyways; hundreds of times for over one million dollars.

Second, Bank of America and SunTrust have refused to disclose their Deposit/Check Collection Procedures, so it is impossible to find that their procedures were reasonable, or not different from the generally accepted usage. (*Id.* at Para. 8). The very fact that discovery is incomplete and that Defendants are unreasonably withholding their procedures should have acted as a bar to Summary Judgment under Rule 56, SCRPC.

*i. Proof of procedural deviations and different activity by the Bank.*

Overland cited specific examples of procedural deviations by the Depository Banks within its' supporting affidavit from Peter Seitz. *See*, (Para. 6 – 8). Therein, Overland highlights a very particular instance on October 1, 2009 when Bank of America refused Nance attempting a third-party deposit (i.e., depositing checks made payable to Taylor Enterprises into her *personal* checking account), but then permitted her to re-deposit those checks on a later date. Here, Bank of America knew of its' responsibility to review Nance's deposits and endorsements, and it did in fact, refuse collection of these checks because it violated bank policy. In the October 1, 2009 letter to Nance, Bank of America explained that "In reviewing your deposit, we found an item where one or more payee(s) are not listed on your deposit account . . . The physical item will be returned to you within 10 business days." (*Id.* at Exhibit A)

However, Bank of America later deviated or disregarded this review and its procedures when it allowed Nance to re-deposit these exact same items on a later date. (*Id.* at Para. 7). As explained by Overland's expert of bank deposit operations, Bank of America's re-deposit occurred even though Nance was still not the payee listed, and the endorsement was improper

and the Drawer's signature was forged. *Id.* Every single check was deposited using an ATM machine. If the exact same check can be denied once for violating bank policy, but accepted on a later date without correction, then one of two things has occurred: (1) bank procedures were not followed; or (2) bank procedures can be overridden. The procedures could be flawed or the collection methods flawed, or both; either way, there is a serious Question of Fact as to the standard of care used on October 1, 2009. Even though Bank of America has not disclosed their procedures here, it obviously implemented some policy for reviewing check endorsements. *Id.* Otherwise, it would not have refused some of Nance's checks as invalid.

Along a similar vein, the Seitz' Affidavit details certain instances when Suntrust Banks disregarded its' own deposit review policies regarding Lara Nance. (*Seitz* Para. 6 – 8; *Exhibits C and D*). As he explains, Suntrust deposited some of Nance's checks with specific endorsement instructions, "For Deposit Only – Account 100010408238," yet that account number lists a separate Payee. Once again, this occurred by either a flawed policy or flawed collection method, and Overland has provided the Court with factual evidence that a Depository Bank's activity was different than its stated policies for check processing.

Therefore, when viewing this evidence in a light most favorable to Plaintiff, it is clear that the banks breached §3-103's duty of ordinary care when collecting the Nance checks, and that pursuant to South Carolina's UCC §§3-404(d), 405(b) and/or 406 the question of fault must be submitted to the trier of fact for findings and apportionment.

ii. *Comparing Bank of America/SunTrust's procedures to general usage.*

Second, the Defendants refusal to disclose their written procedures for depositing check items and review of endorsements for deposit, should serve as further grounds for dismissing the Defendants' motion under Rule 56. On December 16, 2013, Overland requested Bank of America and Suntrust's written policies/procedures Check Processing and it had to file a Motion

to Compel Discovery in this regard. As of time for the **October 29, 2014** Motion hearing, and still to date, the banks have not produced its' prescribed procedures. Therefore, it is impossible for Defendants to assert that its' check processing procedures met the industry standard of ordinary care. (Seitz Affidavit, Para. 8). Until the policies are disclosed for comparison, this Court quite frankly cannot find that ordinary care was used here. **If Overland's sole avenue for demonstrating lack of ordinary care must be based on a bank's procedures being unreasonably different from the accepted general usage, then it must be afforded an opportunity to actually review that procedure.** The Court's order must be reconsidered on this point alone because it is depriving the Plaintiff of its only chance at proving its' case. The materiality of these procedures could not be any more striking.

As the Court is well aware, incomplete discovery must operate as a bar to summary judgment pursuant to Rule 56, SCRCP; otherwise, the Court is rewarding the banks for their discovery abuses.

Alternatively, even if the Court were to maintain that Plaintiff has not, at this stage, demonstrated ample proof that Defendant's lacked of ordinary care in their procedures, it should find that Plaintiff has presented a compelling reason for continued discovery of this case likely to reveal a Question of Fact regarding the reasonableness of Defendants' procedures. So, again, the Court should dismiss the Motion for Summary Judgment until discovery is complete.

- B. Whether the Defendant/Depository Banks employed ordinary care when it deposited Nance's checks remains a Question of Fact despite the use of automation.

Overland now turns the Court's attention back to the finding of a presumption of reasonableness in check automation. The Court's order misinterpreted the standards for ordinary care demanded by the UCC for Defendants/ Depository Banks that employ "automated check



processing systems” for deposit or collection items. The Court’s use of a presumption here negates the Code’s requirement that Banks observe or act in a commercially reasonable manner **throughout** the entire check collection/payment cycle, which includes many steps beyond the act of automated collection (i.e., converting paper into electronic facsimile for use by an automated clearing house). By reading into the definition a new legal presumption, the Court’s order suggests that a Bank has satisfied its duty simply by using a computers to communicate with an Automated Clearing House. This cannot be the intent of the Code for several reasons.

First, the Court seems to be confusing Check Automation with Check Processing. Check Automation<sup>1</sup> refers to the electronic means of collecting a check. This is not the same thing as discerning whether a check is properly payable or authorized for payment/deposit by a financial institution. So, it’s the authorization to negotiate a check that requires due care under the UCC, along with the manner in which check data is recorded and transmitted. One occurs prior to payment (automation) while the other occurs throughout the negotiation process, from collection to withdrawal (authorization). The Court must be able to separately examine these two check negotiation processes to determine liability.

Second, the legal presumption used by the Court is not expressed or implied within the plain reading of the statute. In fact, *Official Comment 5* to the definition of Ordinary Care states the opposite, that “this particular rule [allowing banks to process checks by automated means] applies primarily to Section 4-406<sup>2</sup>. . . .” S.C. Code Ann. §36-3-103. And, “Nothing in Section 3-103(a)[9] is intended to prevent a customer from proving the procedures followed by a bank are unreasonable, arbitrary, or unfair.” *Id.* This statement is reiterated in §3-404’s *Official Comment 3*, and in accord with §3-405’s *Official Comment 4*.

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<sup>1</sup> For more information on check automation, See United States Code of Laws, Regulation CC, otherwise known as “Check 21” Act.

<sup>2</sup> not to be confused with §3-406 as used by Overland.

Third, §3-103 only contains definitions of terms to be used throughout Chapter 3 of the South Carolina UCC, so the statute serves a very limited purpose. The Court's Order appears to be stretching those boundaries beyond recognition. This particular section of the Code (Part 1, entitled "General Provisions and Definitions,") is not the statutory mechanism that gives rise to liability on negotiable instruments; that would be Part 4, "Liability of Parties." In other words, the definition of Ordinary Care should not be used by the Court to introduce legal burdens of proof or presumptions of reasonableness because that would upset the highly detailed, risk-shifting framework of the Commercial Code.

Fourth, the South Carolina Reporter's Comments suggests that §3-103(a)(9) only applies to Drawer's claims against its own bank, the Drawee/Paying Bank. *See, Dennis v. S.C. Nat'l Bank*, 299 S.C. 34, 382 S.E.2d 237 (Ct. App. 1988); *Cf., S.C. Code Ann.* §36-3-103(a)(9) 2008, (overruling the decision of *Dennis* in so much as the failure to exercise ordinary care cannot be proven solely by the failure to employ handwriting professionals to verify its customer's signature); *But see*, South Carolina Reporter's Comments to §3-406, last paragraph.

Finally, the revised §3-103(a)(9)'s definition of ordinary care merely recognizes the reality that today's commercial banks hardly use humans anymore to personally inspect instruments. *See, South Carolina Reporter's Comments to §3-406*. Instead, they assume the risk of loss for paying bad checks by employing software and computerized systems for fraud detection and authorization under Check 21. But allowing banks to use innovative digital tools to collect data doesn't mean that a bank can do nothing at all. And, this Court should not interpret the definition of Ordinary Care as meaning that banks are now shielded from all other responsibilities throughout the check collection and payment cycle. Remember that automated processing of a deposit item is not the one and only step - after collection occurs, there is authorization, clearinghouses, transfers, receipt of funds, posting payment, crediting the account,

and withdraw by the customer, among other heavily regulated processes.

So, the rights, duties and liabilities of a Depository Bank are different according to each step. This is the purpose of the loss allocation principles within the Code. And, this is exactly why a Bank must also follow its own prescribed procedures for check authorization, which usually requires a bank to implement fraud detection software, or employ some methods of reviewing checks for authorization that is consistent in the industry (See, Affidavit of Peter Seitz, Para. 3 – 5).

Therefore, whether the Defendants employed ordinary care when it deposited Nance's checks by automated means remains as a Question of Fact that must be determined at trial.

In summary, the presumption of reasonable care found by this Court has effectively created brand new law in South Carolina which needs to be altered or amended. Regardless, the presumption of reasonable care afforded to these Defendants was rebutted by Overland's evidence of lack of ordinary care. In addition, the Court's award of summary judgment to Defendants was premature and should not have been granted under Rule 56 because the banks have refused to disclose their written procedures. Accordingly, the Court should reconsider its ruling on the sufficiency of evidence presented by Overland in support of its cause of action for negligence.

**2. Duty of Ordinary Care in the Opening of a New Account.**

The Court also concluded that "*Overland is unable to demonstrate that Bank of America or SunTrust owed it any duty regarding [the opening or maintenance of the Nance accounts],*" because it did not "*allege fraud or misrepresentation to it regarding these accounts.*" That is incorrect for two reasons: (A) the duties of new account openings under the UCC do not require fraud or misrepresentation as necessary elements for pleading negligence; and (B) Overland presented the Court with sufficient evidence that Bank of America and Suntrust were both

negligent regarding the opening and maintenance of the Nance accounts.

- A. Demonstrating a lack of Ordinary care in new account openings does not require the elements fraud or misrepresentation.

Overland's non customer relationship to Defendants is completely irrelevant under the UCC. An affirmative legal duty may arise from a statute, contract, relationship, status, property interest, or some other special circumstance. Murray v. Bank of America, N.A., 354 S.C. 337, 343 (Ct. App. 2003). In analyzing the possible duties owed to Overland by the Defendants/Depository Banks, the Court incorrectly focuses on the personal relationship between these parties (citing the holdings of Kerr v. Branch Banking & Trust Co., that banks owe a limited duty of care to their own customers, and that non-customers do not have the right to rely on bank duties absent fraud or misrepresentation).

However, Kerr et al. only applies to breach of contract cases, not statutory violations of the UCC, or negligence *per se*. In fact, none of the cases cited by the Court or defense on this issue even mention the UCC. All of them were investor fraud cases brought under breaches of contract theories, not check fraud cases in violation of statutory duties of ordinary care in negotiable instruments.

Instead, the South Carolina UCC places the proper focus upon a Plaintiff's relationship to the instrument, not the banking institution. This is the whole purpose of Chapter 3. Here, Plaintiff is the supposed Drawer of the Nance checks. Every single check was an Overland corporate check, and Nance presented the checks for deposit as if Overland were the Maker/Drawer. Defendants aided her collection of over one million of Overland's dollars. As an injured Drawer, Overland has the right to bring forth a civil claim against Bank of America and SunTrust for violating the UCC. See, §3-405's Official Comment 4; See also, §3-406's Official Comment 4.

Furthermore, an injured Payee may sue a Depository Bank for conversion pursuant to §36-3-420 regardless of its noncustomer status to the offending bank. *Id.* Official Comment 1; See also, Equitable Life Assur. Soc. Of U.S. v. Okey, 812 F.2d 906, 908-09 (4<sup>th</sup> Cir. 1987). In almost all conversion suits, the injured Payee of a check will not have a customer relationship with the offending bank. In fact, the South Carolina Court of Appeals squarely confronted the issue of whether a non-customer may sue a depository bank for negligently opening a new account in Murray v. Bank of America, N.A., 354 S.C. 337 (Ct. App. 2003). There, the *Murray* Court found that a special relationship and duty of care extended to a depository banks's non-customer whose missing driver's license was used by an imposter to open an account at Bank of America in her name. *Id.* The Court reasoned that banks have a duty of care towards non-customers to follow its own internal procedures in timely closing a fraudulently opened account upon notice of the fraud. *Id.*

So, the Court's requirement that Plaintiff must plead fraud or misrepresentation is not supported by the UCC and is therefore clearly erroneous. The Court's order should be altered or amended to correct this statement of the law, and to further find that a bank's duty of ordinary care in the opening of a new account must conform with the standards implemented by the South Carolina UCC.

- B. Overland presented factual evidence that Bank of America and Suntrust failed to exercise ordinary care when opening the business accounts for Nance, and by negligently maintaining these accounts.

Next, the Court's inquiry should turn on whether Overland presented sufficient evidence that Bank of America/Suntrust lacked Ordinary Care when it opened new business accounts for Lara Nance. The Court did properly note that Ordinary Care as defined in 3-103(a)(9) means the "observance of reasonable commercial standards," in the prevailing industry. A thorough application of the Ordinary Care standard in the context of opening a new bank account is aptly

explained in Official Comment 4 to §3-406. It states, in relevant part, that:

**“Subsection (b) differs from former Section 3-406 in that it adopts a concept of comparative negligence . . . In the case of a forged indorsement the litigation is usually between the payee of the check and the depository bank that took the check for collection . . . [S]uppose the forger opened an account in the depository in a name identical to that of Employer, the payee of the check, and then deposited the check in the account. Subsection (b) may apply. There may be an issue whether the depository bank should have been altered to possible fraud when a new account was opened for a corporation shortly before a very large check payable to a payee with the same name is deposited. Circumstances surrounding the opening of the account may have suggested that the corporation to which the check was payable may not be the same corporation for which the account was opened. If the trier of fact finds that collecting the check under these circumstances was a failure to exercise ordinary care, it could allocate the loss between the depository bank and Employer, the payee.” Id.**

Section 3-405(b) agrees and its commentary provides yet another illustration of circumstances where a commercial bank may be held liable for negligently opening a new account. In fact, the scenario presented within Official Comment 4 to §3-405 is virtually identical to the Overland fact pattern.<sup>3</sup> It states as follows:

**“In [such a case] the depository bank may have failed to exercise ordinary care when it allowed the employee to open an account in the name “Supplier Co.,” to deposit checks payable to “Supplier Co.,” in that account, or to withdraw funds from that account that were proceeds of checks payable to Supplier Co. Failure to exercise ordinary care is to be determined in the context of all the facts relating to the bank’s conduct with respect to the bank’s collection of the check. If the trier of fact finds that there was such a failure and that failure substantially contributed to loss, it could find the depository bank liable to the extent the failure contributed to the loss.” Id.**

That Official Comment completely contradicts the Court’s Summary Judgment Order. It provided three different banking activities that could demonstrate lack of ordinary care: in (1)

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<sup>3</sup> The second sentence refers to a “Case #5,” which is this hypothetical: Where a Dishonest Accounts Payable Clerk uses a check-writing machine to produce checks made payable to a “Supplier Company” of Employer, and then embezzles the funds by depositing them into a new account established in the name of “Supplier” at the dishonest employee’s bank. Basically, what Lara Nance did.

opening the account; (2) depositing the check; or, (3) allowing the funds to be withdrawn.

Noticeably absent here are the elements of fraud or misrepresentation, and a bank-customer relationship.

And, the Commentator takes the analysis of care when opening a new account a step further. It continues,

“Before depositing the check, Employee opens an account in Depository Bank in the name of the corporation and states to the person conducting the transaction for the bank that Employee is manager of a new office being opened by the corporation. Depository Bank opens the account without requiring Employee to produce any resolutions of the corporation’s board of directors or other evidence of authorization of Employee to act for the corporation. A few days later, the check is deposited, the account is credited, and the check is presented for payment. After Depository Bank receives payment, it allows Employee to withdraw the credit by a wire transfer to an account in a bank in a foreign country. The trier of fact could find that Depository Bank did not exercise ordinary care. . . .” S.C. Code Ann. §36-3-405(b), Official Comment 4.

In summary, Depository Banks absolutely have a duty to use ordinary and reasonable care when opening of a new bank account, as well as during their maintenance and transactional activity on their accounts. This duty extends to customers and non-customers alike when dealing with negotiable instruments under the Code. And, fraud and misrepresentation are not prerequisites to pleading negligence. Therefore, the Court must take into consideration **all of the facts and circumstances** surrounding the opening of a new account and the collection and payment of checks when analyzing a bank’s use of ordinary care. §3-405(b).

At the October 29<sup>th</sup> hearing, Overland presented overwhelming evidence that Bank of America and SunTrust lacked ordinary care regarding these matters. On December 21, 2009, Bank of America opened a Sole Proprietorship checking account for Lara Nance without proper documents or proof of authorization (Seitz, Para. 4); while using a false social security number

(*Id.* at Para. 3); and Bank of America opened the new account shortly after explaining to Nance that check names must be linked to account names (*Id.* at Para. 6 and Exhibit A). Whether any of these “red flags” should’ve altered Bank of America to the potential for fraud remains a Question of Fact.

Defendant SunTrust Banks was just as culpable. It allowed Nance to open two dummy accounts in names identical to Overland’s well-known part suppliers, Taylor Enterprises and Atlantic British (*Id.* at Para. 6 and Exhibit C); without proper documentation or proof of authorization (*Id.* at Para. 3 and 6); it deposited the Nance checks even though the names and addresses clearly did not match (*Id.* at Para. 6); and allowed Nance to use a restrictive endorsements stamp that did not correspond with her accounts (*Id.*). According to Overland’s commercial bank operations expert, Peter Seitz, the activities of Bank of America and SunTrust are “not consistent with industry practice” or “the requirements of the Uniform Commercial Code.” (*Id.* at Para. 7).

The Court must strongly reconsider its finding that Plaintiff did not demonstrate a lack of ordinary care in the opening and maintenance of the Nance accounts, and/or the transactional activity with its customer, Lara Nance. Furthermore, Overland has submitted to this Court credible evidence under Rule 56 that a Question of Fact exist as to whether the Defendants exercised ordinary care in their policies or activities. As stated previously, it is impossible for the Court to evaluate the Depository bank’s compliance with industry standards, or its own procedures for negotiating checks, until it discloses their policies in this regard (*Id.* Para. 8). This is yet another reason for the Court to deny Defendants’ motions for summary judgment.

3. **Plaintiff’s Motion to Compel Discovery from Bank of America must be granted, and this Court should not reward Defendants’ withholding discoverable evidence.**

This Court must also reconsider its order regarding the mootness of Plaintiff’s Motion to



Compel discovery. Specifically, Overland issued three Interrogatories (Nos. 20, 21 and 27) and corresponding Requests for Production of Documents (No. 21) requesting the Defendants Bank of America and SunTrust to disclose their written or prescribed policies regarding its check processing and the opening of a new account. See, Overland's Motion to Compel Discovery. Both banks have refused to disclose their policies and procedures to date. As explained earlier, the banks' nondisclosures have deprived Overland of any opportunity to make a factual inquiry into whether or not ordinary care was used by the Bank of America and SunTrust during the alleged activities. At the very least, the procedures must be disclosed so that the Court can compare them with other similar banks to determine if they meet the general standards.

The Court recognized the importance of evaluating the Depository Banks' own prescribed procedures for check processing when it provided that "*the sole avenue for demonstrating lack of ordinary care must be based upon a different procedure or activity by the bank.*" (Page 5). So, it would be impossible for Plaintiff to satisfy the Court's requirement that it demonstrate Bank of America/SunTrust's procedures varied unreasonably from general banking usage unless or until the Banks disclose its' procedures.

Furthermore, as a striking example of why further discovery is necessary and relevant, Plaintiff took deposition testimony from two Bank of America employees after the October 29, 2014 hearing, which revealed further supporting evidence that Bank of America disregarded its' check processing procedures. (See e.g., Deposition of Nancy K. Smith, Page 21, lines 11 – 19; Page 54, lines 3 – 9, attached). These two depositions had been previously set for dates well in advance of the October 29th hearing, but were rescheduled due to attorney scheduling conflicts.

This is exactly why Plaintiff Motion to Compel is not moot, but rather material to the determination of whether Bank of America/SunTrust lacked ordinary care. And, Rule 56 provides that granting Summary Judgment is premature when discovery is incomplete.

Accordingly, the Court's order should be amended to address the Plaintiff's Motion to Compel, but also reconsidered in light of the Court's imposition that Plaintiff demonstrate Defendants' procedures were unreasonable or below standard.

4. **Five additional reasons for the Court to alter, amend or reconsider its Order for Summary Judgment as to Plaintiff's Seventeenth Cause of Action.**
  - A. **Defendant Bank of America's Motion for Summary Judgment Purely on the Law should be limited to legal theories, and not weigh the sufficiency of evidence.**

Bank of America styled its motion as one of "Summary Judgment Based Purely on the Law," and makes clear in its motion that it only seeks a ruling as to Plaintiff's ability to bring forth a negligence cause of action. Yet, the Court treats Bank of America's motion as a standard motion for summary judgment by finding that Overland lacked evidentiary support for its negligence claims. Summary Judgment is a drastic remedy that should not be easily granted, especially under circumstances where the moving party only seeks clarification of the law, not the evidence. Due process of the law requires that Overland, as the non-moving party, be afforded reasonable notice of which types of motions will be presented to the Court.

In this particular instance, Bank of America did not seek for the Court to render judgment as to the weight of the evidence, and counsel for Overland fairly understood that it would be purely arguing matters of law only. It would be highly prejudicial to Plaintiff's case for the Court to now render summary judgment based upon a lack of evidence. For example, prior to the scheduling of the October 29<sup>th</sup> hearing date, Overland's depositions of bank employees were rescheduled. But, Plaintiff's counsel would not have agreed to the rescheduling of the depositions had it known the Court would be weighing its' evidence.

In all fairness to the non-moving party here, the order granting summary judgment must be altered or amended to reflect the actual relief sought by Bank of America. And, to the extent that the Court maintains its ruling as to the "sole avenues" test, then this Court should reset the

hearing upon proper motion.

- B. The Court's finding that Overland's negligence cause of action was displaced by the Commerical Code is clearly erroneous.

Overland's asserts negligence as its 17<sup>th</sup> cause of action against the depository banks, Bank of America and Suntrust Banks. The Order states that "[t]o the extent that Overland is attempting to assert a common law claim against the banks, this Court finds that the South Carolina UCC has displaced common law actions in this area." (citing *Okey* and *Flavor Inn, Inc.*). This was an error of law.

Displacement is addressed in §36-1-103, which provides that the common law is intended to supplement the Code when necessary to explain or clarify the law. Displacement only occurs when one or more particular provisions of the UCC comprehensively addresses a particular subject. For example, the Okey Court found that a victimized Drawee (ie, person intended to receive the check) cannot assert both negligence and conversion against the bank under a forged endorsement theory because it would require two different burdens of proof on the exact same element – due care. Equitable Life Assur. Soc. Of U.S. v. Okey, 812 F.2d 906, 908-09 (4<sup>th</sup> Cir. 1987). So, the effect of Okey is thus: (1) A Payee/Drawee on the forged check may only sue a depository bank for conversion because common law negligence has been displaced by the UCC. Conversely, (2) the Payor/Drawer (ie, the person who supposedly ordered the check) cannot sue Depository Banks under conversion, so it is free to bring a negligence claim. Id.

The Order is void of any explanation on how displacement occurs in the particular instance where a **Drawer** brings a negligence action. Therefore, the Order must be amended to specifically address the manners in which common law negligence claims have been displaced by the Code. Simply citing Okey and Flavor Inn cannot serve as the proper basis because Overland is not a Drawee to the check, nor has it lodged a conversion claim against

BAC/Suntrust. There are no laws in conflict since Overland is not seeking a conversion claim, nor are the burdens of proof so entangled.

Instead, the Court should find that common law of negligence should act as a supplement to the Code's comparative fault approach adopted by §§3-404 and 3-405. It is inconceivable that the Code would specifically adopted "comparative fault," without also intending for the common law to enter into the arena and explain how such an allocation of liability works in South Carolina. By finding that displacement occurs here, the Court is nullifying certain provisions of the UCC.

C. The Order directly conflicts with the law of this case.

In March 2014, Bank of America filed a motion to dismiss Overland's negligence cause of action arguing that the UCC had displaced the common law. Following a hearing, the Court found on May 22, 2014 that "there are issues involving the seventeenth cause of action which could entitle the Plaintiff to judgment." However, it now appears that the Court is concluding the exact opposite, that Overland's negligence cause of action has been displaced by the UCC. The order granting summary judgment directly conflicts with prior findings of this Court and the law of this case. Therefore, the Court should alter or amend its order to reflect a consistent ruling on the issue of whether Plaintiff can, in fact, institute a negligence cause of action against a Depository Bank.

D. Overland is the Drawee to the Nance checks; Overland is the Drawer.

On page 5, the order finds that, "*The South Carolina UCC contemplates a possible cause of action by a drawee against a depository bank, where the depository bank taking a check might have detected the fraud and thus have prevented the loss by the exercise of ordinary care.*"

However, Overland is not a **Drawee** to the Nance checks; that would be Atlantic British and Taylor Enterprises, etc. Overland is the **Drawer**.

The Court's failure to notice this distinction exhibits a fundamental flaw within the order. Normally there are four distinct parties to a check (Drawer, Payee, and the Paying Bank and Depository Bank), and each party has distinctive legal rights and duties with respect to that check. The South Carolina UCC, particularly Sections §3-404, 405, and 406 have established very specific rules that start will shift liability depending on a party's relationship to the item. So, it is critical that the Court understand Overland's status as the supposed **Drawer** of the Nance checks.

Here's an application of the law on this point: A Drawee may only bring one claim against a bank in check fraud cases - for Conversion against the Depository Bank under a theory that it was the true party intended to receive the funds, which were converted by the Depository Bank upon credit and withdrawal by its customer. See, Equitable Life Assur. Soc. Of U.S. v. Okey, 812 F.2d 906, 908-09 (4<sup>th</sup> Cir. 1987). So, if Taylor Enterprises had entered this case by bringing a negligence claim against Bank of America, then this claim should be denied as a matter of law because of displacement. Now, on the other hand, Overland has two available causes of action as the injured Drawer: (1) for negligence against a Depository Bank under §3-405(b); and (2) for conversion against a Drawee Bank(its own bank) under §3-420. Id.

Accordingly, Overland moves the Court to alter or amend its Order to properly reflect that it is the Drawer to the Nance checks.

E. The Court failed to address the merits of Plaintiff's negligence claim supported by breach of duties under 3-405 and 3-406.

The Order granting Summary Judgment only addressed the merits of Overland's negligence claim for lack of ordinary care under §§3-404 and 3-103. It did not address the claims brought in violation of §§3-405 and 406 to support of the negligence claim. The Court ought to correct this omission, or at least explain whether the Order applies with equal force to 3-

405 and 406. Although the Court is correct that §3-404, *Comment 3*, expressly finds causes of action against the Depository Banks under the circumstances presented by this case; *Comment 3* also makes explicit reference to §3-405's *Comment 4*, which details other claims that can be brought against the Depository Banks.

So, to the extent that the Court finds Plaintiff cannot maintain an action under §3-404, then the Court must alter or amend its Order to further explain why the Plaintiff cannot then proceed under 3-405 or 406.

### CONCLUSION

For the reasons provided herein, in addition to the memoranda of law supplied to the Court by Plaintiff's counsel and upon oral arguments present to the Court on this Motion and at the October 29, 2014 hearing, Plaintiff respectfully requests the Court to alter, amend and/or reconsider its Judgment entered on December 15, 2014. Alternatively, Overland respectfully requests the Court schedule a hearing for the presentation of oral arguments in support of the instant motion.

Respectfully submitted,

FAYSSOUX LAW FIRM, P.A.



Dated: January 7, 2014  
Greenville, SC

James W. Fayssoux, Jr., SC Bar #16659  
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Attorneys for Plaintiff

Exhibit # /

Nancy K. Smith

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

COURT OF COMMON PLEAS

Overland, Inc., d/b/a Land  
Rover Greenville,

C.A. NO.  
2010-CP-23-5880

Plaintiff,

vs.

Lara Marie Nance, Charlie Andrew Nance,  
Roger Fields, Synovus Financial  
Corporation d/b/a NBSC, Branch Banking  
and Trust Company, Bank of America  
Corporation, and SunTrust Banks, Inc.,

Defendants.

---

DEPOSITION OF NANCY SMITH

---

DATE TAKEN: Tuesday, November 18, 2014  
TIME BEGAN: 4:20 p.m.  
TIME ENDED: 5:45 p.m.  
LOCATION: Haynesworth, Sinkler, Boyd, PA  
One North Main Street  
Greenville, South Carolina

REPORTED BY: Lisa Garson, Court Reporter  
EVERYWORD, INC.  
P.O. Box 1459  
Columbia, South Carolina 29202  
803-212-0012

---



1 A Yes.

2 Q Nancy, I want you to suppose that instead  
3 of that check saying pay to the order of Nancy  
4 Smith, that it says pay to the order of Nike.

5 Are you familiar with the company, Nike?

6 A Yes.

7 Q Is there any scenario in which the check  
8 made payable to Nike, out in Portland, Oregon,  
9 could be deposited into my, or anyone's, bank  
10 account?

11 That's a bad question. Suppose the check  
12 is made payable to Nike, in Portland, Oregon.  
13 Okay? Would you be able to deposit that check into  
14 your personal bank account at Bank of America?

15 A No.

16 Q Why not?

17 A Because it's not made out to me.

18 Q Is there any scenario in which that check  
19 could be deposited to your account?

20 A Not that I'm aware of.

21 Q Nancy, as I was saying, we asked for your  
22 deposition because you were identified as someone  
23 who opened Lara Nance's account back in 2005.

24 By the time we get to 2005, you'd been  
25 working at Bank of America, that Anderson branch,

1 appear to be third party checks?

2 A Yes.

3 Q Is there a reason why a customer, like  
4 Lara Nance, who has a personal checking deposit  
5 account, could not deposit these items into her  
6 account?

7 MR. SHEEDY: Object to the form.

8 THE WITNESS: Well, because it's not  
9 payable to her; it's payable to this business.

10 BY MR. REID:

11 Q Nancy, just bear with me. Back on  
12 Exhibit 3, did Bank of America accept these checks  
13 for deposit, or did they hold them for further  
14 review?

15 MR. SHEEDY: Object to the form.

16 THE WITNESS: Go ahead and answer?

17 BY MR. REID:

18 Q Yeah.

19 A It says that they've adjusted the  
20 account, so it means they did not accept it. These  
21 look like they were sent back to her.

22 Q And we understand from the document that  
23 they were deposited in the ATM machine.

24 A Yes.

25 Q Who collects checks at the ATM machine?

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Overland, Inc., d/b/a Land Rover  
Greenville,

Plaintiff,

v.

Lara Marie Nance, Charlie Andrew Nance  
Roger Fields, Synovus Financial  
Corporation d/b/a NBSC, Branch Banking  
and Trust Company, Bank of America  
Corporation, and Suntrust Banks, Inc.

Defendants.

IN THE COURT OF COMMON PLEAS  
THIRTEENTH JUDICIAL CIRCUIT  
C.A. No.: 2010-CP-23-5880

**CERTIFICATE OF SERVICE**

I, the undersigned employee of Fayssoux Law Firm, P.A., do hereby certify that I have caused the below-identified documents to be served via electronic mail and regular U.S. Mail on this 7<sup>th</sup> day of January, 2015, to all below-listed parties at the addresses shown below pursuant to the Scheduling Order dated October 22, 2013 in the above-captioned matter. In addition, the undersigned deposes and says that she served the below-identified documents via hand-delivery to Presiding Judge, the Honorable Letitia H. Verdin, at the address shown below.

**Document(s) Served:**

1. *Plaintiff's Notice of Motion and Motion to Reconsider Alter or Amend Judgment Pursuant to Rule 59(e)*

INDIVIDUALS/PARTIES SERVED

Via hand-delivery

The Honorable Letitia H. Verdin  
Chief Judge for Administrative Purposes  
Thirteenth Judicial Circuit  
305 E. North St., Ste. 318  
Greenville, SC 29601

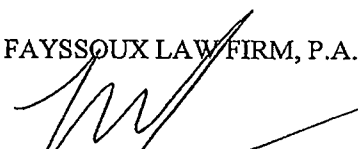
Via U.S. Mail and Electronic Mail

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---

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JAMES W. FAYSSOUX, SR.  
JAMES W. FAYSSOUX, JR.

FAYSSOUX  
LAW FIRM P.A.

PAUL S. LANDIS  
T. HUNT REID

January 29, 2015

The Honorable Letitia H. Verdin  
Chief Judge for Administrative Purposes  
Thirteenth Judicial Circuit  
305 E. North St., Ste. 318  
Greenville, SC 29601

**RE: Overland Inc., d/b/a Land Rover of Greenville v. Lara Marie Nance,  
C.A. No.: 2010-CP-23-5880  
Plaintiff's Rule 59(e) Motion**

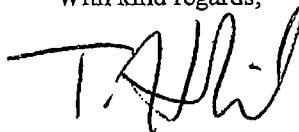
Dear Judge Verdin:

I received your law clerk's correspondence on Tuesday, January 27<sup>th</sup> that Your Honor is willing to receive additional materials in support of Plaintiff's Rule 59(e) Motion filed on January 7<sup>th</sup>. The Plaintiff does not intend to file any memoranda or exhibits on this issue.

However, I would like to enclose two appellate court opinions for your review. BPS, Inc. v. Worthy, 608 S.E.2d 155, 362 S.C. 319 (2005), and Baird v. Charleston Co., 511 S.E.2d 69, 333 S.C. 519 (1999). These cases are being provided to further emphasize the Plaintiff's position that Summary Judgment must not be granted until the non-moving party has had a full and fair opportunity to complete discovery. Id. Should the Court's December 15, 2014 summary judgment order stand, then it would be rewarding the Bank Defendants for their holding back discoverable evidence. Furthermore, the Court of Appeals in BPS, Inc. and the Supreme Court in Baird agree that Summary Judgment is not appropriate where further inquiry into the facts is desirable to clarify the application of the law.

I believe I have said enough. Thank you.

With kind regards,



T. Hunt Reid

THR/lmf  
Enclosures (as stated)

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362 S.C. 319  
Court of Appeals of South Carolina.

BPS, INC., Appellant,  
v.  
William M. WORTHY, II and Carolina Benefit  
Administrators of SC, Inc., Defendants,  
Of Whom William M. Worthy, II, is the Respondent.  
and  
William M. Worthy, II, and Carolina Benefit  
Administrators of SC, Inc., Third-Party Plaintiffs,  
v.  
Robert J. Dickey, Third-Party Defendant.

No. 3921. | Heard Dec. 7,  
2004. | Decided Jan. 10, 2005.

#### Synopsis

**Background:** Insurance claims processing company brought claims against insurance claims administration corporation and its president for breach of contract, breach of contract accompanied by fraudulent act, promissory estoppel, quantum meruit, violation of Unfair Trade Practices Act, intentional interference with contract, fraud, negligent misrepresentation, and fraud in the inducement, and sought injunctive relief, alleging defendant corporation failed to complete its proposed purchase of plaintiff's assets. The Circuit Court, Spartanburg County, Gary E. Clary, J., granted summary judgment to president as to individual liability, and thereafter, Larry R. Patterson, J., denied plaintiff's motion to alter or amend the judgment. Plaintiff appealed.

**Holdings:** The Court of Appeals, Anderson, J., held that:

[1] trial court should have considered affidavits submitted by plaintiff;

[2] genuine issue of material fact precluded summary judgment as to corporate president's personal liability; and

[3] plaintiff was entitled to additional discovery before summary judgment.

Reversed and remanded.

#### West Headnotes (12)

[1] **Judgment**

⇨ Absence of issue of fact

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Rules Civ.Proc., Rule 56.

Cases that cite this headnote

[2] **Judgment**

⇨ Existence or non-existence of fact issue

Summary judgment should not be granted, even when there is no dispute as to evidentiary facts, if there is disagreement concerning the conclusion to be drawn from those facts. Rules Civ.Proc., Rule 56.

Cases that cite this headnote

[3] **Judgment**

⇨ Existence or non-existence of fact issue

When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Rules Civ.Proc., Rule 56.

1 Cases that cite this headnote

[4] **Judgment**

⇨ Nature of summary judgment

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Rules Civ.Proc., Rule 56.

Cases that cite this headnote

[5] **Judgment**

⇨ Nature of summary judgment

Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial

on disputed factual issues. Rules Civ.Proc., Rule 56.

1 Cases that cite this headnote

[6] **Judgment**

⚡ Motion or Other Application

Plaintiff insurance claims processing company submitted affidavits in opposition to motion by defendant president of defendant insurance claims administration corporation to dismiss the claims against him individually, relating to defendant corporation's failure to complete its proposed purchase of plaintiff company's assets, and thus, upon conversion of motion to dismiss into motion for summary judgment, trial court should have considered the affidavits submitted by plaintiff. Rules Civ.Proc., Rule 56.

Cases that cite this headnote

[7] **Corporations and Business Organizations**

⚡ Tortious acts in general

Corporation's president would be personally liable for any tortious acts he participated in or directed.

4 Cases that cite this headnote

[8] **Antitrust and Trade Regulation**

⚡ Persons liable

**Corporations and Business Organizations**

⚡ Participation in unauthorized or wrongful acts of corporation in general

Corporation's president would be personally liable for unfair trade practices that he personally committed. Code 1976, § 39-5-10 et seq.

1 Cases that cite this headnote

[9] **Antitrust and Trade Regulation**

⚡ Persons liable

**Corporations and Business Organizations**

⚡ Participation in unauthorized or wrongful acts of corporation in general

In private actions under the Unfair Trade Practices Act (UTPA), directors and officers

are not liable for the corporation's unfair trade practices unless they personally commit, participate in, direct, or authorize the commission of a violation of the UTPA. Code 1976, § 39-5-10 et seq.

6 Cases that cite this headnote

[10] **Judgment**

⚡ Particular Cases

**Judgment**

⚡ Tort cases in general

Genuine issue of material fact as to whether defendant president of defendant insurance claims administration corporation participated in allegedly tortious conduct and unfair trade practices, relating to corporation's failure to complete its proposed purchase of assets of plaintiff insurance claims processing company, precluded summary judgment for president on the issue of his personal liability for the allegedly tortious conduct and unfair trade practices. Code 1976, § 39-5-10 et seq.

Cases that cite this headnote

[11] **Judgment**

⚡ Hearing and determination

Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Rules Civ.Proc., Rule 56.

Cases that cite this headnote

[12] **Judgment**

⚡ Hearing and determination

Plaintiff insurance claims processing company requested, and therefore was entitled to, additional discovery before trial court granted summary judgment to defendant president of defendant insurance claims administration corporation as to personal liability for defendant corporation's failure to complete its proposed purchase of plaintiff company's assets; plaintiff submitted evidence in active response to trial court's conversion of president's motion to dismiss for failure to state a claim into motion for summary judgment, and plaintiff's motion to



alter or amend judgment claimed plaintiff should have been allowed an opportunity to conduct reasonable discovery before summary judgment. Rules Civ.Proc., Rules 12(b)(6), 56, 59(e).

Cases that cite this headnote

#### Attorneys and Law Firms

**\*\*157 \*322** John D. Hawkins, of Spartanburg, A. Camden Lewis, Mark W. Hardee and Thomas A. Pendarvis, all of Columbia, for Appellant.

Ginger D. Goforth, Matthew E. Cox and Walter M. White, all of Spartanburg, for Respondent.

#### Opinion

ANDERSON, J.:

BPS, Inc. appeals from a circuit court order granting summary judgment to William M. Worthy, II and from an order denying its motion to alter or amend. We reverse and remand.

#### FACTUAL/PROCEDURAL BACKGROUND

BPS, Inc. (BPS) is a company which processes insurance claims as a third party administrator for corporations. Carolina Benefit Administrators of SC, Inc. (Carolina Benefit) administers insurance claims as a third party administrator for self-funded ERISA plans. In the summer of 2000, Robert J. Dickey, president of BPS, and William M. Worthy, II, president of Carolina Benefit, entered into negotiations for the sale of BPS's assets to Carolina Benefit. Around September 22, 2000, Carolina Benefit and BPS executed a letter of intent. Attorneys for both companies then began drafting an Asset Purchase Agreement.

Although no written agreement existed between the parties, Carolina Benefit provided an earnest money deposit of \$100,000 to BPS in November of 2000. Thereafter, a transition team of BPS employees began working out of Carolina Benefit's offices, though they remained BPS employees. Dickey declared that Carolina Benefit received "access to computer and paper files containing information relating to the operations of BPS, Inc., including pricing, renewals and other information concerning customers of BPS, Inc."

In November of 2000, Carolina Benefit learned that various accounts in BPS's portfolio were leaving BPS. On November 22, 2000, Dickey signed a version of the Asset Purchase **\*323** Agreement, making handwritten changes before signing it. Worthy was on vacation at that time. Upon his return, Worthy was informed that BPS's largest account would not be renewed for the coming year. Worthy refused to sign the agreement. Dickey averred that at that time Carolina Benefit had already "taken possession of the BPS assets, employed its employees and begun servicing its clients."

In December of 2000, BPS filed a lawsuit against Carolina Benefit and Worthy seeking injunctive relief and damages. The amended complaint alleged causes of action for breach of contract, breach of contract accompanied by fraudulent act, promissory estoppel, quantum meruit, violation of the Unfair Trade Practices Act, intentional interference with a contract, fraud, negligent misrepresentation, **\*\*158** and fraud in the inducement. Carolina Benefit and Worthy answered and filed a counterclaim against BPS and a cross-claim against Dickey.

BPS sought an injunction to prevent Carolina Benefit

from using the assets and name of BPS, Inc., from employing persons now or formerly employed by BPS, Inc., from contacting or otherwise doing business with any current or former client or customer of BPS, Inc., from utilizing any proprietary information, trade secret or other information obtained from BPS, Inc. in the course of its negotiations and purchase of assets from BPS, Inc., from entering into any contracts of any kind with clients, customers, employees or others now or formerly associated with Plaintiff ....

BPS filed various affidavits in support of the request for the temporary restraining order along with the complaint. A temporary restraining order was issued. Thereafter, a temporary injunction was ordered. The parties subsequently entered into a consent agreement in which Carolina Benefit agreed not to use BPS's assets and name or to use proprietary information or trade secrets obtained from BPS or its employees in the course of its negotiations for the purchase of BPS's assets. By order of the circuit judge, the "Plaintiff shall maintain the disputed \$100,000 earnest money deposit

in an interest-bearing escrow account until further order of this Court.”

Worthy moved to dismiss the action against him individually. He filed an affidavit in support of his motion, as well as \*324 excerpts from the depositions of Worthy and Dickey. The motion was heard before Judge Gary E. Clary on August 14, 2002. The trial court instructed counsel for Worthy to prepare a proposed order granting the motion to have Worthy dismissed as a defendant. The proposed order, mailed on August 27, 2002, noted: “Where matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. See Rule 12(b), SCRCP.”

On August 30, before Judge Clary signed the order, BPS's attorney wrote to the court objecting to the conversion. Counsel for BPS argued that if the motion was to be treated as a motion for summary judgment, the entire depositions should be placed into the record. A complete copy of Dickey's deposition was attached to the letter.

Judge Clary did not reply to this letter, but directed that the letter from BPS's attorney and Dickey's deposition be “filed in the Court file.” Counsel for Carolina Benefit and Worthy did not object. Nonetheless, Judge Clary signed the order as proposed on September 6, 2002. The order referenced the depositions of both Worthy and Dickey in setting forth the facts, but stated: “[BPS] failed to submit any affidavits so the facts before the Court are those as set forth by the Affidavits and Deposition excerpts provided by Defendant/Third-Party Plaintiff Worthy.” The order granted Worthy's motion for summary judgment as to individual liability.

BPS filed a motion to alter or amend. In the interim, Judge Clary left the bench. The motion to alter or amend was heard before Judge Larry Patterson. Judge Patterson denied the motion.

#### STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which 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. *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 601 S.E.2d 342 (2004); *B & B Liquors, Inc. v. O'Neil*,

361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004); *Redwend Ltd. P'ship v. \*325 Edwards*, 354 S.C. 459, 581 S.E.2d 496 (Ct.App.2003). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Medical Univ. of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct.App.1998). If triable issues exist, those issues must go to the jury. \*\*159 *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 573 S.E.2d 830 (Ct.App.2002); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999).

Summary judgment is appropriate where 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 judgment as a matter of law. *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 602 S.E.2d 389 (2004); *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 597 S.E.2d 181 (Ct.App.2004); Rule 56(c), SCRCP; see also *Higgins v. Medical Univ. of South Carolina*, 326 S.C. 592, 486 S.E.2d 269 (Ct.App.1997) (noting that when ruling on motion for summary judgment, trial judge must consider all of the documents and evidence within the record, including pleadings, depositions, answers to interrogatories, admissions on file, and affidavits). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. *Schmidt v. Courtney*, 357 S.C. 310, 592 S.E.2d 326 (Ct.App.2003); *Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001); see also *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002) (“On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.”).

[1] [2] [3] Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000); *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct.App.2004). Summary judgment should not be granted even when there is no dispute \*326 as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000); *Ellis v. Davidson*,

358 S.C. 509, 595 S.E.2d 817 (Ct.App.2004). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Hedgepath v. American Tel. & Tel. Co.*, 348 S.C. 340, 559 S.E.2d 327 (Ct.App.2001); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct.App.1997).

[4] [5] The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003); *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 593 S.E.2d 183 (Ct.App.2004). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004); *Hawkins*, 358 S.C. at 289, 594 S.E.2d at 561-62; *Murray v. Holnam, Inc.*, 344 S.C. 129, 542 S.E.2d 743 (Ct.App.2001).

#### LAW/ANALYSIS

BPS argues that: (1) Judge Clary erred in granting summary judgment to Worthy; (2) summary judgment should not have been granted until discovery was complete; and (3) Judge Patterson erred "in his determination that he had no authority to alter and amend the summary judgment order of Judge Clary."

### I. SUMMARY JUDGMENT

#### A. Basis and Reasons for the Summary Judgment Order in Case *Sub Judice*

[6] The dispositive issue is whether the circuit court erred in granting summary judgment to Worthy. BPS contends Judge Clary's order erroneously found that BPS had failed to submit any affidavits in opposition to Worthy's motion to dismiss, and thus based its findings solely on Worthy's affidavits. We agree.

\*327 Here, the affidavits in support of the temporary injunction were filed with the complaint. It is undisputed that the affidavits were in the record at the time the motion was heard. Furthermore, Judge Clary inserted Dickey's full deposition into the record before he signed the order. Worthy did not \*\*160 object to this action. Judge Clary had the

excerpts from the deposition testimony in the submissions from Worthy. Thus, the circuit court erred in refusing to consider all of the evidence in the record, and in failing to view the evidence in the light most favorable to the non-moving party.

Clearly, many issues in the case remained in dispute. BPS brought nine causes of action in addition to the request for an injunction. Worthy should not have been dismissed from the action unless it was clear that BPS could not establish prima facie liability on any of them.

Worthy claims that as an officer of Carolina Benefit, he is immune from liability. He cites *Hunt v. Rabon*, 275 S.C. 475, 272 S.E.2d 643 (1980), for this proposition. In *Hunt*, the Supreme Court articulated:

Generally the reason for the creation of a corporation is to limit liability. While there are instances in which directors and/or trustees and officers may be personally liable, an officer or a director of a corporation is not, merely as a result of his standing as such, personally liable for torts of corporate employees. To incur liability he must ordinarily be shown to have in some way participated in or directed the tortious act. ....

We find the following relevant rule in 19 Am.Jur.2d *Corporations*, 4, Liability for Torts:

§ 1382. Generally.

A director or officer of a corporation does not incur personal liability for its torts merely by reason of his official character; he is not liable for torts committed by or for the corporation unless he has participated in the wrong. Accordingly, directors not parties to a wrongful act on the part of other directors are not liable therefor. If, however, a director or officer commits or participates in the commission of a tort, whether or not it is also by or for the corporation, he is liable to third persons injured thereby, and it does not matter what liability attaches to the corporation for the tort ....

\*328 § 1383. Liability for acts of subordinate officers, agents, or employees.

Ordinarily, a director is not liable for the tortious acts of officers, agents, or employees of the corporation, unless he participated therein or authorized the wrongful act. It is held that directors cannot be held liable for the acts of subordinate officers which they neither participated in

nor sanctioned, and where they could not, in the exercise of ordinary and reasonable supervision, have detected the wrongdoing of such subordinate officers ....

In 19 C.J.S. *Corporations* § 845-Torts, the rule is stated in this way:

"A director, officer, or agent is not liable for torts of the corporation or of other officers or agents merely because of his office. He is liable for torts in which he has participated or which he has authorized or directed."

*Id.* at 477-78, 272 S.E.2d at 644.

[7] Nothing in the law shields Worthy from direct liability in tort for his own actions. *See Rowe v. Hyatt*, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996) ("An officer, director, or controlling person in a corporation is not, merely as a result of his or her status as such, personally liable for the torts of the corporation. To incur liability, the officer, director, or controlling person must ordinarily be shown to have in some way participated in or directed the tortious act."). Worthy is personally liable for any tortious acts he participated in or directed.

[8] [9] Additionally, Worthy is liable for unfair trade practices that he personally committed. "[I]n private actions under the UTPA, directors and officers are not liable for the corporation's unfair trade practices *unless* they personally commit, participate in, direct, or authorize the commission of a violation of the UTPA." *Plowman v. Bagnal*, 316 S.C. 283, 286, 450 S.E.2d 36, 38 (1994) (emphasis added); *see also Donsco, Inc. v. Casper Corp.*, 587 F.2d 602 (3rd. Cir.1978) (finding that corporate officer is individually liable for unfair competition in which he participates); *Moy v. Schreiber Deed Sec. Co.*, 370 Pa.Super. 97, 535 A.2d 1168 (1988) (stating that corporate president could be held individually liable under the participation theory \*\*161 for acts of unfair competition which he personally \*329 committed); *Great Am. Homebuilders, Inc. v. Gerhart*, 708 S.W.2d 8 (Tex.App.1986) (determining that corporate officer who knowingly participates in deceptive trade practice may be held individually liable).

Similarly, the corporate veil does not protect Worthy from liability for his own actions. Section 33-6-220(b) (1999) of the South Carolina Code states: "Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation

*except that he may become personally liable by reason of his own acts or conduct.*" (Emphasis added).

[10] Worthy asserts that even if the claims apply to him, BPS failed to establish liability based on the evidence presented. Viewing the evidence in the light most favorable to BPS, we conclude there is sufficient evidence in the record to survive summary judgment. First, two of the affidavits of BPS employees alleged that "Mr. Worthy got what he wanted without having to pay." Second, there was evidence that Worthy and Carolina Benefit took possession of BPS assets, employed its employees, and began servicing its clients while intending not to execute the agreement. Third, some files and a computer were taken after Dickey had been assured the parties had reached an agreement. The verbiage and language of the order of the circuit judge reveals indubitably that the court did not consider any of this evidence or give efficacy to the complete depositions of Worthy and Dickey. Therefore, the circuit court erred in granting summary judgment to Worthy.

#### B. Discovery

[11] BPS maintains the granting of summary judgment was improper because discovery was incomplete. Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2001); *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991); *see also Schmidt v. Courtney*, 357 S.C. 310, 319, 592 S.E.2d 326, 331 (Cl.App.2003) ("Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a 'full and fair opportunity to complete discovery.'").

\*330 [12] There may exist a possible query as to whether this issue was raised to the circuit court either during the hearing or during the Rule 59(e), SCRCPP motion. That conundrum is answered directly and completely in the actions and positions taken and argued before the circuit court issued the order granting summary judgment. Specifically, BPS was faced with a motion to dismiss pursuant to Rule 12(b) (6), SCRCPP, dated July 26, 2002. On August 30, 2002, BPS objected to the conversion of the 12(b)(6) motion to a motion for summary judgment. Despite the objection posed by BPS, the circuit judge treated the original 12(b)(6) motion as a motion for summary judgment under Rule 56, SCRCPP. Without utilizing completion of discovery as a ground for

opposition to the conversion activity of the circuit judge, BPS voiced a position in contra to the ruling of the circuit judge that encapsulates the need for further discovery activities. BPS submitted Dickey's complete deposition as an active response to the conversion of the original 12(b)(6) motion.

The Rule 59(e) motion filed by BPS professed:

1. On Page 3 of Judge Clary's Order he states that "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. See Rule 12(b), SCRCP." However, no notice that the motion would be converted from a Motion to Dismiss to a Motion for Summary Judgment was given.

2. "... Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law."

....

6. Mr. John Hawkins, co-counsel for the Plaintiff and Third-Party Defendant, wrote to Judge Clary on August 30, 2002, asking that if indeed the Court intended to convert this matter to a Motion for Summary Judgment, the Plaintiff and Third-Party Defendant should be allowed a "*reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*" Rule 12(b), SCRCP. As stated in the accompanying affidavit of Mr. Hawkins, \*\*162 a review of the Court file shows that Judge Clary granted his request that the deposition of Mr. Dickey be placed in the record. (Emphasis added).

\*331 Luculently, this issue is encompassed within the virginal, continuing, and briefed factual and legal occurrences depicted in the record on appeal in its entirety.

The circuit judge committed reversible error in proceeding to consider and convert the initial Rule 12(b)(6) motion to a motion for summary judgment without giving BPS adequate and reasonable opportunity and time to present all materials pertinent to a Rule 56 motion.

## II. MOTION TO ALTER OR AMEND

BPS avers that Judge Patterson erred in refusing to reach the merits in denying BPS's motion to alter or amend. Because we find that summary judgment was improper, we do not reach this issue. Regardless of how the circuit court ruled on the motion to alter or amend, the fact that the issues were raised and a ruling obtained was sufficient to preserve them for appeal.

## CONCLUSION

Accordingly, we **REVERSE** the circuit court's order granting summary judgment to Worthy and **REMAND** this case for trial.

**REVERSED and REMANDED.**

STILWELL and SHORT, JJ., concur.

Parallel Citations

608 S.E.2d 155

333 S.C. 519  
Supreme Court of South Carolina.

Dr. David R. BAIRD, Dr. George D. Grice, Dr.  
Michael Lampkin, and Dr. Jay B. Robards,  
Appellants,

v.

CHARLESTON COUNTY, South Carolina,  
Respondent.

No. 24885. | Heard Oct. 7, 1998. | Decided Jan. 18,  
1999. | Rehearing Denied Feb. 25, 1999.

Doctors sued county to enjoin issuance of tax exempt bonds for purchase and renovation of medical care facility by non-profit corporation that functioned as billing and collection agent for clinical services by medical university faculty members. The Circuit Court, Charleston County, Daniel E. Martin, Sr., J., granted county's motion to dismiss and granted summary judgment on several issues. Doctors appealed. The Supreme Court, Toal, J., held that: (1) motions to dismiss should not have been converted into summary judgment motions; (2) doctors had standing to bring suit; (3) doctors were not required to comply with statute setting forth requirements for suits affecting obligations of the state; (4) fact question as to whether county council member had conflict of interest when he voted on bond ordinance precluded summary judgment; (5) fact question as to whether non-profit corporation was "hospital agency" or "public agency," as required for issuance of bonds for its benefit, precluded summary judgment; and (6) county's issuance of bonds did not constitute aiding and abetting the corporate practice of medicine.

Affirmed in part and reversed in part.

West Headnotes (27)

- [1] **Pretrial Procedure**  
⊖Matters considered in general

Generally, in considering a motion to dismiss, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. Rules Civ.Proc., Rule 12(b)(6).

11 Cases that cite this headnote

- [2] **Pretrial Procedure**  
⊖Availability of relief under any state of facts provable

A motion to dismiss may not be sustained if the facts alleged and inferences therefrom would entitle the plaintiff to any relief on any theory. Rules Civ.Proc., Rule 12(b)(6).

14 Cases that cite this headnote

- [3] **Judgment**  
⊖Motion or Other Application

County's motions to dismiss doctors' action to enjoining issuance of tax exempt bonds for purchase and renovation of medical care facility should not have been converted into summary judgment motions, even though county submitted affidavits, given that affidavits were in support of county's jurisdictional motions not motions to dismiss, and trial court did not give notice to parties prior to hearing that it was going to consider affidavits and hear motions to dismiss as summary judgment motions. Rules Civ.Proc., Rules 12(b), 56(c).

3 Cases that cite this headnote

- [4] **Pretrial Procedure**  
⊖Evidence  
**Pretrial Procedure**  
⊖Affidavits or other showing of merit

Affidavits and other evidence outside the pleadings may, in certain circumstances, be considered in support of a motion to dismiss based on lack of jurisdiction. Rules Civ.Proc., Rule 12(b).

1 Cases that cite this headnote

- [5] **Judgment**  
 ⚡ Motion or Other Application  
**Pretrial Procedure**  
 ⚡ Evidence  
**Pretrial Procedure**  
 ⚡ Affidavits or other showing of merit

When the allegations of a complaint are factually sufficient, but do not affirmatively show subject matter jurisdiction, a motion to dismiss may be supported by, and the court may consider, affidavits or other evidence proving lack of jurisdiction; however, the presentation of such evidence does not convert the motion to dismiss into one for summary judgment. Rules Civ.Proc., Rules 8(a)(1), 12(b), 56.

2 Cases that cite this headnote

- [6] **Judgment**  
 ⚡ Construction and operation  
**Pretrial Procedure**  
 ⚡ Adjudication on merits

Summary judgment is an adjudication on the merits of the case, whereas dismissal for lack of subject matter jurisdiction is not an adjudication on the merits. Rules Civ.Proc., Rules 12(b), 56.

4 Cases that cite this headnote

- [7] **Judgment**  
 ⚡ Absence of issue of fact

Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Rules Civ.Proc., Rule 56.

20 Cases that cite this headnote

- [8] **Judgment**  
 ⚡ Presumptions and burden of proof

In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the non-moving party. Rules Civ.Proc., Rule 56.

7 Cases that cite this headnote

- [9] **Judgment**  
 ⚡ Existence or non-existence of fact issue

In general, if the pleadings and evidentiary matter in support of summary judgment do not establish the absence of a genuine issue of material fact, summary judgment must be denied, even if no opposing evidentiary matter is presented. Rules Civ.Proc., Rule 56.

14 Cases that cite this headnote

- [10] **Judgment**  
 ⚡ Hearing and determination

Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Rules Civ.Proc., Rule 56.

3 Cases that cite this headnote

- [11] **Action**  
 ⚡ Persons entitled to sue

To be an "interested party," as required for standing, one must generally have a personal stake in the subject matter of the lawsuit, that is,

one must be a real party in interest.

8 Cases that cite this headnote

[12]

**Action**

⚡Persons entitled to sue

The right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, goes, in reality, to the right of the plaintiff to relief rather than the jurisdiction of the court to afford it.

Cases that cite this headnote

[13]

**Action**

⚡Persons entitled to sue

A "real party in interest," for standing purposes, is one with a real, material, or substantial interest.

1 Cases that cite this headnote

[14]

**Action**

⚡Persons entitled to sue

A private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom.

3 Cases that cite this headnote

[15]

**Action**

⚡Persons entitled to sue

Imminent prejudice required for standing must be of a personal nature to the party laying claim

to standing and not merely of general interest common to all members of the public.

4 Cases that cite this headnote

[16]

**Action**

⚡Persons entitled to sue

A court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance.

13 Cases that cite this headnote

[17]

**Counties**

⚡Proceedings Preliminary to Issue of Bonds

Doctors had standing to bring suit to enjoin county from issuing tax exempt bonds for purchase and renovation of medical care facility by non-profit corporation functioning as billing and collection agent for clinical services by medical university faculty members, since issuance of hospital bonds clearly impacted the public health and welfare, a profound public interest.

3 Cases that cite this headnote

[18]

**Counties**

⚡Proceedings Preliminary to Issue of Bonds

Since issuance of hospital revenue bonds by county did not constitute the issuance of state bonds, doctors seeking to enjoin the issuance of the bonds were not required to comply with statute setting forth the requirements for suits affecting obligations of the state. Code 1976, § 15-77-20.

Cases that cite this headnote



[19] **Counties**

⊖Petition or assent of taxpayers or voters

Constitutional mandate that state may not increase public debt through bond issue without first submitting question to public in general election and gaining approval of two-thirds of qualified electors does not apply to the issuance of county bonds. Const. Art. 10, § 11.

Cases that cite this headnote

[20] **Counties**

⊖Meetings

In general, the vote of a county council member who is disqualified because of interest or bias in regard to the subject matter being considered may not be counted in determining the necessary majority for valid action.

Cases that cite this headnote

[21] **Counties**

⊖Ordinances and by-laws

A court has jurisdiction to invalidate a county ordinance if the requisite number of votes to pass the ordinance would not exist but for the improper vote.

Cases that cite this headnote

[22] **Judgment**

⊖Particular Cases

Fact question as to whether county council member had conflict of interest when he voted on ordinance to issue tax exempt bonds for purchase and renovation of medical care facility by non-profit corporation functioning as billing and collection agent for clinical services by

medical university faculty members, precluded summary judgment in doctors' action to enjoin the issuance of the bonds.

1 Cases that cite this headnote

[23] **Judgment**

⊖Particular Cases

Fact question as to whether non-profit corporation functioning as billing and collection agent for clinical services by medical university faculty members was a "hospital agency" or "public agency," as required for issuance of bonds for its benefit, precluded summary judgment in doctors' action to enjoin issuance of tax exempt bonds for purchase and renovation of medical care facility by corporation. Code 1976, §§ 44-7-1430(e, j), 44-7-1440.

Cases that cite this headnote

[24] **Health**

⊖Practice of medicine by corporations or other business entities

**Health**

⊖Institutions and Facilities

There is a common law prohibition against the corporate practice of medicine.

2 Cases that cite this headnote

[25] **Injunction**

⊖Commission of crime in general

While equity has no criminal jurisdiction and will not enjoin the commission of a crime solely for the purpose of enforcing the criminal laws, the fact alone that the wrongs complained of are accompanied by, or are, violations of the criminal law will not displace the jurisdiction of equity to exercise its injunctive powers to prevent such wrongful acts whenever there are

other facts present which afford a basis for the exercise of equitable jurisdiction.

Cases that cite this headnote

[26] **Criminal Law**

⊗ Aiding, abetting, or other participation in offense

It is generally unlawful for a person to aid and abet the commission of a crime.

Cases that cite this headnote

[27] **Counties**

⊗ Public improvements

Since county was authorized to finance acquisition and improvement of hospital facilities and to enter into agreements with corporations necessary or incidental to issuance of bonds, county did not aid and abet the commission of a crime when it issued tax exempt bonds for purchase and renovation of medical care facility by non-profit corporation functioning as billing and collection agent for clinical services by medical university faculty members, notwithstanding allegations that the corporation was illegally engaged in corporate practice of medicine. Code 1976, §§ 44-7-1420(4), 44-7-1430.

2 Cases that cite this headnote

**Attorneys and Law Firms**

**\*\*71 \*524** Carl F. Muller, John C. Moylan, III, and Andrew B. Coburn, of Wyche, Burgess, Freeman, & Parham, P.A., of Greenville, for appellants.

Robert L. Widener and Michael A. Scardato, of the McNair Law Firm, of Columbia, for respondent.

**Opinion**

**\*\*72** TOAL, Justice:

This case involves the issuance of tax exempt bonds by Charleston County ("County") for the purchase and renovation of a medical care facility. A group of Charleston doctors ("Doctors") sued to enjoin the issuance of the bonds. The circuit court granted County's motion to dismiss and also granted summary judgment on several issues. We affirm in part and reverse in part.

**FACTUAL/PROCEDURAL BACKGROUND**

The Medical University of South Carolina ("MUSC") had plans to build an out-patient clinical practice facility on its campus. As plans for the new facility were being developed, an opportunity to purchase the St. Francis Hospital facility adjacent to the MUSC campus became available. MUSC determined that the St. Francis facility could be utilized to house its clinical practice programs. University Medical Associates ("UMA")<sup>1</sup> of MUSC chose to pursue tax-exempt bonds under the Hospital Revenue Bond Act, S.C.Code Ann. § 44-7-1410 *et seq.* (1976 & Supp.1997) (the "Act"), to fund the purchase price and renovation cost for the St. Francis facility.

Charleston County Council approved a bond ordinance on December 31, 1996, issuing \$85 million in tax-exempt hospital revenue bonds for the purchase and renovation of St. Francis Hospital. County Council approved the bonds after a third **\*525** reading of the ordinance. The bonds will be the limited obligation of Charleston County payable from the revenues of UMA's clinical practice program. It is estimated that if such hospital bonds are not issued, MUSC could pay over \$25 million more in interest costs over the life of the loan to acquire the facility and over \$12 million for the renovation costs of the facility. On April 8, 1997 the State Budget and Control Board, by a vote of 5 to 0, approved the issuance of the bonds.<sup>2</sup>

On June 7, 1997, Doctors sued to enjoin the issuance of the hospital revenue bonds.<sup>3</sup> The defendant, County, made a Rule 12(b) motion to have Doctors' complaint dismissed.<sup>4</sup> The trial court granted County's motion, making the following conclusions: (1) Doctors lacked standing to sue; (2) pursuant to the "Enrolled Bill Rule," Doctors could not go behind the collective action of the county council; (3) there was no allegation or proof of any alleged conflict on the part of those voting to pass the

Ordinance after the third reading; (4) the trial court did not have jurisdiction to review the conflict of interest claim; (5) the record did not substantiate a conflict of interest on the part of Dr. Wallace; (6) UMA is a "hospital agency" that may participate in the issuance of tax-exempt hospital revenue bonds; (7) nothing substantiates that UMA is engaged in the unlawful practice of clinical medicine and, additionally, the proper defendant for such a claim is UMA, not County; and (8) Doctors failed to fulfill the statutory conditions precedent to filing the lawsuit.

Doctors appealed, raising the following issues:

**\*526** (1) Whether physicians who directly compete with the proposed beneficiaries of a hospital revenue bond have standing to challenge the issuance of those bonds?

(2) Whether the issuance of bonds should be invalidated because of Dr. Wallace's participation on county council?

**\*\*73** (3) Whether UMA may be considered a "hospital agency" or a "public agency" such that it may receive tax-exempt bonds pursuant to the Hospital Revenue Act?

(4) Whether UMA is engaged in the unlawful practice of medicine and, if so, whether that prevents UMA from receiving the tax-exempt bonds?

(5) Whether Doctors were required to comply with the procedure set forth in S.C.Code Ann. § 15-77-20 (1976) in filing this lawsuit?

(6) Whether summary judgment was proper under the facts of this case?

## LAW/ANALYSIS

### A. CONVERSION OF 12(b)(6) MOTIONS

There has been much confusion in this case over whether the trial court properly granted summary judgment on several of the issues. County's original motion before the trial court was a motion to dismiss made pursuant to Rule 12(b), SCRCP, and included, among others, the following arguments: (1) Doctors failed to comply with the procedure in S.C.Code Ann. § 15-77-20 (1976) in instituting this action; (2) Doctors lacked standing; (3) the trial court did not have subject matter jurisdiction over the conflict of interest claim; (4) Doctors failed to state a

cause of action concerning the third reading of the Bond Ordinance; and (5) the trial court lacked subject matter jurisdiction and/or Doctors failed to state a cause of action as to whether UMA was a "hospital agency" or "public agency" and whether UMA was authorized to practice medicine. At the motion hearing, Doctors' attorney reminded the trial court that this was a hearing to consider County's motion to dismiss and complained about affidavits submitted by County in support of its motion. The trial court nevertheless granted summary judgment on several of the issues.

<sup>[1] [2]</sup> **\*527** Under Rule 12(b)(6), SCRCP, a defendant may make a motion to dismiss based on a failure to state facts sufficient to constitute a cause of action. Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995). The 12(b)(6) motion may not be sustained if the facts alleged and inferences therefrom would entitle the plaintiff to any relief on any theory. *Id.* Rule 12(b) further provides:

*If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*

Rule 12(b), SCRCP (emphasis added). We have interpreted this language as meaning "the trial court may treat a 12(b)(6) motion as a motion for summary judgment and consider matters presented outside the pleadings if the parties are afforded a reasonable opportunity to respond to such matters in accordance with Rule 56(c) and (e) of the South Carolina Rules of Civil Procedure. The notice provisions in Rule 56 are incorporated into Rule 12(b)(6)." *Brown v. Leverette*, 291 S.C. 364, 367, 353 S.E.2d 697, 698-99 (1987); *see also Johnson v. Dailey*, 318 S.C. 318, 457 S.E.2d 613 (1995). In *Brown*, we found the trial court had not given notice to the parties that it was going to consider the affidavits and hear the 12(b)(6) motion as a motion for summary judgment. Thus, the supporting affidavits in *Brown* were improperly considered by the trial court in ruling on the 12(b)(6) motion.

<sup>[3]</sup> In the instant case, the trial court bifurcated County's jurisdictional motions and its 12(b)(6) motions. For the jurisdictional motions, the trial court ruled that it would address them as a matter of law on the facts before it. For

the 12(b)(6) motions, the trial court ruled that it must convert them to motions for summary judgment since matters outside the pleadings were submitted by both parties and not excluded by it at the hearing. We find that the trial court improperly \*528 converted County's 12(b)(6) motions into summary judgment motions.

\*\*74 County submitted its motion to dismiss to the trial court on June 30, 1997. On September 23, 1997, just two days before the motion hearing, County filed its memorandum in support of its motion to dismiss along with supporting affidavits. At the hearing, County never argued that its affidavits and other documents were in support of its 12(b)(6) motions. In fact, County's attorney unequivocally stated at the hearing that the affidavits were being introduced in support of County's jurisdictional motion: "I have filed several affidavits in this in support of my jurisdictional motion because this gives you the background of what is at stake here and what University Medical Associates is;" "I presented affidavits that deal with the jurisdictional issues in this case." Moreover, the trial court did not give notice to the parties prior to the hearing that it was going to consider affidavits and hear the 12(b)(6) motions as motions for summary judgment.<sup>6</sup> The first indication that County's 12(b)(6) motions would be converted to summary judgment motions was the trial court's order of dismissal. Under these facts, the trial court erred in converting County's 12(b)(6) motions into motions for summary judgment. See *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697; *Higgins v. MUSC*, 326 S.C. 592, 486 S.E.2d 269 (Ct.App.1997) (holding that the plaintiffs had not been "fairly apprised" that the trial court would consider material outside the pleadings in support of the defendant's 12(b)(6) motion).

[4] [5] [6] \*529 Nevertheless, affidavits and other evidence outside the pleadings may, in certain circumstances, be considered in support of a motion to dismiss based on lack of jurisdiction. For instance, when the allegations of the complaint are factually sufficient under Rule 8(a)(1), SCRCP, but do not affirmatively show subject matter jurisdiction, the motion to dismiss may be supported by, and the court may consider, affidavits or other evidence proving lack of jurisdiction. *Woodard v. Westvaco Corp.*, 315 S.C. 329, 433 S.E.2d 890 (Ct.App.1993), *vacated on other grounds by* 319 S.C. 240, 460 S.E.2d 392 (1995). However, the presentation of such evidence does not convert the motion to dismiss into one for summary judgment. Summary judgment is an adjudication on the merits of the case, whereas dismissal for lack of subject matter jurisdiction is not an adjudication on the merits. *Id.*

[7] [8] [9] [10] Thus, we find the trial court erred in converting County's 12(b)(6) motions to summary judgment

motions. That said, even if the motions were properly converted to summary judgment motions, summary judgment should not have been granted. Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *Cafe Assoc., Ltd. v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991). In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the non-moving party. *Id.* In general, if the pleadings and evidentiary matter in support of summary judgment do not establish the absence of a genuine issue of material fact, summary judgment must be denied, even if no opposing evidentiary matter is presented. See *Title Ins. Co. of Minnesota v. Christian*, 267 S.C. 71, 226 S.E.2d 240 (1976); Rule 56(c), SCRCP. Moreover, summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baughman v. AT & T*, 306 S.C. 101, 410 S.E.2d 537 (1991). In the present case, nothing in the record \*\*75 before this Court demonstrates the absence of a genuine issue of material fact on any of the issues. In addition, the parties have yet to engage in discovery. Nevertheless, summary judgment may be appropriate at some later stage in the proceedings if evidence is presented in compliance with Rule 56, SCRCP, \*530 that demonstrates the absence of a genuine issue of material fact.

To avoid any further confusion as this case proceeds below, we will consider each issue ruled upon by the trial court.

## B. STANDING

Doctors argue they are "interested parties" under the Act and, therefore, have standing to bring this lawsuit.

S.C.Code Ann. § 44-7-1590(C) (Supp.1997) provides:

Any *interested party*, within twenty days after the date of the publication of the notice, but not afterwards, may challenge the action so taken by the state board, the county board, or the Department of Health and Environmental Control, by action de novo in the court of common pleas in any county where the hospital facilities are to be located.

(emphasis added).

[11] [12] [13] Although section 44-7-1590(C) does not define "interested party," to have standing, one must generally have a personal stake in the subject matter of the lawsuit, i.e., one must be a *real party in interest*.<sup>7</sup> *Glaze v. Grooms*, 324 S.C. 249, 478 S.E.2d 841 (1996); *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996). A real party in interest is one with a real, material, or substantial interest. *Anchor Point Inc. v. Shoals Sewer Co.*, 308 S.C. 422, 418 S.E.2d 546 (1992).

[14] [15] Additionally, a private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom. *Blandon v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985); see also *Myers v. Patterson*, 315 S.C. 248, 433 S.E.2d 841 (1993). Such imminent prejudice must be of a personal nature to the party laying claim to standing and not merely of general interest common to all members of the public. *Citizens of Lee County, Inc. v. Lee County*, 308 S.C. 23, 416 S.E.2d 641 (1992).

[16] \*531 However, a court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance. See *Thompson v. South Carolina Comm'n on Alcohol and Drug Abuse*, 267 S.C. 463, 229 S.E.2d 718 (1976) (holding that the plaintiffs had standing because the questions involved were of such wide concern, both to law enforcement personnel and to the public); *Berry v. Zahler*, 220 S.C. 86, 66 S.E.2d 459 (1951) (holding that questions of public interest originally encompassed in an action should be decided for future guidance); *Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 44 S.E.2d 88 (1947) (same); cf. *Quinn v. City of Columbia*, 303 S.C. 405, 401 S.E.2d 165 (1991) (rejecting the contention that the matter was of such public importance as to confer standing).

[17] In this case, Doctors have specifically alleged that County committed an *ultra vires* act by exceeding its statutory authority to issue the hospital bonds. Moreover, the issuance of the hospital bonds clearly impacts a profound public interest—the public health and welfare. In fact, the express purpose of the Act is to promote the public health and welfare. See S.C.Code Ann. § 44-7-1420 (1985). It is hard to conceive of any greater societal interest than this one. Thus, as citizens of Charleston County, Doctors have a significant interest in ensuring that their county acts within the legal parameters established by the legislature for funding hospital development. Thus, by virtue of the immense public interest at stake here, Doctors have standing to bring the present action, \*\*76 and any further determination of

imminent prejudice is unnecessary.

#### C. STATUTORY CONDITIONS PRECEDENT

The court below found that Doctors had not complied with the requirements of S.C.Code Ann. § 15-77-20 (1976) in filing their lawsuit. Thus, the court held that the present action was barred. Doctors argue section 15-77-20 is inapplicable to the instant facts and section 44-7-1590(C) provides the only procedure with which they must comply. We agree.

Section 15-77-20 provides in full:

#### § 15-77-20. SUITS AFFECTING OBLIGATIONS OF THE STATE

\*532 No suit shall be filed nor shall any pending suit be prosecuted in any court of this State affecting the issuance or sale of any state security, certificate of indebtedness or bond the intent or effect of which is to prevent, delay or affect the sale or other disposition thereof or which would have this effect unless and until the plaintiff in such action shall make application to the circuit judge presiding in the circuit in which the action is brought or, if there be no judge presiding, then to the resident judge of such circuit or to the Chief Justice of the Supreme Court, if the action be brought in the original jurisdiction thereof, or if he be disabled or disqualified to an associate justice, for leave to bring or prosecute such action and shall convince such judge or justice of the merit in such action or proceeding. Such suit shall not then be filed or prosecuted unless and until the plaintiff shall file in such court a bond in such amount as will adequately protect the State against loss, damage, injury and costs in an amount of not less than twenty-five thousand dollars, subscribed by a duly licensed surety company or secured by the deposit of a like amount in cash, conditioned to pay all loss, damage, injury and costs, including attorney's fees, which the State may sustain in any such action. And before any such action shall be commenced at least ten days' notice thereof, together with a copy of the proposed complaint, shall be given to the Governor and the State Treasurer, so as to afford them an opportunity to appear before the judge or justice in opposition to the filing of the suit and to be heard upon the amount of the bond to be required.

(emphasis added).

The bond ordinance in this case describes the relevant hospital bonds as being issued by County for the purpose of defraying the cost of acquiring St. Francis Hospital.

The Budget and Control Board Resolution also states that "the Bond proceeds are to be made available to [UMA] upon terms which require [UMA] to make payments to or for the account of the County in amounts sufficient to pay the principal of, premium, if any, and interest on the Bonds...." The ordinance declares that the bonds and the interest shall never constitute an indebtedness of County.

[18] \*533 The critical question here is whether the issuance of these hospital revenue bonds by County constitutes the issuance of state bonds or securities as contemplated by section 15-77-20. We find they do not.

[19] Our Constitution and Code of Laws clearly differentiate between county and state bonds. In the Code, county bonds are covered under S.C.Code Ann. § 4-15-10 *et seq.* (1986). Section 15-77-20, on the other hand, governs "suits affecting the obligations of the state." Additionally, pursuant to Article X, § 11 of the South Carolina Constitution, the State may not increase the public debt through a bond issue without first submitting the question to the public in a general election and gaining the approval of two-thirds of the qualified electors. Yet, it is well settled that this constitutional mandate does not apply to the issuance of county bonds. *Zeigler v. Thompson*, 119 S.C. 101, 111 S.E. 880 (1922). Thus, in this case, although County is a division of the State, the issuance of bonds by County does not constitute the issuance of state bonds or securities as contemplated by section 15-77-20.

The trial court further held in its order that state securities are implicated because UMA is an affiliate of MUSC, which is a state agency. Moreover, this lawsuit will affect the loan obligation and pledge of revenue by UMA to Charleston County. Thus, section 15-77-20 is triggered. Again, the \*\*77 bond ordinance makes clear that the principal and interest of the hospital bonds are payable by County solely out of the revenues derived from the St. Francis project. No obligation is created on the part of County or the State.

We hold that Doctors are not required to follow the procedure set forth in section 15-77-20 to institute this action.

#### D. CONFLICT OF INTEREST

Doctors alleged in their complaint that the bond issue was unlawful because Dr. Wallace, a county council member, had a conflict of interest and voted on the ordinance. Doctors alleged that Dr. Wallace worked under and was paid by UMA.

On October 11, 1996, the South Carolina Ethics Commission issued an informal opinion to the Deputy County Attorney, \*534 stating that Dr. Wallace should disqualify himself from any issues concerning the revenue bonds.<sup>8</sup> The opinion was based on the Ethics Reform Act of 1991—S.C.Code Ann. § 8-13-700(B) (Supp.1995).<sup>9</sup> Doctors alleged that Dr. Wallace disregarded this advice and cast a tie-breaking vote in favor of issuing the bonds on December 17, 1996.

In granting summary judgment on this issue, the trial court made the following conclusions: (1) under *Bear Enterprises v. County of Greenville*, 319 S.C. 137, 459 S.E.2d 883 (Ct.App.1995),<sup>10</sup> a court cannot conceivably examine individual votes on every legislative matter that a citizen may not agree with; (2) under the Enrolled Bill Rule,<sup>11</sup> the court cannot go behind the collective action of council; (3) there is no allegation that Dr. Wallace voted in the third and final reading; (4) the court does not have jurisdiction to review the conflict of interest \*535 claim; and (5) the record fails to substantiate a conflict of interest on the part of Dr. Wallace.

[20] [21] A threshold issue for this Court is whether invalidation of the bond ordinance is a proper remedy for a violation of the State Ethics Act. There is no direct authority which prevents this Court from invalidating a bond ordinance based upon a violation of the State Ethics Act.<sup>12</sup> In general, the vote of a council member who is disqualified because of interest or bias in regard to the subject matter being considered may not be counted in determining the necessary majority for valid action. See W.J. Dunn, Annotation, *What Constitutes Requisite Majority of Members of Municipal Council Voting on Issue*, 43 A.L.R.2d 698, 748 (1955). Therefore, a court has jurisdiction to invalidate an \*\*78 ordinance if the requisite number of votes to pass the ordinance would not exist but for the improper vote.

[22] Furthermore, the trial court's reliance on the Enrolled Bill Rule and *Bear Enterprises* is misplaced here. Doctors are not attempting to go behind the actions of county council, but are simply arguing that Dr. Wallace's conflict of interest and his vote on December 17 should, on its face, invalidate County's passage of the bond ordinance. Thus, Doctors have stated a claim upon which relief can be granted. County's motion to dismiss should not have been granted on this issue. In addition, a genuine issue of material fact exists as to whether Dr. Wallace in fact had a conflict of interest and whether any such conflict warrants invalidation of the ordinance. Therefore, summary judgment on this issue is improper at this stage of the proceedings. See *Baughman v. AT & T*, 306 S.C. 101, 410 S.E.2d 537 (stating that 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).

**\*536 E. "HOSPITAL AGENCY" OR "PUBLIC AGENCY"**

Under the Act, "the several counties of the State functioning through their respective county boards shall be empowered: (1) To enter into agreements with any *hospital agency* or *public agency* necessary or incidental to the issuance of bonds...." S.C.Code Ann. § 44-7-1440 (1985) (emphasis added). Doctors alleged in their complaint that UMA was neither a hospital agency nor a public agency and, therefore, the bonds could not be issued for UMA's benefit.

The Act defines *hospital agency* as "any person, firm, corporation, association, or partnership whether for profit or not for profit, existing or created at any time and empowered to acquire, by lease or otherwise, operate and maintain hospital facilities." S.C.Code Ann. § 44-7-1430(e) (Supp.1997). *Public agency* is defined as "any county, city, town, or hospital district of the State existing or created at any time pursuant to the laws of the State authorized to acquire, by lease or otherwise, operate, and maintain hospital facilities." S.C.Code Ann. § 44-7-1430(j) (Supp.1997).

[23] UMA is described as a non-profit corporation formed as a billing and collecting agent for the clinical practice of medicine at MUSC. *Proveaux v. MUSC*, 326 S.C. 28, 482 S.E.2d 774, 775. UMA is an operation of MUSC's Clinical Practice Plan. *Higgins v. MUSC*, 326 S.C. 592, 486 S.E.2d 269 (Cl.App.1997). The factual dispute here involves whether UMA is "empowered to acquire, by lease or otherwise, operate and maintain hospital facilities." See S.C.Code Ann. § 44-7-1430(e). We therefore find that the motion to dismiss should not be granted on this issue because Doctors have stated a claim upon which relief can be granted. Moreover, summary judgment is also improper because there is a genuine issue of material fact as to whether UMA qualifies as a "hospital agency."

**F. CORPORATE PRACTICE OF MEDICINE**

Doctors alleged in their complaint that UMA is illegally engaged in the corporate practice of medicine. Doctors argue that the bonds should not be issued because, otherwise, County would be aiding and abetting UMA in the commission of this unlawful activity. The trial court concluded that nothing \*537 presented in the case

established any illegality by UMA. The trial court further held that, in the alternative, the enjoining of any alleged illegal activities must be directed against UMA, and not against County.

[24] [25] South Carolina has a common law prohibition against the corporate practice of medicine. *McMillan v. Durant*, 312 S.C. 200, 439 S.E.2d 829 (1993); *Wadsworth v. McRae Drug Co.*, 203 S.C. 543, 28 S.E.2d 417 (1943); *Ezell v. Ritholz*, 188 S.C. 39, 198 S.E. 419 (1938). In their complaint, Doctors asked the trial court to enjoin the commission of a crime, *i.e.*, the aiding and abetting of the corporate practice of medicine. In general, the rule is that equity has no criminal jurisdiction and will not enjoin the commission of a crime solely for the purpose of enforcing the criminal laws. *State ex rel. McLeod v. Holcomb*, 245 S.C. 63, 138 S.E.2d 707 (1964). However, the fact alone that the \*\*79 wrongs complained of are accompanied by, or are, violations of the criminal law will not displace the jurisdiction of equity to exercise its injunctive powers to prevent such wrongful acts whenever there are other facts present which afford a basis for the exercise of equitable jurisdiction. *Id.*; *Ezell v. Ritholz*, 188 S.C. 39, 198 S.E. 419. In *Ezell*, this Court held that a licensed professional could sue to enjoin others, including corporations, from unlawfully engaging in the practice of such profession. This Court found that the unlawful practice of the profession infringed upon the property and pecuniary rights of those licensed to practice.

[26] [27] It is generally unlawful for a person to aid and abet the commission of a crime. See, *e.g.*, *State v. Leonard*, 292 S.C. 133, 355 S.E.2d 270 (1987) (stating that in order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct). Under *Ezell*, it is equally logical that a licensed physician could sue to enjoin someone from aiding and abetting another in the unlawful practice of medicine. However, in this case, we find that Doctors have failed to state facts sufficient to constitute a cause of action. The Act expressly empowers counties "to finance the acquisition, enlargement, improvement, construction, equipping and providing of such hospital facilities to the end that the public health and welfare of the people of the \*538 State will be promoted...." S.C.Code Ann. § 44-7-1420(4) (1985). The Act further permits a county to enter into agreements with corporations necessary or incidental to the issuance of bonds. S.C.Code Ann. § 44-7-1430 (1985). The possibility that a corporation will use hospital bond proceeds to engage in the unlawful practice of medicine does not by itself impugn a county's decision to issue such bonds. We agree with the trial court that the proper avenue for relief for Doctors is to seek an injunction directly against UMA.

MOORE, WALLER and BURNETT, JJ., and Acting  
Associate Justice DIANE SCHAFER GOODSTEIN,  
concur.

### CONCLUSION

Based on the foregoing, the trial court is **AFFIRMED IN  
PART AND REVERSED IN PART.**

Parallel Citations  
511 S.E.2d 69

### Footnotes

- 1 UMA is described as a not-for-profit corporation that functions as the billing and collection agent for the clinical services by MUSC faculty members.
- 2 To comply with S.C.Code Ann. § 44-7-1590(B) (Supp.1997), the Budget and Control Board published its decision in the *Charleston Post and Courier* on May 22, 1997.
- 3 The complaint alleged the following causes of action: (1) Dr. Charles Wallace, an elected member of the Charleston County Council and employee of UMA, had a direct conflict of interest in voting on the proposed hospital revenue bonds; (2) hospital revenue bonds may be issued only for the benefit of either a "hospital agency" or a "public agency," and UMA is neither; and (3) UMA is a corporation engaged in the unlawful practice of medicine and therefore, issuance of the proposed bonds would aid and abet UMA in that unlawful activity.
- 4 Alternatively, the defendants moved to have the plaintiffs post a bond of not less than \$1,700,000.00.
- 5 At the motion hearing, Doctors' attorney objected to the introduction of County's affidavits, arguing that the hearing was on a motion to dismiss and not on the merits of the case. County's attorney responded, stating that the affidavits were in support of County's jurisdictional motions.
- 6 Providing notice prior to the hearing is essential under Rule 56(c): "The [summary judgment] motion shall be served at least ten days before the time fixed for the hearing. The adverse party may serve opposing affidavits not later than two days before the hearing...." Rule 56(c), SCRCP. In fact, County's proposed order dated October 10, 1997, provides for express notice of the 12(b)(6) conversion 30 days before a hearing. However, there is no evidence in this case suggesting Doctors had any notice prior to the hearing, in compliance with Rule 56, SCRCP, that the trial court would look beyond the pleadings in considering County's 12(b)(6) motions.
- 7 The right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, goes, in reality, to the right of the plaintiff to relief rather than the jurisdiction of the court to afford it. *Bardoon Properties, NY v. Eidolon Corp.*, 326 S.C. 166, 485 S.E.2d 371 (1997).
- 8 The opinion stated: "while the end result of a benefit or detriment [to UMA] may be remote in time and effect, it is my informal opinion that Dr. Wallace should disqualify himself...."
- 9 Section 8-13-700(B) provides in part:  
No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated has an economic interest.
- 10 In *Bear Enterprises*, the issue was whether county council's passage of a zoning ordinance was arbitrary and capricious. In upholding the discretion of the zoning authority, the Court noted that it was improper for anyone to interrogate county council members individually in order to impeach the council's decision. 459 S.E.2d at 885 n. 1.
- 11 The Enrolled Bill Rule as stated in *State ex rel. Hoover v. Town Council of Chester*, 39 S.C. 307, 17 S.E. 752, 755 (1893) is as follows:  
We announce that the true rule is that, when an act has been duly signed by the presiding officers of the general assembly, in open session in the senate and house, approved by the governor of the state, and duly deposited in the Office of the Secretary of State, it is sufficient evidence, nothing to the contrary appearing upon its face, that it passed the general assembly and that it is not competent either by the journals of the two houses or either of them, or by any other evidence, to impeach such an act.



And this being so, it follows that the court is not at liberty to inquire into what the journals of the two houses may show as to the successive steps which may have been taken in the passage of the original bill.

- <sup>12</sup> S.C.Code Ann. § 8-13-780 (Supp.1997) provides the remedies for a breach of the State Ethics Act. Section 8-13-780(A) provides: "The provisions of this section are in addition to all other civil and administrative remedies against public officials, public members, or public employees which are provided by law." Thus, the remedies outlined in section 8-13-780 are not exclusive.

**Hunter Reid**

---

**From:** Verdin, Letitia H. Secretary (Angela G. Hyder)  
**Sent:** Monday, December 29, 2014 3:21 PM  
**To:** Jim Sheedy; hunter@fayssouxlaw.com; sdriscoll@driscollsheedy.com  
**Subject:** RE: Overland's Rule 59(e) motion, request for extension

Hunter,  
Judge Verdin grants a ten-day extension for you to file your Motion.

Thank you,  
Angie Hyder  
Administrative Specialist for  
Letitia H. Verdin  
Greenville County Courthouse  
305 East North Street, Suite 318  
Greenville, SC 29601-2120  
(864)467-8448 Office  
(864)467-8504 Fax

---

**From:** Jim Sheedy [mailto:jimsheedy@driscollsheedy.com]  
**Sent:** Monday, December 29, 2014 2:47 PM  
**To:** Verdin, Letitia H. Secretary (Angela G. Hyder)  
**Subject:** Overland's Rule 59(e) motion, request for extension

Pls. see below (which bounced back).

---

**From:** Jim Sheedy  
**Sent:** Monday, December 29, 2014 2:38 PM  
**To:** lverdinsc@scurts.org  
**Cc:** 'Hunter Reid'; Susan Driscoll; 'Verdin, Letitia H. Law Clerk (Virginia Rogers)'  
**Subject:** Overland's Rule 59(e) motion, request for extension

Judge Verdin,

Actually, I said to Hunter it was my belief upon review of Rules 6(b) and 59(e) that I do not have the power to extend, and the ten (10) day time limit is non-discretionary, i.e., "not later than", "shall", nor am I aware of any cases allowing for extensions under Rule 59(e).

But I was also unaware of any Rule or decisional law prohibiting an amended Rule 59(e) so long as the amendment is not tantamount to a new motion (beyond the time limit).

While I am willing to be accommodating, I cannot do more than what the law allows me to do.

Jim

---

**From:** Hunter Reid [mailto:hunter@fayssouxlaw.com]  
**Sent:** Monday, December 29, 2014 2:29 PM  
**To:** lverdinsc@scurts.org

**Cc:** Jim Sheedy

**Subject:** FW: Overland's Rule 59(e) motion, request for extension

Judge Verdin,

Good afternoon. I am writing you to request an extension of time to file a Rule 59(e) Motion in the Overland v. Nance lawsuit. I was out of the state all of last week for Christmas holidays, and I have been sick as well. If your Honor believes it cannot grant me an extension until the end of this week under these circumstances, then would your Honor please also consider allowing me to submit an Amended Motion at a later date?

I have conferred with opposing counsel, Jim Sheedy, and he doesn't have any objections to this request.

Thank you,

Hunter Reid



**T. Hunt "Hunter" Reid**

209 EAST WASHINGTON STREET (29601)  
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GREENVILLE, SC 29603  
864.233.0445  
864.672.3706 FAX  
[WWW.FAYSSOUXLAW.COM](http://WWW.FAYSSOUXLAW.COM)

---

**From:** Jim Sheedy [mailto:[jimsheedy@driscollsheedy.com](mailto:jimsheedy@driscollsheedy.com)]

**Sent:** Monday, December 29, 2014 2:16 PM

**To:** Hunter Reid

**Cc:** Susan Driscoll

**Subject:** Overland's Rule 59(e) motion, request for extension

Hunter, look at Rule 6(b) and Rule 59(e). I don't think we can consent or that Judge Verdin has the discretion to extend, i.e. "shall be served not later than 10 days ..." If you have a case that says I can do this, I'm happy to oblige, but I honestly don't think there is one under Rule 59(e). Rather, the time is mandatory, I believe.

---

**From:** Hunter Reid [mailto:[hunter@fayssouxlaw.com](mailto:hunter@fayssouxlaw.com)]

**Sent:** Monday, December 29, 2014 2:08 PM

**To:** Jim Sheedy; Susan Driscoll

**Subject:** Overland's Rule 59(e) motion, request for extension

Guys,

Do you have any problem if I seek an extension of time to file my Rule 59e motion with Judge Verdin? I have been out of town for Christmas and sick the whole time. I would like more time to submit a motion.

Let me know as soon as you can.

Thanks,

Hunter

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

Overland, Inc., d/b/a Land Rover Greenville,)

Plaintiff,

vs.

C.A. No.: 2010-CP-23-5880

Lara Marie Nance; Charlie Andrew Nance;)
Bank of America, N.A; and SunTrust Banks,))
Inc.,)

Defendants.)

B OF A'S RESPONSE TO PLAINTIFF'S RULE 59(e) MOTION

Defendant Bank of America, N.A.¹ (B of A) hereby responds to Plaintiff's Motion to Alter / Amend or Reconsider Pursuant to Rule 59(e), SCRCP, (the "Motion"), as follows.

Rule 59(e), SCRCP, is an active area of South Carolina decisional law that has to be closely followed. The Motion is not in compliance with the Rule.

I.

"A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." Rule 59(e), SCRCP. (Emphasis added.) Although Rule 6(b), SCRCP, grants a lower court discretion to extend for an additional period not exceeding the original time, "[t]he time for taking any action under rule . . . 59 . . . may not be extended except to the extent and under the conditions stated in [the rule]." *Wannamaker v. Wannamaker*, 395 S.C.

Driscoll Sheedy, P.A.
Attorneys at Law

¹With the consent of Plaintiff, Bank of America, N.A. was substituted as party defendant in the place of originally named Bank of America Corporation.

592, 599, 719 S.E.2d 261, 265 (Ct. App. 2011) (A court could not alter or amend the judgment on its own initiative outside of the ten day period set forth in Rule 59(e)). Rule 59(e) mandates service within 10 days or less after the entry of the order. *Fitzjohn v. Player*, 2012 WL 10844384, fn. 1 (Ct. App. 2012); *Howard v. Cartee*, 2011 WL 11733589 (Ct. App. 2011) (a Rule 59(e) motion filed prior to the entry of the order is untimely); *South Carolina Dept. of Social Services v. Padgett*, 2006 WL 7286058 (Ct. App. 2006).

Cases interpreting Fed. R. Civ. P. 59(e), which is substantively the same² as Rule 59(e), make it clear that a court does not have the authority to extend the time within which a party may file a motion under Rule 59(e). “[A] motion under Rule 59(e) must be filed within ten days after entry of the judgment, and the Rules just as clearly provide the district court with *no authority to extend the filing period*.” *Panhorst v. U.S.*, 241 F.3d 367 (4th Cir. 2001) (Emphasis added.), *cited with approval* by *U.S. v. Reid*, 2011 WL 285867, *1 (D.S.C. 2011). “[T]he Federal Rules clearly prescribe that a motion under Rule 59(e) must be filed within ten days after entry of the judgment, and the Rules just as clearly provide the district court with no authority to extend the filing period.” *Reid*, 2011 WL 285867, *1. The South Carolina Rules of Civil Procedure contain mandatory language identical to the language in the Federal Rules. A court may not extend the time within which a Rule 59(e) motion can be filed.

A timely motion under Rule 59(e) stays the time for appeal until written notice of entry of the order granting or denying the Rule 59(e) motion. Rule 59(f), SCRCP. *See Coward Hund Const.*

²In the Federal Rule, a party must “file” rather than “serve” the motion and is given twenty-eight rather than ten days to do so. The mandatory language of “shall” appears in both the Federal and State rules. Rule 6, which allows for extension of time, is identical in both the Federal Rules and the South Carolina Rules.

Co., Inc. v. Ball Corp., 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999) (a second Rule 59(e) motion did not stay the time for appeal).³ An untimely motion does not stay the time for appeal; and, as a result, the time for appeal begins to run upon notice of entry of the dispositive order. *Johnson v. Mew*, 2012 WL 10862785 (Ct. App. 2012).

The Order granting summary judgment (SJ Order) was filed on December 15, 2014. Plaintiff had written notice of entry of the SJ Order on December 17th. Thus, a Rule 59(e) motion was due for service by December 29th. On December 29th, Plaintiff asked for an extension of the 10 days. Although Plaintiff told the Court B of A did not object to the extension, B of A stated the 10-day limit in Rule 59(e) is not capable of extension. The Motion was untimely and should be denied on that basis. Further, should there be an appeal, B of A reserves all rights to assert, because the Motion was untimely, the period within which to appeal the SJ Order (on or before January 16, 2015) is jurisdictional and has expired, and any appeal should therefore be dismissed.

II.

Should the Court view the Motion as timely as to B of A⁴ notwithstanding applicable, non-discretionary law, the Motion is just a re-hash of Plaintiff's arguments which the Court has already rejected in the SJ Order.

Rule 59(e) is for the very limited purpose of obtaining a ruling on matters raised prior to judgment but not ruled on. *Bodkin v. Bodkin*, 388 S.C. 203, 694 S.E.2d 230 (Ct. App. 2010). This

³ The instant issue is failure to file within 10 days and the lower court's inability under the Rule to extend time. This is different from successive Rule 59(e) motions or a timely Rule 59(e) motion which contains repetitive arguments. See, e.g., *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 14-21, 602 S.E.2d 772, 775-778 (2004).

⁴ Counsel for Plaintiff never sought an extension of time to move under Rule 59(e) as to SunTrust.

Rule is the procedural mechanism by which matters raised but not decided are nevertheless preserved for appeal. *Hancock v. Wal-Mart Stores, Inc.*, 355 S.C. 168, 171, 584 S.E.2d 398, 399 (Ct. App. 2003).

Rule 59(e) is not a means for asking a court to reconsider an argument that was already rejected. *Elam v. South Carolina Dept. of Transp.*, 361 S.C. at 24, 602 S.E.2d at 780 does not stand for the proposition that Rule 59(e) allows a litigant to just re-hash the same arguments previously lost. The language "misunderstood, failed to fully consider" should be read in context; and the context is to ensure a court recognizes an argument and rules on it. If an argument is not really decided in an order, Rule 59(e) is there to make sure the trial court actually rules on it. But if the court has rendered a decision, Rule 59(e) does not give a litigant a second bite at the apple.

At the summary judgment hearing, first, SunTrust argued, as set forth in its Memorandum in Support, it owed no duty to Plaintiff which was not SunTrust's customer; even if SunTrust had a duty, the undisputed testimony before the Court showed Plaintiff was precluded from any recovery by fictitious payee (UCC 3-404), padded payroll (UCC 3-405) and for having substantially contributed to the making of the forgeries (UCC 3-406); SunTrust handled the forged deposits by automated processing; and there was no evidence of any special or unusual processing for the deposits. B of A then argued as it had previously on a Rule 12(c) motion that, under the facts at bar, it had no statutory duty to non-customer Plaintiff even under UCC 3-404(d) and 3-405(b); and even if there were such a duty, these two UCC provisions do not create directory statutory claims for indemnity against forgeries. B of A and SunTrust adopted each other's arguments. These were the issues that Plaintiff briefed and argued at the hearing.

In the SJ Order, this Court ruled B of A and SunTrust did not owe any duty to Plaintiff under the facts of this case. Further, even if there were a duty, Plaintiff did not rebut the presumption of ordinary care in automated check processing with evidence that either B of A or SunTrust used a different procedure for accepting the deposited forgeries. In the Motion, Plaintiff has set forth four grounds (including subparts). Every one of those grounds was decided in the SJ Order. The Court did consider the evidence before it on ordinary care; the Court did reject Plaintiff's arguments about opening accounts; the Court did dismiss the motion to compel as moot; and the Court did consider B of A's legal theories (i.e., no duty), find the UCC displaced the common law, did not contradict itself by granting summary judgment, and said there was no cause of action.⁵ Plaintiff is just disagreeing with the Court rather than requesting a ruling on an undecided, presented issue. The Motion is not a proper one under Rule 59(e).

III.

Rule 59(e) is unavailable to raise a new issue that could have been heard prior to judgment but was not. *Gartside v. Gartside*, 383 S.C. 35, 677 S.E.2d 621 (Ct. App. 2009); *Crary v. Djebelli*, 321 S.C. 38, 467 S.E.2d 128 (Ct.App. 1995); and *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (1990). "[A] party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not." *Poch v. Bayshore Concrete Products / South Carolina*, 386 S.C. 13, 31, 686 S.E.2d 689, 699 (Ct. App. 2009) (citations omitted.). "[A] party cannot use Rule 59(e) to present new evidence to the court." *Mozingo v. Ford Motor Company*, 2009 WL 9528979, *1 (Ct. App. 2009), citing *Brailsford v. Brailsford*, 380 S.C.

⁵ Any typographical errors are not tantamount to failure to rule.

443, 448, 669 S.E.2d 342, 345 (Ct. App. 2008) (holding issue not preserved for appeal where it was never presented to the trial court prior to the filing of the motion to alter or amend.).

Rule 56(c) allows materials in opposition to a motion for summary judgment to be submitted "not later than two days before the hearing." There is nothing under Rules 56(c) or 59(e), or the decisional law interpreting either, that permits submission of supplementary evidence after the dispositive motion has been decided and while the motion is subject to reconsideration pursuant to Rule 59(e). Before the Court at summary judgment were excerpts from depositions taken prior to the hearing, as well as the affidavits of Peter Seitz and Michael O'Shea. Depositions of Smith and Persons, taken six weeks after the summary judgment hearing, could not have been presented at such hearing, and may not be used to supplement the record on the Motion.

Further, Plaintiff has now, for purposes of the Motion, contended it is entitled to further discovery on the issue of ordinary care. Of course, the issue of ordinary care is irrelevant if there is no duty in the first place. B of A owed no duty to non-customer Plaintiff. But if B of A did owe a duty, Plaintiff should have said in its brief and at the summary judgment hearing that the motions could not be heard until discovery was complete. Instead, Plaintiff said, "... BOA summary judgment should be denied because there is insufficient evidence in the record." (Response of Overland, Inc. to Defendants' Bank of America and SunTrust Banks Motions for Summary Judgment, p.6) Plaintiff's only argument that summary judgment was premature, (*Id.*, p.5), was tied to its existing written discovery from B of A. At the hearing, Plaintiff said it had received all requested discovery, Plaintiff withdrew its motion to compel (which the Court ruled was moot), and then Plaintiff argued the summary judgment motions based on the existing evidence. When Plaintiff

now says summary judgment should be reversed to allow for further future discovery, Plaintiff is asserting a new position that was not raised at the hearing. New positions may not be asserted for the first time on a Rule 59(e) motion.

IV.

Should the Court consider the Motion to be timely, view the Motion as requesting a ruling on a presented, undecided issue, and then grant Plaintiff the opportunity to retroactively supplement the record, the late evidence does not show B of A or SunTrust used a different procedure for accepting the deposited forgeries, as correctly enunciated in the SJ Order. Plaintiff has agreed the two banks processed the forgeries by automated means through deposit of them into an ATM. (Aff. Seitz, ¶ 7). No one could genuinely assert otherwise. Hence, the burden to rebut the legal presumption of ordinary care, when automated check processing devoid of any initial human review is undisputed, falls on the party saying lack of ordinary care, viz., Plaintiff.

In this case, Plaintiff has to show the banks violated their prescribed electronic review procedures or their electronic review procedures vary unreasonably from general banking usage. S.C. Code Ann. § 36-3-103(a)(9). There was no evidence on general banking usage for deposit of third party checks into an ATM. So Plaintiff had to show the banks violated their own prescribed ATM deposit procedures. "When a bank or payee electronically processes checks pursuant to its normal procedures and does not employ automated procedures that unreasonably vary from general banking usage, no genuine issue of material fact exists as to whether the payee's automated processing of checks is commercially reasonable." *Watson Coatings, Inc. v. American Express Travel Related Services, Inc.*, 436 F.2d 1036, 1041-42 (8th Cir. 2006). See also *Pernikoff*

Construction Company v. U.S. Bank, 2010 WL 3258399, *5 (E.D. Mo. 2010) (“Plaintiff presents no evidence that Defendants deviated from their own procedures in processing the Checks, or that their automated check processing procedures varied unreasonably from general banking usage.”). “The statute does not impose a duty upon a paying bank to inspect every check to verify signatures appearing thereon prior to processing the check for payment. The mere fact that a bank may have paid an item over a forged signature does not establish that a bank failed to exercise ‘ordinary care.’” *Groue v. Capital One*, 47 So.3d 1038, 1044 (La. App. 1 Cir. 2010).

“A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact.” *Powell v. Potterfield*, 2014 WL 2582765, *1 (S.C. App. 2014), *quoting Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009). This case is 4 years old. B of A has been a party for more than 2 years. Plaintiff was not a customer of B of A (which cannot be disputed), B of A and Plaintiff had zero contact about Nance until her forgeries were discovered (which is well-established in the depositions), so B of A had no check-processing duty to Plaintiff. Yet Plaintiff wants further discovery assuming there was a duty, which is the only way Plaintiff can reach the issue of ordinary care. It is self-evident once the forgeries were accepted into the ATM along with all the other items for electronic processing, it is not possible there could be individualized, different treatment of just one customer’s deposits drawn on accounts of Plaintiff. Plaintiff had to have something to rebut the presumption that automated processing is ordinary care. Plaintiff had nothing after more than 2

years. Nothing is not enough.

WHEREFORE, for all or any of the four foregoing reasons, the Motion should be denied.

Charlotte, NC

Date: 1/30/15

DRISCOLL SHEEDY, P.A.

By: J W Sheedy

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ATTORNEYS FOR B OF A

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Overland, Inc. d/b/a Land Rover Greenville,
Plaintiff,

v.

Lara Marie Nance, Charlie Andrew Nance,
Roger Fields, ADP Dealer Services Group,
Piedmont Automotive of Anderson, Inc. d/b/a
Piedmont Chrysler Jeep Dodge, Piedmont
Automotive of Anderson South Carolina, LLC
d/b/a Apex Automotive, Synovus Financial
Corporation d/b/a NBSC, Branch Banking and
Trust Company, Bank of America Corporation,
and SunTrust Banks, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

**MEMORANDUM OF DEFENDANT,
SUNTRUST BANKS, INC., IN
OPPOSITION TO PLAINTIFF'S
MOTION TO ALTER/AMEND
OR RECONSIDER PURSUANT
TO RULE 59(e)**

C.A. No.: 2010-CP-5880

Defendant SunTrust Banks, Inc. ("SunTrust") responds to Plaintiff's motion to alter, amend, or reconsider pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, stating as follows:

Plaintiff's Rule 59(e) motion seeks to rehash and recharacterize its prior arguments, which this Court properly found to fail under the law and facts. The Court has not misapprehended anything with respect to its rulings on the standard of care, the lack of factual dispute regarding the ordinary and reasonable care of SunTrust, the mootness of Plaintiff's motion to compel, or any of the other erroneous grounds raised in Plaintiff's motion. The order granting summary judgment to SunTrust should therefore stand.

Additionally, even if there were grounds for altering or amending the judgment (and there are not), the Court has further grounds for upholding summary judgment in favor of SunTrust which were not addressed in the Court's order. Specifically, as discussed more fully in SunTrust's memorandum in support of summary judgment, the unequivocal evidence shows that Overland was grossly negligent and reckless in failing to take any reasonable steps to prevent Ms. Nance's fraudulent conduct, including failing to have internal controls to properly reconcile the monthly expenses and bank statements, to monitor Ms. Nance's activity, to assure access to the blank check stock and the accounting department were secure, and to assure Ms. Nance did not have a criminal history prior to hiring her as Overland's accounts payable clerk. These failures were more than fifty percent of the cause of Overland's alleged damages. Any alleged negligence by the other defendants, including SunTrust, does not collectively come close to that of Overland. Under the circumstances, Overland's negligence operated as a matter of law as much greater than a 50% proximate cause of its damages and any claim relying on an underlying negligence theory is barred. *Bass v. Gopal, Inc.*, 384 S.C. 238, 247, 680 S.E.2d 917, 921 (Ct. App. 2009) *aff'd*, 395 S.C. 129, 716 S.E.2d 910 (2011) (citing *Bloom v. Ravoir*, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000)) ("If the sole reasonable inference that may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent, the circuit court may determine judgment as a matter of law in favor of the defendant.").

Finally, SunTrust adopts the arguments made by Bank of America in its response to Plaintiff's motion to alter, amend, or reconsider pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure.

Respectfully submitted,

GALLIVAN, WHITE & BOYD, P.A.



W. Howard Boyd, Jr. (S.C. Bar #826)

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Greenville, SC

January 30, 2015

Attorney for Defendant, SunTrust Banks, Inc.

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Overland, Inc. d/b/a Land Rover Greenville,

Plaintiff,

v.

Lara Marie Nance, Charlie Andrew Nance,
Roger Fields, ADP Dealer Services Group,
Piedmont Automotive of Anderson, Inc. d/b/a
Piedmont Chrysler Jeep Dodge, Piedmont
Automotive of Anderson South Carolina, LLC
d/b/a Apex Automotive, Synovus Financial
Corporation d/b/a NBSC, Branch Banking and
Trust Company, Bank of America Corporation,
and SunTrust Banks, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

MOTION FOR SUMMARY JUDGMENT
OF DEFENDANT
SUNTRUST BANKS, INC.

C.A. No.: 2010-CP-23-5880

TO: T. HUNT REID, ESQ., ATTORNEY FOR PLAINTIFF OVERLAND, INC. D/B/A
LAND ROVER GREENVILLE:

YOU WILL PLEASE TAKE NOTICE that Defendant SunTrust Banks, Inc. ("SunTrust"), by and through its undersigned attorneys, will move at a date and time to be set by the Court, but no sooner than ten (10) days after service hereof, for an Order, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, granting summary judgment in its favor as a matter of law as to all claims and defenses asserted in this case inasmuch as there is no genuine issue of material fact and SunTrust is entitled to judgment in its favor on the following grounds:

1. SunTrust owes no common law duty of care to Plaintiff Overland, Inc. d/b/a Land Rover Greenville ("Overland" or "Plaintiff").

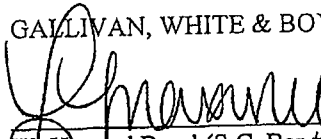
2. SunTrust owes no duty to Plaintiff under Articles 3 and 4 of the UCC, S.C. Code Ann. § 36-3-100, *et seq.*, § 36-4-100, *et seq.*
3. Even if SunTrust owes Plaintiff a duty, there is no evidence SunTrust has breached such duty.
4. Even if SunTrust breached a duty owed to Plaintiff, SunTrust's breach was not a proximate cause of Plaintiff's damages.
5. Even if SunTrust's breach of a duty owed to Plaintiff was a proximate cause of Plaintiff's damages, SunTrust's breach did not substantially contribute to Plaintiff's damages.
6. Even if SunTrust's breach of a duty owed to Plaintiff substantially caused Plaintiff's damages, Plaintiff's comparative negligence was a much greater than fifty percent (50%) cause of its loss.
7. There is no evidence SunTrust has engaged in an unfair or deceptive trade practice.
8. Even if SunTrust has engaged in an unfair or deceptive trade practice, it has had no adverse impact on the public interest.
9. Even if SunTrust has engaged in an unfair or deceptive trade practice, it was not a proximate cause of Plaintiff's damages.

This motion is based upon the pleadings and discovery in this case, the supporting memorandum of law filed or to be filed, and applicable common and statutory law of the State of South Carolina.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

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August 22, 2014

Attorneys for Defendant SunTrust Banks, Inc.

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

C.A. No.: 2010-CP-5880

Overland, Inc. d/b/a Land Rover Greenville,
Plaintiff,

v.

Lara Marie Nance, Charlie Andrew Nance,
Roger Fields, ADP Dealer Services Group,
Piedmont Automotive of Anderson, Inc. d/b/a
Piedmont Chrysler Jeep Dodge, Piedmont
Automotive of Anderson South Carolina, LLC
d/b/a Apex Automotive, Synovus Financial
Corporation d/b/a NBSC, Branch Banking and
Trust Company, Bank of America Corporation,
and SunTrust Banks, Inc.,

Defendants.

**MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT
OF DEFENDANT SUNTRUST
BANKS, INC.**

INTRODUCTION

This matter is before the Court on a motion for summary judgment filed by Defendant SunTrust Banks, Inc. ("SunTrust"). Specifically, SunTrust seeks the dismissal of the remaining causes of action Plaintiff Overland, Inc. d/b/a Land Rover Greenville ("Overland") asserted against it – the Seventeenth Cause of Action for Negligence, Gross Negligence & Recklessness (S.C. Code §§ 36-3-404, 36-3-405, 36-3-406) and the Twentieth Cause of Action¹ for Violation of S.C. Unfair Trade Practices Act.

This action arises from the fraudulent activity of Overland's former employee, Defendant Lara Marie Nance ("Ms. Nance"). Ms. Nance, who had a criminal history of check fraud, was employed by Overland where she gained access to its internal accounting system and forged

¹ Misnumbered as the "Fifteenth Cause of Action" in Plaintiff's Third Amended Complaint

checks bearing the maker's signature of Overland's owner, Dr. Jack Frasher. (Third Am. Compl. at 10, ¶¶ 40-41). The checks were made out to vendors of Overland, including Taylor Enterprises, Atlantic British, and Invision Industries and drawn on Overland's accounts maintained with NBSC and BB&T. Ms. Nance opened sole proprietorship depository accounts with other banks, including SunTrust, in her name d/b/a one of those Overland vendors. These accounts were all under Ms. Nance's control and were not maintained by Overland. (Third Am. Compl. at 4-5, ¶15(c)). Although Ms. Nance's scheme lasted for allegedly two and one-half (2 ½) years, (Third Am. Compl. at 4, ¶ 14), the relevant account she maintained at SunTrust was opened and was active for only approximately one (1) week before her scheme was discovered. Further, of the \$1,282,000.00 in damages claimed by Overland (Third Am. Compl. at 4, ¶ 14), only approximately \$54,000.00 was deposited into Ms. Nance's SunTrust account.

The undisputed evidence shows that not only did Overland hire Ms. Nance as its accounts payable clerk while she was on probation for prior check fraud convictions, but Overland's lack of internal controls allowed her to continually draft fraudulent checks on behalf of Overland and remain undiscovered for 2 ½ years. Ms. Nance's fraudulent activity remained undiscovered by Overland because it did not properly reconcile its monthly bank statements to ensure that all checks posted to its account were actually authorized expenditures. Instead, Overland's controller would simply compare the monthly statements with a list of all the checks written that month, which included both authorized and fraudulent checks. No one at Overland actually confirmed that the monthly expenses posted to its accounts were authorized. In fact, there was such a lack of internal controls and oversight at Overland that for approximately three (3) months after Ms. Nance ceased being the accounts payable clerk, no one noticed that: 1) an additional username was added to its accounting software; 2) Ms. Nance had regained unfettered access to

its accounting software; 3) Ms. Nance was continuing to generate and sign checks on Overland's behalf; and 4) Ms. Nance was entering the accounting department's building even though she no longer worked there.

Despite the fact that Ms. Nance's fraudulent scheme lasted for approximately 2 ½ years during which she allegedly embezzled a total of \$1,282,000.00, Overland attempts to claim SunTrust is at fault for Ms. Nance's ability to fraudulently obtain funds. However, SunTrust's involvement was limited to only 1 week at the end of Ms. Nance's scheme in January 2010, and approximately \$54,000.00 – approximately 4% of the total damages claimed by Overland. Moreover, the course of conduct for 2 ½ years prior to SunTrust's involvement makes clear that Ms. Nance was able to fraudulently obtain these funds through Overland's own negligence and without any participation from SunTrust. Because SunTrust owed no duty to Overland and did not breach any alleged duty owed to Overland, the claims against it should be dismissed. Further, even assuming a cause of action can be maintained against SunTrust, it did not proximately cause or substantially contribute to Overland's damages. Rather, Overland's own gross negligence, recklessness, and failure to exercise any care to protect its assets bars the recovery of any damages it has claimed. Lastly, even assuming the statements set forth in the Affidavit of Peter Seitz, are true, SunTrust is still entitled to summary judgment based on the arguments raised herein.²

STATEMENT OF FACTS

I. OVERLAND'S HIRING AND EMPLOYMENT OF LARA NANCE

Ms. Nance was hired by Overland as the accounts payable clerk in May 2006. (Deposition of Lara Nance at 9:19-22, attached hereto as "Exhibit A"). While in this position,

² SunTrust contends that the Affidavit of Mr. Seitz, received on October 24, 2014, may be improper under Rule 56, SCRPC, to the extent Mr. Seitz opines as to subjects outside his scope of expertise, including legal issues and relating to requirements imposed upon SunTrust by applicable law.

Ms. Nance was the only accounts payable clerk at Overland. (Deposition of Gwen Patton at 73:19-25, attached hereto as "**Exhibit B**"). As a part of her duties, Ms. Nance was given access to Overland's computerized accounting system, ADP. (Ex. A at 9:23 - 10:1; 13:13-25). Ms. Nance was able to log into the ADP program, input payee names and amounts, and print checks on behalf of Overland. *Id.* at 10:2-15; 14:11-13. It was through this access that Ms. Nance was able to forge checks bearing the maker's signature of Dr. Jack Frasher, the owner of Overland. *Id.* at 10:16-20; 11:13-23. In September 2009, Ms. Nance's position at Overland changed from accounts payable clerk to serving as Dr. Frasher's assistant and title clerk. *Id.* at 16:20 - 17:14. At this point in time, Ms. Nance was supposed to have ceased having access to ADP to input payee names and amounts and generate checks on behalf of Overland. *Id.* at 19:4-8.

It is undisputed that at the time Ms. Nance was hired by Overland, she was on probation for prior check fraud convictions. *Id.* at 41:19 - 42:8; Deposition of Dr. Frasher at 8:20 - 9:2, attached hereto as "**Exhibit C**"). Dr. Frasher acknowledged that because of the duties of the accounts payable clerk, it would have been helpful to know whether that individual had a criminal background for check fraud. (Ex. C at 6:10-15). He also admitted that had he known Ms. Nance had been twice convicted of check fraud, he would not have hired her in 2006. *Id.* at 5:11-14. However, prior to hiring her, Overland never asked Ms. Nance about her criminal record, *id.* at 349:25 - 350:6; Ex. A at 41:15-18, and there is no indication that any background check was conducted.³ In fact, Ms. Nance's employee file does not indicate that Overland ever

³ Overland has not produced a copy of the background check allegedly performed on Ms. Nance. However, Overland has produced Ms. Nance's employee personnel file and testimony indicates that if a background check was conducted, it would be stored in the employee's personnel file. (Ex. B at 46:3-6; 66:14-19). Additionally, Dr. Frasher testified that the controller, who was Gwen Patton at the time, would have ordered the background check (Ex. C at 25:11-15; 27:6-10). However, Ms. Patton testified that she did not order Ms. Nance's background check or background checks for any new employees. (Ex. B at 64:24 - 65:23; 236:9-10, 15-20).

required a résumé, application, references, or prior work history for Ms. Nance prior to hiring her. *Id.* at 35:20 - 36:8.

Additionally, Dr. Frasher admitted that even if Overland conducted a criminal background check on Ms. Nance, it would have been insufficient. Despite the fact that Overland was aware of Ms. Nance's residence in Anderson County at the time she was hired, Overland's background check would have only inquired into Ms. Nance's criminal history in Greenville County. *Id.* at 23:5 - 24:1. Accordingly, this background check would not have uncovered Ms. Nance's criminal history in Anderson County and elsewhere. *Id.* at 23:5 - 24:1; 351:2-3; Deposition of Susan Unser at 237:14-17, attached hereto as "**Exhibit D**"). Nevertheless, Ms. Nance's criminal record would have been obtainable through a report generated by the South Carolina Law Enforcement Division. *Id.* at 9:10-14; 10:25 - 13:25).

II. OVERLAND'S ACCOUNTING DEPARTMENT AND LACK OF OVERSIGHT

Overland's centralized accounting department was located in Greenville, which conducted the accounting and payables for all of the dealerships owned by Overland (i.e., Land Rover Columbia and Land Rover Asheville). (Ex. A at 86:1-11). The head of the accounting department was the controller, which was Gwen Patton from 2004 until July 2009, and then Sue Unser from July 2009 to present. (Ex. B at 161:5-8; Ex. D at 63:24 - 64:4). During Ms. Nance's employment, the accounting department was located in a building separate from the Greenville dealership's showroom. (Ex. A at 81:22-25). Overland's stock of blank checks, which were fed into the printer after information was entered into ADP, were stored in the accounting department building, but not kept under lock and key. (Ex. D at 229:10-15; Ex. B at 53:14-21). Rather, these blank checks were kept in the open on shelves along with office products.

Accordingly, there was nothing to prevent Ms. Nance from gaining access to the check stock. (Ex. A at 16:6-19; 76:9-17).

Despite being a resident of Greenville, Dr. Frasher was not present at Overland's Greenville location very often due to his busy schedule and business ventures. *Id.* at 86:19 – 87:6. Indeed, during the time Ms. Nance was forging checks at Overland, Dr. Frasher ran approximately seven (7) dealer franchises, owned five commercial properties, one of which was under a lease, and was actively involved in numerous extracurricular organizations and activities. (Ex. C at 254:18 – 256:1). Dr. Frasher testified that during this time, he spent approximately fifteen (15) hours per week at Overland's Greenville location and only thirty (30) minutes each day with the controller. *Id.* at 260:17-22; 236:1-5. Even when he was with the accounting department, Dr. Frasher was usually on his cell phone or interrupted during these brief meetings. (Ex. B at 196:12-19).

Two types of checks could be generated through ADP at Overland: (1) the monthly checks sent to regular vendors to cover all of the invoices received that month; and (2) on-demand checks, which were generated in response to specific requests on an individualized basis. *Id.* at 63:20 – 71:6; Deposition of Allison Autrey Malone at 44:14-23, attached hereto as “**Exhibit E**”). Overland required a purchase order and invoice as backup for generating and signing a monthly check. (Ex. D at 243:19- 245:25). Several times each month, the accounts payable clerk would present Dr. Frasher with a stack of these checks to sign for payables. (Ex. C at 267:24 – 268:18).

In order to generate an on-demand check, Overland required a check request, which needed to include a copy of an invoice or some other backup documentation for the requested expense. Additionally, the check request had to be signed-off by a manager and was then filed

by the accounting department in its authorized expenditure records. (Ex. D at 101:6 – 102:23). The checks forged by Ms. Nance were on-demand checks that did not have any corresponding check request or backup documentation (i.e., purchase order or invoice) and were, therefore, not included in the accounting department's authorized expenditure records. (Ex. D at 221:25 – 222:15).

Evidently, Ms. Nance's activity went undetected by Overland for 2 ½ years because the controller's monthly reconciliation of the bank statements consisted only of comparing the bank statement with a report from ADP that listed all of the checks entered into ADP for that month. *Id.* at 251:2 – 253:6; 254:7-14; Ex. B at 251:5-12. This prevented Overland from discovering Ms. Nance's scheme because the ADP report used to reconcile the bank statements only listed all of the checks generated that month, which included both legitimate checks as well as those allegedly forged by Ms. Nance. *Id.* at 252:19 – 253:6. Even though the records for authorized on-demand check expenditures were stored in the accounting department, there was no policy requiring reconciliation of the monthly statement and monthly authorized expenditures to ensure that all of the checks posted on the monthly statement were actually approved. *Id.* at 254:11-14; Ex. B at 264:22 – 265:11; Ex. E 47:9-18. There was also no policy for the reconciliation of the bank statement and the invoices or purchase orders for those checks. *Id.* at 253:7-12; 264:3-16; Ex. B at 146:6-17. Additionally, both the former and current controller for Overland testified that they only reviewed the monthly statements, and neither they nor anyone else at Overland regularly reviewed the microfiche of check images included with these monthly statements. *Id.* at 143:11-22; Ex. B at 221:3-16. Finally, throughout Ms. Nance's employment, Overland never conducted an audit. (Ex. C at 353:7-11). Thus, during its monthly reconciliation, Overland's controller was simply confirming that all of the checks issued, even those checks

forged by Ms. Nance, had cleared Overland's bank accounts – there was no reconciliation process in place to confirm that the checks posted on the monthly statements were actually authorized, legitimate expenditures. Had these reconciliations taken place, Ms. Nance's fraudulent conduct would have been discovered by Overland well before Ms. Nance opened any accounts at SunTrust. (Ex. E at 112:10 – 113:20).

Through Ms. Nance's employment as the accounts payable clerk, she came to realize that its accounts payable reconciliation process was not thorough. In fact, Ms. Patton testified that when she conducted the monthly reconciliation of the checking accounts she was "flying as fast as [she] could" to compare the monthly statement to the ADP report. (Ex. B at 265:8-15). According to Ms. Nance's testimony, "[t]here were invoices out there for purchases made that never made it to accounts payable. There were invoices that had been paid where the check was never reconciled, never accounted for on the bank statement. There was no A equals B in the whole process." (Ex. A at 34:5-10). Ms. Nance admitted that the reason the checks she forged went undetected was because "there was no reconciliation the whole time [she] was at the dealership." *Id.* at 37:13 – 38:4.

Ms. Nance ceased having access to ADP to input payee names and amounts and generate checks on behalf of Overland when her position changed in September 2009. Nance 19:4-8. In this new position, Ms. Nance was located in the Greenville showroom and no longer worked in the accounting department. (Ex. D at 198:9-14). However, the access code to enter the accounting department was never changed and Ms. Nance still had the ability to enter that area. *Id.* at 215:14 – 217:6. Further, on October 26, 2009, Ms. Nance allegedly regained her ADP access through fraudulent means to become a system administrator. *Id.* at 197:24 – 198:4. With the system administrator capabilities, Ms. Nance had access to all of ADP's features, including

the ability to input payee names and amounts and to generate checks on behalf of Overland. *Id.* at 207:21 – 208:22. ADP has ability to track a user's activity and to monitor an employee's level of access, (Ex. B at 258:5-14), but Ms. Nance's activity on ADP was not monitored by Overland throughout her employment. (Ex. A at 75:17-23).

III. SUNTRUST'S LIMITED INVOLVEMENT

Despite the fact that Ms. Nance's scheme allegedly lasted from 2007 until 2010, she did not open any accounts at SunTrust until January 19, 2010 – almost immediately prior to Overland discovering her fraudulent conduct. *Id.* at 94:7-10; Ex. E at 108:12-14. Ms. Nance opened two business checking accounts at SunTrust. The first account, ending in -80238, was titled "Lara M. Nance d/b/a Taylor Enterprises" and opened on January 19, 2010 (the "Taylor Enterprise Account"). *Id.* at 94:7-10; SunTrust's Answ. Interrog. No. 16, attached hereto as "**Exhibit F**"). The second account, ending in -08600, was titled "Lara M. Nance d/b/a Atlantic British" and opened on January 28, 2010 (the "Atlantic British Account"). *Id.* at 99:2-15; Ex. F at No. 16. No forged checks from Overland were deposited into the Atlantic British Account. *Id.* at 99:2-18; 163:12; Ex. F at No. 22).

Only a total of 18 checks, which were made out to "Taylor Enterprises" and allegedly bore forged maker's signatures, were deposited into the Taylor Enterprise Account. (Ex. C at 381:22 – 383:5; Ex. F at No. 22. The sum of these checks was \$54,671.38. (Ex. F at No. 22). These checks were all dated within a span of only one week: January 18, 2010 to January 25, 2010. (Ex. A at 162:9-12). Each of the deposits were in groupings of three checks – one each from the Greenville, Asheville, and Columbia locations – for a total of six deposits. *Id.* at 161:20-24; Ex. C at 329:8 – 330:9; 331:19 – 332:12; Ex. F at No. 22). Thus, even though Ms.

Nance's fraudulent scheme lasted approximately 2 ½ *years*, SunTrust's involvement, if any, was limited to approximately *one week* at the end of this 2 ½ year period.

Ms. Nance testified that she did not have any personal knowledge concerning SunTrust's check processing procedure or that SunTrust varied its procedure for her accounts. *Id.* at 104:18 – 105:7). Additionally, neither Dr. Frasher nor Overland's controller had any knowledge of SunTrust's check processing procedures. (Ex. C at 323:1-5; Ex. D at 273:14-24).

IV. DISCOVERY OF LAURA NANCE'S FRAUDULENT ACTIVITY

Despite the fact that Ms. Nance's scheme occurred during a time period when Overland was undergoing extreme financial difficulties, Ms. Nance's activity went undiscovered for approximately 2 ½ years until late January 2010. *Id.* at 363:16-18; Ex. D at 129:24 – 130:8; Ex. E at 108:12-14. Prior to its discovery, Overland was often "out of trust" on its floor plan – meaning, the proceeds for sales of vehicles at the dealership, which were collateral for the floor plan, were not applied to the floor plan, but rather Overland used these proceeds for other purposes, including to make payroll during this financially strained period. (Ex. D at 131:19 – 132:17; Ex. B at 261:9-12). In fact, this was occurring so frequently, it might have been on a daily basis. (Ex. D at 134:25 – 135:12).

Ms. Nance's fraudulent conduct was discovered by Alison Autrey Malone, who was the accounts payable clerk who replaced Ms. Nance in September 2009. (Ex. E at 31:9-13; 34:3-6). The Greenville store manager, Gregg Babetz, brought a check to Ms. Malone because he noticed Overland may have made duplicate payments. *Id.* at 77:15 – 79:6. Mr. Babetz gave Ms. Malone a copy of the piece of check stock for the duplicate check in order for her to look further into this issue. *Id.* at 81:2-15. Ms. Malone discovered duplicate checks had been generated by looking to the invoices for this particular vendor and through the ADP system. She also discovered that one

check had backup documentation and the copy of the check Mr. Babetz gave her did not. *Id.* at 83:8-22; 84:18-23. By pulling up the list of usernames on ADP, Ms. Malone, Mr. Babetz, and Overland's assistant controller, Lissette Spivey, discovered that a sham ADP username had been created and that username had capabilities to draft checks on ADP. *Id.* at 83:24 – 84:4; 87:15-24; 88:6-13. The time stamp on the copy of the duplicate check, which was generated by this sham ADP username, led them to believe that Ms. Nance was its creator. The timestamp indicated that the check was generated at 7:30 a.m. and Ms. Nance was the only employee who arrived at the dealership prior to its opening at 8:00 a.m. *Id.* at 80:10 – 82:6; 90:6-19; 93:11-14.

ARGUMENT

SunTrust is entitled to summary judgment dismissing the remaining causes of action asserted against it. SunTrust owes no common law or statutory duty to Overland, and even if it did owe Overland such duty, it has not been breached. Additionally, SunTrust has not engaged in any unlawful trade practice that had an adverse impact on the public interest or proximately caused Overland's damages.

Summary judgment is appropriate where “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 judgment as a matter of law.” Rule 56(c), SCRCP. In considering a motion for summary judgment, this court “must view the facts in the light most favorable to the non-moving party. Nonetheless a court “cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts.” *Bloom v. Ravoir*, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000). If the moving party meets its initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere

allegations or denials contained in the pleadings; rather, the nonmoving party must present specific facts showing there are genuine issues necessitating trial. *Rife v. Hitachi Const. Machinery Co., Ltd.*, 363 S.C. 209, 213, 609 S.E.2d 565, 568 (Ct. App. 2005). “The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” *Grant v. Mount Vernon Mills, Inc.*, 370 S.C. 138, 634 S.E.2d 15 (Ct. App. 2006). For purposes of SunTrust’s motion, there is no genuine issue of material fact and SunTrust is entitled to judgment as a matter of law.

I. OVERLAND’S SEVENTEENTH CAUSE OF ACTION FAILS AS A MATTER OF LAW

Under the Seventeenth Cause of Action, Overland attempts to assert a negligence claim against SunTrust under Sections 3-404, 3-405, and 3-406 of the UCC in allowing Ms. Nance to open accounts at SunTrust, deposit into her Taylor Enterprises Account at SunTrust checks forged on Overland’s accounts, and then use the proceeds for personal expenditures. Despite these allegations and Dr. Frasher’s contention that the only harm SunTrust caused was allowing Ms. Nance to open her accounts in the name of existing businesses (Ex. C at 327:9 – 328:6; 347:2-7), Sections 3-404, 3-405, and 3-406 expressly limit Overland’s purported cause of action to SunTrust’s “paying the instrument or taking it for value or for collection.” See S.C. Code Ann. §§ 36-3-404(d), -405(b), and -406(b). Thus, the opening of Ms. Nance’s accounts at SunTrust is irrelevant to any purported claim under these provisions of the UCC, which only pertain to SunTrust’s check processing procedures.

a. SUNTRUST OWES NO COMMON LAW DUTY OF CARE TO OVERLAND

To the extent Overland attempts to assert a common law negligence claim against SunTrust, it must be dismissed because SunTrust owes no common law duty to Overland. Foremost, it is well-settled that the UCC has displaced any common law negligence cause of

action in this context. *Equitable Life Assur Soc. of U.S. v. Okey*, 812 F.2d 906, 908-09 (4th Cir. 1987) (finding that current § 36-3-420⁴ displaced common law negligence claims due to the provision's allocation of the burden of proof of the due care element, which differs from the common law); *Flavor Inn, Inc. v. NCNB Nat'l Bank of S.C.*, 309 S.C. 508, 511-12, 424 S.E.2d 534, 536 (1992); The reasoning for this displacement is that "when the Code and common law both provide a means of recovery, the Code should displace the common law, because variations in the common law among states destroy the uniformity in commercial transactions sought to be accomplished by the Uniform Commercial Code." *Id.* at 909.

Moreover, even if the common law negligence cause of action has not been displaced by the UCC, it is well-settled that banks do not owe a duty of care to any non-customer. *Kerr v. Branch Banking & Trust Co.*, 408 S.C. 328, 333-34, 759 S.E.2d 724, 726-27 (2014); *Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220, 225-26 (4th Cir. 2002) (finding that the bank did not owe duty of care to a non-customer who was defrauded by the bank's customer through its use of the bank's services and, therefore, was not liable in negligence under the theory that the bank allowed its customer to establish and operate a fraudulent bank account in his name "d/b/a [a large financial securities firm]"). Thus, any claim against SunTrust relying on a common law duty of care – whether involving the opening of Ms. Nance's accounts, or the acceptance of forged checks deposited into her account – should be dismissed as a matter of law.

b. THERE ARE NO CAUSES OF ACTION UNDER SECTIONS 3-404, 3-405, AND 3-406 OF THE UCC

SunTrust joins Defendant Bank of America's Motion for Summary Judgment and Memorandum in Support regarding Overland's inability to assert a direct cause of action against SunTrust and Bank of America under Sections 3-404, 3-405, and 3-406 of the UCC. Due to the

⁴ On December 17, 2013, the Court signed an order dismissing Overland's Eighteenth Cause of Action against SunTrust for conversion under S.C. Code Ann. § 36-3-420 (2008) and § 36-3-419 (1962).

fact that SunTrust and Bank of America are similarly situated in this litigation, this argument and grounds for summary judgment apply equally to both defendants.

c. SUNTRUST DID NOT BREACH ANY ALLEGED DUTY OWED TO OVERLAND

Even if it is assumed that Overland is able to assert a cause of action against SunTrust under a negligence theory, there is no evidence that SunTrust failed to exercise ordinary care in the "paying the instrument or taking it for value or for collection." *See* S.C. Code Ann. § 36-3-404(d), -405(b), and -406(b). There is no evidence that SunTrust employed anything other than its automated check processing procedure for the acceptance of checks deposited into Ms. Nance's Taylor Enterprises Account. Neither Dr. Frasher nor Overland's controller are familiar with SunTrust's check processing procedures. (Ex. C at 323:1-5; Ex. D at 273:14-24), and Ms. Nance admitted that she was never advised by SunTrust that it vary from its normal check processing procedures. (Ex. A at 104:18 - 105:7). Automated check processing is explicitly allowed and included in the definition of "ordinary care" in the UCC. S.C. Code Ann. § 36-3-103(9). Thus, there is no indication that SunTrust's paying or collecting of the alleged fraudulent checks deviated from the ordinary care.

d. SUNTRUST'S CONDUCT DID NOT PROXIMATELY CAUSE OR SUBSTANTIALLY CONTRIBUTE TO OVERLAND'S DAMAGES

Assuming a negligence cause of action against SunTrust can be asserted, and further assuming SunTrust was somehow negligent in allowing Ms. Nance to open accounts at SunTrust in her name d/b/a one of Overland's vendors and/or in accepting checks deposited into Ms. Nance's Taylor Enterprises Account, SunTrust's negligence was not a proximate cause of Overland's damages. Further, even if SunTrust's negligence was a proximate cause of Overland's damages, it did not substantially contribute to Overland's damages. *See* S.C. Code Ann. § 36-3-404(d), -405(b), and -406(b). Rather, Overland's own gross negligence and

recklessness, as described in detail above, allowed Ms. Nance to not only be hired in a position that gave her check-writing abilities, but also allowed her to continually draft fraudulent checks on behalf of Overland and remain undiscovered for 2 ½ years.

The Statement of the Facts makes clear that Overland failed to do any of the following, which would have prevented or uncovered Ms. Nance's fraudulent conduct during the 2 ½ years prior to SunTrust's involvement:

- Conduct a sufficient background check prior to hiring Ms. Nance as its accounts payable clerk, which would have revealed she was on probation for check fraud
- Reconcile the monthly bank statements with the records of authorized on-demand checks
- Reconcile the monthly bank statements with invoices and purchase orders
- Review the check images included in the monthly bank statements
- Conduct an audit during Ms. Nance's tenure at Overland from 2006 – 2010
- Monitor the usernames on ADP
- Monitor Ms. Nance's activity on ADP
- Prevent Ms. Nance from having access to the accounting department after she no longer worked there
- Securely store the blank check stock

Based on the foregoing, it is undisputed that Overland's negligence in the hiring of Ms. Nance in a position that granted her access to generate checks while she was on probation for check fraud, lack of internal controls, and lack of oversight allowed Ms. Nance's fraudulent scheme to last approximately 2 ½ years – not SunTrust's limited involvement, which was only approximately one week at the end of this time frame. Ms. Nance even admitted that the checks she forged went undetected because "there was no reconciliation the whole time [she] was at the dealership," Nance 37:13 – 38:4, not because of any negligent conduct by SunTrust. Accordingly, SunTrust's opening of Ms. Nance's accounts in her name d/b/a one of Overland's

vendors and/or depositing of the allegedly forged checks did not proximately cause or substantially contribute Overland's damages as a matter of law.

c. ALTERNATIVELY, EVEN IF SUNTRUST'S NEGLIGENCE PROXIMATELY CAUSED AND SUBSTANTIALLY CONTRIBUTED TO OVERLAND'S DAMAGES, OVERLAND'S CLAIM MUST FAIL BECAUSE IT WAS COMPARATIVELY NEGLIGENT BY MORE THAN FIFTY PERCENT

Even if it is assumed that SunTrust's negligence proximately caused and substantially contributed to Overland's damages, Overland cannot recover as it was grossly negligent and reckless in failing to take any reasonable steps to prevent Ms. Nance's fraudulent conduct, and its negligence and recklessness contributed as more than a fifty percent (50%) cause of its damages. "If the sole reasonable inference that may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent, the circuit court may determine judgment as a matter of law in favor of the defendant." *Bass v. Gopal, Inc.*, 384 S.C. 238, 247, 680 S.E.2d 917, 921 (Ct. App. 2009) *aff'd*, 395 S.C. 129, 716 S.E.2d 910 (2011) (citing *Bloom v. Ravoir*, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000)).

For the reasons set forth above, even if SunTrust was negligent, Overland was contributorily negligent by failing to take any reasonable steps to employ internal controls to properly reconcile the monthly expenses and bank statements, to monitor Ms. Nance's activity, to assure access to the blank check stock and the accounting department were secure, and to assure Ms. Nance did not have a criminal history prior to hiring her as Overland's accounts payable clerk. As an undisputed matter of fact, Overland could have discovered and prevented its damages at any time over this 2 ½ year period by the exercise of any care. Further, even assuming the defendants were negligent, any negligence of the defendants combined pales in comparison to the gross negligence, recklessness, and failure of Overland to exercise any care to protect its assets. Accordingly, Overland's negligence operated as a matter of law as much

greater than a 50% proximate cause of its damages and any claim relying on an underlying negligence theory is barred.

II. OVERLAND CANNOT ASSERT A CLAIM FOR A VIOLATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT

Overland alleges SunTrust's automated check processing system linked to other banks constitutes an unfair or deceptive act or practice. (Third Am. Compl. at 40, ¶¶ 184-185). SunTrust joins Defendant Bank of America's Motion for Summary Judgment and Memorandum in Support concerning Overland's inability to assert a cause of action against SunTrust and Bank of America for violation of the South Carolina Unfair Trade Practices Act, S.C. Code § 39-5-10, *et seq.* ("SCUTPA") because it is preempted by § 36-3-103(9), which expressly allows automated check processing. Due to the fact that SunTrust and Bank of America are similarly situated in this litigation, this argument and grounds for summary judgment apply equally to both defendants.

Even if Overland's SCUTPA claim is not preempted, or if Overland asserts SunTrust violated SCUTPA by allowing Ms. Nance to open accounts at SunTrust in her name d/b/a one of Overland's vendors, it fails as a matter of law. In order to bring an action under SCUTPA, Overland must demonstrate: (1) that SunTrust engaged in an unlawful trade practice; (2) that Overland suffered actual, ascertainable damages as a result of SunTrust's use of the unlawful trade practice; and (3) that that unlawful trade practice engaged in by SunTrust had an adverse impact on the public interest. *Havird Oil Co., Inc. v. Marathon Oil Co., Inc.*, 149 F.3d 283, 291 (4th Cir. 1998). There is no evidence or law to support that SunTrust's check processing procedures and/or the opening of Ms. Nance's accounts were unfair or deceptive or had an adverse impact on the public interest. *See deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 270, 536 S.E.2d 399, 407 (Ct. App. 2000); *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320,

396 S.E.2d 105 (Cl. App. 1989) (stating that a trade practice is “unfair” when it is offensive to public policy or when it is immoral, unethical, or oppressive and is “deceptive” when it has the tendency to deceive). Even assuming there were any law to support Overland’s SCUTPA claim (which there is not), and further assuming SunTrust engaged in an unfair trade practice, as discussed in detail above SunTrust’s actions were not a proximate cause of Overland’s loss. Simply stated, Overland did not suffer its claimed damages because of anything SunTrust did, but because it was asleep at the switch for 2 ½ years while Ms. Nance robbed it. Accordingly, Overland’s claim against SunTrust fails to meet all of the requisite elements to assert a cause of action under SCUTPA and must be dismissed.

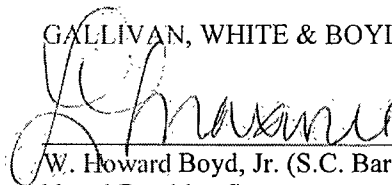
CONCLUSION

Summary judgment is appropriate to expedite the disposition of cases that do not require the services of a fact finder. *See Grant*, 370 S.C. 138, 634 S.E.2d 15. Here, as made evident by the supporting documents submitted with this memorandum, there is no genuine dispute that SunTrust is not liable to Overland under the UCC, the common law, or SCUPTA. Therefore, SunTrust is entitled to judgment as a matter of law with regard to Overland’s remaining causes of action asserted against it. For these reasons and those discussed above, SunTrust respectfully requests that the Court grant summary judgment in its favor.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

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October 24, 2014

*Attorneys for Defendant,
SunTrust Banks, Inc.*

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Overland, Inc. d/b/a Land Rover Greenville,

Plaintiff,

v.

Lara Marie Nance, Charlie Andrew Nance,
Roger Fields, Piedmont Automotive of
Anderson, Inc. d/b/a Piedmont Chrysler Jeep
Dodge, Piedmont Automotive of Anderson
South Carolina, LLC d/b/a Apex Automotive,
Synovus Financial Corporation d/b/a NBSC,
Branch Banking and Trust Company, Bank of
America Corporation, and SunTrust Banks,
Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

CERTIFICATE OF SERVICE

C.A. No. 2010-CP-23-5880

I herby certify that I am an employee of the law firm of Gallivan, White & Boyd, P.A.,
counsel for the Plaintiff, and I have, this date written below, served the within **Memorandum in
Support of Motion for Summary Judgment** upon all counsel of record, by depositing a copy
thereof in the United States Mail, postage prepaid, and addressed as follows:

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Signed this 24th day of October, 2014.

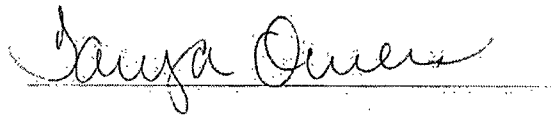
A handwritten signature in cursive script, reading "Tanya Owens", is written over a horizontal line.

EXHIBIT A

CAUSE NO. 2010-CP-23-5880

OVERLAND, INC., D/B/A	)	COURT OF COMMON PLEAS
LAND ROVER OF GREENVILLE	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	COUNTY OF GREENVILLE
	)	
LARA MARIE NANCE, ET AL	)	
	)	
DEFENDANTS.	)	STATE OF SOUTH CAROLINA

ORAL DEPOSITION OF

LARA NANCE

January 15, 2014

ORAL DEPOSITION OF LARA NANCE, produced as a witness at the instance of the DEFENDANT NBSC, and duly sworn, was taken in the above-styled and numbered cause on the 15th of January, 2014, from 9:10 a.m. to 2:09 p.m., before Julie I. Upton, CSR in and for the State of Texas, reported by machine shorthand, at the FMC Carswell, Federal Medical Center, Naval Air Station, J Street, Building 3000, Fort Worth, Texas 76127 pursuant to the South Carolina Rules of Civil Procedure and the provisions stated on the record or attached hereto.

1 you want to say to your client about that?

2 MS. PRICE: No. We do waive reading and
3 signing.

4 MR. SHEEDY: You do waive it?

5 MS. PRICE: We do waive it.

6 MR. SHEEDY: Okay.

7 Q. (BY MR. SHEEDY) Lara, if you don't mind, I'm
8 not a terribly formal person. May I call you Lara
9 during the deposition, or would you prefer I call you
10 Ms. Nance?

11 A. Please call me Lara.

12 Q. And please call me Jim. It's what I'm used to
13 hearing.

14 I'm going to jump into this without a lot
15 of background information. I'm doing that largely at
16 the request of your lawyer, Chip Price. So if this
17 seems like I'm diving right into the middle of the
18 stream, I apologize.

19 As I understand it, Lara, you were hired
20 by Overland in May of 2006 as an accounts payable
21 clerk. Is that true?

22 A. That is correct.

23 Q. And upon your employment you were given access
24 to certain of Overland's computerized accounting
25 systems?

1 A. Yes, sir.

2 Q. Overland, as your employer, showed you how to
3 use these systems, didn't it?

4 A. Yes, sir.

5 Q. And you had the ability to log onto the
6 computerized system too, didn't you?

7 A. Yes, sir.

8 Q. You could input payee names in the system as I
9 understand it. Is that correct?

10 A. Yes, sir.

11 Q. And you know what I mean by the word "payee"?

12 A. Yes, sir.

13 Q. And you could input amounts that were to be
14 paid to vendors too, couldn't you?

15 A. That's correct.

16 Q. And it was by being able to input and have
17 access to the system that you were in a position where
18 you were forging checks, which is the reason that
19 you're here at Carswell, correct?

20 A. Yes, those are the charges.

21 Q. Okay. And as I understand the fact pattern
22 Lara -- correct me if I'm wrong -- there were three
23 vendors of Overland that you regularly wrote on checks.
24 Is that true?

25 A. I can't -- I mean, I'm not going to say three

1 vendors. It's been a long time ago.

2 Q. Let me help you. Does Atlantic British
3 refresh your recollection?

4 A. I don't know.

5 Q. Okay. What about Envision Industries? Do you
6 have a recollection of that?

7 A. No, sir.

8 Q. Do you have a recollection of Taylor
9 Enterprises?

10 A. No, sir.

11 Q. Okay. I'm going to show you some checks later
12 that have those payees written on them.

13 Now as I understand it, you would input
14 checks into the system in the name of payees, and then
15 you would sign makers, or Overland's signature, on the
16 checks. Is that true?

17 A. Not at all times, no.

18 Q. Okay. But in some instances?

19 A. Yes, sir.

20 Q. Okay. You would be in a position where you
21 could print out the checks, and in some instances sign
22 the name of Dr. Frasher on them. Is that true?

23 A. Yes, sir.

24 Q. Okay. And at the time that you were signing
25 these checks to these particular payees, you didn't

1 A. That's correct. That's correct.

2 Q. You were the one who was the signer on the two
3 Bank of America accounts, correct?

4 A. That's correct.

5 Q. Okay. And the monies that came out of those
6 accounts you used for various purposes, as I understand
7 it. Is that true?

8 A. That's correct.

9 Q. Okay. So during this period of time when some
10 of the checks had forged signatures of Dr. Frasher, you
11 were an employee of Overland?

12 A. That's correct.

13 Q. And you were an accounts payable clerk
14 preparing and processing checks to be paid to various
15 vendors of Overland, correct?

16 A. At the beginning, yes.

17 Q. At the beginning. And the reason you say "at
18 the beginning" was because there did come a time when
19 you were promoted into a different position?

20 A. That's correct.

21 Q. Okay. But before you were promoted into a
22 different position, you used the computerized
23 accounting system at Overland to fulfill your job
24 function as an accounts payable clerk, right?

25 A. Correct.

1 Q. You were given access to the computer systems
2 and checks by Overland as an accounts payable clerk?

3 A. Yes.

4 Q. And your access included the ability to enter
5 payment amounts on checks, right?

6 A. Yes, sir.

7 Q. It also included the ability to enter payee
8 names. Is that right?

9 A. At certain times. It wasn't that way in the
10 beginning.

11 Q. Okay. And you had the ability to actually
12 print checks?

13 A. Yes, sir.

14 Q. So that necessarily means, does it not, that
15 you had access to the paper check stock that Overland
16 had on NBSC and BB&T accounts?

17 A. Define "stock."

18 Q. Okay. That is sort of a term that I use.
19 Let's use a different word. You had access to the
20 checks so that you could print a check that could be
21 presented for deposit by a payee or by you?

22 A. The actual printed check? Once it was
23 printed, yes, I had access to it.

24 Q. Okay. And in order to print something I guess
25 you had to put a check into the printer, right?

1 A. Some of them were kept -- some of them were
2 kept by the comptrollers. Some of them were taken to
3 Dr. Frasher for him to sign and then give back. And
4 some of them I kept.

5 Q. Your answer teaches me that my question wasn't
6 very precise. The actual pieces of paper that were fed
7 into the printer that constitute checks that can be
8 presented for deposit or stuck in the mail and sent to
9 a vendor, where were those blank checks kept?

10 A. They were kept under -- there was a -- the
11 shelving, like shelves with various office products,
12 items like that. And then the checks were kept on the
13 lower -- the floor underneath the shelving.

14 Q. Were they behind anything that was locked?

15 A. No. No, sir.

16 Q. So as I understand it, the checks were right
17 out there in the open the same as supplies that were
18 used at Overland. Is that true?

19 A. That is correct.

20 Q. Now, you mentioned to me just a moment ago
21 that there was a time when you had a change in
22 position. You went from accounts payable clerk to what
23 position?

24 A. I went to -- it was a combination of
25 Dr. Frasher's assistant. I did DMV work. And that's

1 what I would call the position. It was never declared
2 -- there was never a declaration as to what it was.

3 Q. Okay. When you say "DMV work," was there a
4 title department at Overland?

5 A. There was.

6 Q. Were you in the title department?

7 A. Initially, no. I offered information because
8 I had done title work previously in my life. But then
9 they moved me into Dr. Frasher's assistant/DMV.
10 Anything to do with DMV, going there to rectify issues,
11 titles, anytime there was an issue with funding for a
12 contract, you know, purchase of a contract, then I
13 would have to go to the DMV and try to rectify it or,
14 you know, that's the extent.

15 Q. So was there anyone else performing such DMV
16 title work at Overland at this time?

17 A. Numerous people.

18 Q. So when we talk about title work, I'm guessing
19 that means you were assisting and/or completing forms
20 400?

21 A. Yes, sir, that was part of it.

22 Q. Assisting and/or completing Affidavits of
23 Sale?

24 A. That's correct.

25 Q. Assisting and/or completing odometer

1 Dr. Frasher's name to some of the checks that were
2 issued?

3 A. That's correct.

4 Q. There was a point in time, though, when you
5 ceased to have access to the computerized accounting
6 system, for lack of a better term, at Overland, wasn't
7 there?

8 A. Yes, sir.

9 Q. Okay. And that was corrected, as I understand
10 it, where you regained access to the computerized
11 accounting system, didn't you?

12 A. They took -- when I went to log on the
13 computer, they had taken away access and it was given
14 back to me by the comptroller because I still had to
15 get in to do the title work and the -- I mean, I was
16 still at that point doing accounts payable at some
17 periods of time.

18 Q. Okay. So let me see if I can show you what
19 has been premarked as Deposition Exhibit 1 for Bank of
20 America.

21 A. Yes, sir.

22 Q. This is an e-mail, Lara, from somebody named
23 Britt at ADP. Take a second, if you would, please, and
24 review this.

25 A. Yes, sir.

1 A. No. It was not a thorough system, no.

2 Q. Okay. And if it was not a thorough system,
3 what do you think was not being done that would have
4 made it thorough?

5 A. There were invoices out there for purchases
6 made that never made it to accounts payable. There
7 were invoices that had been paid where the check was
8 never reconciled, never accounted for on the bank
9 statement. There was no A equals B in the whole
10 process.

11 Q. I see. Was it your function during the two
12 and-a-half -- actually more like three and-a-half
13 years. Does that sound right for the length of time
14 you were at Overland?

15 A. I don't know. I know that was the -- what am
16 I trying to say? I did the accounts payable longer
17 than I did anything else.

18 Q. Okay. During the time that you did accounts
19 payable, I take it more than one person was opening
20 bank statements. Is that true?

21 A. That's correct.

22 Q. Okay. The accounts payable clerks would have
23 some involvement in looking at the checks or items
24 included in the statement. Is that your testimony?

25 A. All we had access to, or all I had access to,

1 the same page.

2 Q. Okay. Do you know if there was any internal
3 report generated each month balancing the trail ledger
4 and showing what had been paid during the month, what
5 funds had been collected and what funds had been paid
6 out and what the balance was in the accounts?

7 A. To my knowledge, yes, but I cannot -- I
8 cannot -- I mean, that's hearsay.

9 Q. Okay. Over the period of time that you were
10 at Overland, there were a number of checks where you
11 signed Dr. Frasher's name. Correct?

12 A. Correct.

13 Q. And a part of what I'm trying to understand,
14 Lara, and forgive me for being somewhat more blunt
15 about this, is how in an account payable reconciliation
16 process those checks were not detected or not found to
17 be lacking an underlying invoice to back them up? Can
18 you explain that to me?

19 A. Because the individuals involved, there was no
20 reconciliation the whole time I was at the dealership.

21 Q. And by "no reconciliation" you mean account
22 payable reconciliation?

23 A. There was no thorough reconciliation for
24 anything, anything that had to do with the dealership
25 whether it be the floor plan payoff, whether it be the

1 payroll, whether it be -- I mean, the whole gamut.
2 There was no -- we had cars that were sitting in the
3 lot that they said were gone. There was never -- there
4 was no balancing system.

5 Q. No, no, I'm -- I will ask you a couple of
6 questions about cars on the lot. You've been in the
7 automobile business before Overland, right?

8 A. That's correct.

9 Q. So you're familiar with the term "out of
10 trust," right?

11 A. That's correct.

12 Q. During this period of time that you were at
13 Overland, do you know if the floor plan financed here
14 ever indicated that the Land Rover was out of trust?

15 A. Yes, sir.

16 Q. Okay. Was that something that happened
17 infrequently or frequently?

18 A. All I know is there was issues with cars not
19 being paid off in the proper time frame. And because
20 of the relationship, it was forgiven -- exactly two
21 times that I can recall and that I'm aware of. The
22 rest of the time it, like I said, I don't know if there
23 was a penalty paid -- I don't know. There were two
24 specific times specifically that I'm aware of where it
25 was forgiven.

1 dealerships before; is that true?

2 A. That's correct.

3 Q. So you had experience in that regard?

4 A. That's correct.

5 Q. And what was the process by which you were
6 hired at Land Rover? Did they give you an application
7 for employment? Did you receive an interview? If you
8 recall.

9 A. Initially I was interviewed. I came in for an
10 interview. And then I was handed a packet from her and
11 it had some questions but that's all I recall.

12 Q. Okay. And I don't mean to embarrass you with
13 these questions --

14 A. It's okay.

15 Q. -- but I have to ask them. Did Overland ask
16 you whether you had any criminal record either on the
17 application or in the interview?

18 A. No, sir.

19 Q. And as I understand it, at the time you were
20 hired by Overland you were on probation? This would
21 have been May of 2006.

22 A. Yes.

23 Q. And that would have been probation for prior
24 check fraud?

25 A. That's correct.

1 Q. Okay. Now, was that the first time that you
2 had had any criminal charges in connection with
3 forgery, that probation?

4 A. I believe that's correct.

5 Q. Okay. So at the time that Overland hired you,
6 you were on probation for check forgery and Overland
7 hired you to go into the accounts payable?

8 A. That's correct.

9 Q. Okay. Lara, I'm going to try and make this
10 move quickly. I'm going to show you a stack of
11 documents. And, if you would, go through this stack of
12 documents. You take whatever time you feel that you
13 need, but I will tell you in advance in the interest of
14 moving this along that there are two things that I'm
15 going to ask you with respect to this stack of
16 documents. One is whether the maker signatures on the
17 checks were forged by you.

18 A. Okay.

19 Q. And the second is if at the time you -- at the
20 time of these checks whether the amount of the checks
21 was intended to go to these named payees that are shown
22 in the check. I will represent to you in the ease of
23 moving through this, that there are only three payees
24 on here; Taylor Enterprises, Atlantic British and
25 Envision Industries.

1 your use of the ADP software for accounts payable
2 purposes?

3 MR. REID: Hunter Reid, object to the
4 form of the question.

5 Q. (BY MR. SHEEDY) You may answer the question
6 if you understand it.

7 A. He said objection --

8 Q. That just means he doesn't like the way that I
9 phrased it and a judge ultimately will have to decide
10 that. I tell you what, I'll rephrase it for you.

11 A. Okay.

12 Q. During the period of two and-a-half years that
13 you were at Overland, nobody was actually tracking or
14 monitoring your use of the ADP software, were they?

15 MR. REID: Object to the form again.

16 A. That's correct.

17 Q. (BY MR. SHEEDY) There was nobody going in and
18 seeing that Lara was on the program for two and-a-half
19 hours today and here is what she did?

20 A. To my knowledge, no, because nothing ever
21 ironed out. And so if they had stuff open, it was left
22 open. They never resolved anything that was still out
23 there.

24 Q. Tell me what you mean by "ironed out" and
25 "resolved what was still out there," please.

1 A. You had payable invoices that were not paid
2 and then you would get hit with three months of
3 invoices when the account got cut off. We had
4 electricity cut off for past due invoices. The
5 penalties paid for cars that were not paid off within
6 three-day time parameter. It was -- nobody ever
7 checked to see if any of this was being taken care of
8 on a timely basis.

9 Q. Thank you. Further, as I understand your
10 testimony, the actual NBSC and BB&T checks were on a
11 shelf with other supplies and not under lock and key.
12 Is that true?

13 A. That's correct.

14 Q. And there was nothing to obstruct or prevent
15 you from gaining access to those checks which were on
16 that self?

17 A. That's correct.

18 MR. REID: Object to form.

19 Q. (BY MR. SHEEDY) To the best of your
20 knowledge, Overland didn't have any contact with Bank
21 of America about these two accounts of yours, the sole
22 proprietorship and your individual account while you
23 were at Overland?

24 A. That's correct. And I'm going to say this and
25 I know at one point in time Gwen Patton had involved

1 called them and asked if they had a position?

2 A. Yes, sir.

3 Q. And they asked you to come in and meet with
4 them?

5 A. Yes, sir.

6 Q. And during that meeting you had an opportunity
7 to meet with Dr. Frasher for a period of time?

8 A. The initial meeting was Gwen Patton, and then
9 she called me back, said she wanted me to meet
10 Dr. Frasher. And then he set up another meeting and
11 then Gwen Patton hired me.

12 Q. Okay. I think I understand now. Thank you.
13 The -- I've not ever walked into the dealership on
14 Laurens Road. Where was your office space located?

15 A. It started off -- the dealership was on the
16 left-hand side, the Land Rover dealership. The
17 right-hand side is the BMW, Vespa, all of that. The
18 accounting office was behind Linda Long Travel and it
19 was -- I mean, it was Linda Long property, or whatever,
20 and they paid rent to her to rent this office space.

21 Q. I know exactly. I know the shopping center so
22 I know what you're talking about. The accounting space
23 where you were located was in a separate building from
24 the dealership itself?

25 A. That is correct.

1 Q. Okay. Was the accounting for Overland, were
2 you-all the centralized accounting for all the
3 dealerships under the Overland umbrella in Greenville
4 to your knowledge?

5 A. Yes.

6 Q. Okay. And by that what I mean is, that the
7 payables and any invoices that went out were paid by
8 the Greenville office and the Greenville accounting
9 unit for the Asheville store, for the Columbia store
10 and Hilton Head store?

11 A. That's correct.

12 Q. When you went full-time, what hours were you
13 present on the job?

14 A. Anywhere from 7:00 in the morning until 5:00
15 in the afternoon. It depended on what was going on.
16 And there were days that we worked on Saturdays to
17 close the end of the month. There were weekends we had
18 quarterly events.

19 Q. Ms. Nance, I'm going to show you a few things.
20 Let me ask you this before I show them to you. How
21 often did you see Dr. Frasher? Was he consistently
22 present or was he -- you're smiling.

23 A. He was in and out. He traveled a lot. And
24 even when he was there, you couldn't -- vary rarely
25 could you stop him long enough to maybe go over one or

1 two things. It was very difficult and he didn't come
2 in until later, later in the day, which always served
3 to be an issue when stuff had to go out and so on and
4 so forth. He was not the easiest person to get ahold
5 of. He had other stuff he had to do and other
6 activities that went on.

7 Q. Thank you. There was a question that was
8 posed to you early on. It was about your access to the
9 ADP system or the regaining of access to the ADP system
10 in October of 2009.

11 Do you recall that line of questions?

12 A. Yes, sir.

13 Q. You had indicated that there was a letter that
14 was required for you to regain access to the ADP
15 system. Is that right?

16 A. Yes, sir.

17 Q. What I'm putting in front of you is NBSC 1.
18 Does that appear to be --

19 MR. HOWARD: And for purposes of
20 identification I actually -- everybody on the line,
21 what I'm referring to, because of what has happened
22 here, I've shifted up some of the numbering on some of
23 the documents that I've sent out. This is actually
24 Document 2 that I've provided, and what I've done is
25 reidentified that as NBSC 1 for purposes of the

1 was involved. I don't know if it was at that point in
2 time or some other time. But SunTrust was involved at
3 some point.

4 Q. Okay. And you maintained two accounts at
5 SunTrust. Is that correct?

6 A. That's correct.

7 Q. The first account ends in 8023. If someone
8 could hand you Exhibit 3. You opened this account
9 January 19, 2010. Is that right?

10 A. Yes, ma'am.

11 Q. And you were an employee of Overland at this
12 time?

13 A. Yes, ma'am.

14 Q. And prior to this account had you had any
15 other accounts at SunTrust?

16 A. I believe there was a personal account, but I
17 do not know that for sure.

18 Q. And would that have been at the same time or
19 had that closed prior to opening this account?

20 A. I really can't answer that. I just -- I know
21 that at some point SunTrust had entered my personal
22 realm.

23 Q. At some point other than this account or the
24 account on Exhibit 4?

25 A. At some time -- I want to say it was during my

1 A. No, ma'am.

2 Q. If you could turn to Exhibit 2. This is
3 another account you have at SunTrust, correct? Maybe
4 Exhibit 4 would be a more helpful reference..

5 MS. DRISCOLL: Do you want her to look at
6 Exhibit 2 or Exhibit 4?

7 MS. MAXWELL: Both is fine.

8 Q. (BY MS. MAXWELL) Ms. Nance?

9 A. Sorry, I was looking.

10 Q. And this says on Exhibit 2 it's a new account
11 deposit for \$5,000?

12 A. Yes, ma'am.

13 Q. And on the second page, is that your signature
14 on the check?

15 A. Yes, ma'am.

16 Q. And this check was drawn on your other account
17 maintained at SunTrust, correct?

18 A. That's correct.

19 Q. And was this the only deposit made into this
20 account?

21 A. I can't answer that question. It's been a
22 long time, and without having bank records in front of
23 me I can't answer that.

24 Q. You were the only one with the authority to
25 make deposits into this account, correct?

1 A. I would say so.

2 Q. Okay. And then just a few last questions.
3 You opened these accounts to deposit and withdraw money
4 into, correct?

5 A. That's correct.

6 Q. And they were not affiliated with Overland?

7 A. They were when bills needed to be paid out of
8 them.

9 Q. Did anyone at Overland instruct you to open
10 these accounts?

11 A. No ma'am.

12 Q. And were any bills of Overland used to -- were
13 any bills of Overland's used or were monies from these
14 accounts used to pay any of Overland's bills other than
15 the office supplies and bonuses you mentioned earlier?

16 A. I don't know without looking at the bank
17 statements.

18 Q. And to your personal knowledge, you don't know
19 how SunTrust's check processing procedure works, do
20 you?

21 A. No, ma'am.

22 Q. In your personal knowledge, you don't know how
23 SunTrust's check processing procedure worked after you
24 deposited checks into your SunTrust account, correct?

25 A. That's correct.

1 Q. And you have no reason to believe that
2 SunTrust processes these different on your account as
3 opposed to any others in January of 2010, correct?

4 A. That's correct.

5 Q. And you have no reason to believe that
6 SunTrust changes processes for your account, correct?

7 A. That's correct.

8 Q. For Exhibit Number 3, where -- did you fill
9 this out on your own and bring it to SunTrust branch?

10 A. I was given the form. I took it away from the
11 office and then I took it back to her.

12 Q. You signed it outside of -- not in front of
13 SunTrust employees?

14 A. That's correct.

15 Q. And to the best of your knowledge, SunTrust
16 didn't -- excuse me, Overland didn't have any contact
17 with SunTrust regarding your account, correct?

18 A. To my knowledge.

19 Q. All right.

20 MS. MAXWELL: That's all the questions I
21 have.

22 EXAMINATION

23 BY MR. MOORE:

24 Q. Laura, my name is David Moore. Do you know
25 Roger Fields?

1 The portion at the top above the check,
2 that is not an invoice, is it?

3 A. No.

4 Q. That's part of the check, isn't it?

5 A. That's correct.

6 Q. And as I understand the accounts payable
7 process, this is the part that an employer would keep
8 for their records?

9 A. That's correct.

10 Q. You tear off the check and mail it to the
11 payee and keep the part at the top?

12 A. Yes.

13 MR. SHEEDY: That's all I have. I
14 appreciate your patience.

15 EXAMINATION

16 BY MS. MAXWELL:

17 Q. Lara, this is Lauren Maxwell. I represent
18 SunTrust. I have a few follow-up questions.

19 A. Yes, ma'am.

20 Q. When you deposited your checks into SunTrust
21 account in the name of Taylor Enterprises, you would do
22 two or three checks at a time. You didn't go
23 separately to SunTrust for each check, did you?

24 A. That's what I remember.

25 Q. And if that's what the records indicated, you

1 would have no reason to dispute that, correct?

2 A. Correct.

3 Q. And these checks were only over the course
4 of -- over the scope of about one week, correct?

5 A. I don't recall.

6 MS. MAXWELL: If someone could hand her
7 SunTrust 1.

8 A. Yes, ma'am.

9 Q. (BY MS. MAXWELL) The dates on the check only
10 range from January 18 of 2010 to January 25, 2010,
11 correct?

12 A. Yes, ma'am.

13 Q. And so if you were depositing these in groups,
14 you would only go to SunTrust less than a handful of
15 times probably to make those deposits, correct?

16 A. Correct.

17 MR. REID: Object to form.

18 Q. (BY MS. MAXWELL) And moving on to the other
19 account that you have at SunTrust, the Atlantic British
20 name, you had to show your Social Security number and
21 driver's license when you opened that account, right?

22 A. I'm assuming so. I can't physically put
23 myself back there. So I don't know that they actually
24 -- that I pulled it out and showed them or that they
25 took information off the first -- I can't answer that.

1 Q. Okay.

2 MS. MAXWELL: If someone could hand you
3 Exhibit 2.

4 A. Okay. Yes, ma'am.

5 Q. (BY MS. MAXWELL) If the records indicated
6 that this was the only deposit made into this account,
7 would you have any reason to dispute that?

8 A. Not at this time.

9 Q. And so if that was the only deposit, that
10 would be the only time you went into SunTrust to
11 deposit into this account, correct?

12 A. To my knowledge.

13 Q. Right. You would have no other reason to go
14 back into SunTrust to make these deposits?

15 A. To my knowledge.

16 Q. All right. And did you ever -- when you were
17 opening these accounts or at any time while they were
18 open with SunTrust, did you ever tell any
19 representative from SunTrust that you did not have the
20 authority to present these checks for payment?

21 A. No, ma'am. I did not.

22 Q. All right.

23 MS. MAXWELL: That's all I have. Thank
24 you, Ms. Nance.

25 MR. HOWARD: Anything, David?

CAUSE NO. 2010-CP-23-5880

OVERLAND, INC., D/B/A	)	COURT OF COMMON PLEAS
LAND ROVER OF GREENVILLE	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	COUNTY OF GREENVILLE
	)	
LARA MARIE NANCE, ET AL	)	
	)	
DEFENDANTS.	)	STATE OF SOUTH CAROLINA

ORAL DEPOSITION OF

LARA NANCE

January 15, 2014

I, Julie I. Upton, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, LARA NANCE, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That examination and signature of the witness to the deposition transcript was waived by the witness and agreement of the parties at the time of the deposition;

That the original deposition was delivered to Mr. Joshua Howard;

1 That a copy of this certificate was served on all
2 parties shown herein on _____ and filed
3 with the Clerk pursuant to Rule 203.3.

4 I further certify that I am neither counsel for,
5 related to, nor employed by any of the parties or
6 attorneys in the action in which this proceeding was
7 taken, and further that I am not financially or
8 otherwise interested in the outcome of the action.

9 Certified to by me this _____ day of
10 _____, _____.

11
12
13
14 Julie I. Upton
Texas CSR No. 2544
Expiration Date: 12/31/14
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EXHIBIT B

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

OVERLAND, INC., D/B/A LAND ROVER OF
GREENVILLE,

Plaintiff,

vs.

CASE NO. 2010-CP-23-5880

LARA MARIE NANCE; CHARLIE ANDREW
NANCE; ROGER FIELDS; ADP DEALER
SERVICES GROUP; PIEDMONT AUTOMOTIVE
OF ANDERSON, INC., D/B/A PIEDMONT
CHRYSLER JEEP DODGE; PIEDMONT
AUTOMOTIVE OF ANDERSON, SOUTH
CAROLINA, LLC, D/B/A APEX
AUTOMOTIVE; SYNOVUS FINANCIAL
CORPORATION, D/B/A NBSC; BRANCH
BANKING AND TRUST COMPANY; BANK OF
AMERICA CORPORATION; AND SUNTRUST
BANKS, INC.,

Defendants.

DEPOSITION OF: GWEN PATTON (Volume 1)

DATE: July 15, 2014

1 give them to me to file away. There wasn't that
2 many new people there all the time, though.

3 Q. Where would you file them?

4 A. In their employee folder.

5 Q. In their personnel file?

6 A. Yes, sir.

7 Q. Do you know where or who -- excuse me. Do
8 you know who actually did the background check; what
9 company --

10 A. No.

11 Q. -- what individual?

12 A. I don't remember now, no. I'm sure we had
13 to pay them. So there's got to be a record of the
14 check somewhere, or even on the report, but no.

15 Q. Do you -- do you remember whether -- while
16 you were working at Overland, whether there were
17 applications for the various jobs?

18 A. Yes, there's a -- you know, a general
19 application.

20 Q. General application. And what was on --
21 can you describe that general application?

22 A. Not any different than any other general
23 application form. You know; who you are, your
24 address, all the main legal questions; if you've
25 ever been convicted of a crime, answer yes or no; if

1 there by me.

2 Q. Okay. So they could use it?

3 A. Yes.

4 Q. And your check stock and those type of
5 things, were they -- were they kept in your office
6 or a separate place?

7 A. They were kept along that stock wall of
8 all the supplies.

9 Q. Was --

10 A. Each store has a box, and they're all
11 blank. They have to run through the laser before
12 anything prints on it. All that's on there is the
13 color and the check number.

14 Q. And where was this wall with the -- all
15 the supplies and the check stock? Was that in your
16 office or outside your office?

17 A. No, outside my office.

18 Q. Outside your office. So it was in the
19 same area where the other guests were and Lara and
20 those other individuals sat?

21 A. Right.

22 Q. Okay.

23 A. It's just they had the flat side of the
24 wall, and the side towards me had all the shelves so
25 I could see who was taking something.

1 Q. Did you --

2 A. -- maybe it was when Charlotte kept being
3 out sick and we were getting behind again, looking
4 through the file of people that had applied. I
5 mean, that's my only thought. I can't be sure.

6 Q. Do you remember actually interviewing Lara
7 Nance prior to her being hired?

8 A. Yes.

9 Q. Who did you interview with? I mean --

10 A. Well --

11 Q. -- was it just you, or was there somebody
12 else with you to interview her?

13 A. She was waiting -- we were waiting for
14 Dr. Frasher. So I said, hi, how are you? Had her
15 sit up down up front in the showroom. And I
16 remember, because she's diabetic and she had to
17 go -- she had to leave and go get something to eat,
18 because she was about ready to pass out.

19 And so then I think she just left that
20 day. It was like, that was the weirdest thing ever.
21 And she said, I got really sick and I had to go.
22 And she came back the next day, and I think she
23 visit [sic] with Doc before she even visit [sic]
24 with me.

25 Q. And how -- do you -- you were not the -- a

1 part of her visit with Dr. Frasher?

2 A. I had to have been at some point. I'm
3 sure we talked together, and maybe I left her.
4 Maybe he had her first, and then I came back in. I
5 just remember it being so random that -- how many
6 times do you wait for someone to come for an
7 interview and then they wait so long they disappear,
8 and then the next day they come back? So --

9 Q. So she disappeared --

10 A. I remember that.

11 Q. -- and then the next day she came back?

12 A. Yes, and you know, she had a --

13 Q. Did she have an appointment the next day,
14 or she just showed back up?

15 A. She just showed -- I think she just showed
16 back up. And then -- because she had a -- needed
17 her insulin or whatever, needed to get something to
18 eat.

19 Q. Now, do you remember whether she actually
20 filled out an application?

21 A. That, I don't -- no, I don't remember.
22 I'm sure we had her fill one out, but I -- I don't
23 picture it in my mind. That's a while ago.

24 Q. Were you involved in doing a background
25 check on Lara Nance?

1 A. No, I don't -- I never did the background
2 checks.

3 Q. You didn't. Who would do the background
4 checks?

5 A. I don't remember the name of the company,
6 but Doc was the one that always received the report.
7 See, June was there at that time. So you know, I
8 don't know if she submitted it or if Doc submitted
9 it.

10 Q. Would you have any involvement in doing
11 background checks?

12 A. No.

13 Q. During the whole time you were at
14 Overland --

15 A. No.

16 Q. -- you had no involvement in that?

17 A. No. He gave me, I remember, a few reports
18 to file away after June was, you know, gone. That
19 was the payroll person. So I do remember seeing a
20 few of them, you know.

21 Q. But do you remember actually being the
22 person to order them?

23 A. No, I don't.

24 Q. Okay. You would not have done that?

25 A. No. And if I did, I honestly forgot. I

1 do not remember ordering any. And I know we had a
2 lot of salespeople. I must have submitted them
3 somewhere. I don't -- I can't imagine -- unless
4 Melissa did it for Doc, but I don't remember the
5 name of a company I would have sent a request to or
6 anything.

7 Q. Would you ever review background checks?

8 A. No.

9 Q. Who would --

10 A. I mean, the salespeople -- he received
11 them all. So he would review them. He would write
12 his notes on them or whenever, and I'd just stick it
13 in the file.

14 Q. Okay. And you would supposedly stick them
15 in their personnel file; is that correct?

16 A. Excuse me. Yes, in their personnel file.

17 Q. And the other person who would do that was
18 June; is that correct?

19 A. Yes.

20 Q. So aside from maybe getting a background
21 check and putting it into a file, you didn't have
22 any involvement in ordering a background check and
23 then reviewing the background check for the company?

24 A. No. I mean, if -- I could have. If
25 someone showed me something and I'd say, oh, yeah, I

1 guess I -- oh, no, no, no, it would come to me
2 maybe, but it doesn't at this point. I do not
3 remember.

4 MR. CLINKSCALE: Do you want to take a
5 quick break before we go on to another subject? Why
6 don't we take just a quick break.

7 (Recess 4:22-4:39 p.m.)

8 BY MR. CLINKSCALE:

9 Q. Ms. Patton, are you ready? I think we're
10 ready to start back. We've got everybody here. I
11 want to show you the next exhibit, to see if you've
12 ever seen this exhibit or a document similar to it.

13 MR. CLINKSCALE: Mark this as
14 Exhibit No. 3 to her deposition.

15 (Defendants' Exhibit 3 marked.)

16 MR. REID: You said Exhibit 3, right?

17 MR. CLINKSCALE: Yeah, Exhibit 3. I know
18 it's exhibit to one of the other depositions too.

19 BY MR. CLINKSCALE:

20 Q. Can you look at that? Do you -- have you
21 ever seen that particular document or a document
22 similar to that?

23 A. No.

24 Q. Okay. Now, this is a SLED report on Lara
25 Nance. Okay? And I will represent to you that it

1 says that Lara Nance was arrested at least twice,
2 maybe three times, for forgery before she was hired
3 by Overland. Okay? Were you aware of any previous
4 forgery arrest --

5 A. No.

6 Q. -- of Lara Nance?

7 A. No.

8 Q. Did you, at any time, learn that Lara
9 Nance had been arrested?

10 A. Yes.

11 Q. When did you learn --

12 A. Well, not arrested, but a record of --

13 Q. Forgery?

14 A. -- something, speaking to Dr. Frasher
15 after I was gone from Overland.

16 Q. Okay. When did you learn that?

17 A. In a conversation with him somewhere along
18 the line, because he said, can you believe the
19 background check we did did not pick up in another
20 state -- her record in another state?

21 Q. And when did he say that to you?

22 A. (No verbal response.)

23 Q. You don't remember? But you were not
24 working there when he said that?

25 A. Correct.

1 Q. Okay. Now, I think you said that Lara
2 Nance's position when she started working at
3 Overland was a payable clerk?

4 A. Yes.

5 Q. What is a payable clerk?

6 A. You put all the invoices -- let's say you
7 buy parts from NAPA Auto Parts. Today you buy a
8 part No. X for \$20, and you put it in the system,
9 put it in the parts, a new part, NAPA payable, and
10 you're keeping a tally of how much you owe them. So
11 at the end of the month, you write them one check.

12 And then she would pull all the accounts,
13 make sure that the bills match the statements, that
14 they're billing us -- is usually how you do it.
15 Most people give statements; some don't -- but like
16 gas, water, light bills -- but match the statement
17 with what you've entered and make sure your books
18 match the statement. Then you write a check to NAPA
19 Auto Parts.

20 Q. And how would she actually write the
21 check?

22 A. There's two different ways to write a
23 check in the ADP system. One is through the
24 payable, where you do like a -- you can pick who
25 you're going to pay or you can run them all, and it

1 prints them all out in a row and then it lists all
2 the invoices that you're paying on the check itself;
3 or on a demand check, you want the check now and
4 you're just going to put it where it goes when
5 you're tying it. And so there are the two kinds. So
6 you can say, oh, I'll only buy peanut butter from
7 this guy once a year, so I'm going to write a check
8 today for him; or you know, a tool and they want
9 their money now; or -- so you write the check on
10 demand.

11 Q. So you had the ability to actually run the
12 check through, and the computer system would put all
13 the information in it?

14 A. Yes.

15 Q. Or you could actually type that
16 information in yourself?

17 A. Both ways are going into the computer and
18 spitting out a check from the same source. It's
19 just getting there -- to the check, on the check,
20 two different ways.

21 Q. Okay.

22 A. It's either you're inputting the
23 information and storing it to pay it at a later
24 date, the payables --

25 Q. Right.

1 A. -- or on demand, where you're putting it
2 in and doing it now.

3 Q. And putting it in at the same time?

4 A. Yes.

5 Q. And then print it out right there?

6 A. Yes.

7 Q. Okay.

8 A. You can tell the difference on the checks
9 by the on demand -- for payables, the batch type of
10 thing does not have a name of who processed it at
11 the top of the check. And the on-demand checks, it
12 tells the name of the person who's making the check.

13 Q. Okay. So if you were -- if I was doing an
14 on-demand check and I was typing in the information
15 at the time I was going to actually print out the
16 check --

17 A. Uh-huh.

18 Q. -- then it would show my name at the top
19 of that check as the one who is doing that, correct?

20 A. Yes, because it goes by your user ID.

21 Q. What was Lara Nance's user ID?

22 A. Her name prints out as Lara Nance.

23 Q. Okay.

24 A. Gwen Patton, to specify -- whoever types
25 the --

1 clerk and you were there, were there any other
2 payable clerks?

3 A. Well, I could have done payables with my
4 access. Lissette could have done payables, because
5 we had larger access, and we had to get in there to
6 be able to fix things or --

7 Q. But would you or Lissette normally do
8 payables?

9 A. No. Like if someone was out and we were
10 trying to get caught up, we might enter 10, 20
11 invoices or something, or if someone was -- Lara was
12 on vacation or something like that.

13 Q. But while Lara was there and she was the
14 payable clerk, she would be the one to do the
15 payables; is that --

16 A. Yes.

17 Q. -- correct?

18 A. Uh-huh.

19 Q. Now, while she was there and she was the
20 payable clerk and she was doing the payable, did you
21 have someone else who was doing the payables also?

22 A. No.

23 Q. Okay. So that was her job, and she was
24 the only payable clerk at that time?

25 A. Correct.

1 that was going out of the account, would it not?

2 A. Right.

3 Q. And it would show you the checks, et
4 cetera, correct?

5 A. Yes, both statements came with a nice set
6 of microfiche copies of checks. And when the
7 statements would come in the mail, Doc would open
8 them and he would normally look through them, and he
9 would put little X marks by the checks he wanted you
10 to -- what's this? What's this? He was the final
11 check.

12 Q. So was he the first check? I don't mean
13 to -- would he be the first one to look at the
14 statements when they came in from BB&T, or would he
15 be the last person to look at the statements?

16 A. He'd be the first one, because if he was
17 there, he opened the mail. If he wasn't there, I
18 would open the mail, or Lissette would open the
19 mail, or Melissa would open the mail and then give
20 it to us.

21 Q. So he would look at the statements from
22 BB&T and then he would give those statements to you
23 or to Lissette?

24 A. To me, yes.

25 Q. And you would then look at them again?

1 be in that policy manual?

2 A. Oh, generic ADP, put in your own name,
3 type of legal stuff that had already been reviewed
4 and, you know -- I don't know where it really -- I
5 think it was a ADP type of manual.

6 Q. Did it have any -- did Overland have any
7 policies that specifically referenced how you would
8 reconcile the bank statements and look at the bank
9 statements and check the invoices and all those type
10 of things?

11 A. No, no. Like a formal, written job
12 description book? Is that --

13 Q. Well, just a formal --

14 A. -- what you're looking for?

15 Q. -- written statement so the people doing
16 those things would know what they were doing.

17 A. No.

18 Q. Do you remember Overland having any type
19 of manuals to do any type of processes at Overland?
20 I know we talked about the manual was from ADP. Now
21 I'm talking about any separate manuals that were on
22 the shelf that were Overland manuals to tell you how
23 to do certain things.

24 A. No.

25 Q. Did they have any manuals?

1 Rover in the summer of 2004, correct?

2 A. Yes.

3 Q. You were hired as a controller?

4 A. Uh-huh.

5 Q. And you held that position as controller,
6 or as you say, office manager, from 2004 until the
7 time you left in July 2009?

8 A. Yes.

9 Q. And in July of 2009, you were actually
10 fired; is that correct?

11 A. Yes.

12 Q. Okay. Now, when Dr. Frasher was deposed,
13 I want to share with you --

14 A. What does that mean, deposed?

15 Q. Same thing that we're doing with you right
16 now, when we took his deposition.

17 A. Okay.

18 Q. Sorry. It's not a reference to a killing
19 of a king.

20 A. Feels like it.

21 Q. I'm going to show you Pages 148 through
22 150 of Dr. Frasher's deposition. I'd like you to
23 begin at Line 24, where it says, at the bottom of
24 Page 148, Okay. Let me ask you about that. Now,
25 what happened? You fired Gwen Patton, right?"

1 MR. SHEEDY: Oh, absolutely. I didn't get
2 your clue. Sorry.

3 (Recess 7:21-7:24 p.m.)

4 BY MR. SHEEDY:

5 Q. When Dr. Frasher was deposed, when I asked
6 him how much time he would spend with you and then
7 Sue, he said, not a lot of time. I would say an
8 average of 30 minutes or less.

9 MR. SHEEDY: Let the record reflect I'm
10 showing the witness Page 263.

11 BY MR. SHEEDY:

12 Q. To the best of your recollection, is that
13 pretty accurate? 30 minutes or less per day?

14 A. Yes.

15 Q. Which is not a lot of time, is it, given
16 what we're describing here tonight?

17 A. No. And then he usually had someone on
18 the cell phone or someone interrupting, or you know,
19 he was just busy all over the place.

20 Q. Understood.

21 MR. SHEEDY: Let's mark this as an
22 exhibit, please.

23 (Defendants' Exhibit 9 marked.)

24 BY MR. SHEEDY:

25 Q. Mr. Clinkscale asked you a bunch of

1 reconcile the account with the ADP system, right?

2 A. Right.

3 Q. Now, when you got those bank statements
4 each month with the -- during the time when the
5 items or checks were enclosed, did you, Gwen,
6 actually physically look at each check, or were you
7 only looking at the statement?

8 A. I'm looking at the statement.

9 Q. Okay.

10 A. Number to number, number to number. And
11 if something's missing, I look at the picture of the
12 check.

13 Q. Was there anybody that you knew within the
14 dealership who was actually physically looking at
15 each check included in that statement?

16 A. No. I can't even guarantee Doc did, but
17 he opened the statement before he brought it to me.
18 So I -- I have to assume he looked, because he would
19 mark things, you know, if he didn't know -- he's
20 like, I've got a couple questions on this one. Will
21 you look at this and this? What is this for?

22 Q. Were his marks on the statements, or were
23 any of them on the items or checks themselves?

24 A. Usually, he'd put a sticky note on the
25 statement, and sometimes he'd mark the checks with

1 Q. Take a second, if you would, please, and
2 read the highlights.

3 A. (Complies with request.) No.

4 Q. Now, that testimony that you're reading
5 seems to indicate that you would have been the
6 person that ordered the background check. Do you
7 see where it says that?

8 A. Yes, sir.

9 Q. Did you order a background check?

10 A. No.

11 Q. Okay.

12 A. Not to my recollection. I would think it
13 would be June Huddleston or Jack Frasher, because
14 June did payroll and -- I don't remember.

15 Q. But as you sit here today, right now, you
16 feel comfortable saying that you didn't order the
17 background check?

18 A. Correct.

19 Q. Is that true?

20 A. Yes.

21 Q. Okay.

22 A. I can't think of a company that we used to
23 submit them to. I can't remember the process. I
24 remember him getting the reports and bringing them
25 to me, but I don't remember like requesting them.

CERTIFICATE OF REPORTER

I, Kathy Zebert, Registered Professional Reporter and Notary Public for the State of South Carolina at large, do hereby certify that the foregoing transcript is a true, accurate and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

WITNESS MY HAND, I have hereunto affixed my official seal this 28th day of July, 2014, at Greenville County, South Carolina.

KATHY ZEBERT
REGISTERED PROFESSIONAL REPORTER
MY COMMISSION EXPIRES:
JANUARY 9, 2022

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

OVERLAND, INC., D/B/A LAND ROVER OF
GREENVILLE,

Plaintiff,

vs.

CASE NO. 2010-CP-23-5880

LARA MARIE NANCE; CHARLIE ANDREW
NANCE; ROGER FIELDS; ADP DEALER
SERVICES GROUP; PIEDMONT AUTOMOTIVE
OF ANDERSON, INC., D/B/A PIEDMONT
CHRYSLER JEEP DODGE; PIEDMONT
AUTOMOTIVE OF ANDERSON, SOUTH
CAROLINA, LLC, D/B/A APEX
AUTOMOTIVE; SYNOVUS FINANCIAL
CORPORATION, D/B/A NBSC; BRANCH
BANKING AND TRUST COMPANY; BANK OF
AMERICA CORPORATION; AND SUNTRUST
BANKS, INC.,

Defendants.

VOLUME II

PAGES 246 - 328

DEPOSITION OF: GWEN PATTON

DATE: August 10, 2014

A. WILLIAM ROBERTS, JR. & ASSOCIATES

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(803) 731-5224	(864) 234-7030	(704) 573-3919

1 A. I think Doc looked at them. That was his
2 purpose of opening it first, you know, to...

3 Q. Did he look at every single check in there?

4 A. I don't know.

5 Q. When you got the bank statements would you
6 cross-check the debits shown on those statements
7 against the invoices received from suppliers?

8 A. No. No. At that point it's just check for
9 check, you know, what we entered what the bank has.

10 Q. So you would cross-check the statements
11 with the ADP entries; is that what you're saying?

12 A. Yes.

13 Q. During this period of time were you
14 tracking expenses paid to Taylor Enterprises through
15 the ADP system?

16 A. I don't remember. If they had a vendor
17 number there would be a summary you could print for
18 the vendor. If they were done with a regular check
19 without a vendor number, I mean, you could still run
20 a history on them. It was just --

21 Q. Were you doing that?

22 A. -- harder. No.

23 Q. Were you doing that for any of the vendors
24 of Land Rover?

25 A. It's always -- the information is always

1 can.

2 Q. Can they track what that person did in the
3 system while they were using it?

4 A. I believe so.

5 Q. To your knowledge other than the Internet
6 usage that was tracked that one time, was the use of
7 the ADP system monitored in this way at Land Rover?

8 A. No.

9 Q. Is there also -- excuse me, there's also a
10 way to monitor an employee's level of access, right?

11 A. Uh-huh.

12 Q. And is that something called the UUP
13 report, does that sound familiar?

14 A. Update user profile, it stands for, yes.

15 Q. So if you typed in a person's user name,
16 the ADP system would then give you that person's
17 level of access at that time; is that right?

18 A. Yeah. You could run the report from there
19 or update it.

20 Q. Using the UUP report you could either see
21 what that person's access was at that time or you
22 could change it; is that true?

23 A. Correct.

24 Q. And that was a function of the system
25 administrator?

1 you've sold the car from the date that you sold it to
2 pay off the car, you know. Sometimes you don't get
3 your funds if you had -- you may be missing a piece
4 of paper, or a document, a copy of a driver's license
5 or something the funding bank required. You might be
6 six or seven days, you know. The customers had it
7 for a couple of days longer than when you've been
8 funded for it.

9 Q. So there were times when Land Rover did not
10 pay off the loan on that car within the requisite
11 time period by the bank; is that true?

12 A. Yes.

13 MS. DRISCOLL: That's all I have.

14 EXAMINATION

15 BY MR. HOWARD:

16 Q. Gwen, my name is Josh Howard. We met
17 before.

18 A. Yes.

19 Q. I represent NBSC in this matter. You might
20 have gone through this, but I'm not sure.

21 During your time period when you were with
22 Overland, with the Land Rover dealership, was there a
23 check writing process that was in place?

24 A. Can you be more specific?

25 Q. Was there -- to be more specific, was there

1 then he'd send them back with little notes of things
2 he wanted to know, what's this or what have you, then
3 you'd research further. So that was like a safety
4 catch there.

5 Dealer trades and purchases, they always
6 had a form you fill out for dealer trade, what we're
7 trading out, what we're getting in, you know, what
8 we're paying out, what they're supposed to be paying
9 us. So it had a process, but it didn't have a
10 statute number on the bottom of a form or anything
11 like that.

12 Q. No, I understand that. And let me ask it
13 this way. When you have checks and there's at least
14 somewhat of a process as what you're describing,
15 whether it's from the standpoint of making sure that
16 the checks that are being written by the company are
17 checks that should be written by the company to
18 vendors or banks or whatever; is that right? You
19 have a process for doing that?

20 A. That was basically the safety catch was the
21 person who signed the check.

22 Q. Okay. How do you -- how are you keeping
23 track of which checks were approved or not?

24 A. I had no purpose of doing that at the time.
25 I mean, if the check was written and he signed it and

1 it cleared the bank, you know, I just was doing my
2 part of that process, which was reconciling the bank
3 account.

4 Q. Okay. And to reconcile the bank account
5 you were just pulling a printout from ADP; is that
6 right?

7 A. Yes, sir.

8 Q. Okay. And then you were looking at the
9 printout from ADP, and you were looking at the checks
10 that were coming through the bank; is that right?

11 A. Yes.

12 Q. And you were just -- as long as it was on
13 that ADP sheet you were --

14 A. Flying as fast as I could, 10,000, 10,000,
15 20, 20, you know, \$12, \$12, debit, credit.

16 Q. So let me ask this then, let me see if
17 you'd agree with this: During your tenure there, and
18 this is during your period of time I'll ask you this,
19 do you agree that this was part of the process for
20 check writing at Overland during your time, a check
21 can only be generated by accounting personnel with
22 access to check writing in the ADP system?

23 A. Yes.

24 Q. Okay. A check request must be presented to
25 accounting personnel that detailed payee, check

1 CERTIFICATE OF REPORTER
2

3 I, Michele E. Becker, Registered Professional
4 Reporter and Notary Public for the State of South Carolina
5 at Large, do hereby certify that the foregoing transcript
6 is a true, accurate, and complete record.

7 I further certify that I am neither related
8 to nor counsel for any party to the cause pending or
9 interested in the events thereof.

10 Witness my hand, I have hereunto affixed my
11 official seal this 18th day of August, 2014 at Greenville,
12 Greenville County, South Carolina.
13
14
15
16
17
18
19
20

21 _____
22 Michele E. Becker,
23 Registered Merit Reporter
24 My Commission expires
25 November 21, 2021

EXHIBIT C

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

OVERLAND, INC., D/B/A LAND ROVER OF
GREENVILLE,

Plaintiff,

vs.

CASE NO. 2010-CP-23-5880

LARA MARIE NANCE; CHARLIE ANDREW
NANCE; ROGER FIELDS; ADP DEALER
SERVICES GROUP; PIEDMONT AUTOMOTIVE
OF ANDERSON, INC., D/B/A PIEDMONT
CHRYSLER JEEP DODGE; PIEDMONT
AUTOMOTIVE OF ANDERSON, SOUTH
CAROLINA, LLC, D/B/A APEX
AUTOMOTIVE; SYNOVUS FINANCIAL
CORPORATION, D/B/A NBSC; BRANCH
BANKING AND TRUST COMPANY; BANK OF
AMERICA CORPORATION; AND SUNTRUST
BANKS, INC.,

Defendants.

DEPOSITION OF: JACK L. FRASHER, JR.

DATE: May 22, 2014

A. WILLIAM ROBERTS, JR. & ASSOCIATES

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1 A. Right.

2 Q. Okay. Doctor, you're familiar with Lara
3 Nance, I assume.

4 A. Certainly.

5 Q. Okay. Lara Nance worked for you from 2006
6 through 2010, early 2010, correct?

7 A. (Witness nods head.)

8 Q. Is that correct?

9 A. January -- late January 2010. That's
10 correct.

11 Q. Okay. Dr. Frasher, had you known that Lara
12 Nance had been twice convicted of check fraud, would
13 you have hired Lara Nance in 2006?

14 A. No.

15 Q. Okay. Lara Nance was in your
16 accounts-payable department, correct?

17 A. Yes.

18 Q. Okay. And in your accounts-payable
19 department, she was responsible for paying your
20 vendors; is that correct?

21 A. Right. Yes.

22 Q. Okay. Keeping track of the invoices and
23 paying your vendors, correct?

24 A. Yes.

25 Q. Okay. In that role, she had access to your

1 accounting system, correct?

2 A. Limited access. You know, we have a
3 controller who has complete access. And the -- the
4 way automotive computer systems are designed, you
5 know, you can -- you can have variable access
6 depending on the -- the position the person is in.

7 Q. Okay. She had the ability in your system
8 to have a check drawn and printed, correct?

9 A. Right.

10 Q. Okay. And you would agree with me that
11 somebody in that position, if you're hiring somebody
12 in that position, it would be helpful to know whether
13 that person had a criminal history for check fraud,
14 correct?

15 A. Absolutely.

16 Q. Okay. What did Overland do to determine
17 whether Ms. Nance had a criminal history for check
18 fraud when you hired her in 2006?

19 A. At the time we were doing background checks
20 through the Greenville Law Enforcement Center.

21 Q. Okay.

22 A. And we, you know, had been doing that for a
23 good while and did that with all potential employees,
24 along with, you know, a drug screening, driving
25 record. Because in our business, that --

1 Q. Okay. Were you responsible for setting the
2 protocols for the background check through the law
3 enforcement division?

4 A. Well, ultimately, no. I mean, I -- as far
5 as that goes, we thought that was standard. We just
6 thought that was -- if you have a question about
7 the -- the law and anyone that's violated it, it just
8 seemed to be what people were doing and what we were
9 led to do. And I don't know details on that. I
10 don't remember.

11 Q. Did they generate a report?

12 A. Yeah.

13 Q. Okay. Do you have that report?

14 A. Not here, but I...

15 Q. Would that...

16 A. I would assume, but I don't know.

17 Q. Would that report have been in Ms. Nance'
18 employment file?

19 A. I don't know. I would assume, yes.

20 Q. You're aware today and you became aware
21 then that Ms. Nance was on probation when you hired
22 her in 2006, right?

23 A. Oh, yes.

24 Q. And she was on probation for check fraud,
25 correct?

1 A. Again, it's a very frustrating time, so I
2 heard forgery working in a car dealership.

3 Q. Tell me about that. What do you mean, you
4 heard? Where did you hear forgery working in...

5 A. Well, that's -- again, I -- once all of
6 this was uncovered, I was dealing with a number of
7 professionals, and just -- that's what I was --
8 that's what was uncovered through another --
9 actually, through Secret Service.

10 Q. Are you aware that her records and her
11 record of past forgeries and check fraud are
12 available through the South Carolina Law Enforcement
13 Division?

14 A. I told you what I know.

15 Q. Okay. I'm going to show you a document
16 which we'll mark as Exhibit 1.

17 A. Is that for me?

18 MR. REID: What are we going to call this,
19 Josh, Defendant Synovus Exhibit 1 or...

20 MR. HOWARD: Just call it Defendant's
21 Exhibit 1.

22 MR. REID: Okay.

23 MR. HOWARD: Okay.

24 (DFT. EXH. 1, Criminal Record Check, was
25 marked for identification.)

1 MR. REID: And, Josh, this -- this isn't
2 something that's Bates-stamped, so this isn't --
3 wasn't previously part of discovery, or is this just
4 an un-Bates-stamped...

5 MR. HOWARD: Did y'all -- it might be. It
6 might be Bates-stamped now.

7 MR. CLINKSCALE: You want a
8 Bates-stamped -- let me see if we have a
9 Bates-stamped copy.

10 MR. HOWARD: We can have them substitute...

11 MR. REID: Do we want to go off the record?

12 MR. HOWARD: Let's go off the record real
13 quick.

14 (Off-the-record conference.)

15 BY MR. HOWARD:

16 Q. Dr. Frasher, you're reviewing the document
17 I just put in front of you marked as Exhibit 1,
18 correct?

19 A. (Witness nods head.)

20 Q. Okay. Have you seen this document before?

21 A. I've seen several documents. I don't know
22 if I've seen this one, but --

23 Q. Okay.

24 A. -- I've seen similar.

25 Q. Do you -- do you recognize the name Lara.

1 Nance on the first page that's been handwritten in?

2 A. (Witness nods head.)

3 Q. You do?

4 A. Certainly. Yes.

5 Q. Do you know whether that's her date of
6 birth?

7 A. Oh, no. I do not.

8 Q. Okay. Do you know whether that's her
9 Social Security number?

10 A. No. I do not.

11 Q. Okay. In the course of hiring her, you
12 would have had her date of birth available to you,
13 correct?

14 A. Yes.

15 Q. You would have received her driver's
16 license, correct?

17 A. Yes.

18 Q. And you did receive her driver's license.
19 I can show you...

20 A. I would assume.

21 Q. I can show you her employment records. And
22 in the course of hiring her, you would have had her
23 Social Security number, correct?

24 A. Yes.

25 Q. Because you would have had to have received

1 her Social Security card to hire her.

2 A. Well, I -- again, I wasn't personally doing
3 all of that.

4 Q. Okay. Overland would have --

5 A. Overland.

6 Q. -- been receiving this information.

7 You see on the second page of this
8 document, you see down at the bottom of the page,
9 where you'll see the last set of dotted lines. Do
10 you see that?

11 A. Uh-huh.

12 Q. It starts just below that. Dated
13 March 25th, 2003. Do you see that?

14 A. Right.

15 Q. Okay. And do you see to the right, arrest
16 charge for forgery, correct?

17 A. Yes.

18 Q. Okay. And then you go down to the middle
19 of the third page, correct? Are you down in the
20 middle of the third page?

21 A. Uh-huh.

22 Q. And you see, starting with CIT-16-13-10; do
23 you see that?

24 A. Yes.

25 Q. Okay. Felony, out to the right of that?

1 A. Yes.

2 Q. And you see out to the right of that:
3 Court charge, forgery; value, 5,000 or more.
4 Correct?

5 A. Yes.

6 Q. Okay. And that's dated 7/21/2005, correct?
7 Do you see that --

8 A. Uh-huh.

9 Q. -- down below?

10 A. Yeah.

11 Q. Okay. And we can go on and on, but you
12 would agree with me that there are -- one, two,
13 three, four, five -- six pages on her arrest record,
14 correct?

15 A. Yeah.

16 Q. And this arrest record is for South
17 Carolina, correct?

18 A. Yes. It says -- yeah. South Carolina Law
19 Enforcement.

20 Q. Okay. And these are all dated prior to
21 your hiring of Ms. Nance, correct?

22 A. Well, I'm seeing different dates.

23 Q. You can look through the arrest record.

24 A. I guess it's the court dates that are
25 after.

1 drug-free workplace. And, you know, I mean, it
2 would -- we're pretty transparent on that. And we've
3 had some people just disappear and not -- not do the
4 testing and answer their own question then.

5 Q. Okay. Now, you're aware, the address that
6 she gave you for her current -- where she was living
7 at the time when you hired her -- we can go to --
8 there are several pages, but we'll just go to FLF
9 120. She actually gave you two here. Do you see
10 that? She gave you 803 Chantilly Lane, Anderson,
11 with a ZIP code. Do you see that at the top? I'm
12 sorry. Section 1. Employee information.

13 A. Uh-huh.

14 Q. Okay.

15 A. And right beside it, 100 Lake View Drive.

16 Q. Right. Townville.

17 A. Uh-huh.

18 Q. That's on her driver's license, I'll
19 represent to you, on FLF 121.

20 Do you know whether the background check
21 you performed looked in Anderson County?

22 A. My understanding, our background check
23 was -- what we thought was a background check was not
24 near as thorough as, of course, what we're doing now.
25 But, you know, it ends up, from what I gather, it's

1 Greenville County. Which -- or -- or South Carolina
2 if you go beyond that. Which, you know, I'm not
3 going to get on a soapbox about if we want crime to
4 stop, we should have national background checks. But
5 that's just -- at the time we thought we were doing a
6 background check that was thorough.

7 Q. Did you ever consult anybody about the type
8 of background check you should be doing?

9 A. No. Basically, in the literature and
10 everything, it was background check. Not that I
11 recall consulting anyone.

12 Q. Okay. Who's going to have the most --
13 who's going to be the person most knowledgeable from
14 your company about the background checks you were
15 doing back in May of 2006?

16 A. I would imagine the most knowledgeable
17 would be the people that do it. We were just -- you
18 know, the controller was managing to give everyone
19 the pertinent forms, or the office manager or the
20 general manager of each store, and in some cases, you
21 know, having the person go out and bring back; in
22 other cases, ordering the -- the tests and that sort
23 of thing.

24 So it's just -- it was a procedure. As far
25 as who's the most knowledgeable, obviously, we

1 weren't knowledgeable enough with the -- the
2 thoroughness.

3 Q. Well, who was doing it, when you said the
4 most knowledgeable person would be the person that
5 was doing it?

6 A. The law enforcement center was providing.
7 But as far as who was doing it, the law enforcement
8 center. I don't --

9 Q. Okay.

10 A. -- I don't understand the question.

11 Q. Who -- well, let me ask it this way: Who
12 from Overland -- from your office in Greenville where
13 Ms. Nance was hired, who would have ordered the
14 background check on Ms. Nance?

15 A. As I said, the controller. But we had
16 multiple dealerships at the time.

17 Q. Uh-huh.

18 A. And in many cases -- for example, the
19 Asheville dealership, that would be in the hands of
20 Clayton, the office manager that is distributing the
21 paperwork or ordering that. But it could be the --
22 the manager of the dealership was involved. He was
23 the one interviewing. He may have had the service
24 manager involved. But as far as that, I would think
25 the office manager or the controller as far -- we had

1 was the one responsible for gathering the paperwork,
2 employee file, and...

3 Q. I'm just asking -- all I want to know is --
4 I just want you to answer...

5 A. I don't -- I don't know anymore than that.

6 Q. Okay. All I'm asking is to the best of
7 your knowledge, Gwen Patton was the person that had
8 ordered the background check of Lara Nance.

9 A. When Lara was employed, she was the
10 controller, I believe. So she would have been.

11 Q. And she would have been the person who
12 would have ordered the background check?

13 A. Not necessarily in person. Again, that
14 could have been assigned to the Greenville manager.
15 But my -- my -- I just think ultimately, she's the
16 one responsible for making sure we have all the
17 documents. She knows no one is to be put on payroll
18 or anything until all of the information was in. So
19 the background check, as well as the drug test.

20 Which I'm the only one they communicate on
21 the drug -- with on the drug test, for privacy.
22 We've over -- we think we've overprotected that. But
23 the drug results come to me only. I provide that to
24 her or to the manager of the individual store. So...

25 Q. Do you order the drug results --

1 Q. Well, you can look through it again.

2 A. You want me to?

3 Q. I really don't want you to, but you're
4 welcome to. But I'm not going to stop you.

5 A. I don't -- I don't see it. I would assume
6 we don't have that here. Except for this data card.

7 Q. Okay.

8 A. The employee data card that gives her
9 different -- her previous address, her address, the
10 State of South Carolina new-hire reporting form.

11 Q. Uh-huh.

12 A. And then date of birth.

13 Q. Those are FLF 122 and 123.

14 A. Right.

15 Q. And those don't contain references or past
16 employment history, do they?

17 A. No. Those forms do not. You're right.
18 That's most of what I see as far as her personal.

19 Q. Okay. Let's just -- then we'll finish with
20 this. In that stack of documents you just reviewed,
21 which was represented to us to be her employment
22 file, there is no application, correct?

23 A. Correct.

24 Q. There is no resumé.

25 A. Correct.

1 Q. There is no reference sheet.

2 A. Correct.

3 Q. There are no notes in there of references
4 or past work history.

5 A. Correct.

6 Q. There's no information on past work history
7 in there, correct?

8 A. I believe that's correct.

9 Q. Okay. Thank you, Doctor.

10 Before we get too far into this, Doctor, I
11 want you to -- I'm going to mark this as Exhibit 3.

12 (DFT. EXH. 3, Handwriting Samples, was
13 marked for identification.)

14 BY MR. HOWARD:

15 Q. And I'll make copies for everybody.

16 Do you have a pen, Doctor?

17 A. Huh?

18 Q. Do you have a pen?

19 A. Uh-huh.

20 Q. Can you sign your name ten times, please?

21 A. I'll have writer's cramp.

22 MR. REID: You can take a break if you
23 want. You don't have to sign it ten times as fast as
24 you can.

25 A. Actually, I've done some J.L., some Jack L.

1 of concern of overpayment to vendors?

2 A. No. I did not.

3 Q. Had you looked at all the bank
4 statements -- you or anyone at Overland -- at the
5 bank statements and reconciled those with the
6 invoices, would you have been able to detect what
7 Lara Nance was doing --

8 MR. REID: Object to the form.

9 BY MS. GRANT:

10 Q. -- prior to the time?

11 A. I -- first of all, I -- I don't and have
12 not. As far as -- I -- I think it would be best to
13 ask them.

14 Q. But you, as president --

15 A. They could probably better explain.

16 Q. -- of Overland, I just want to know your
17 opinion. Had the controller done what you've already
18 said was her job to do, which was to reconcile the
19 statements to the invoices, had she done that,
20 would...

21 A. No. They were to legitimate vendors,
22 and -- I mean, there was nothing to alarm anyone at
23 that point.

24 Q. Had she reviewed the actual -- not only the
25 invoices, but noticed whether or not the parts had

1 political litmus.

2 A. I'm not a member of the republican party,
3 but I get their mailings for whatever reason. Maybe
4 years ago, you know, I signed the wrong thing.

5 Q. Rather, the point of my question was to
6 gauge whether you are active and, therefore,
7 committing any time to that endeavor. And I --

8 A. No. I...

9 Q. -- think you're implying that you are
10 inactive.

11 A. I am politically active. I was at a
12 luncheon yesterday for my optometry profession at the
13 Capital City Club. So I mean, I know a number of the
14 Upstate legislators, and I -- but I never plan to
15 run. I -- I do, you know, care; but it gets
16 frustrating for all of us at times.

17 Q. Amen to that.

18 So we've got six dealerships, four pieces
19 of property, a fifth piece of property with a lease,
20 a lot of extracurricular activities. It's fair to
21 say you're a pretty busy guy, aren't you?

22 A. I would say. But I think six dealerships
23 is a little bit -- we don't think of it that way. I
24 think of our dealerships as, right now, three: The
25 motorcycles, the cars in Greenville, and the cars in

1 Asheville. And that's -- back then there were cars
2 in Columbia.

3 Q. Yes.

4 A. So that would have been four.

5 Q. And I -- and I should have been clear. My
6 question goes to the Nance era. During the Nance
7 era, you had --

8 A. Four.

9 Q. -- you had the three Land Rovers, a
10 Jaguar --

11 A. All part of the same.

12 Q. -- a Lotus and a --

13 A. Even the financial statement...

14 Q. -- a Lotus and -- I under- -- we're
15 going to get to that. But there were six, in
16 essence, franchise agreements.

17 A. Oh, yeah. There were more than that.

18 Q. What other ones were there?

19 A. In the motorcycle side, you've got BMW,
20 Ducati, the Nance era.

21 Q. Seven franchise agreements.

22 A. Uh-huh.

23 Q. I think I did the math right that time. So
24 I go back to my observation, during the Nance era,
25 you were a pretty busy fellow.

1 A. Sure.

2 Q. When you sold your optometry practice, did
3 you keep any interest in it?

4 A. No.

5 Q. Okay. So that was a complete walk-away.

6 A. Yes.

7 Q. I have...

8 A. I lease the building. Excuse me.

9 Q. I was going to ask that.

10 A. My colleague leased the building for six
11 years, or the --

12 Q. And you...

13 A. -- bulk of the building.

14 Q. And you were a landlord in that respect.

15 A. Uh-huh.

16 Q. Okay. She...

17 A. Not now.

18 Q. She needs to transcribe a yes or a no.

19 A. Yes.

20 Q. She can't transcribe a nod or a wink or a
21 guttural response.

22 A. Yeah.

23 Q. I have been in your Asheville store. I
24 have been in your Greenville store. I've never been
25 in your Columbia store. Each one of those stores has

1 paraphrasing -- I had people doing that, are you
2 saying that for the most part, you exercised general
3 supervisory authority as the chief executive, but
4 were not handling all of the day-to-day operations
5 within any of these dealerships; is that fair?

6 A. It's hard to generalize. I'm considered an
7 active owner, I think, by the manufacturer. I'm not
8 an absentee owner. Via phone calls, e-mail, I'm --
9 I'm involved with primarily the management of each.
10 I do visit. I -- I charge the manager of each store
11 with day-to-day. Mickey has been charged with
12 coaching and leading the managers, and they're
13 working with the controller. It's -- I'm involved.
14 I'm just not -- I mean, I've allowed Mickey to
15 basically deliver the -- you know, the processes
16 primarily lately.

17 Q. During the Nance era, how much time did you
18 spend in the Greenville dealership each day?

19 A. Physically in the dealership?

20 Q. Yes, sir.

21 A. I would say probably 15 hours a week,
22 something like that.

23 Q. About two hours -- about three hours a day?

24 A. Yeah. And it may vary. If I'm in
25 Asheville one day, I would spend no time.

1 A. Yeah. But not as common. It was more of
2 a -- you know, seeing them. Which, you know, I saw
3 this lady yesterday, but I think she habitually is
4 reminding me of that so that I don't miss that.

5 Q. When you signed checks during -- when you
6 signed checks during the Nance era, would you be
7 alone in the room doing that, or would there be the
8 controller or somebody --

9 A. No.

10 Q. -- from accounts payable --

11 A. Usually I was initially alone.

12 Q. -- there, as well?

13 A. And I would just simply separate the checks
14 that I wasn't 100 percent sure about or I didn't feel
15 the backup was adequate. And most every time if I
16 have a stack of checks, I'm going to end up with a
17 smaller stack that they're going to have to give me
18 further information or -- or look into and make sure
19 the charges were right or whatever.

20 Q. You would look at each and every check and
21 put your maker's signature on that check if it was in
22 the stack.

23 A. Yes.

24 Q. Okay. And who would be giving you that
25 stack, your controller?

1 A. She was aware of it; but typically, in the
2 routine, that's the payable clerk or -- you know,
3 they were part time sometimes, like Lara. And it may
4 be Lissette that presents them to me, but...

5 Q. So several times a month you would be
6 signing a big stack of checks, and your controller
7 and possibly -- well, more likely -- excuse me -- the
8 accounts-payable person would also be looking at each
9 and every one of those checks.

10 A. Yeah. She would be generating them
11 generally.

12 Q. And looking at them once they're signed,
13 right?

14 A. Yes. I would imagine.

15 Q. And who would be responsible for pushing
16 them out the door?

17 A. I believe that most of the time, the
18 payable clerk.

19 Q. And were there times when somebody would
20 come back and say, Jack, you missed three checks here
21 in this stack of 100 checks?

22 A. Not three, but I would occasionally get a
23 reminder, hey, you didn't sign this one.

24 Q. So there was somebody looking behind you
25 with respect to your signature to make sure that it

1 Q. So you have no knowledge about SunTrust's
2 procedure for --

3 A. No.

4 Q. -- check processing.

5 A. No. They had a very friendly branch
6 manager who was working hard to get our business, and
7 a nice person, and just -- they brought -- she
8 brought in a guy with the credit-card processing,
9 very aggressive, very -- very hope -- or helpful, and
10 we just, you know, switched to them.

11 Q. What was her name? I'm sorry. Something
12 Brantley?

13 A. Susan.

14 Q. Susan Brantley. Is that what you said?

15 A. That doesn't sound right.

16 Q. What was the name you just said?

17 A. Susan. But locally here -- left the bank
18 for a while, came back. Susan...

19 Q. Okay.

20 A. I think she was even, at one point, sort of
21 the branch manager, although our opinion is, in
22 Greenville, SunTrust doesn't exist. They don't seem
23 to have a decision maker here.

24 Q. Okay. So you don't know if SunTrust's
25 procedures for check processing are different from --

1 Q. I'm going to hand you Exhibits 18 through
2 24. Here you go. I'll give you a chance to review
3 those.

4 A. Okay.

5 MS. MAXWELL: Go off the record for a
6 second.

7 (Off-the-record conference.)

8 BY MS. MAXWELL:

9 Q. Now, Dr. Frasher, what do you contend, as
10 the owner of Overland, that SunTrust did to cause you
11 harm?

12 A. Well, what seemed odd -- and I didn't know
13 what happened -- was just that she could open
14 accounts in the name of businesses that existed. And
15 I was always under the impression that if you wrote a
16 check to someone or to some business, that you were
17 kind of protecting yourself, and no one else could
18 just take it and deposit or -- deposit it or cash it.
19 And so I learned a lot about things that could --
20 could happen as a result of this.

21 So that's -- you know, opening an account
22 in the name of a business that existed is, I think,
23 the thing that -- I don't know all the details of --
24 about which one SunTrust had, et cetera, off the top
25 of my head. But, you know, maybe Mike is the most

1 knowledgeable. But that's my understanding. And
2 from what I'm seeing here, it looks like she's
3 handling Taylor Enterprises, our bulk-oil supplier,
4 and doing these smaller checks, and multiples in some
5 cases. That's what -- you know, I don't know what
6 this cash -- maybe she showed up with cash.

7 Q. Okay. And have you seen these documents
8 before?

9 A. Those exact ones, I -- I don't recall.

10 Q. Okay.

11 A. I don't...

12 Q. Well, if I represented that they were
13 deposits into her account at SunTrust, you would have
14 no reason to disagree?

15 A. No.

16 Q. Okay. Now, there's a total of seven
17 deposits all in all, correct, including this initial
18 200?

19 A. I haven't counted them, but there's --
20 there's -- there's three on this one.

21 Q. Three checks?

22 A. One deposit.

23 Q. But one deposit.

24 A. Correct. Yeah. So there's two. There's
25 three more checks and one deposit. Three. Getting a

1 little greedy. Nope. Still three. Four. Five.

2 Yeah. Seven.

3 Q. Okay. And that includes the
4 account-opening deposit of cash, correct?

5 A. Correct.

6 Q. So there's only six deposits of checks.

7 A. Right.

8 Q. Okay. And what's the -- the date of that
9 account opening is January 19th --

10 A. Okay.

11 Q. -- 2010, correct?

12 A. I'm sure it is. One more. Where is the
13 date on that one, the second page or -- or here?

14 Q. I believe it's right there in that stamp --

15 A. Yeah. Okay.

16 Q. -- on the second page.

17 Okay. And the date on the last deposit is
18 January 27th, 2010, correct? On Exhibit 24.

19 A. 27th.

20 Q. The 27th, correct?

21 A. Uh-huh.

22 Q. So just about a week of deposits, from the
23 19th to the 27th.

24 A. Yeah.

25 Q. Okay. And each of those deposits had three

1 checks, correct?

2 A. I believe that's right.

3 Q. All right. And each of those deposits
4 included one from Greenville Overland, one from
5 Columbia Overland, and one from Asheville, correct?

6 A. I had not noticed all of that, but...

7 Q. I'll give you a chance to review.

8 A. Seems like that's the case so far. They
9 all seem that way.

10 Q. Okay.

11 A. Okay. I assume that's right. Yeah. It
12 appears that way.

13 Q. Now, in order for SunTrust to suspect
14 something unusual, there would have to be some sort
15 of change in activity or in the routine activity,
16 correct?

17 MR. REID: Object to the form.

18 A. I don't know enough about your business to
19 say that.

20 BY MS. MAXWELL:

21 Q. Well, in your general business experience,
22 what causes you to raise a red flag? It would be
23 sort of a difference in the ordinary course, correct?

24 MR. REID: Object to the form.

25 A. Well, I'm just -- again, my only -- my only

1 surprise is I didn't know that someone could show up
2 and open an account in a business name.

3 BY MS. MAXWELL:

4 Q. I'm not talking about that. I'm just
5 asking in your experience, what would cause -- you
6 know, something -- business as usual, and then
7 something different happens, and that would cause you
8 to raise a red flag, correct?

9 MR. REID: Object to the form.

10 A. I'm assuming that would be a reason to --
11 to question things.

12 BY MS. MAXWELL:

13 Q. And...

14 A. One of many, probably.

15 Q. And as we've, you know, seen through these
16 documents, she opened the account on January 27th --
17 or excuse me -- January 19th.

18 A. Right.

19 Q. And then for almost six consecutive days,
20 she deposited three checks each, one from each
21 location, correct?

22 MR. REID: Object to the form.

23 A. I have to see the dates, but yeah. The
24 19th, she deposited three. The 20th, she deposited
25 three. The 21st she deposited three. I'm not -- I

1 might be missing a date.

2 BY MS. MAXWELL:

3 Q. The 21st?

4 A. 22nd, I think she deposited three. Boy,
5 she didn't miss a trick. Then she jumps to the next
6 week, I guess, the 26th.

7 Q. Presumably a weekend. Who knows?

8 A. Yeah. And then the 27th. And then she --
9 I guess the 28th was the end of the road, so that...

10 Q. So in this week span, the same activity,
11 each deposit, correct?

12 A. Other than the initial deposit with cash,
13 right.

14 Q. So based on that limited period from start
15 to finish, there was nothing out of the ordinary
16 based on this activity, correct?

17 MR. REID: Object to the form.

18 A. I'm just curious, again, how you go in and
19 show up with cash and open an account.

20 BY MS. MAXWELL:

21 Q. Well, based on -- from the 19th...

22 A. I mean, the whole thing looks unusual.

23 Q. Wait a minute. Let me finish my question.

24 From the 19th to the 27th, there was
25 nothing -- they're all almost -- nearly identical

1 took them out of circulation.

2 Q. And just to make sure I clarify, the only
3 thing that you think SunTrust did wrong or the ways
4 that you were harmed by SunTrust was by opening an
5 account in the name of a known business?

6 MR. REID: Object to the form.

7 A. Oh, I -- I don't know of anything else.

8 BY MS. MAXWELL:

9 Q. Okay. And they would have no way to know
10 your signature; I believe that's what you testified,
11 correct?

12 A. Other than unless they're really studying
13 the payments I'm making, you know, on my personal
14 side. Otherwise...

15 MS. MAXWELL: All right. I have no further
16 questions.

17 EXAMINATION

18 BY MR. MOORE:

19 Q. Dr. Frasher, my name is David Moore.

20 A. Hey, David.

21 Q. If it's okay with you, I'm not going to
22 move.

23 A. That's fine.

24 Q. I represent Roger Fields. And because he
25 is not a bank, my situation is a little bit different

1 A. Right.

2 Q. -- like Lara Nance who might steal from
3 you.

4 The first thing we've discussed earlier
5 today is the hiring process you went through, I
6 believe, correct?

7 A. Correct.

8 Q. And, of course, with the hiring process, if
9 you can discover that Lara Nance or someone else is
10 an embezzler or might -- or might steal from you,
11 you're not going to hire them; is that correct?

12 A. Correct.

13 Q. So it has the effect of basically
14 eliminating that particular risk. Now, my
15 understanding from your previous testimony is you
16 think y'all went through a process through the
17 Greenville Law Enforcement Center to obtain
18 information, correct?

19 A. Correct.

20 Q. Roger Fields did not interfere with your
21 obtaining that type of information, did he?

22 A. No.

23 Q. He's had no input there whatsoever.

24 A. No.

25 Q. Okay. I assume you also interviewed Lara

1 Nance before you hired her, correct?

2 A. Yes.

3 Q. Okay. And do you recall whether one of the
4 questions was whether she had ever been convicted a
5 crime?

6 A. It's not a question I asked, certainly.

7 Q. Okay.

8 A. I was the final person that interviewed
9 her.

10 Q. Okay. Who else interviewed her; do you
11 recall?

12 A. It would -- it would have been, at that
13 time, Gwen.

14 Q. Right.

15 A. Perhaps Greg, as the manager of the
16 Greenville operation. But probably Gwen would be the
17 primary. Whether she pulled Lissette in, I don't
18 know.

19 Q. Okay. Typically, do you know whether they
20 explore whether she has a criminal record of any
21 sort?

22 A. Well, the criminal background check and the
23 other things I mentioned are -- you know, the highway
24 department, the drug test and all those typical
25 things; that's -- that's what we did.

1 Q. Okay.

2 A. We just weren't doing it adequately with
3 the background check apparently.

4 Q. If she told you she didn't have any
5 criminal background, obviously, she interfered with
6 your process there of trying to keep someone with a
7 criminal background from being employed, right?

8 A. Right.

9 Q. Roger Fields had nothing to do with that
10 either; am I correct?

11 A. Correct.

12 Q. Okay. Now, another thing that you did was
13 you hired ADP to help you with regard to the issuance
14 of checks and paying vendors and that type thing. Am
15 I right?

16 A. Yes.

17 Q. Okay. And Lara Nance was smart enough, I
18 guess, to basically defeat that particular activity,
19 as well; am I correct on that?

20 A. Yes. Apparently so.

21 Q. Okay. Do you know whether Roger Fields had
22 anything to do with that?

23 A. No.

24 Q. Okay. Do you have anybody who can testify
25 to that effect?

1 Q. Sure.

2 A. But yes, she had access.

3 Q. Roger Fields had nothing to do with that
4 either.

5 A. Not that I know of.

6 Q. Okay. Now, you touched upon this a little
7 while ago. Another method you can do to protect
8 yourself is to undertake audits. My understanding is
9 that was not done.

10 A. That was not done and not recommended by my
11 CPA.

12 Q. Okay. Do you now undertake audits?

13 A. My CPA still doesn't think we need a
14 full-blown audit.

15 Q. Okay.

16 A. I -- I think there -- I surveyed a number
17 of car dealers. A few do, with an automotive
18 specialist. More -- more don't. More rely on the
19 ADP or the Reynolds & Reynolds.

20 Q. If an annual audit had been done in this
21 case --

22 A. Uh-huh.

23 Q. -- would you have been able to catch Lara
24 Nance with regard to what she was doing?

25 A. I was told by an accountant, probably not;

1 from 9 to 11 to \$13 per hour. Does that sound right
2 to you?

3 A. That doesn't sound unusual.

4 Q. That's a 31 percent increase.

5 A. She started at a very low amount. And, you
6 know, again, hindsight, we can say, wow, she was
7 willing to do that to come into a business that she
8 was familiar with, you know, the accounting system,
9 et cetera.

10 Q. '08, '09 were pretty tough times for the
11 economy, weren't they?

12 A. They were. At the end of the day, a lot of
13 people make a pretty good bit in the automobile
14 industry, and 13 an hour is not a ton of money in
15 that -- that segment. It's -- you know, it...

16 Q. This was also a time when Land Rover --
17 your Overland franchises had a cash-flow problem.

18 A. Sure.

19 Q. Was there anybody else whose income
20 increased 31 percent during that same
21 two-and-a-half-year period?

22 A. Well, again, they were -- most people were
23 making a lot more money than Lara Nance in the
24 business. But as far as percentage, I don't know.

25 Q. At your place.

EXAMINATION

BY MR. SHEEDY:

Q. On the checks where you claim that there was an incomplete or missing payee endorsement, did those checks also contain a forged maker's signature of your name?

A. Not that I recall.

Q. So you are aware of checks that have genuine Jack Frasher signatures but improper payee endorsements? Remember your answer to Mr. Howard earlier.

A. Wait a minute. Wait a minute. Wait. Let me make sure I understand the question.

Q. Let me rephrase.

A. I'm not going to have inconsistencies, so just let me...

Q. Let me rephrase. Do you understand what a forged maker's signature is?

A. That's the signature on the check.

Q. That's your signature.

A. Right. If it's me. Right.

Q. Right. Are you aware of any checks that are included in your claim that do not have a forged maker's signature?

A. No.

1 Q. They all have forged maker's signatures,
2 don't they?

3 A. As far as I know.

4 Q. Okay. So even if the payee endorsements
5 had been complete or in accordance with the check,
6 the checks still had forged maker endorsements,
7 didn't they?

8 A. I hope I'm understanding what you're
9 saying. You know the policy I've -- I instituted a
10 long time ago about two people needed to sign if it
11 wasn't me. If you're talking about my signature
12 and -- and a forged -- my signature and a forgery...

13 Q. I want to make sure you understand my
14 question.

15 A. I'm still not a hundred percent sure I'm
16 getting it.

17 Q. When you just went through these checks
18 with -- with Hunter a moment ago --

19 A. Right.

20 Q. -- and you said some of them had for
21 deposit only, right?

22 A. Right.

23 Q. And you said some of them, the endorsement
24 on the back wasn't the same as the payee on the
25 front.

1 A. Right.

2 Q. Okay. Every single one of those instance
3 involved a check that also had your name forged, too,
4 didn't it?

5 A. Most likely.

6 Q. Okay.

7 A. Yeah.

8 MR. SHEEDY: Thank you.

9 MR. HOWARD: Done.

10 (The deposition concluded at 7:28 p.m.)

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CERTIFICATE OF REPORTER

I, Kathy P. Taylor, Registered Professional Reporter and Notary Public for the State of South Carolina at large, do hereby certify that the foregoing transcript is a true, accurate and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

WITNESS MY HAND, I have hereunto affixed my official seal this 2nd day of June, 2014, at Greenville County, South Carolina.

KATHY P. TAYLOR
REGISTERED PROFESSIONAL REPORTER
MY COMMISSION EXPIRES
JUNE 13, 2017

EXHIBIT D

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF GREENVILLE

Overland, Inc., d/b/a
Land Rover of Greenville,
Plaintiff,

vs. CASE NO. 2010-CP-23-5880

Lara Marie Nance, Charlie Andrew
Nance, Roger Fields, ADP Dealer
Services Group, Piedmont Automotive of Anderson,
Inc. d/b/a Piedmont Chrysler Jeep Dodge,
Piedmont Automotive of Anderson South
Carolina, LLC d/b/a Apex Automotive, and
Synovus Financial Corporation d/b/a
NBSC, Branch Banking and Trust Company,
Bank of America Corporation, and SunTrust
Banks, Inc.,
Defendants.

DEPOSITION OF: SUSAN M. UNSER

DATE: July 18, 2014

TIME: 9:17 a.m.

LOCATION: LAW OFFICES OF HAYNSWORTH SINKLER
BOYD, P.A.
One North Main Street, 2nd Floor
Greenville, SC

TAKEN BY: Counsel for the Defendants

REPORTED BY: Susan M. Valsecchi, RPR, CRR
Certified Realtime Reporter

A. WILLIAM ROBERTS, JR.; & ASSOCIATES

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1 her notice.

2 Q. And that would be notice that he was
3 going to let her go?

4 A. Yes.

5 Q. And this was in June of 2009 or, July?

6 A. I think it was July.

7 Q. July of 2009?

8 I am guessing that that was not well
9 received by Ms. Patton.

10 A. No.

11 Q. Did you and Gwen have any sort of
12 communication, after he had given Gwen notice,
13 about the fact that she was being asked to leave?

14 A. Other than she taught me -- showed me
15 how she did payroll.

16 Q. Yes.

17 A. And she just said, I can't do this
18 anymore, and she left.

19 Q. So she didn't complete her showing you
20 how to do payroll?

21 A. She did most of it. I mean, she showed
22 me most of it.

23 Q. I see. So she left by August of 2009?

24 A. She left in July.

25 Q. She left in July of 2009?

1 A. Yes.

2 Q. Upon her leaving, were you then
3 ascended to the position of controller?

4 A. Yes.

5 Q. Now, I understand this is somebody
6 else's testimony, but I'm trying to get this
7 straight in my mind.

8 When we deposed Lara Nance, Lara Nance
9 indicated that there was a time when the dealership
10 didn't have a controller.

11 Do you know anything about that?

12 A. No, sir.

13 Q. There wasn't any lapse between when you
14 were promoted -- well, between when Gwen left and
15 you were promoted?

16 A. No.

17 Q. There was also some testimony
18 indicating that there had been a time when maybe
19 you were up in the showroom area performing some
20 functions, rather than being down in the accounting
21 domain.

22 Is that your recollection of events?

23 A. No.

24 Q. Okay. So you came on in the accounting
25 function, had about six weeks, and then for all

1 or data that would suggest what the expense is for?

2 A. Through payables, that is correct.

3 Q. Now, I understand the on-demand
4 function is different, right?

5 A. Right.

6 Q. But even when you use the on-demand
7 function, the program requires that you input
8 something to explain what the check's for, right?

9 A. No, it does not require that.

10 Q. So the system, as you understand it,
11 you can just, on demand, issue checks all day long
12 without any backup when you utilize that function.

13 A. On the system itself, you can.

14 Q. Right. Is there some internal policy
15 with respect to back-up data on on-demand
16 transactions?

17 A. Yes, it's the same as it is for your
18 payables. You don't necessarily have to have a
19 purchase order, but you do have to have a check
20 request and an invoice to go with that check
21 request, or at least some sort of back-up to say
22 why you're requesting that check.

23 Q. I see. And is that -- on on-demand
24 transactions, as I understand it, they don't have
25 to be authorized by Jack or Mickey or the store

1 managers, right?

2 A. Yes, they do.

3 Q. Oh, they do?

4 A. Yes.

5 Q. So those still have to go up the chain
6 and get authorized.

7 A. Yes.

8 Q. And somewhere there needs to
9 be -- somewhere are there some initialling that's
10 done approving those transactions?

11 A. For an on-demand check, we will have a
12 check request, and it asks who the check should be
13 payable to and name and address, what the check was
14 for, where you want it charged, and then there's
15 signature lines at the bottom, who requested the
16 check and who approved it.

17 Q. I see. And it would need to have an
18 approval signature at the bottom?

19 A. Yes.

20 Q. Do you keep those requisition forms for
21 on-demand checks?

22 A. Yes, they're attached to the copy of
23 the check and then filed.

24 Q. Are those requisition forms inputted in
25 some way into the ADP system?

1 Q. But it would have been after the end of
2 that quarter?

3 A. I think so.

4 Q. And you think it would have been after
5 the end of the 4th quarter, December 31, 2009, the
6 second one?

7 A. I think it was before that.

8 Q. So you think the second one was before
9 the fourth quarter end?

10 A. Yes.

11 Q. Did you know this person?

12 A. No.

13 Q. Had you had any contact with NBSC on
14 the floor plan lending prior to these audits?

15 A. Yes.

16 Q. And what contact did you have?

17 A. This was a new system for NBSC, they
18 had never done anything like this, so we were
19 having to talk back and forth about the different
20 vehicles that were on their floor plan, and
21 Dr. Frasher had to take out an extra loan, so we
22 had to talk about the loan itself. And specifics
23 in these conversations, I don't remember.

24 Q. It sounds like cash was tight.

25 A. Yes, it was.

1 Q. And Dr. Frasher wouldn't have infused
2 more capital in the way of taking out another loan
3 if cash had been plentiful, correct?

4 A. Correct.

5 Q. And was that a concern that was being
6 discussed among you and management during this
7 time?

8 A. Yes.

9 Q. Okay. And what was the nature of those
10 discussions?

11 A. On my part, that we need to get some
12 money in here so that we can play off floor plan.

13 Q. Because you had some history with that
14 that you probably remember pretty well; didn't you?

15 A. Yes.

16 Q. And you weren't anxious to have that
17 recur, were you?

18 A. No.

19 Q. So what kind of discussions were you
20 having in terms of your accounting function with
21 management?

22 A. Do we have any cars that we can floor?
23 You need to sell more cars so we get more money in
24 here.

25 Q. Were you looking at expenses?

1 A. Yes.

2 Q. Okay. Were you looking at ways to cut
3 expenses?

4 A. Yes.

5 Q. Were there discussions at that time
6 about particular categories of expenses that were
7 potential cuts?

8 A. There were some. Outside services was
9 one.

10 Q. Like advertising? Is that an outside
11 service?

12 A. No. Outside services would have
13 been -- well, Mickey went into outside services,
14 but also our detail people -- not our detail
15 people, but our detail vendor, he's outside
16 services. Anybody that was doing anything outside
17 that wouldn't fit into the other expenses was
18 outside services.

19 Q. Just how tight was cash during this
20 time?

21 A. It was pretty tight.

22 Q. Were there some challenges making
23 payroll?

24 A. We always made payroll, but that would
25 put us out of trust. To cover the payroll,

1 sometimes we couldn't pay off a car.

2 Q. So you were gambling that nobody showed
3 up to do a new-and-used-car inventory, correct?

4 MR. REID: Object to form.

5 BY MR. SHEEDY:

6 Q. You may answer over the objection. I
7 will rephrase it. I don't literally mean you went
8 to Vegas.

9 Were you taking some risk with respect
10 to the timing and receipting of funds in order to
11 cover payroll without necessarily covering in
12 accordance with the out-of-trust provisions in your
13 loan documents?

14 A. Yes.

15 Q. And how often was that occurring again,
16 during this period?

17 A. It was happening quite often.

18 Q. Okay. And one of the ways to address
19 that, I take it -- and you haven't said this, I'm
20 inferring -- that it was Jack Frasher obtained a
21 loan and infused the loan proceeds into the
22 business.

23 MR. REID: Object to form.

24 BY MR. SHEEDY:

25 Q. Is that what your testimony was?

1 Q. \$800,000?

2 So \$800,000 comes into the business,
3 and even after the \$800,000 comes into the
4 business, how long before cash-flow challenges
5 reappeared?

6 A. They never went away.

7 Q. Oh, they never went away, even with the
8 \$800,000 infused?

9 A. Yes.

10 Q. So I take it the \$800,000, then, was
11 used to cover what I will call an arrearage or an
12 existing liquidity problem in the business; is that
13 right?

14 A. I believe so.

15 Q. Do you know what I mean by that?

16 A. That it was used to cover other --

17 Q. It was used to cover an
18 already-existing deficit, as opposed to working
19 capital to shield against ongoing cash shortfalls.

20 A. Yes, it was.

21 Q. And this happened kind of right after
22 you became controller.

23 A. It was right around the same time. I
24 don't know if it was right after or right before.

25 Q. So all through this period -- August

1 2009 to February 2010 -- cash was tight?

2 A. Yes.

3 Q. And there were recurring instances
4 where you had to use the proceeds from the sale of
5 a car to cover other expenses and then correct that
6 when you could?

7 A. Yes.

8 Q. Okay. And that was something that was
9 occurring on a monthly basis?

10 A. It was occurring a lot.

11 Q. Was it occurring daily?

12 A. It could have been.

13 Q. Okay. And was there a point in time
14 where your floor plan lender, through one of these
15 audits that we just discussed, ascertained that
16 that was going on?

17 A. Yes.

18 Q. Okay. And were there discussions,
19 then, with the floor plan lender about the use of
20 car sale proceeds?

21 A. Yes, we had meetings with NBSC.

22 Q. Were those meetings in addition to the
23 audit events that we described a few moments ago?

24 A. Yes, we went to the bank and met with
25 the bankers.

1 A. Yes.

2 MR. SHEEDY: Okay. Let's mark that as
3 an exhibit.

4 (UNSER EXH. 5, e-mails dated 9/26/2009
5 between Britt Crump and Lara Nance, was marked for
6 identification.)

7 BY MR. SHEEDY:

8 Q. Here's the last in the chain and that's
9 an e-mail chain with a Richard Mashburn.

10 Do you know Richard Mashburn?

11 A. No.

12 Q. Do you know who Woody is?

13 A. Woody is the guy that used to be our IT
14 person.

15 Q. Got you. Do you know what this meeting
16 was to be about?

17 A. No, I do not.

18 MR. SHEEDY: Okay. Let's go on and
19 mark this as an exhibit as well.

20 (UNSER EXH. 6, an e-mail dated October
21 26, 2009, to Lara Nance from Richard Mashburn, was
22 marked for identification.)

23 BY MR. SHEEDY:

24 Q. So within a span, it appears, of about
25 four hours -- but in any event, in just one day,

1 October 26th -- Lara Nance appears to have made
2 herself the system administrator of ADP for Land
3 Rover, correct?

4 A. That's what it appears.

5 Q. And that's what you subsequently came
6 to understand after Lara had left, based upon your
7 reviewing some of these documents now.

8 A. Yes.

9 Q. At this point, she wasn't down in your
10 accounting department when all of these e-mails and
11 other activities took place, right?

12 A. Right.

13 Q. She was in the showroom.

14 A. Right.

15 Q. Now, where was her office in the
16 showroom?

17 A. Right beside Dr. Frasher's office.

18 Q. Okay. Who else was near her besides
19 Dr. -- what other offices were near hers, besides
20 Dr. Frasher's?

21 A. She shared an office with Melissa, and
22 then the break room was next to hers.

23 And let me see.

24 At that time, I think the F&I office
25 was next to the break room and then there was just

1 from the accounts payable access functions?

2 A. Yes.

3 Q. And you don't know when he did that?

4 A. We did it -- I don't know if he did it
5 or if Lissette did it --

6 Q. I see.

7 A. -- but it was changed when we moved her
8 upstairs, either in September or October, which I
9 think we moved her in September.

10 Q. Good, you anticipated my question.

11 So she went upstairs in September.

12 How long after she went upstairs in
13 September did her accounts payable access change?

14 A. It would have been immediately.

15 Q. Immediately, so same day.

16 A. Yeah, maybe a couple of days later, but
17 within that few days' timeframe.

18 Q. So during this two-and-a-half-month
19 period -- I guess it's two and a half months -- two
20 months and five days, plus whatever time period in
21 January -- while Lara had system administrator
22 access, she could write checks, correct?

23 A. Yes.

24 Q. She could transfer money between
25 accounts, correct?

1 A. She didn't have access to the bank
2 account. She would between the accounts on our
3 system, just our general ledger accounts, yes.

4 Q. She could enter something as having
5 been expensed, right?

6 A. Yes.

7 Q. She could increase a parts inventory
8 value if she wanted?

9 A. Yes.

10 Q. She could input purchase order numbers,
11 invoice numbers, for example?

12 A. Yes.

13 Q. And here's where I am confused, Sue:
14 Are you saying that, even as a system
15 administrator, there were some aspects of the ADP
16 system that Lara could not utilize?

17 A. No. If she were a system
18 administrator, she had access to everything.

19 Q. Including financial information?

20 A. Yes.

21 Q. Monthly reports? Year-end reports?

22 A. Yes.

23 Q. Sue, to the best of your knowledge,
24 information and belief, is there anybody at Land
25 Rover who told Lara that it was okay to make

1 workplace at those hours engaging in these
2 activities unbeknownst to others in the controller
3 function?

4 A. She was working in the showroom at that
5 time, so she had -- I believe she had a key to get
6 into the showroom building, so she would come in
7 early before anybody was there.

8 And my understanding is that she would
9 write out the check, then she would come down to
10 the accounting office and get the check before
11 anybody else was in the office. And then none of
12 us knew that she was writing checks, because none
13 of us were there at the time.

14 Q. For her to have gotten into the
15 accounting office, it would seem that she had the
16 code to the security pad, right?

17 A. She did.

18 Q. And, therefore, that code wasn't
19 changed until after she was moved to the showroom
20 area?

21 A. No, and the reason we left her with the
22 code is because she still needed to come into the
23 office because we kept all of the titles of the
24 MSOs down in the accounting office, so that's why
25 she still had access to our office, because, also,

1 if she needed to look up an old deal, they were
2 also filed down by us, so that's why she still had
3 the code.

4 Q. A new acronym, MSO, is manufacturer's
5 source of origin?

6 A. I never knew what the MSO stands for.
7 MCO, is what it is.

8 Q. MCO, okay.

9 And that is the document that predates
10 a title that indicates where the unit may have been
11 manufactured?

12 A. Correct.

13 Q. You have given me an explanation for
14 the period of time that Lara was in the showroom.

15 And as part of that explanation, you
16 said that Lara still needed to come down into the
17 accounting department.

18 Did she have a need to come down into
19 the accounting department when no one was there?

20 A. No.

21 Q. So why did she need the security code,
22 if, when she would be down in the accounting
23 department, people would be there?

24 A. Because if you don't have the code,
25 every time she wanted to come down there, somebody

1 would have to get up from their desk and go answer
2 the door, and she was down there often enough, that
3 we just kept her with the code.

4 Q. Sue, does everybody up in the showroom
5 have the code?

6 A. No.

7 Q. Does Greg?

8 A. Yes.

9 Q. Does Jack?

10 A. Yes.

11 Q. Does Mickey?

12 A. I'm not sure on that. We talked about
13 that earlier. I think he just had a key to the
14 other door.

15 Q. Were the managers given that code?

16 A. No.

17 Q. And by managers, I mean service, sales
18 and parts.

19 A. No.

20 Q. This, as you, I think, know, don't you,
21 scheme of Lara's, existed before you assumed the
22 position of controller.

23 A. Yes.

24 Q. Okay. How did you understand that this
25 was happening before Lara went to the showroom?

1 But she knew that something was up,
2 because she just didn't come back to work.

3 Q. Oh, so she quit before she got fired?

4 A. Yeah, she just didn't show back up.

5 Q. Did your accounting function do an
6 investigation to determine the scope of the checks
7 that had actually been withdrawn improperly from
8 the BB&T and NBSC accounts?

9 A. We had some help from Mike's company --

10 Q. Right, but before Mike's company.

11 A. -- he came in and helped.

12 Q. Before Mike's company, is that
13 something that you folks first attempted to do, or
14 was it sufficient just to know that it had been
15 done and then it was time to outsource to do a
16 forensic accounting for the scope of the problem?

17 A. I don't really know if we immediately
18 got Mike involved. I know we tried finding some of
19 it on our own, but I don't remember what we did.

20 Q. And did you generate any paperwork in
21 connection with that effort, on your own?

22 A. I have copies of everything in my
23 office, but I don't -- you know, as far as reports
24 that we had run, I don't think there were any.

25 Q. Now, for the checks that you understood

1 had been forged by Lara, did you engage in any
2 effort to match up, against each check, the
3 purchase order and invoice?

4 A. There is no backup for it. We tried,
5 but there isn't any.

6 Q. So these are on-demand checks without a
7 backup?

8 A. Yes.

9 Q. And as I understand it, there are
10 records kept of authorized expenditures.

11 A. Yes.

12 Q. And these are checks for which there is
13 no listing on the authorized expenditure records?

14 A. Right.

15 Q. And the authorized expenditure records
16 are never reviewed when the bank statements and the
17 bank account reconciliations are done so that the
18 only checks clearing the account are those that
19 appear on the authorization list, right?

20 MR. REID: Object to form.

21 THE WITNESS: Yeah, I don't understand
22 what you're asking.

23 BY MR. SHEEDY:

24 Q. Okay, I will rephrase it.

25 There is a list of authorized checks,

1 the number of checks.

2 Q. So I understand it, the check stock in
3 the accounting department, during your time as
4 controller up to February 2010, is --

5 Well, where is it kept?

6 A. It was kept in the accounting office.

7 Q. Under lock and key?

8 A. The accounting office was under lock
9 and key.

10 Q. Once you're in the accounting office,
11 is the check stock under lock and key?

12 A. No.

13 Q. So it's accessible to anybody that's in
14 that office?

15 A. Right, but it's just blank check stock.

16 Q. I understand, which can be fed into a
17 computer, right?

18 A. Yes.

19 Q. So if somebody has system administrator
20 access and can input the data, they also have the
21 check stock, right?

22 A. If they're in the accounting office,
23 yes.

24 Q. There is a supply closet in the
25 accounting office?

1 A. Yes.

2 Q. Is the hiring that you participated in,
3 has that been after Lara Nance was --

4 A. Yes.

5 Q. -- no longer employed?

6 A. Yes.

7 Q. How do you perform a background check
8 now?

9 A. Through Mike's company. When I very
10 first started there, we were -- everybody was
11 required to do a background check.

12 You had to go to the detention center
13 and have them do your background check for you.

14 After Lara, that's when we found out
15 that they only did a local background check. Prior
16 to that, we thought it was, you know, statewide,
17 but we found out that's not the case.

18 Q. So when you were hired, did you go down
19 to the detention center?

20 A. Yes.

21 Q. And you went, yourself, down there to
22 the detention center?

23 A. Yes. Well, they give you the -- I
24 mean, you have the form that gives your background
25 check.

1 in reconciling your system against the bank's --

2 A. Yes.

3 Q. -- on a daily basis; is that right?

4 A. Yes.

5 Q. And in the course of the information
6 that was available to you on daily basis, you would
7 have balance information available?

8 A. Yes.

9 Q. And you would have had transaction
10 information available?

11 A. Right.

12 Q. And items would have been viewable on a
13 daily basis; is that right?

14 A. Yes.

15 Q. Let me make sure I understand this.

16 As I understood the check-writing
17 procedure that Overland employed -- and I want to
18 make sure I understand it -- let's go like this.

19 To institute the check-writing program
20 or policy and procedure, Overland would receive an
21 invoice from a vendor, or there would be some check
22 request. Is that right?

23 A. Yes.

24 Q. A purchase order either would have been
25 generated beforehand or at some point in

1 conjunction with the invoice --

2 A. Right.

3 Q. -- or a check request.

4 So you would either have
5 a -- internally, you would have a check request or
6 a PO; is that right?

7 A. Right.

8 Q. And PO being purchase order, correct?

9 A. Correct.

10 Q. And that purchase order or check
11 request would either be signed or initialed by
12 whomever was making the request; is that right?

13 A. Yes, but if it wasn't the center
14 manager or the department manager, then a manager
15 would have to sign off on it.

16 Q. Okay. Somebody would either put their
17 signature or their initials on the purchase order
18 or check request; is that right?

19 A. Yes.

20 Q. And by placing their initial or
21 signature, that would serve as that person's
22 approval; is that right?

23 A. Yes.

24 Q. Just making sure. Tell me if I'm wrong
25 about that. But when you say that it needs to be

1 approved, that's what you're talking about?

2 A. That's correct.

3 Q. At some point, then, the invoice, if
4 there was an invoice, and a PO, would be paired; is
5 that right?

6 A. Yes.

7 Q. And then that paired invoice and PO
8 would be given to the accounts payable clerk?

9 A. Yes.

10 Q. And then the accounts payable clerk
11 would generate a check?

12 A. They would post it into accounts
13 payable. And for most vendors, we cut our payable
14 checks usually once a month, or thereabouts. So
15 some of the vendors would have numerous invoices,
16 and then we would cut the check. I tried to do it
17 around the 10th of the month. And that's when the
18 check would be generated.

19 Q. And then that check, after it was cut,
20 would be placed with the series of invoices it was
21 paying, along with the POs; is that right?

22 A. Yes.

23 Q. And then that would be presented to
24 Dr. Frasher --

25 A. Yes.

1 A. No.

2 Q. When you received them, as I understand
3 it, you would open them up and on the front of them
4 you would have balance information, correct, at the
5 top?

6 A. Yes.

7 Q. And then starting right at the balance
8 information, you would start seeing the checks; is
9 that right?

10 A. Yes.

11 Q. And these checks would be identified by
12 date, check number and amount; is that right --

13 A. Yes.

14 Q. -- on the statement?

15 A. Yes.

16 Q. You were comparing that against, you
17 stated, I believe, a report?

18 A. Yes.

19 Q. What's the name of the report that you
20 were comparing them against?

21 A. I know our acronym for it was AGRC, so
22 cash in bank, I think, was the name of it.

23 Q. Was this a report generated by the ADP
24 system?

25 A. Yes.

1 Q. What is on that report?

2 A. It gives the reference number, which
3 would either be a check number or receipt number.
4 It gives the source that it was posted in, the date
5 that it was posted, the amount, and whatever
6 description. So, for a check, it would be who the
7 check was written to. Receipt was -- who it was
8 receipted of.

9 Q. So when you say written to, it would be
10 whatever vendor name it was cut to; is that right?

11 A. Yes.

12 Q. And then, as I understood it, what
13 you'd do is you would look on the statement, find a
14 date, check number and check, and then come over
15 and find it on the other --

16 A. Yes.

17 Q. -- on your ADP report; is that right?

18 A. Yes.

19 Q. And during the period of Lara Nance's
20 scheme, this report generated by ADP is going to
21 have checks that were legitimate on it, right?

22 A. Right.

23 Q. And it's also going to have checks on
24 it that y'all claim are illegitimate; is that
25 right?

1 A. Yes.

2 Q. And according to your allegations, the
3 checks on that ADP report that were illegitimate
4 were also showing up in the bank statements,
5 correct?

6 A. Yes.

7 Q. But at no point was there a general
8 review of the items in the bank statement, correct?

9 And what I mean by the items, I mean
10 the physical item, looking at the front face of
11 that check.

12 A. No.

13 Q. The front face of the item was only
14 reviewed, I think according to you, when there were
15 any questions about it; is that right?

16 A. Yes.

17 Q. When did questions arise?

18 Actually, on the checks, I never had
19 any questions that came up on it, because, if there
20 were, we would catch it at the time that -- when I
21 did the cash on a daily basis, if anything looked
22 out of line, we found it at that point.

23 For instance, we had somebody else that
24 tried to -- well, actually took one of our checks
25 and then changed the amount on it.

1 So in doing our daily cash balancing,
2 we found that that was a fraud check, because what
3 was on our books was totally different than what
4 was trying to clear the bank.

5 So those are the types of things that
6 we would catch.

7 Q. The report that you were reviewing
8 generated by ADP that you were using the -- is it
9 ACRC or AGRC?

10 A. AGRC.

11 Q. AGRC. The AGRC report. Who was
12 checking to make sure that all of the items on the
13 AGRC report were actually approved?

14 A. Nobody.

15 Q. Okay.

16 A. And if I can elaborate on that just a
17 little bit.

18 Q. Sure.

19 A. The reason would be because you would
20 have to look up every single check and pull out all
21 of the invoices, and that would take all day, or it
22 would take several days to pull everything out and
23 look at it to make sure that every single check had
24 an approval with it.

25 And I have other things that -- time

1 you?

2 A. Yes.

3 Q. An these on-demand checks, they would
4 be included on the bank statements, correct?

5 A. Yes.

6 Q. It would show where money had come out
7 of Overland's account, at BB&T, correct?

8 A. Correct.

9 Q. And this was -- even though it was a
10 check, that was on demand.

11 A. Yes.

12 Q. When you noticed this on the bank
13 statement, did you ever reconcile to see where the
14 backup was for those checks?

15 MR. REID: Object to form.

16 THE WITNESS: No.

17 BY MS. GRANT:

18 Q. Whose job was it to do the
19 reconciliations?

20 A. I did the reconciliations on the bank
21 statements.

22 Q. But you did not do the reconciliation
23 on these on-demand checks to find the backup to
24 support it; is that a correct statement?

25 MR. REID: Object to form.

1 A. No.

2 Q. So you're not familiar with their check
3 processing procedure?

4 A. No.

5 Q. And for the Overland account at
6 SunTrust do you have those deposit agreements in
7 your office?

8 A. I should, yes.

9 Q. Have you reviewed them?

10 A. No.

11 Q. Okay. Has Dr. Frasher reviewed those
12 agreements?

13 A. I don't think so.

14 Q. So to the extent Overland has an
15 account with SunTrust, are you familiar with the
16 check-processing procedures for that account?

17 A. Other than we write a check and -- I
18 mean, it was the same with when I was talking to
19 this gentleman about Banc of America, I just know
20 that we deposit the check and it will either clear,
21 or it won't.

22 Q. So Overland has not asked for those
23 checks to be reviewed on a check-by-check basis?

24 A. No.

25 Q. Okay. The scheme seemed to be

1 CERTIFICATE OF REPORTER
2

3 I, Susan M. Valsecchi, Registered
4 Professional Reporter and Notary Public for the
5 State of South Carolina at Large, do hereby certify
6 that the foregoing transcript is a true, accurate,
7 and complete record.

8 I further certify that I am neither
9 related to nor counsel for any party to the cause
10 pending or interested in the events thereof.

11 Witness my hand, I have hereunto
12 affixed my official seal this 29th day of July,
13 2014 at Columbia, Richland County, South Carolina.
14
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22
23

24 Susan M. Valsecchi, RPR, CRR
25 My Commission expires
January 4, 2015

EXHIBIT E

Deposition of Allison Autrey Malone

Page 1

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

Overland, Inc., D/B/A Land Rover
Greenville,

Plaintiff,

-vs-

2010-CP-23-5880

Lara Marie Nance; Charlie Andrew
Nance; Roger Fields; ADP Dealer
Services Group; Piedmont
Automotive of Anderson, Inc.,
d/b/a Piedmont Chrysler Jeep
Dodge; Piedmont Automotive of
Anderson South Carolina, LLC d/b/a
Apex Automotive; Synovus Financial
Corporation d/b/a NBSC; Branch
Banking and Trust Company; Bank of
America Corporation; and SunTrust
Banks, Inc.,

Defendant.

DEPOSITION OF ALLISON AUTREY MALONE

GREENVILLE, SOUTH CAROLINA

SEPTEMBER 23, 2014

REPORTED BY: Cathy L. Young, CVR-M

Deposition of Allison Autrey Malone

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1 then relate them back to the accounting department.

2 Q. Okay. So there would be an invoice that your
3 company has sent to that customer; is that correct?

4 A. Yes.

5 Q. And you would then be making sure that that invoice
6 is inputted into the Excel program?

7 A. They -- our customer inputs it into the program, and
8 I verify special pricing that they receive from our
9 company.

10 Q. So do you do anything other than verify the special
11 pricing?

12 A. No.

13 Q. So by reconciliation, all you're doing is checking
14 the pricing on your employer's invoice to this
15 customer?

16 A. Yes.

17 Q. Okay. Anything having to do with the billing of
18 that customer and the collection of that invoice is
19 handled by the accounting department and not by you?

20 A. No, correct, yes, sir.

21 Q. Okay. Do you have a cell phone?

22 A. I do.

23 Q. What is your cell phone number?

24 A. 864-630-5978.

25 Q. Do you have an email address?

Deposition of Allison Autrey Malone

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1 A. I do.

2 Q. And what is your email address?

3 A. It's allifaye23@gmail.com.

4 Q. Somewhere along the line I've gotten the impression
5 that you were from here in Greenville County.

6 A. Yes, sir.

7 Q. Went to high school here in Greenville County?

8 A. Yes, sir.

9 Q. Do you have family still here in Greenville County?

10 A. Yes, sir.

11 Q. If you would, state the names of your family who are
12 over the age of 18 living here in Greenville? I'm
13 not trying to be nosey, I'm just trying to pick them
14 off a jury list in the future if I have to.

15 A. Are you looking just for immediate family members?

16 Q. Anyone over the age of 18 who is related to you.

17 A. My father, David Autrey; mother, Diane Autrey;
18 brother, Jennings Autrey; sister-in-law, Kristin
19 Autrey; grandparents, Joanne and Donald Dockery;
20 aunt and uncle, Donnie and Sherry Dockery; their
21 daughter, Hannah Dockery; another aunt, Deborah
22 Holcombe and Charlie Holcombe. I think that's it.

23 Q. Autrey, Dockery and Holcombes?

24 A. Yes.

25 Q. Your husband, is his family from here?

Deposition of Allison Autrey Malone

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1 Q. We're on economics for a moment. Did you take any
2 economics courses?

3 A. Yes, sir.

4 Q. Micro?

5 A. Yes, sir.

6 Q. Macro?

7 A. I believe I took both, Micro and Macro, yes.

8 Q. Did you take anything beyond Introductory Micro and
9 Macro?

10 A. No, sir.

11 Q. Did you take any computer courses?

12 A. Yes, sir.

13 Q. What computer courses did you take?

14 A. It was just a generic computer course required of
15 all freshmen. You know, it just touched on all
16 Microsoft-based programs, that was about it.

17 Q. So you would have learned Excel in that course?

18 A. Yes, sir.

19 Q. But you would not have, for example, learned any
20 specialized general ledger accounting programs?

21 A. No, sir.

22 Q. You didn't learn ADP, for example?

23 A. No, sir.

24 Q. You didn't learn QuickBooks, for example?

25 A. No, sir.

Deposition of Allison Autrey Malone

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1 A. Yes, sir.

2 Q. And during the course of the day, everybody kind of
3 knew if you were sitting there at your receptionist
4 station or you weren't, right?

5 A. Yes, sir.

6 Q. And could kind of tell what you were doing for the
7 most part?

8 A. Yes, sir.

9 Q. So how long were you in that position as
10 receptionist and titling clerk?

11 A. Until 2009 is when I transferred over to the
12 accounting department, so approximately September
13 2009.

14 Q. So there were no intermediate positions that you
15 held?

16 A. No, sir.

17 Q. You worked in the receptionist spot and then went
18 direct over into the accounting department?

19 A. Yes, sir.

20 Q. And during the time that you were in the
21 receptionist spot, you weren't doing anything
22 related to accounting or receiving any training
23 relating to the ADP system?

24 A. Yes, but as my -- as I was there longer, they --
25 they would give me little responsibilities here and

Deposition of Allison Autrey Malone

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1 A. Sounds correct, around -- I'm not sure of the exact
2 timeframe that Sue came onboard.

3 Q. The sole function that you had in the accounting
4 department as I understand it, Allison, had to do
5 with payables.

6 A. Yes, sir.

7 Q. Is that fair?

8 A. Yes, sir.

9 Q. Okay. You weren't doing anything on receivables?

10 A. No, sir.

11 Q. You weren't doing anything with respect to the
12 generation of month-end financial reports?

13 A. No, sir.

14 Q. You weren't doing anything with respect to the
15 generation of year-end financial reports?

16 A. No, sir.

17 Q. You weren't generating P&Ls?

18 A. No, sir.

19 Q. Or balance sheets?

20 A. No, sir.

21 Q. You were only involved in accounts payable during
22 your stay in the accounting department at Land
23 Rover?

24 A. And as I understand it, the only training that you
25 received on the ADP system once you came down to the

Deposition of Allison Autrey Malone

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1 business with the parts department or it was
2 administrative office or administrative sales,
3 everything that you paid, you got some kind of third
4 party approval orally or in writing?

5 A. Yes, sir.

6 Q. Okay. Talk to me a little bit about on demand
7 checks. Are you familiar with that term?

8 A. Yes, sir..

9 Q. Okay. Just so that the record is clear and you and
10 I are communicating on the same basis, tell me what
11 your understanding is of an on demand check.

12 A. Do you mean how the process worked or definition of
13 an on demand check?

14 Q. Well, let's start with the definition, and then if
15 you would please, give me the process.

16 A. On demand is -- that would be -- there would be -- I
17 would need to cut a check for that specific moment.
18 I would cut it, someone's standing in front of me,
19 and I would cut it essentially on demand.

20 Q. Sure. This would be somebody who was, forgive the
21 turn of phrase, higher up the food chain than you
22 with authority to request a check?

23 A. Yes, sir.

24 Q. Okay. This would be Greg Babbitz?

25 A. Greg, yes, sir.

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1 the system, code it accordingly, driver check, for
2 instance, code it, and then I would file it under
3 that driver's file in my filing cabinet.

4 Q. Okay. That would be the driver situation?

5 A. Yes, sir.

6 Q. And would that apply by analogy to Jack and Greg as
7 well?

8 A. Yes, sir.

9 Q. Okay. So at the end of the hypothetical month when
10 a bank statement arrives, there are a bunch of
11 checks in the bank statement, and some of them are
12 on demand checks.

13 A. Uh-huh.

14 Q. Somebody could pull those on demand checks, pull
15 Allison's on demand file, and there will be written
16 or verbal authorizations matching up with every on
17 demand check?

18 A. Yes, sir.

19 Q. And was that a function that you did each month,
20 that kind of reconciliation?

21 A. No, sir.

22 Q. Okay, do you know if Gwen did?

23 A. I believe she did, yes, sir.

24 Q. And -- okay, thank you. Did anybody train you on
25 how to handle on demand checks?

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1 Q. Okay. So at all times when you logged in, there was
2 no Lara Nance around during the terminal login?

3 A. No, sir.

4 Q. Okay. And when she would come to this computer,
5 when you were there as well, you were already logged
6 in always?

7 A. Yes, sir.

8 Q. Okay. So there was never an opportunity for her to
9 see, for example, your password in a block -- I mean
10 your username in a block but not your password?

11 A. No, sir.

12 Q. Okay. And you've never seen anybody else's user
13 name at Land Rover?

14 A. No, sir, -- yeah, not that I remember at all.

15 Q. Okay. Based upon prior testimony from various folks
16 in this matter, Allison, you have been specially
17 designated as the person who knows all about the
18 discovery of Lara's investment scheme. How did you
19 discover this?

20 A. I remember being asked about a check.

21 Q. Was this a catering check?

22 A. I believe so. I don't remember the specific vendor,
23 but I believe that sounds correct, and I believe it
24 was Greg that brought it to me. It looked like a
25 duplicate payment.

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1 Q. So let's stop for a moment. As I understand it,
2 Greg brought to you a check drawn on a Land Rover
3 account; is that right?

4 A. Yes, sir.

5 Q. Do you remember if it was on the NBSC or the BB&T
6 account?

7 A. I do not remember.

8 Q. You understood that to be a check that represented
9 payment of the debt owed to a caterer?

10 A. Yes, sir.

11 Q. Okay. And was in fact the caterer owed that money;
12 to your knowledge?

13 A. To my knowledge, yes.

14 Q. If the caterer was owed the money, and if the check
15 had been issued, why was Greg bringing the check to
16 you?

17 A. I don't remember the specific circumstances. I --
18 and I -- as I remember us looking at it, me thinking
19 that invoice had already been paid, and I'm not
20 sure, it looked like there was a duplicate payment,
21 and him asking me did we pay them twice, and then
22 that's when my research began at that point.

23 Q. Now I'm confused. He brings you one check, right?

24 A. It was a copy of a check, I believe, is what he
25 brought me, sir.

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1 Q. One copy of a check that evidences payment to the
2 caterer; is that right?

3 A. Yes, sir.

4 Q. What was the reason for thinking that that was
5 duplicate?

6 A. I do not recall. I remember -- because I remember
7 odd things, I remember we would use a caterer for an
8 event, and we were pretty on top of paying those
9 vendors we would use for quarterly events pretty
10 quickly, because we would have to turn in that
11 payment to Land Rover for reimbursement. I was not
12 part of that. I was just part of cutting that
13 check. So I know I was pretty on top of, and I
14 rephrase that, not reimbursement, it was for noting
15 our expenses for that account, too, for the event.
16 Basically to say we did the event is how I remember
17 it. I would turn that over to the marketing
18 department. But I remember that I would pay those
19 vendors used for an event in a very timely fashion
20 to make sure it was turned back in as credit for
21 that Land Rover event.

22 Q. Do you know why Greg thought when he had the paper
23 copy of that check that it represented a duplicate?

24 A. I do not remember why he brought it to me, no, sir.

25 Q. Okay. But at the time that he brought it to you and

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1 asked you to look into it, --

2 A. Yes, sir.

3 Q. -- you understood that you were researching whether
4 this caterer had been paid twice?

5 A. Yes, sir.

6 Q. Okay. But he didn't inform you of any underlying
7 factual reason why he thought that there had been
8 double payment?

9 A. No, sir.

10 Q. Okay. Now, you have the check, you're down in the
11 payables department, what do you do with it?

12 A. I pulled up looking at -- looking for backup for the
13 check, and I remember looking at the timestamp was
14 what stood out the most.

15 Q. The timestamp?

16 A. On the check, yes, sir.

17 Q. You mean date of the check?

18 A. The -- and the time, there was a time on the check
19 itself.

20 Q. I see. You mean on the reverse side of the check
21 when it was presented to a bank?

22 A. It was on the top portion, there was the backup
23 portion, and it would have the user name and a
24 timestamp, I believe, is where it was, on the top of
25 the check. And the check was at the bottom of a

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1 piece of 8-1/2 by 11 sheet of paper at the top.

2 Q. Here is what I am interpreting you to say, that you
3 were handed a copy of a piece of check stock; is
4 that correct?

5 A. Uh-huh.

6 Q. And at the top was the check itself?

7 A. The bottom was the check itself.

8 Q. The bottom was the check itself and at the top was
9 the information that you would typically see when
10 you printed the check off of your printer?

11 A. Yes, sir.

12 Q. And then on the reverse side of check if the check
13 had been negotiated would have been the normal bank
14 stamps indicating process?

15 A. Yes, sir.

16 Q. Had the check in fact been processed?

17 A. I don't remember that at all, sir.

18 Q. Okay. So you saw on the top a timestamp?

19 A. Yes, sir.

20 Q. Okay. Proceed please.

21 A. And I remember it being 7:30 something, and I know
22 that --

23 Q. P.M.?

24 A. A.M.

25 Q. A.M.

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1 A. And I got there at 8:00 A.M., and so I knew that was
2 prior to me getting there, and that was the first
3 red flag that indicated I did not cut that check,
4 because I might stay late, but I was never there
5 early. I live 45 minutes away, I wasn't there
6 early.

7 Q. Not a morning person, aye? So that was a flag to
8 you?

9 A. Yes, sir.

10 Q. And what did you do then because you had seen that
11 cause for suspicion?

12 A. I remember looking back and pulling my backup back
13 in that caterer's vendor file.

14 Q. What do you mean by your backup? You're not
15 referring to the Excel anymore, are you?

16 A. No, sir.

17 Q. You're referring to your file where you would keep
18 your invoices?

19 A. Yes, sir.

20 Q. And you went rifling through the invoices to find
21 one for the caterer; is that correct?

22 A. Yes, sir.

23 Q. Did you find one?

24 A. I believe I did. I did find it with a different
25 check number, and then a different check. So we had

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1 two checks, same vendor. I don't remember the
2 amounts, I don't remember if the amounts matched.

3 Q. All of this is before even accessing ADP?

4 A. Yes, sir.

5 Q. At some point then, you went and sat at your desk
6 and logged onto ADP, right?

7 A. Yes, sir.

8 Q. And I assume you logged onto ADP using the vendor
9 number for that caterer?

10 A. Yes, sir.

11 Q. You then would have pulled up the screen that would
12 show open and closed?

13 A. Yes, sir.

14 Q. You knew it should be closed because even you had
15 paid it?

16 A. Right, yes, sir.

17 Q. And I assume it showed as closed?

18 A. As I remember, yes, sir.

19 Q. But were duplicate invoices there?

20 A. I don't remember what was on -- I don't remember
21 duplicate invoices. I just know I had duplicate
22 checks, and at that point, I took it back to Greg.

23 Q. Did the ADP screen show you the double payment?

24 A. I do not remember. I don't remember that. I know
25 that I had duplicate payments both showing Allison

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1 Autrey cut them, and at that point, I took it to
2 Greg, and through a conversation Lissette and I had,
3 we pulled up user names, and that's when I
4 discovered duplicate user name with Allison Autrey.

5 Q. Okay. We'll get to that in just a second. So you
6 brought this upstairs to Greg and you made Greg
7 aware of two payments?

8 A. At this point, Greg was in our same office, so I
9 looked across --

10 Q. He was accounting with you?

11 A. Yes.

12 Q. Okay. You made him aware that the caterer had been
13 paid twice?

14 A. Yes, sir.

15 Q. Okay. And did anybody actually call the caterer to
16 see if the caterer had gotten double payment?

17 A. I don't recall if anyone called them or not.

18 Q. When you looked at these two checks, were you able
19 to determine that one of them was genuine and one
20 was not?

21 A. One had -- I remember one had the backup with that
22 check number. The other one I had not -- I didn't
23 have any backup for that check number.

24 Q. Did you look at the maker signature on that check?
25 Do you know what I mean by maker signature?

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1 Q. Okay. So let's go back to the sequence of events.
2 I leapfrogged for a moment. You're down there, you
3 go on the ADP, you determine you've got duplicate
4 checks. I asked if you called the caterer, you said
5 you don't know if anybody called the caterer.

6 A. Right.

7 Q. Okay. What was the next investigatory step in which
8 you were involved relating to this caterer incident
9 or question?

10 A. That would have been pulling my backup, pulling the
11 vendor file, and seeing which check was in that
12 file.

13 Q. After you did that, what, if anything, further did
14 you do?

15 A. That's the point where we saw -- that's where I saw
16 the timestamp, and was concerned because I couldn't
17 understand why Allison Autrey cut a check at 7:30
18 something in the morning. And at that point is
19 where we looked in the ADP system.

20 Q. Who is we at this point, Greg and you?

21 A. Lissette and myself.

22 Q. Lissette and you. You went to the ADP system and
23 you were able to pull up a list of user names?

24 A. Yes. She had that access, I did not.

25 Q. I see. And was that the first time that you knew

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1 that Lissette had access to all the user names?

2 A. Yes, sir.

3 Q. When you pulled up that list of user names, were you
4 able to tell dates when user names had been given?

5 A. No, sir.

6 Q. Okay. Now you saw a user name that was similar to
7 Allison Autrey?

8 A. Yes.

9 Q. But you said the Autrey was underlined?

10 A. It was -- they would put an underscore between your
11 first and last name. So my user name was
12 Allison_Autrey. Underneath that, my account in the
13 system was Allison_Autrey 1 is how it is designated.

14 Q. I see.

15 A. It was an additional account that looked just like
16 mine.

17 Q. Did that portion of the system give passwords too?

18 A. No, sir.

19 Q. Okay. Passwords were only available to the
20 individuals themselves?

21 A. Yes, sir.

22 Q. Now in addition to Lissette, did Gwen also have
23 access to a list of authorized users?

24 A. I'm not sure. I assume she did because I believe
25 her and Lissette's accessibility was probably along

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1 account, but I remember him stopping the check-
2 writing privileges. I think at that point we just
3 went into survival mode not knowing where those
4 checks are being generated from. And he stopped
5 those check-writing privileges on that account.

6 Q. Allison, at what point in time did someone say,
7 "Darn, this is Lara Nance"?

8 A. I don't remember that specific moment. I think what
9 led to it, what I remember, was the timeframe
10 because no one else was there at that point, because
11 we all -- I mean the dealership was open till 7:00,
12 so a lot of people were late, but no one was early.
13 She was the only one there at that time of the
14 morning.

15 Q. And you knew that she was there at that time of the
16 morning?

17 A. Yes, sir.

18 Q. She had a habit of coming in before 8:00?

19 A. Yes, sir.

20 Q. That was something that you knew when you were in
21 the accounting department, right?

22 A. Yes, sir.

23 Q. That was something you knew when you were up in the
24 titling and receptionist function?

25 A. Yes, sir.

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1 When you came in in the morning, were machines on
2 sleep mode or shutoff or did it look like somebody
3 had just been there using the machines?

4 A. Everything was off, lights were off, machines were
5 off, and that was -- typically I was the first one
6 in the building, and I would enter from the
7 roadside, not the dealership side, but where the
8 glass doors are, and I would enter that way and turn
9 on all the lights and the machines and kind of get
10 everything geared up for the day.

11 Q. Lara came in early and always came in early. Was
12 she the only one up in the dealership at 7:30 in the
13 morning typically based on your understanding?

14 A. As I remember, yes, sir.

15 Q. And nobody ever said to her, you know, I'm not
16 comfortable with you being up here at 7:30 in the
17 morning?

18 A. No, sir.

19 MR. REID:

20 Object to the form.

21 EXAMINATION CONTINUES BY MR. SHEEDY:

22 Q. So from the time that Lara arrived to the time that
23 Lara left, Lara pretty much had access to the
24 accounting department because she had the code,
25 right?

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1 Q. And were those marketing expenses something that he
2 was monitoring?

3 A. He monitored all expenses that came in and out of
4 the dealership, so yes.

5 Q. Okay. Even the parts expenses and everything?

6 A. Yeah, as far as, yes, as I remember, he did, yes,
7 sir.

8 Q. Okay. I believe I understood you to say that in
9 your role in the payables department, you were there
10 in September of 2009; is that correct?

11 A. As I remember, yes.

12 Q. And by, I guess, end of January, Lara's scheme had
13 been discovered; is that right?

14 A. Yes.

15 Q. Okay. So in your period from entering in the
16 payables department through the time that Lara's
17 scheme was discovered, as I understood it, when you
18 would go to pay a check, you would make sure that
19 the backup was there, correct?

20 A. Yes, sir.

21 Q. Okay. That backup could be a check request or an
22 invoice?

23 A. Yes, sir.

24 Q. And once that check was approved, did you put a --
25 did I understand you affixed the stamp?

Deposition of Allison Autrey Malone

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1 EXAMINATION BY MR. BOYD:

2 Q. Allison, my name is Howard Boyd. I represent
3 SunTrust which came into this game very late. Did
4 you ever have any dealings with anyone from SunTrust
5 Bank?

6 A. Outside of the tellers, no, sir.

7 Q. And the teller involved was simply the routine
8 transactions you would have with a bank teller?

9 A. Yes, sir.

10 Q. If at any time the comptroller in doing the
11 reconciliation had actually asked you or whoever was
12 in the position prior to you to check to see if
13 there was backup for all the checks that had been
14 written, then Lara Nance's scheme would have been
15 uncovered, correct?

16 MR. REID:

17 Object to form.

18 WITNESS CONTINUES:

19 A. Meaning if they would have -- can you clarify? If
20 they would have pulled a copy of all of the
21 checks --

22 Q. Yeah, if you get a list of all the checks that were
23 written from the ADP system and the comptroller is
24 checking that, if she goes one additional step and
25 says would you check the backup for all these

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Deposition of Allison Autrey Malone

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1 checks, then it would have been discovered there was
2 not backup for many of these checks, correct, or for
3 some of the checks?

4 MR. REID:

5 Object to form.

6 WITNESS CONTINUES:

7 A. Yes, but there was no -- there was no reason to
8 think that there wasn't any backup because we had
9 all of the -- the way the checks were cut as far as
10 the payables go, the check is cut and the backup
11 there, and Dr. Frazier is seeing it. There was no
12 reason to believe that there were additional checks
13 being cut.

14 Q. But no one checked that until this duplicate check
15 to the caterer showed up?

16 A. I wasn't in that comptroller office, so I'm not
17 aware.

18 Q. While you were there, that wasn't done; to your
19 knowledge?

20 A. As a payables clerk, it was not.

21 Q. Okay.

22 MR. BOYD:

23 Thank you. Nothing further.

24 MR. REID:

25 Could we take a break?

Deposition of Allison Autrey Malone

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CERTIFICATE

I, the undersigned, Cathy L. Young, CVR-M, Notary Public in and for the State of South Carolina, do hereby certify that the foregoing deposition was taken on the 23rd day of September, 2014;

That the within deponent was sworn to tell the truth and that the foregoing is an accurate transcription of the testimony taken under oath;

I further certify that I am neither Counsel nor Solicitor to any of the parties in said suit, nor interested in the event of the cause.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 5th day of October, 2014.

CATHY L. YOUNG, CVR-M

NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES FEBRUARY 19, 2019.

EXHIBIT F

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
Overland, Inc. d/b/a Land Rover Greenville,	)	
	)	
Plaintiff,	)	
	)	DEFENDANT SUNTRUST BANKS,
vs,	)	INC.'S ANSWERS TO PLAINTIFF'S
	)	FIRST INTERROGATORIES
Lara Marie Nance, Charlie Andrew Nance	)	
Roger Fields, ADP Dealer Services Group,	)	C.A. No.: 2010-CP-23-5880
Piedmont Automotive of Anderson, Inc. d/b/a	)	
Piedmont Chrysler Jeep Dodge, Piedmont	)	
Automotive of Anderson South Carolina, LLC	)	
d/b/a Apex Automotive, Synovus Financial	)	
Corporation d/b/a NBSC, Branch Banking and	)	
Trust Company, Bank of America	)	
Corporation, and SunTrust Banks, Inc.,	)	
	)	
Defendants.	)	

TO: JAMES W. FAYSSOUX, JR. AND T. HUNT REID, ATTORNEYS FOR PLAINTIFF

Defendant, SunTrust Banks, Inc. (hereinafter "SunTrust"), by and through his undersigned counsel, hereby submits the following Answers to Plaintiff's First Set of Interrogatories pursuant to Rules 26 and 33 of the *South Carolina Rules of Civil Procedure*:

GENERAL OBJECTIONS

The following general objections are incorporated by reference into each of SunTrust's answers as set forth below:

1. SunTrust objects to these discovery requests, including the definitions and instructions, to the extent they seek to alter or expand upon the requirements and provisions of the *South Carolina Rules of Civil Procedure*. SunTrust will respond to these discovery requests in a manner consistent with Rule 33 of the *South Carolina Rules of Civil Procedure*.

- (f) Whether the investigations or inquiries led to any formal or informal reprimand, sanctions, fine, or regulatory or other action;

ANSWER:

See answer to Interrogatory No. 14.

16. List each and every account opened, maintained or used by LMN, CAN, or RF, at Defendant's bank by providing the account type, name, number, routing number, credit card number and expiration date(s) issued thereto, pins numbers associated therewith, open and close dates, and by identifying which local branch maintained each account.

ANSWER:

Subject to the general objections, as Plaintiff is already aware, LMN maintained two accounts with SunTrust: business checking accounts ending in -80238 and -08600. Account -80238 was titled "Lara M. Nance d/b/a Taylor Enterprises", was opened on January 19, 2010, and closed on March 24, 2010. Account -08600 was titled "Lara M. Nance d/b/a Atlantic British", was opened on January 28, 2010, and closed on March 12, 2010. A debit card ending in -4361 was held in the name of LMN, was opened on February 1, 2010, and closed on February 22, 2010. A debit card ending in -4429 was held in the name of CAN, was opened on February 1, 2010, and closed on February 24, 2010. A debit card ending in -6736 was held in the name of Atlantic British, was opened on January 28, 2010, and closed on March 15, 2010.

SunTrust is unclear as to the meaning of "which local branch maintained each account." LMN, or any customer of SunTrust could visit any of SunTrust's branches to transact business on her accounts; the accounts are not maintained at branches. Account -80238 was opened at the branch located at 3898 Liberty Highway, Anderson, South Carolina. Account -08600 was

a depositary bank SunTrust had no obligation or ability to verify the maker signature of Plaintiff on any checks presented for deposit by LMN.

22. **List the total number and sum of all deposits into, and withdrawals out of each account maintained, used or controlled by LMN, CAN or RF. This includes deposits by tangible instruments, electronically or by other authorized means.**

ANSWER:

SunTrust objects to this Interrogatory on the grounds that it seeks information that is not relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to the foregoing and general objections, there was one deposit into account -08600 in the amount of Five Thousand and 00/100 (\$5,000.00) Dollars. There were a total of eighteen (18) checks deposited into account -80238, the sum of which is Fifty Four Thousand Six Hundred Seventy-One and 38/100 (\$54,671.38) Dollars. However, due to the fact that several checks were deposited during a single transaction, there were only six (6) deposit transactions by LMN into her account. One withdrawal from account -80238 was a check for Five Thousand and 00/100 (\$5,000.00) Dollars, which was deposited into account -08600. There was one deposit of a check from Plaintiff into account -8803 in the amount of Three Hundred Forty Seven and 36/100 (\$347.36) Dollars. Other than monthly interest, there were only two small cash deposits into Account -10697. SunTrust further refers Plaintiff to the documents to be produced or made available in Response to Plaintiff's Request for Production.

23. **Describe in detail any and all representations made by Defendant LMN to Plaintiff, its agents and/or employees of Plaintiff, or any Defendants or any agent or representative of said Defendants regarding Plaintiff's inventory, business accounts and**

ANSWER:

SunTrust objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine. Subject to the foregoing and the general objections, even if SunTrust knew of or had reason to question any suspicious account activity, disclosure of any information related thereto would be impermissible to any non-regulatory authority, and would not be relevant or admissible in any private right of action.

GALLIVAN WHITE & BOYD, P.A.



W. Howard Boyd (S.C. Bar #826)

Lauren T. Maxwell (S.C. Bar #79846)

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Counsel for Defendant SunTrust Banks, Inc.

March 3, 2014
Greenville, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

Overland, Inc. d/b/a Land Rover Greenville,)

Plaintiff,)

vs.)

CERTIFICATE OF SERVICE

C.A. No.: 2010-CP-23-5880

Lara Marie Nance, Charlie Andrew Nance)
Roger Fields, ADP Dealer Services Group,)
Piedmont Automotive of Anderson, Inc. d/b/a)
Piedmont Chrysler Jeep Dodge, Piedmont)
Automotive of Anderson South Carolina, LLC)
d/b/a Apex Automotive, Synovus Financial)
Corporation d/b/a NBSC, Branch Banking and)
Trust Company, Bank of America Corporation,)
and SunTrust Banks, Inc.,)

Defendants.)

The undersigned certifies that Defendant Suntrust Banks, Inc.'s Answers to Plaintiff's First Interrogatories and Defendant Suntrust Banks, Inc.'s Responses to Plaintiff's First Requests for Production was served upon all counsel of record this 3rd day of March, 2014, by depositing copies of the same in the United States mail, postage paid, and/or email, and addressed as follows:

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Julie Pierson

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

Overland, Inc., d/b/a Land Rover Greenville,)

Plaintiff,

vs.

C.A. No.: 2010-CP-23-5880

Lara Marie Nance; Charlie Andrew Nance;)
Roger Fields; Synovus Financial)
Corporation d/b/a NBSC; Branch Banking)
and Trust Company; Bank of America)
Corporation; and SunTrust Banks, Inc.,)

Defendants.)

**B OF A'S NOTICE OF AND MOTION FOR SUMMARY JUDGMENT
PURELY ON THE BASIS OF LAW AS TO 17th AND 15th CAUSES OF ACTION**

To: Plaintiff and its counsel, James W. Fayssoux, Jr., Esq. and T. Hunter Reid, Esq.

PLEASE TAKE NOTICE that pursuant to Rule 56(b), SCRPC, defendant Bank of America Corporation (B of A), through its undersigned counsel, hereby moves on legal grounds for summary judgment dismissing with prejudice the 17th and 15th causes of action against it.

Plaintiff has briefed and argued that the 17th cause of action asserts a direct negligence claim for indemnity under UCC 3-404, 3-405 and 3-406 based upon Virginia law. However, Virginia's *Halifax* case holds there is no direct negligence claim under UCC 3-406. So the UCC 3-406 portion of the 17th cause of action is without merit even under Virginia law.

The South Carolina cases recognize UCC 3-404 and 3-405 as defenses. No South Carolina case has allowed for a direct claim under UCC 3-404 and 3-405. Like all jurisdictions, South Carolina recognizes direct claims under UCC 3-420 (conversion claims by payees) and 4-401 (claims

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by customers against their banks). As the drawer, Plaintiff is not entitled to bring a UCC 3-420 claim. However, Plaintiff has brought UCC 4-401 claims against its own banks, NBSC and BB&T.

Plaintiff relies on *Gina Chin* to support its direct claim theories. However, *Gina Chin* is not binding authority on this Court. It was decided in Virginia which has rejected the double forgery rule, i.e., when there are forged maker signatures and forged payee indorsements, no loss can be assessed based on the payee indorsements and the loss falls on the drawee bank(s). Unlike Virginia, South Carolina follows the double forgery rule. Plaintiff's direct claim on the theory of *Gina Chin* presupposes South Carolina will overturn its adoption in the *Read* case of the double forgery rule.

The alleged direct claim provisions, UCC 3-404(d) and 3-405(b), do not apply unless Plaintiff concedes the embezzler acted as an impostor and the padded payroll rule governs. Plaintiff has made neither concession. Plaintiff thinks UCC 3-404 and 3-405 provide an unlimited remedy without any liability on its part, which is not the statutory language.

Plaintiff has also treated incorrectly UCC 3-404(d) and 3-405(b) as indemnity provisions. On their face, the subsections call for loss allocation between Plaintiff and B of A. Plaintiff cannot use UCC 3-404(d) and 3-405(b) unless Plaintiff first has admitted liability for impostor and padded payroll conduct. Plaintiff only has an opportunity to reduce its loss, viz., the total face amount of the forged checks (less any recoveries received by Plaintiff).

The 15th cause of action is for violation of the SC UTPA. Plaintiff says that B of A's automated check processing system linked to other banks constitutes an unfair or deceptive act or practice. (Third Amended Complaint, p.40, ¶¶ 184-185). Because automated check processing is expressly allowed under the UCC and by federal reserve check clearinghouse rules and regulations,

Plaintiff cannot use the UTPA to hold B of A liable under a different standard of conduct. Thus, Plaintiff's UTPA cause of action against B of A is preempted pursuant to S.C. Code Ann. § 39-5-40(a) and, therefore, should be dismissed.

All of these issues are purely legal and should be decided prior to trial for the parties to make an efficient and focused presentation at trial, and not waste judicial resources and taxpayer money before a jury. Plaintiff is asking this Court to travel a great distance beyond current South Carolina statutory and decisional law. The litigants need clarity on whether the trial court is willing to go in all of these aggressive directions.

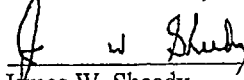
Nothing herein is intended to waive the rights of B of A to file additional motions for summary judgment, if necessary, should this motion not be fully granted.

WHEREFORE, for the foregoing reasons, the 17th and 15th causes of action against B of A should be dismissed with prejudice.

Charlotte, NC

Date: 9/5/14

DRISCOLL SHEEDY, P.A.

By: 
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ATTORNEYS FOR B OF A

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

Overland, Inc., d/b/a Land Rover Greenville,))

Plaintiff,))

vs.))

Lara Marie Nance; Charlie Andrew Nance;)
Roger Fields; Synovus Financial)
Corporation d/b/a NBSC; Bank of America,)
N.A.; and Suntrust Banks, Inc.,)

C.A. No.: 2010-CP-23-5880

Defendants.))

**BANK OF AMERICA'S BRIEF IN SUPPORT OF ITS RULE 56(B)
MOTION AS TO THE 17TH AND 20TH CAUSES OF ACTION AGAINST IT**

In support of its motion for summary judgment as to the 17th and 20th causes of action against it (the "Motion"), defendant Bank of America, N.A. (B of A) respectfully submits the following.

I. Right to Summary Judgment

"A party against whom a claim . . . is asserted may, at any time, move . . . without supporting affidavits for a summary judgment in his favor . . ." Rule 56(b), SCRCP. Summary judgment is the appropriate remedy when no cause of action exists. *Linog v. Yampolsky*, 376 S.C. 182, 656 S.E.2d 355 (2008) (no cause of action exists for medical battery); *Majstorich v. Gardner*, 361 S.C. 513, 604 S.E.2d 728 (Ct. App. 2004) (no cause of action exists for breach of express warranty for a lawyer to obtain a specific result); *Toomer v. Norfolk Southern Ry. Co.*, 344 S.C. 486, 544 S.E.2d 634 (Ct. App. 2001) (no equitable indemnity lies where there is no contractual, master/servant, contractor/subcontractor or other special relationship); and *Brown v. Pearson*, 326

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S.C. 409, 483 S.E.2d 477 (Ct. App. 1997) (no cause of action for clergy malpractice). Here, Plaintiff as maker on the checks has no direct tort claim under the Uniform Commercial Code (UCC) for indemnity for its entire check fraud loss from B of A as depository. Nor does Plaintiff have a cause of action that the federal and state check clearinghouse process is an unfair trade practice.

II. The 17th and 20th Causes of Action

The 17th cause of action sounds in negligence, gross negligence and recklessness under S.C. Code Ann. §§ 36-3-404, -405 and -406. Plaintiff alleges that B of A breached a duty of ordinary care in opening checking accounts for embezzler Lara Marie Nance (Nance) and accepting for deposit from her checks drawn on Plaintiff's NBSC and BB&T accounts bearing forged signatures and forged endorsements. (Third Amended Complaint, p. 37, ¶¶ 165-166). As a result, Plaintiff pleads it is entitled to recover from B of A for all of the forgeries, plus consequential damages, interest, expenses and the costs of the action. (*Id.*, pp. 37-38, ¶¶ 169-170).

The 20th cause of action has been mislabeled the 15th cause of action. (*Id.*, p. 40). The 20th cause of action is under the South Carolina Unfair Trade Practices Act (UTPA). Plaintiff says that "BOA . . . [has] operated under a system that manages its respective customers' financial affairs through a comprehensive system of links between and among its deposit accounts and drawee or payor banks, but fails to properly coordinate information and protections through these various linked accounts. Thus, [B of A] willfully administered a system that lacks sufficient safeguards to protect drawee or payor banks, and the public at large, from suffering a stream of damages and harm when [B of A] failed to properly process and maintain information in its systems." (*Id.*, p. 40, ¶ 184). For this alleged unfair trade practice, Plaintiff contends it is entitled to recover from B of A

for all of the forgeries, trebled, punitive damages, interest, expenses, attorneys' fees and costs. (*Id.*, p. 41, ¶¶ 187-188).

III. Undisputed, Dispositive Facts

"This action arises . . . on or about July 2007 . . . until in or around February 2010 . . ." (*Id.*, p.4, ¶ 14.) Plaintiff "maintained business accounts at NBSC and BB&T for its dealership." (*Id.*, p.9, ¶ 33.) Plaintiff did not have an account at B of A during this period.

Nance wrote checks on Plaintiff's accounts that were unauthorized by Plaintiff. (*Id.*, pp. 37, ¶ 165). Nance deposited the funds into her two accounts at B of A (as well as at SunTrust) endorsing the payee names of legitimate companies which she was not authorized to do. (*Id.*, p.4, ¶15(c).)

For purposes of the Motion, there are only three dispositive facts, all of which have been repeatedly represented to the Court and none of which can now be disputed: a) Plaintiff banked at NBSC and BB&T; b) Plaintiff did not have an account at B of A; and c) Nance forged maker signatures and the endorsements of legitimate payees on checks drawn on Plaintiff's NBSC and BB&T accounts. Accepting these three indisputable, dispositive facts, the Court must grant the Motion, inasmuch as the two remaining causes of action against B of A have no merit under existing South Carolina law.

IV. No UCC 3-406 Direct Tort Claim

The 17th cause of action asserts a direct statutory tort claim under, among other provisions, UCC 3-406(b). There is no South Carolina decisional law to support a direct statutory tort claim under UCC 3-406(b). So Plaintiff based its claim upon Virginia law. In *Halifax Corp. v. Wachovia Bank*, 268 Va. 641, 604 S.E.2d 403 (2004), the Supreme Court of Virginia held there was no direct

statutory tort claim under UCC 3-406(b). One of the many reasons the Virginia court denied the claim was because UCC 3-406(b) (unlike UCC 3-404(d) and -405(b)) did not say "the person bearing the loss may recover from the person failing to exercise ordinary care." *Halifax*, 268 Va. at 654, 604 S.E.2d at 408.

S.C. Code Ann. § 36-3-406(b) (2008) does not say "the person bearing the loss may recover from the person failing to exercise ordinary care." Instead, § 36-3-406 states specifically that it is a "preclusion" against recovery. See S.C. Code Ann. § 36-3-406(a) and (b). Hence, the statutory language of South Carolina's UCC 3-406 does not support any right to an affirmative claim. Rather, South Carolina's UCC 3-406(b) states "the loss is allocated." S.C. Code Ann. § 36-3-406(b). Through its reference to *Read v. South Carolina National Bank*, 286 S.C. 534, 335 S.E.2d 359 (1985), the South Carolina Reporter's Comment makes it clear that the revised § 36-3-406 does not create a cause of action. The Comment states that the "adoption of this provision does not affect the authority of [*Read*], which is the leading decision on the effect of a drawer's negligence upon the drawer's claim that his signature was unauthorized." S.C. Code Ann. § 36-3-406, S.C. Reporter's Comment. In *Read*, the Court cast § 36-3-406(b) as a defense, not a separate cause of action. See *Read*, 286 S.C. at 541-542, 335 S.E.2d at 363. The S.C. Reporter's Comment proceeds to say that the revised § 36-3-406 operates as a "counter defense" that has been "substantially restrict[ed]". *Id.*

The S.C. Reporter's Comment makes it clear § 36-3-406 operates as a defense, not a cause of action. The introduction of a comparative fault scheme does not change the underlying nature of this Statute. It remains a defense to an action, rather than a cause of action itself. Because there is

no South Carolina direct statutory tort claim for indemnity under UCC 3-406(b), the UCC 3-406 portion of the 17th cause of action should be dismissed with prejudice.

V. No Direct Claim for Indemnity under UCC 3-404 or 3-405 Either

The remainder of the 17th cause of action is rooted in UCC 3-404(d) and 3-405(b). To allow Plaintiff to proceed with a direct claim for indemnity under South Carolina's UCC 3-404(d) and 3-405(b), this court will have to take four successive leaps in directions our appellate courts have not heretofore gone: i) this court will have to overrule the adoption of the double forgery rule in the *Read* case; ii) this court will have to find that UCC 3-404(d) and 3-405(b) are not just defenses and will have to create direct statutory causes of action; iii) this court will have to allow such newly created causes of action without Plaintiff conceding impostor or fictitious payee (UCC 3-404), or padded payroll (UCC 3-405); and iv) this court will have to allow for indemnity under UCC 3-404(d) and 3-405(b) rather than just contribution or loss allocation. Before this trial court is Plaintiff's 17th cause of action and it is not available under the current state of the law.

A. South Carolina's Double Forgery Rule

In *Read*, 286 S.C. 534, 335 S.E.2d 359, our Supreme Court cited to the 5th Cir. Court of Appeals decision in *Perini*:

In *Perini v. First National Bank of Habershan, Co.*, 553 Fed.2d 398 (5th Cir.1977), the Fifth Circuit, in a most celebrated case, held that in cases where a defective endorsement is accompanied by a forged drawer's signature, that the loss is a forged check loss and not an endorsement loss, and no liability could be assessed on the basis of the endorsement.

Read, 286 S.C. at 542, 335 S.E.2d at 364. *Perini* was adopted in *Read* to address the second cause of action in that case that involved a forged drawer signature and a missing payee endorsement.

Until *Read* is overruled, the law in South Carolina is that where there exists a forged maker signature and a forged payee endorsement, the loss is not on the endorsement but on the signature. The checks at issue here all have forged maker signatures and forged payee endorsements. There is no South Carolina case holding that a drawer (like Plaintiff) can utilize UCC 3-404(d) and 3-405(b) to assert a claim against a depository bank in a double forgery situation. Therefore, under existing South Carolina law, the claims of Plaintiff are against its own banks, NBSC and BB&T, not the depository banks B of A and SunTrust.

Plaintiff looks to *Gina Chin & Assoc., Inc. v. First Union Bank*, 256 Va. 59, 500 S.E.2d 516 (1998), a Virginia case, in order to avoid the double forgery rule. For this trial court to follow *Gina Chin*, the court will have to find (based on *Gina Chin* and not on anything existing under South Carolina law) that the revisions to UCC 3-404(d) and 3-405(b) effectively overrule our Supreme Court's adoption of the double forgery rule. Further, *Gina Chin* was before the Virginia court on a Rule 12 motion. All the Virginia court really said was that the novel cause of action could proceed into discovery. The subsequent *Gina Chin* decision, after trial, made no mention of direct statutory tort claims under UCC 3-404(d) and 3-405(b) surviving the double forgery rule. The subsequent *Gina Chin* decision holds the former First Union liable under the common law tort doctrine of *respondeat superior* for its bad-actor employee directly aiding and abetting the forgeries. Plaintiff is asking this trial court not to follow precedent. This is different from and well beyond allowing development of facts through discovery on a brand new cause of action never seen by the appellate courts. This trial court should apply the double forgery rule and dismiss with prejudice the 17th cause of action.

B. The Defenses of UCC 3-404(d) and 3-405(b)

In *Wachovia Bank, N.A. v. Federal Reserve Bank of Richmond*, 338 F.3d 318 (4th Cir. 2003), decided after North Carolina added the loss allocation revisions to UCC 3-404(d) and 3-405(b), U.S. Court of Appeals Judge Dennis W. Shedd addressed a third party complaint under North Carolina law based on UCC 3-406(b). He concluded "this statute provides for a defense but does not expressly create a cause of action." *Id.* at 325. Although Judge Shedd was looking at North Carolina's UCC 3-406(b), his reasoning applies with equal force to South Carolina's UCC 3-404(d) and 3-405(b).

A check is a negotiable three-party instrument. There is the maker or drawer that causes the check to be issued. There is the drawee bank on which the check is drawn for payment. There is the payee that endorses the check for payment. There are no other parties to a check.

When a maker signature or payee endorsement is forged or unauthorized, the maker or drawer has a claim against the drawee, its own bank, under UCC 4-401 for honoring a check not properly payable. The maker or drawer has no statutory conversion claim under UCC 3-420 against the drawee, its own bank, or the depository that accepted the check; the claim of the maker sounds exclusively in contract against its own bank. That bank, the drawee, then has warranty claims under UCC 3-417 and 3-418 against the depository if the check had only a forged payee endorsement. The drawee also has defenses to its customer's claim under 3-404 (impostor; fictitious payee), 3-405 (padded payroll) and 3-406 (customer substantially contributing to the forgery). The depository has these same defenses if it accepts a tender of defense on the warranties. The customer may invoke loss allocation against the drawee if the drawee lacked ordinary care in taking or paying the forgery.

When a payee endorsement is forged or unauthorized, the payee has a UCC 3-420 conversion claim against the drawee and the depository. The drawee may have warranty claims against the depository for forged endorsements. Both the drawee and the depository may plead UCC 3-404, 3-405 and 3-406 as defenses. The payee may invoke loss allocation if the drawee and/or depository lacked ordinary care in taking or paying the forgery.

An examination of the pre-2008 S.C. Code Ann. § 36-3-405¹ helps demonstrate that the 2008 revisions did not create a new cause of action, but merely eliminated the absolute quality of the defenses. Prior to the revisions, the defenses of fictitious payee or imposter and padded payroll were all complete bars to recovery by the employer-drawer. See *Stone Mfg. Co. v. NCNB of South Carolina*, 308 S.C. 287, 290, 417 S.E.2d 628, 630 (Ct. App. 1992) (Pre-2008 S.C. Code Ann. § 3-405 “makes no reference to the bank’s negligence as an exception to its application.”). The allegedly forged endorsements were considered effective and no claim could be lodged by the employer-drawer against a bank that accepted the check for deposit or paid the check from the drawer-employer’s account.

The revised S.C. Code Ann. § 36-3-405(b) overrules *Stone*, because it now qualifies the defenses of fictitious payee or imposter (UCC 3-404) and padded payroll (UCC 3-405) by allowing the employer-drawer to demonstrate a lack of ordinary care on the part of the payee bank and/or depository bank. However, the employer-drawer must still have a viable claim under UCC 4-401

¹ The 2008 revisions split former S.C. Code Ann. 36-3-405 into the new S.C. Code Ann. §§ 36-3-404 and 3-405.

(not properly payable) or UCC 3-420 (conversion).² If the employer-drawer can prove that the bank failed to exercise ordinary care, then the employer-drawer's own negligence is no longer a bar to recovery. See S.C. Code Ann. § 36-3-405, S.C. Reporter's Comment ("[I]f the employer can establish that the depository bank failed to exercise ordinary care and that the failure substantially contributed to the loss, the employer can recover from the depository bank to the extent the bank's failure to exercise ordinary care contributed to the loss."). This is not a new cause of action, instead it is the tempering of a formerly absolute defense.

The point is the UCC has a well-established, risk-shifting statutory scheme for addressing the various fact patterns of check forgery. New, direct causes of action should be expressly stated, as Judge Shedd noted, and not implied.³ Before a new, direct cause of action is judicially created from statutory implication, much thought has to be given to the ramifications of such cause of action on the other provisions in Articles 3 and 4. For example, Plaintiff as drawer wants to be able to sue directly B of A as depository and NBSC as drawee under UCC 3-404(d) and 3-405(b) in connection with forged signatures and forged payee endorsements. Normally, without any such new cause of

² A good example can be found in *Rodrigue v. Olin Employees Credit Union*, 406 F.3d 434 (7th Cir. 2005). There, the Seventh Circuit analyzed the Illinois version of 3-405, as a defense that did not shield the Credit Union from liability for conversion. The plaintiff's conversion action was allowed to proceed, because the defense was not an absolute bar, but was rather a loss allocation provision. See *Rodrigue*, 406 F.3d 440-41, 449-51. That was the intent behind the change to 3-404 and 3-405, that the bank would have to face the consequences of its failures, while still taking into account the negligence of the plaintiff. As the court stated in *Atlantic Mutual Insurance Company v. The Provident Bank*, 79 Ohio Misc.2d 5, 10, 669 N.E.2d 901, 904 (1996), "[t]he bank's failure to detect the forgeries at the time of presentment is counterbalanced by the employer's own failure to act in a prudent and safe manner. Accordingly, they shall both wallow equally in the fruits of their failures."

³ Another court that has looked at this issue found that the actual cause of action against a bank arose under UCC 4-401, while defenses to that action could be found in UCC 3-404, 3-405 and 3-406. See *Environmental Equipment & Service Co. v. Wachovia Bank, N.A.*, 741 F. Supp. 2d 705, 713 (E.D. Pa. 2010) (While PCC § 4401 "creates a general cause of action . . . other sections of the PCC offer substantial defenses for banks", such as Sections 3405 and 3406.) "This scheme provides a comprehensive remedy for the parties to the transaction . . ." *Id.* at 714.

action, Plaintiff would be suing just its own bank NBSC which would make warranty claims against B of A for the payee endorsements (assuming the unavailability of the double forgery rule). With this new cause of action advocated by Plaintiff, B of A and NBSC would both fall under UCC 3-404(d) and 3-405(b) where there is no mention of loss allocation between drawee and depository in a double forgery case. If UCC 3-404(d) and 3-405(b) are to be re-written into provisions for joint contribution among tortfeasors, the South Carolina General Assembly should do it after study by the Judiciary Committee and input from the Bar, including its sections. For now, UCC 3-404(d) and 3-405(b) should remain defenses, although no longer absolute; and the provisions of Articles 3 and 4 for handling check fraud claims should not be expanded to allow stand-alone tort claims for indemnity for the entirety of a check fraud loss.

C. UCC 3-404(d) and 3-405(b) Limited to Impostor or Fictitious Payee and Padded Payroll

On their face, each of UCC 3-404(d) and 3-405(b) contains language conditioning any recovery by a claimant against a bank. UCC 3-404(d) is available "with respect to an instrument to which Subsection (a) or (b) applies." S.C. Code Ann. § 36-3-404(d) (2008). Under UCC 3-404(d), bank liability exists only if the forger acted as an impostor (subsection(a)) or the payee was fictitious (subsection (b)). UCC 3-405(b) contains preambulatory language to the loss allocation portion that such portion applies where "an employer entrusted an employee with responsibility with respect to

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an instrument and the employee or a person acting in concert with the employee makes a fraudulent endorsement of the instrument.” S.C. Code Ann. § 36-3-405(b). Under UCC 3-405(b), there may be bank liability under the padded payroll fact pattern.

Under both §§ 36-3-404(d) and 3-405(b), a claimant has to first concede impostor or fictitious payee and padded payroll to fit within these two sections. There must be a determination or admission that “the employee’s indorsement in the name of the employer is effective” (S.C. Code Ann. § 36-3-405, S. C. Reporter’s Comment) and a determination or admission that the payee endorsement is effective (S.C. Code Ann. § 36-3-404, S.C. Reporter’s Comment). Plaintiff has not made any such concessions. Because Plaintiff has not admitted impostor or fictitious payee and padded payroll, Plaintiff has no right to loss allocation or a direct statutory tort claim under the plain language of UCC 3-404(d) and 3-405(b). This is yet another independent, self-sustaining reason why the 17th cause of action under UCC 3-404(d) and 3-405(b) must fail.

D. No Right to Indemnity under UCC 3-404(d) and 3-405(b)

On the 17th cause of action, Plaintiff has sued B of A seeking actual damages for all of the check forgeries presented by Nance for deposit into her two accounts at B of A. Even if this trial court decides not to follow the double forgery rule adopted in the *Read* case; allows Plaintiff to proceed with a direct statutory tort claim against B of A as depository, based on statutes drafted to be qualified defenses; and permits Plaintiff to proceed with its direct claims without being bound to

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admit impostor or fictitious payee and padded payroll, Plaintiff is still not entitled to indemnity under UCC 3-404(d) and 3-405(b).

UCC 3-404(d) and 3-405(b) are plainly contribution (loss allocation), not indemnity, provisions. Plaintiff may recover only "to the extent the failure to exercise ordinary care contributed to the loss." S.C. Code Ann. §§ 36-3-404(d) and 36-3-405(b). There is nothing in either provision that would enable Plaintiff to recover its entire loss irrespective of its own liability therefor. Since 2012, Plaintiff has advanced its 17th cause of action on a fault-free basis. Plaintiff has to be at least partially at-fault to fall under UCC 3-404(d) and 3-405(b), which is not the 17th cause of action that has been through discovery in this case. UCC 3-404(d) and 3-405(b) do not provide for indemnity, but are simply loss allocation provisions. The cause of action must fail for this reason, in addition to the others stated above.

VI. Federal and State Check Clearing not an Unfair or Deceptive Act or Practice

Under S.C. Code Ann. § 39-5-40(a) (1976), the UTPA is inapplicable to "actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law." This exemption is "intended to exclude those actions or transactions which are allowed or authorized by regulatory agencies or other statutes." *Ward v. Dick Dyer and Associates, Inc.*, 304 S.C. 152, 155, 403 S.E.2d 310, 312 (1991). "The purpose of the exemption is

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to insure that a business is not subject to a lawsuit under the Act when it does something required by law, or does something that would otherwise be a violation of the Act, but which is allowed under other statutes or regulations.” *Id.*, quoting *Skinner v. Steele*, 730 S.W.2d 335, 337 (Tenn. App. 1987). The “regulatory exemption in section 39-5-40(a) is based on the concept that the legislature has determined certain matters are appropriate for resolution by administrative agencies with particular expertise, rather than by the general jurisdiction of a trial court.” *InMed Diagnostic Services, L.L.C. v. MedQuest Associates, Inc.*, 358 S.C. 270, 277, 594 S.E.2d 552, 555 (Ct. App. 2005). See also *Carr v. United Van Lines, Inc.*, 289 S.C. 194, 345 S.E.2d 734 (Ct. App. 1986) (Transaction exempt from UTPA because the action was specifically permitted under regulations and tariffs administered by the Interstate Commerce Commission.); *The Coastal Bank v. Crump*, 2013 WL 8482310, *5 (S.C. Comm. Pl. 2013) (“Lender’s allegedly wrongful conduct, relating to its lending practices and decision to make the subject loan to Borrowers, is exempt from SCUTPA . . . as those practices are heavily regulated by federal and state law.”); *Myatt v. RHBT Financial Corporation*, 2005 WL 6229334, *9 (S.C. Comm. Pl. 2005) (Because “Bank acted in a manner authorized by federal law as to both fund availability (Reg CC) and wire transfers (Reg J)”, summary judgment was proper as to account holder’s UTPA claim.).

Plaintiff’s 20th cause of action against B of A is based upon B of A’s use of a “comprehensive system of links between and among its deposit accounts and drawee or payor banks.” (Third

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Amended Complaint, p. 40, ¶ 184.)⁴ Plaintiff is referring to the electronic processing of checks presented for deposit at B of A by its customers. This electronic system is allowed and regulated in accordance with state law (South Carolina's adoption of the UCC) and federal law (Check Clearing for the 21st Century Act or the Check 21 Act). S.C. Code Ann. § 36-4-201, *et seq.* addresses bank deposits and collections and sets forth exactly how checks are to be transferred, presented and collected by each bank dealing with the check. Under the Check 21 Act, Congress established a federal statutory framework for electronic check processing. Regulation CC, (12 C.F.R., Part 229), sets forth the federal requirements for the collection, presentment and payment of checks. 12 C.F.R. § 229.3 addresses the enforcement of Regulation CC and allocates responsibility to the Federal Deposit Insurance Corporation (FDIC) for monitoring compliance with the Regulation.

B of A's system of electronic processing of checks is exempt under S.C. Code Ann. § 39-5-40(a) because check processing is heavily regulated under both state and federal law. Any alleged failure of B of A's check processing system would be addressed under the federal regulations and, where not covered by federal law, under South Carolina's adoption of the UCC. The 20th cause of action against B of A should be dismissed.

⁴ Plaintiff also makes certain allegations about B of A's "customer service system" (Third Amended Complaint, p. 40, ¶ 185); however, Plaintiff is not a customer of B of A, so the customer service provided by B of A to its other customers has no bearing on Plaintiff's UTPA claim against B of A.

VII. Conclusion

Plaintiff has no basis for asserting a direct tort claim under UCC 3-406(b). Plaintiff has no direct tort claim for indemnity under UCC 3-404(d) or 3-405(b) either. The double forgery rule bars Plaintiff's UCC 3-404(d) and 3-405(b) direct tort claims against B of A. UCC 3-404(d) and 3-405(b) do not create direct tort causes of action but rather set forth a loss allocation escape for a claimant otherwise precluded by impostor or fictitious payee, and padded payroll. To avail itself of loss allocation under UCC 3-404(d) and 3-405(b), Plaintiff has to concede its own liability for impostor or fictitious payee and padded payroll, which is not the posture of the 17th cause of action. Even if Plaintiff is able to assert a direct statutory tort claim under UCC 3-404(d) and 3-405(b), Plaintiff is not entitled to indemnity for all forgeries deposited at B of A as Plaintiff has claimed. Under UCC 3-404(d) and 3-405(b), Plaintiff gets a loss allocation between its fault and the banks' purported failure to exercise ordinary care in taking or accepting the forgeries. Any one of these four independent, self-sustaining reasons militates for dismissal with prejudice of the 17th cause of action in this case.

Plaintiff's 20th cause of action is equally unavailing, because check processing is exempt from the UTPA. It is an area heavily regulated by both federal and state law. Any question as to the propriety of B of A's practices in this area is subject to review by the FDIC. Because of the UTPA exemption, Plaintiff cannot lodge a UTPA claim against B of A that its check processing system is

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an unfair or deceptive act or practice. As a result, the 20th cause of action should be dismissed with prejudice.

WHEREFORE, for the foregoing reasons, B of A asks that the Motion be granted and the two remaining causes of action against it be dismissed with prejudice.

Charlotte, NC

Date: 10/24/14

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ATTORNEYS FOR B OF A

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	C.A. No.: 2010-CP-23-5880
Overland, Inc., d/b/a Land Rover	)	
Greenville,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Lara Marie Nance, Charlie Andrew Nance	)	
Roger Fields, Synovus Financial	)	
Corporation d/b/a NBSC, Branch Banking	)	
and Trust Company, Bank of America	)	
Corporation, and Suntrust Banks, Inc.	)	
	)	
Defendants.	)	

RESPONSE OF OVERLAND, INC.
TO DEFENDANTS' BANK OF AMERICA and SUNTRUST BANKS
MOTIONS FOR SUMMARY JUDGMENT

Plaintiff respectfully submits this Response to Defendant Bank of America (BOA)'s Motion for Summary Judgment Purely on the Basis of Law, and in response to Defendant Suntrust Banks (Suntrust)'s Motion for Summary Judgment. Plaintiff relies upon this memorandum and oral arguments presented by counsel in respectfully requesting the Court to dismiss Defendants' motion.

1. **BOA's Motion for Summary Judgment Purely On The Basis Of Law is not appropriate and should be treated as wasteful of judicial resources.**

The issue regarding whether Overland has a valid claim of negligence against BOA and Suntrust (Depository Banks) has already been ruled upon by this Court. On May 22, 2014, this Court entered an order affirming that issues involving Overland's negligence cause of action

could entitle it to judgment against these defendants as a matter of law. Defendants' Motion to Dismiss was denied. The instant motion is nothing more than a motion to reconsider masquerading as a Rule 56 motion, and therefore, should be rejected. Defendant BOA continues to waste the Court's time and resources by presenting motions in piecemeal fashion, particularly with respect to matters which have been previously raised and ruled upon.

2. Defendant BOA's substantive legal arguments are meritless.

Defendant BOA has misstated the law in South Carolina with respect to check fraud scheme. Depository Banks may be sued for negligence by customers and noncustomers alike. The UCC and South Carolina's Commercial Code expressly provide that tort claims are available to check drawers/makers against depository banks under certain circumstances set forth within S.C. Code 36-3-404(d) and 405(b), which is exactly what occurred in the Overland suit. Defendant BOA is asking the Court to disregard 3-404's Official Commentary that "[i]n those cases . . . (referring to situations where the person taking the check for collection failed to exercise ordinary care in detecting the fraud) . . . the drawer has a **cause of action** against the offending bank to recover a portion of the loss. The amount of loss to be allocated to each party is left to the trier of fact." The S.C. Reporter's Comment agrees that 3-404(d) is "new and changes prior law," by affording the party bearing the loss in an imposter or fictitious payee case "can recover from the person who negligently . . . took the [check] for value or collection." There is no distinction here between customers and noncustomers, nor are there any requirements of seeking indemnity in order for 3-404(d) to apply.

Also, these code sections are not merely affirmative or counter defenses that may be used by a Drawer to transfer fault as suggested by BOA. Rather, they are independent, tort claims available to a party suffering the loss in a check fraud scheme. This is the exact framework to

which Overland has plead its negligence causes of action.

The only accurate statement of the law offered by Defendant BOA is that 3-406 does not provide for new causes of action against depository banks. Although 3-406 also adopts a comparative fault approach similar to 3-404 and 3-405, it only provides for defenses and counter defenses. Overland's negligence cause of action should not be dismissed outright simply because it pled a 3-406 counter defense as an alternative mode of relief.

Nonetheless, the *Read* case cited by the defense has been applied incorrectly to this case. *Read* was as an Employer v. Drawee Bank fact pattern analyzed under 3-406(a), not an Employer v. Depository Bank case applied to 3-404(d) and 3-405(b). There is absolutely no authority within the *Read* case which prohibits a negligence cause of action under 3-404(d) or 3-405(b). Instead, the *Read* Court dismissed the plaintiff's conversion cause of action. Moreover, the *Read* Court stated in dicta that, "[l]iability for accepting a check for deposit into an incorrect account lies with the depository bank." *Id.* 286 S.C. at 542-43, 335 S.E.2d at 364. Which is exactly what occurred in the Overland suit – Defendant BOA deposited checks made payable to "Taylor Enterprises" into Lara Nance's **personal** checking account (See, Affidavit of Peter Seitz).

Furthermore, the *Read* case does not represent South Carolina's double forgery rule. Even if it did, the 2008 revisions to Code adopting comparative fault would have completely erased this outdated approach to double forgeries (i.e., using contributory negligence instead of comparative fault). As explained by Overland the last time this issue was presented to the Court, *Read* was decided in 1985, several years before the UCC and South Carolina's Commercial Code were revised. In 1990 the UCC undertook a major revision in order to specifically adopt a comparative negligence approach to determining liability in a check fraud scheme, and provided for negligence causes of action against depository banks in some instances. The South Carolina

Code enacted these same revisions in 2008. See e.g., SC Code Ann. §§36-3-404, 405¹ and 406. Overland relied upon Virginia's *Gina Chin* case as explanative of why the classification of the double forgery as either a forged endorsement or forged maker's signature is no longer relevant or necessary now that comparative fault has been adopted. The Virginia Supreme Court in *Gina Chin*, analyzing verbatim language to South Carolina's 3-404 and 3-405, rejected the Depository Bank's argument that double forgeries operated as a defective endorsement only, and held that UCC 3-404 and 3-405 may be used by a drawer against the depository bank in a double forgery situation. 256 Va. 59, 500 S.E.2d 516 (Va. 1998).

Here, Defendant BOA is misdirecting the Court by citing 3-406's preclusions, and then lumping together the holding of *Read* into 3-404 and 3-405. Overland is not asking the Court to overrule or disregard *Read*, but rather to recognize that it only belongs within a 3-406 analysis, and that 3-404 and 3-405 triggers principles of comparative fault so that a depository bank's own negligence may be considered by the trier of fact in this case.

Moreover, summary judgment would not be appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Bennett v. Investors Title Ins. Co., 370 S.C. 561, 569, 635 S.E.2d 660, 664 (Ct. App. 2006).

¹ S.C. Code Ann. §36-3-405(b), entitled "Employer's responsibility for fraudulent endorsement by employee," provides that, "For the purpose of determining the rights and liabilities of a person who, in good faith, pays an instrument or takes it for value or for collection, if an employer entrusted an employee with responsibility with respect to the instrument and the employee or a person acting in concert with the employee makes a fraudulent indorsement of the instrument, the indorsement is effective as the indorsement of the person to whom the instrument is payable if it is made in the name of that person. **If the person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.**" (emphasis added).

Finally, Defendant BOA attempts more misdirection by arguing that Overland must first concede some degree of liability in order to avail itself of a negligence claim. However, §3-405's *Official Comment 1* disagrees, "... If the bank failed to exercise ordinary care, subsection [405] (b) allows the employer to shift loss to the bank to the extent the bank's failure to exercise ordinary care contributed to the loss. . . **The provision applies regardless of whether the employer is negligent.**" (emphasis added). Based upon the plain reading of our current statutory laws, Overland is not required, nor does it accept BOA's invitation, to admit liability under this fact pattern.

In conclusion, there is no merit to BOA's arguments that Overland's negligence cause of action should be removed from the case. The law in South Carolina is crystal clear that depository banks may be sued in negligence under 3-404(d) and 3-405(b).

3. BOA's motion should be dismissed as premature because it has not properly answer or produced discovery in compliance with Overland's requests.

As an additional threshold matter, Summary Judgment is only proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." S.C. R. Civ. P. 56(c). So, BOA and Suntrust must first comply with discovery dutifully before the Court entertains its' summary judgment motions.

Relevant to this point, Overland's complaint alleges two specific occurrences in support of its negligence claims: (1) that BOA/Suntrust were negligent in allowing the embezzler (Lara Nance) to open checking accounts without proper identification; and (2) that BOA/Suntrust were negligent when it accepted from Nance checks that were not properly payable to her and then collected funds from Overland's account with checks bearing forged endorsements. However,

BOA and Suntrust have been unwilling to produce the operations and/or control manuals implemented by the bank, which would detail their procedures for opening new accounts, for depositing checks and/or item processing, and their account monitoring practices. These are not abstract features to a bank. The Bank Secrecy Act mandates that all financial institutions implement Customer Identification Programs in order to prevent fraudulent activity and terrorism. The Affidavit of Peter Seitz, dated October 21, 2014, explains in detail the importance for requiring BOA and Suntrust to produce their manuals and the relevance it would have in determining liability in this case. This Court should not allow BOA and Suntrust to continue hiding its banking operations manuals while also claiming no genuine issues of fact are at issue. Accordingly, BOA motion should also fail.

4. Notwithstanding the above, BOA summary judgment motion should be denied because there is sufficient evidence in the record which presents material issues of fact that may only be determined at trial.

For instance:

- Lara Nance opened two checking accounts at BOA using a false Social Security Number and did not produce any documentation to BOA or Suntrust that she was doing business as Taylor Enterprises and Atlantic British. (Exhibit A - Deposition of Lara Nance, Pg. 53, lines 23-25; Pg. 111, lines 12-19)
- Lara Nance admitted to forging Charlie Nance's signature on the authorization cards at Suntrust (Exhibit B - Deposition of Lara Nance, Pg. 101, line 22 - Pg. 102, line 4)
- BOA and Suntrust deposited for Lara Nance third party corporate checks that were not payable to her and bearing forged endorsements (See, Affidavit of

Michael O'Shea).

- BOA refused to deposit many of Nance's stolen checks because they not properly payable, yet it allowed Nance to re-deposit those same checks on a later date
(See, *Exhibit A to Affidavit of Peter Seitz*).

These are but a few examples of the manners in which Overland claims that a jury is necessary to determine whether or not BOA and Suntrust were negligent in this matter. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (S.C. 2009) (requiring a mere scintilla of evidence in order for the non-moving party to survive summary judgment). The applicable statutes have implemented a comparative fault analysis with this specific fact pattern in mind. See, S.C. Code §36-3-405, *Official Comment 4*. The Overland suit is identical to the case scenarios discussed within the official commentaries, which provide recovery from a Depository bank for all or part of the loss suffered by the victimized Employer. Accordingly, the issues presented by the Overland suit can only be determined by the trier of fact.

5. Likewise, Suntrust Banks' motion should be dismissed for the same reasons cited hereinabove.

Suntrust is correct that it is similarly situated to Defendant BOA, so the law in South Carolina should apply equally and it too must face the trier of fact to render judgment on their percentage of fault. However, Suntrust is very much mistaken that its' more limited involvement with Lara Nance relieves Suntrust of any liability. This logic is faulty for two reasons: 1) Lara Nance's concurrent deposit activity at Suntrust presents a distinct set of facts for the jury to decide upon; and 2) Suntrust misses the obvious point that depositing \$54,671.38 is a substantial amount of money. And, for it to have been deposited within one week's time is unusual enough

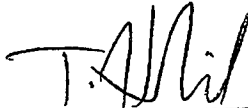
for a jury to find that it failed to use ordinary care in collecting her deposits and in opening her accounts without proper documentation.

In addition, Suntrust asserts in its motion that Overland's comparative fault exceeds the fifty percent (50%) threshold precluding recovery. But, again, Suntrust cannot show this fact by a preponderance of the evidence at Summary Judgment stage. That is a jury issue only.

6. Based upon the forgoing, Overland respectfully request the Court deny Defendants' BOA and Suntrust motions for summary judgment.

Respectfully submitted,

FAYSSOUX LAW FIRM, P.A.



Dated: October 27, 2014
Greenville, SC

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EXHIBITS

A and B

(Excerpts from Lara Nance's deposition)

CAUSE NO. 2010-CP-23-5880

OVERLAND, INC., D/B/A	)	COURT OF COMMON PLEAS
LAND ROVER OF GREENVILLE	)	
PLAINTIFF,	)	
VS.	)	COUNTY OF GREENVILLE
LARA MARIE NANCE, ET AL	)	
DEFENDANTS.	)	STATE OF SOUTH CAROLINA

COPY

ORAL DEPOSITION OF

LARA NANCE

January 15, 2014

ORAL DEPOSITION OF LARA NANCE, produced as a witness at the instance of the DEFENDANT NBSC, and duly sworn, was taken in the above-styled and numbered cause on the 15th of January, 2014, from 9:10 a.m. to 2:09 p.m., before Julie I. Upton, CSR in and for the State of Texas, reported by machine shorthand, at the FMC Carswell, Federal Medical Center, Naval Air Station, J Street, Building 3000, Fort Worth, Texas 76127 pursuant to the South Carolina Rules of Civil Procedure and the provisions stated on the record or attached hereto.

A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
scheduledepo.com

1 in October of 2005, right?

2 A. Like I said, date-wise I can't give you an
3 answer.

4 Q. Okay. I'm going to show you what has been
5 premarked as Deposition Exhibit 3. Is that your
6 signature which appears on Deposition Exhibit 3?

7 A. That's correct.

8 Q. Okay. And the date that appears on the second
9 page of Deposition Exhibit 3, do you see that date?

10 A. Yes, sir.

11 Q. Okay. What is that date?

12 A. 10-26-2005.

13 Q. Do you have any reason as we sit we here today
14 to believe that that date was not the date that you
15 opened this account?

16 A. No, sir.

17 Q. Okay. Now, this account, Lara, was set up as
18 a deposit account into which you would deposit funds
19 and from which you could withdraw funds, correct?

20 A. That's correct.

21 Q. And as I understand it, this was an individual
22 account just Lara Nance, right?

23 A. Yes, sir. I don't know if this is the time,
24 but I'm looking at this paper and that's not my Social
25 Security number on the tax identification number.

1 I've got.

2 MR. REID: Are we still on? Can we take
3 about a 5- or 10-minute break so I can streamline my
4 questions?

5 MR. HOWARD: That's fine. Probably
6 appropriate.

7 MR. SHEEDY: I've got two quick
8 questions. May I do that out of order just to be done?

9 MR. REID: Yes.

10 EXAMINATION

11 BY MR. SHEEDY:

12 Q. Ms. Nance, I asked you some questions earlier
13 about the signature cards and you looked at these
14 Social Security numbers and you said they were
15 incorrect, do you remember that?

16 A. Yes, sir.

17 Q. Okay. And they're incorrect in that they
18 should say 57 instead of 55, right?

19 A. That's correct.

20 Q. Otherwise they're correct?

21 A. Yes.

22 MR. SHEEDY: Okay. Thank you. That's
23 it.

24 (Break taken from 12:19 p.m. to 12:40
25 p.m.)

1 Q. (BY MS. MAXWELL) This is the account where
2 the checks I previously provided to you were deposited
3 into, correct?

4 A. I don't really want to answer that because I
5 don't -- there is a lot of accounts. And you-all are
6 asking me questions about this account and that
7 account. Without having backup via statements and
8 stuff like that, I don't want to answer that question.
9 I can't answer that question.

10 Q. Well, okay.

11 MS. MAXWELL: Can you hand her Exhibit 2,
12 please?

13 MS. DRISCOLL: Okay.

14 Q. (BY MS. MAXWELL) And, Ms. Nance, if you can
15 turn to the sixth page, Check Number 239834 --

16 MS. DRISCOLL: Wait a minute. What
17 exhibit are you on?

18 MS. MAXWELL: Number 2.

19 MS. DRISCOLL: Exhibit 2 only has two
20 pages.

21 MS. MAXWELL: I'll withdraw that.

22 Q. (BY MS. MAXWELL) Exhibit 3. Is that your
23 signature on the line next to the word Signature 1?

24 A. Yes, ma'am.

25 Q. And whose signature is that below yours?

102

1 A. My ex-husband's. Well, I take that back. My
2 ex-husband's name is there. He did not sign this.

3 Q. Who signed it?

4 A. I did.

5 Q. Okay. And next to signature it says
6 Name/Title. Do you see that?

7 A. Yes, ma'am.

8 Q. It says Owner. What were you stating that you
9 were the owner of?

10 A. The company listed above.

11 Q. Okay. And next to Charlie Andrew Nance below
12 that it says Officer. What would he be the officer of?

13 A. He had nothing to do with this. His name was
14 on there, but he wasn't anything in this whole mix.
15 His name was put on the paperwork.

16 Q. And in the portion below where it starts, "It
17 is agreed" --

18 A. Uh-huh.

19 Q. -- if you don't mind reading that. It
20 mentions that this account shall be governed by the
21 rules and regulations of this account.

22 MR. REID: Lauren, this is Hunter. What
23 document are you on?

24 MS. MAXWELL: Exhibit 3.

25 MR. REID: All right. Thank you.

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE 2014 OCT 27 PM 4:15 CASE NO. 2010-CP-23-5880

OVERLAND, Inc., d/b/a Land Rover
Greenville,

Plaintiff,

vs.

LARA MARIE NANCE, et. als.

Defendants.

AFFIDAVIT OF PETER SEITZ

Peter Seitz, personally appearing before me, who being duly sworn, states
the following:

1. My name is Peter Seitz, I am over the age of eighteen, and have personal knowledge of the facts stated herein.
2. I am the Director of Enterprise Risk with First Bancorp. I hold a B.A. with Distinction from the University of Virginia and a J.D. *cum laude* from the Washington & Lee University School of Law. I have served over twenty years in bank management of four community banks, two of which regularly operated in South Carolina. In performing my responsibilities, I have had the opportunity assist the deposit operations of my respective employers with issues similar to those which are the subject of this matter. Based on this banking experience, I prepared to offer several opinions in this matter. To that end, I have reviewed certain pleadings and discovery

produced in this matter.

3. It is customary for a bank to obtain basic identification information from a consumer desiring to open a checking account. These identification procedures must comply with the implementing regulations for the Bank Secrecy Act and are commonly known in the industry as the "know your customer" (or KYC) rules. Banks collect the social security numbers (SSNs) from consumers in order to comply with KYC. It is customary for a bank to compare the SSNs provided by a consumer to a database which identifies suspect numbers. Ms. Nance provided defendant, Bank of America, with an incorrect SSN which such a database would have ascertained as invalid as to her and be considered a "red flag" under customary banking practice.
4. Similarly, banks obtain KYC information for sole proprietorships as well. While a sole proprietorship may use the individual's SSN, the sole proprietorship may provide a Taxpayer Identification Number (TIN) as well. When Ms. Nance converted the personal account to a sole proprietorship account at Bank of America, she used the same incorrect SSN that she originally provided Bank of America. In order to achieve documentary compliance with KYC, a sole proprietorship should present a business license or documentation to establish probate of the trade name being used by the sole proprietor.
5. Banks are required to maintain records of how they complied with the KYC rules. The defendant banks, SunTrust Bank and Bank of America, have

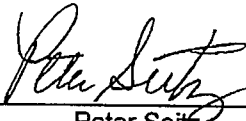
refused to produce such procedures in the discovery in this matter. In order to evaluate their compliance with their procedures and banking regulations, I would need to review the requested discovery.

6. A bank which negotiates a check for deposit bears the primary obligation of ascertaining that the check has the proper endorsement. In this matter, the defendant banks, SunTrust Bank and Bank of America, have collectively negotiated more than one hundred checks for deposits without the proper endorsement of the payee of the checks in question. In one particular instance, the defendant, Bank of America, recognized that three checks deposit on or just before October 1, 2009 in the respective amounts of \$3115.62, \$2956.42 and \$3094.71 were not properly endorsed and returned the checks to the depositor, the defendant Ms. Nance (See, Exhibit A, attached). Less than a month later, Ms. Nance re-deposited the same checks for deposit with the defendant, Bank of America without any objection by the bank (See, Exhibit B, attached). This further illustrates that the defendant, Bank of America, knew of its responsibility to review the endorsement of a check, it properly returned the checks for an improper endorsement, but then failed to stop the re-deposit of the same checks on a subsequent date. Similarly, SunTrust Bank accepted checks made payable to an entity with a specific address (Exhibit C, attached) that did not correspond with the address provided by the sole proprietor in opening the account (Exhibit D, attached). Instead, SunTrust accepted an endorsement of "For Deposit Only – Account 100010408238".

7. Between 2005 and 2009, Bank of America accepted for deposit at its ATMs more than a hundred checks made payable to a payee who was not the depositor. Such checks are known in the industry as "third party" checks as the ultimate depositor is a third party in the transaction. Since the payee (or second party) is not present when the check is negotiated, the bank assumes the risk that the payee's (second party's) endorsement is valid. The checks were negotiated without the endorsement of the payee (second party). This is not consistent with industry practice or the requirements of the Uniform Commercial Code.
8. Banks customarily document their procedures for accepting checks for deposits by whichever channel that the customer elects to use (e.g. over the teller line or at an ATM). The defendant banks, SunTrust and Bank of America have refused to produce those procedures in discovery in this matter. In order to evaluate the defendant bank's compliance with their procedures for negotiating checks, I would need to review the requested discovery.

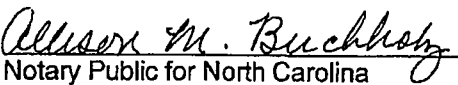
[The balance of this page intentionally blank].

FURTHER AFFIANT SAYETH NOT.


Peter Seitz

SWORN TO before me this

21 day of October, 2014.


Notary Public for North Carolina

My Commission Expires: 12-10-2018



EXHIBIT A

TO AFFIDAVIT OF PETER SEITZ



Advice Reference # 97905997
Account Number ending in 1589
ATM Card Number ending in 0661

ATM ID: ISCD3026
Transaction #: 8706

October 1, 2009

LARA M NANCE
100 LAKEVIEW DR
TOWNVILLE SC 296893036

Dear Valued Bank of America Customer,

Thank you for your ATM deposit to the above account for \$ 9166.75. In reviewing your deposit, we found an item made payable to a business and deposited into your personal account. We have adjusted the amount for you. \$3094.71 has been deducted from your account.

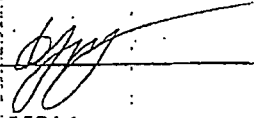
We have provided an image(s) of your deposited item(s) for your reference. The physical item will be returned to you within 10 business days. We apologize for any inconvenience this situation causes you.

Should you have any questions about this or any other transaction on your account, please contact us at the Customer Service telephone number on your Bank of America account statement.

We appreciate your business and look forward to continuing to serve you.

Sincerely,

Service and Fulfillment Operations

VERIFY THE AUTHENTICITY OF THIS MULTI-TONE SECURITY DOCUMENT.		CHECK BACKGROUND AREA CHANGES COLOR GRADUALLY FROM TOP TO BOTTOM.	
 COLUMBIA		NBSC THE NATIONAL BANK OF SOUTH CAROLINA GREENVILLE, SOUTH CAROLINA 29602	
840 Jamil Rd. I-26 @ Pinay Grove Columbia, SC 29210 (803) 731-4433		401609 67-88532	
DATE 21SEP09	PAY THIS AMOUNT TO THE ORDER OF *****3,094 DOLLARS 71 CENTS		AMOUNT OF CHECK *****3,094.71
TO THE ORDER OF TAYLOR ENTERPRISES 2586 SOUTHPORT RD SPARTANBURG SC 29030	DR. J. L. FRASHER, JR., PRES. 		
401609 10532006661362523465501*			
THE ORIGINAL DOCUMENT HAS A WHITE REFLECTIVE WATERMARK ON THE BACK. HOLD AT AN ANGLE TO SEE THE MARK WHEN CHECKING THE ENDORSEMENT.			

END OF ADVICE 710



Advice Reference # 97905998
Account Number ending in 1589
ATM Card Number ending in 0661

ATM ID: ISCD3026
Transaction #: 8706

October 1, 2009

LARA M NANCE
100 LAKEVIEW DR
TOWNVILLE SC 296893036

Dear Valued Bank of America Customer,

Thank you for your ATM deposit to the above account for \$ 9166.75. In reviewing your deposit, we found an item made payable to a business and deposited into your personal account. We have adjusted the amount for you. \$3115.62 has been deducted from your account.

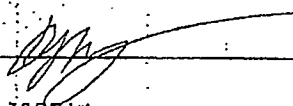
We have provided an image(s) of your deposited item(s) for your reference. The physical item will be returned to you within 10 business days. We apologize for any inconvenience this situation causes you.

Should you have any questions about this or any other transaction on your account, please contact us at the Customer Service telephone number on your Bank of America account statement.

We appreciate your business and look forward to continuing to serve you.

Sincerely,

Service and Fulfillment Operations

VERIFY THE AUTHENTICITY OF THIS MULTICOLORED SECURITY DOCUMENT. CHECK BACKGROUND AREA CHANGES COLOR GRADUALLY FROM TOP TO BOTTOM.	
 GREENVILLE	1450 LAURENS ROAD GREENVILLE, SC 29607 (864) 232-7493
DATE 21SEP09	NBSC THE NATIONAL BANK OF SOUTH CAROLINA GREENVILLE, SOUTH CAROLINA 29602
PAY THIS AMOUNT TO THE ORDER OF	
*****3,115 DOLLARS 62 CENTS	AMOUNT OF CHECK *****3,115.62
TO THE ORDER OF TAYLOR ENTERPRISES 2586 SOUTHPORT RD SPARTANBURG SC 29030	DR. J. L. FRASHER, JR., PRES. 
⑈ 105530 ⑈ ⑆ 053200666 ⑆ 36252343800 ⑈	

END OF ADVICE 710



Advice Reference # 97905999
Account Number ending in 1589
ATM Card Number ending in 0661

ATM ID: ISCD3026
Transaction #: 8706

October 1, 2009

LARA M NANCE
100 LAKEVIEW DR
TOWNVILLE SC 296893036

Dear Valued Bank of America Customer,

Thank you for your ATM deposit to the above account for \$ 9166.75. In reviewing your deposit, we found an item made payable to a business and deposited into your personal account. We have adjusted the amount for you. \$2956.42 has been deducted from your account.

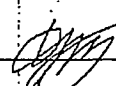
We have provided an image(s) of your deposited item(s) for your reference. The physical item will be returned to you within 10 business days. We apologize for any inconvenience this situation causes you.

Should you have any questions about this or any other transaction on your account, please contact us at the Customer Service telephone number on your Bank of America account statement.

We appreciate your business and look forward to continuing to serve you.

Sincerely,

Service and Fulfillment Operations

VERIFY THE AUTHENTICITY OF THIS MULTI-TONE SECURITY DOCUMENT		CHECK BACKGROUND AREA CHANGES COLOR GRADUALLY FROM TOP TO BOTTOM	
 JAGUAR LAND ROVER ASHEVILLE 496 Cardinal Rd., P.O. Box 280 Mills River, NC 28759 Tel: (828) 891-7400 www.jaguarlandrover.com		BB&T BRANCH BANKING AND TRUST COMPANY GREENVILLE, SOUTH CAROLINA	
DATE 21SEP09		239347	
TO THE ORDER OF TAYLOR ENTERPRISES 2586 SOUTHPORT RD SPARTANBURG SC 29030		PAY THIS AMOUNT IN SPENT *****2,956 DOLLARS 42 CENTS	
		AMOUNT OF CHECK *****2,956.42	
		DR. J. L. FRASHER, JR., PRES. VOID IF NOT CASHED IN 90 DAYS.	
			
⑈239347⑈ ⑆053201507⑆0005221147105⑈			
THE ORIGINAL DOCUMENT HAS A WHITE REFLECTIVE WATERMARK ON THE BACK. HOLD AT AN ANGLE TO SEE THE MARK WHEN CHECKING THE ENDORSEMENT.			

END OF ADVICE 710

EXHIBIT B

TO AFFIDAVIT OF PETER SEITZ

LARA M NANCE

H
 Combined Statement
 Page 2 of 10 002230441589
 Statement Period
 10-24-09 through 11-20-09
 B 15 E I E P I 15

Deposit Accounts

MyAccess Checking

LARA M NANCE

Your Account at a Glance

Account Number	0022 3044 1589	
Beginning Balance on 10-24-09	\$ 389.32	
Deposits and Other Additions	+ 146,092.48	<i>Your account has overdraft protection provided by Deposit Account number 0007 8383 6180.</i>
Checks Posted	- 91,061.81	
ATM and Debit Card Subtractions	- 16,771.20	
Service Charges and Other Fees	- 214.00	
Other Subtractions	- 25,779.60	
Ending Balance on 11-20-09	\$ 12,655.19	

MyAccess Checking Additions

Deposits and Other Additions	Date Posted	Amount(\$)
BkofAmerica ATM 10/27 #000009647 Deposit Anderson Main Anderson SC	10-27	9,165.58
BkofAmerica ATM 10/28 #000001100 Deposit West Anderson Anderson SC	10-28	8,631.16
BkofAmerica ATM 10/29 #000001597 Deposit West Anderson Anderson SC	10-29	9,166.75*
BkofAmerica ATM 11/03 #000003786 Deposit West Anderson Anderson SC	11-03	8,994.00
BkofAmerica ATM 11/03 #000007890 Deposit Pleasantburg Greenville SC	11-03	2,800.00
BkofAmerica ATM 11/03 #000007894 Deposit Pleasantburg Greenville SC	11-03	980.00
BkofAmerica ATM 11/05 #000004436 Deposit West Anderson Anderson SC	11-05	6,111.20
BkofAmerica ATM 11/05 #000004433 Deposit West Anderson Anderson SC	11-05	2,999.54
CheckCard 1103 New Balance Greenville Greenville SC 74071059308987135809319	11-05	124.01
BkofAmerica ATM 11/06 #000006360 Deposit Anderson Main Anderson SC	11-06	196.00
Return Of Posted Check / Item (Received On 11-09) Check #0000001626	11-10	18,053.00
BkofAmerica ATM 11/10 #000006379 Deposit West Anderson Anderson SC	11-10	9,707.89
BkofAmerica ATM 11/12 #000007011 Deposit West Anderson Anderson SC	11-12	9,516.92
BkofAmerica ATM 11/12 #000007359 Deposit West Anderson Anderson SC	11-12	780.00
Return Of Posted Check / Item (Received On 11-13) Check #0000001627	11-16	10,918.00
BkofAmerica ATM 11/15 #000003103 Deposit Clemson Blvd Pendleton SC	11-16	3,340.00

BOA 000362

Amount: \$9,166.75 Sequence Number: 2382112823
Account: 2230441589 Capture Date: 10/29/2009
Bank Number: 58157700 Check Number: 4530261597

Electronic Deposit Image

\$9166.75

5815-7700 002230441589 401

Electronic Endorsements:

Date	Sequence	Bank #	Endrs Type	TRN	RRC	Bank Name
10/29/2009	000002382112823	11000138	Rtn Loc/BOFD	Y		BANK OF AMERICA, NA

BOA 001204

Amount: \$3,115.62 Sequence Number: 2382112824
Account: 362523438001 Capture Date: 10/29/2009
Bank Number: 05320066 Check Number: 105530

VERIFY THE AUTHENTICITY OF THIS MULTITONE SECURITY DOCUMENT. CHECK BACKGROUND AREA CHANGES COLOR GRADUALLY FROM TOP TO BOTTOM.

LAND ROVER 1450 LAURENS ROAD
GREENVILLE, SC 29607
(864) 232-7493

NBSC THE NATIONAL BANK OF SOUTH CAROLINA
GREENVILLE, SOUTH CAROLINA 29602

105530 87-80/532

DATE 21SEP09

PAY THIS AMOUNT OF THREE THOUSAND ONE HUNDRED FIFTEEN DOLLARS AND SIXTY TWO CENTS

AMOUNT OF CHECK 3,115.62

TO THE ORDER OF
TAYLOR ENTERPRISES
2586 SOUTHPORT RD
SPARTANBURG SC 29030

DR. J. L. FRASHER, JR., PRES.

⑈105530⑈ ⑆053200666⑆362523438001⑈

⑈7811506026 18011418 000115-62 NEGOTIATED AT BANK OF AMERICA⑈

Electronic Endorsements:

Date	Sequence	Bank #	Endrs Type	TRN	RRC	Bank Name
10/29/2009	000002382112824	11000138	Rtn Loc/BOFD	Y		BANK OF AMERICA, NA

BOA 001205

Amount: \$2,956.42 Sequence Number: 2382112825
 Account: 5221147105 Capture Date: 10/29/2009
 Bank Number: 05320160 Check Number: 239347

VERIFY THE AUTHENTICITY OF THIS MULTITONE SECURITY DOCUMENT.  JAGUAR LAND ROVER ASHEVILLE 490 Cardinal Rd., 6 Hwy 280 Macon River, NC 28759 Tel: 828 851-1750 www.jaguarlandrover.com		CHECK BACKGROUND AREA CHANGES COLOR GRADUALLY FROM TOP TO BOTTOM. BB&T BRANCH BANKING AND TRUST COMPANY GREENVILLE, SOUTH CAROLINA	
DATE 21SEP09	PAY THIS AMOUNT *****2,956 DOLLARS 42 CENTS	AMOUNT OF CHECK *****2,956.42	
TO THE ORDER OF TAYLOR ENTERPRISES 2586 SOUTHPORT RD SPARTANBURG SC 29030		DR. J. L. FRASHER, JR., PRES. VOID IF NOT CASHED IN 60 DAYS.	
# 239347# 1053201607#0005221147105#			
THE ORIGINAL DOCUMENT HAS A WHITE REFLECTIVE WATERMARK ON THE BACK. HOLD AT AN ANGLE TO SEE THE MARK WHEN CHECKING THE ENDORSEMENT.			

8784 15CD3826 18011418 0022956.42 NEGOTIATED AT BANK OF AMERICA

ENDORSE HERE
 DO NOT WRITE, STAMP OR SIGN BELOW THIS LINE
 RESERVED FOR FINANCIAL INSTITUTION USE

Electronic Endorsements:

Date	Sequence	Bank #	Endrs Type	TRN	RRC	Bank Name
10/29/2009	000002382112825	11000138	Rtn Loc/BOFD	Y		BANK OF AMERICA, NA

BOA 001206

Amount: \$3,094.71 Sequence Number: 2382112826
 Account: 362523465501 Capture Date: 10/29/2009
 Bank Number: 05320066 Check Number: 401609

VERIFY THE AUTHENTICITY OF THIS MULTI-TONE SECURITY DOCUMENT. CHECK BACKGROUND AREA CHANGES COLOR GRADUALLY FROM TOP TO BOTTOM.

LAND-TRON
COLUMBIA

840 Bank Rd. L-28 Pine Grove
 Columbia, SC 29210
 (803) 731-4493

NBSC
 THE NATIONAL BANK OF SOUTH CAROLINA
 GREENVILLE, SOUTH CAROLINA 29602

401609 87-66632

DATE: 21SEP09

PAY TO THE ORDER OF: TAYLOR ENTERPRISES
 2586 SOUTHPORT RD
 SPARTANBURG SC 29030

DR. J. L. FRASHER, JR., PRES.

*****3,094 DOLLARS 71 CENTS*****

*****3,094.71*****

TO THE ORDER OF

THE ORIGINAL DOCUMENT HAS A WHITE REFLECTIVE WATERMARK ON THE BACK. HOLD AT AN ANGLE TO SEE THE MARK WHEN CHECKING THE ENDORSEMENT.

8763 1503225 10211412 0003094-71 NEGOTIATED AT BANK OF AMERICA

DO NOT WRITE, STAMP OR SIGN BELOW THIS LINE
 RESERVED FOR FINANCIAL INSTITUTION USE

ENDORSE HERE

Electronic Endorsements:

Date	Sequence	Bank #	Endrs Type	TRN	RRC	Bank Name
10/29/2009	000002382112826	11000138	Rtn Loc/BOVD	Y		BANK OF AMERICA, NA

BOA 001207

EXHIBIT C

TO AFFIDAVIT OF PETER SEITZ



Client Profile - LARA M NANCE

Profile Information:

TIN: 247-57-4671
Birth Date: 07/06/1976
ID Theft Protection: NO
ID Theft Product:
Address: 803 CHANTILLY LN
ANDERSON, SC 29825
Phone Number: (864)817-5337
Business Type:

Demographic Information:

Employer: LAND ROVER
Job Title:
Officer:
Bank Employment Type: Non-employee CODE=
Work Phone: ()-
Occupation:
Household Income:
Household Net Worth:

Accounts

Row	Account Number	Class	Relationship	Current Balance	Opened Date	Closed Date
1	000001000104080238	DEP	Sole owner		01/19/2010	03/24/2010
2	000001000106908600	DEP	Sole owner		01/28/2010	03/12/2010
3	004011807202404627	CCD	Cardholder		07/08/2008	02/22/2010
4	004011807203314361	CCD	Cardholder		02/01/2010	02/22/2010

Accounts

Row	Title/Address
1	LARA M NANCE D/B/A,TAYLOR ENTERPRISES,,,PO BOX 55,TOWNVILLE SC 29689-0055,,,
2	LARA M NANCE D/B/A,ATLANTIC BRITISH,,,803 CHANTILLY LN,ANDERSON SC 29625-5802,,,
3	LARA M NANCE,,,803 CHANTILLY LN,ANDERSON SC 29625-5802,,,
4	LARA M NANCE,,,803 CHANTILLY LN,ANDERSON SC 29625-5802,,,

Accounts

Row	Bank Number
1	175
2	175
3	175
4	175

BH2FL096691



Business Account Signature Card

Account Title **LARA M NANCE Or**
CHARLIE ANDREW NANCE D/B/A
TAYLOR ENTERPRISES

Region **022**
 Account Number **1000104080238**

Type of Organization Other

Verification/Tax Identification No. 247574671

Authorized Signatory(s)

Signature 1 Lara M NanceName/Title LARA M NANCE / OwnerSignature 2 Charlie Andrew NanceName/Title CHARLIE ANDREW NANCE / Owner

Signature 3 _____

Name/Title _____

Signature 4 _____

Name/Title _____

Signature 5 _____

Name/Title _____

Signature 6 _____

Name/Title _____

Date Opened 01/19/2010

Date Revised

Reason

Career 8060288

Officer Number 032330

ID



Work Phone (864) 617 5337

By WENDY DEWISE OYE

☐ Replacement☐ Change

SunTrust Bank ("Bank")

It is agreed that all transactions between the Bank and the entity listed in the above Account Title ("Depositor") shall be governed by the rules and regulations for this account and the above signed as the authorized agent(s) of the Depositor hereby acknowledge(s) receipt of such rules and regulations and the funds availability policy. The Depositor also acknowledges the funds availability policy has been explained.

Check Appropriate Box:

☒ Individual / Sole Proprietor☐ Corporation☐ Partnership☐ Limited Liability Company

Enter the tax classification (D=disregarded entity, C=corporation, P=partnership) _____

☐ Other (See Instructions.) _____☐ Exempt payee

Certification—Under penalties of perjury, I, as authorized agent of the Depositor certify that:

- 1) 247574671 is the correct taxpayer identification number for the Depositor (or the Depositor is waiting for a number to be issued), and
- 2) The Depositor is not subject to backup withholding because: (a) the Depositor is exempt from backup withholding, or (b) the Depositor has not been notified by the Internal Revenue Service (IRS) that it is subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified the Depositor that it is no longer subject to backup withholding, and
- 3) The depositor is a U.S. citizen or other U.S. person (defined in the instructions)

Certification Instructions. You must cross out item 2 above if the depositor has been notified by the IRS that the depositor is currently subject to backup withholding because the depositor has failed to report all interest and dividends on the depositor's tax return.

Signature of U.S. Person

Lara M Nance

Date _____

EXHIBIT D

TO AFFIDAVIT OF PETER SEITZ

Check Image Print

User ID: UVNL2
Report ID: Check Image Print

Date: 08/15/2012
Time: 09:48:43

Capture Date	Sequence Number	Check Number	Amount	Posting Date	Posting Account
20100120	91201271	106257	2789.54	20100120	362523438001

VERIFY THE AUTHORITY OF THIS AUTHORIZED SIGNATURE DOCUMENT. CHECK BACK FOR A FRAUD ALERTS OR CHANGES TO YOUR ACCOUNT.

LAND PROVER
GREENVILLE

420 LAURENS ROAD
GREENVILLE SC 29607
(864) 232-7433

NBSC 106257

DATE: 8/15/2012

PAY TO THE ORDER OF

TAYLOR ENTERPRISES
2584 SOUTHPORT RD
SPARTANBURG SC 29310

DR. J. L. FRASER, JR., PRES.

AMOUNT OF CHECK: *****2,789.54

2,789 DOLLARS 54 CENTS

106257 10532006664362523438001

FOR DEPOSIT ONLY
ACCT: 100114000238

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Overland, Inc., d/b/a Land Rover
Greenville,)

Plaintiff,)

v.)

Lara Marie Nance, Charlie Andrew Nance
Roger Fields, Synovus Financial
Corporation d/b/a NBSC, Branch Banking
and Trust Company, Bank of America
Corporation, and Suntrust Banks, Inc.)

Defendants.)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
C.A. No.: 2010-CP-23-5880

AFFIDAVIT OF MICHAEL F.
O'SHEA

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 OCT 27 PM 4 19

AFFIDAVIT ATTACHED

Affidavit

State of South Carolina

County of Greenville

I, Michael F. O'Shea, do hereby swear under penalty that;

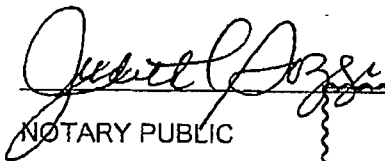
1. I am over 18 years of age and competent to testify as to my knowledge of the facts stated herein.
2. I am a forensic accountant and Director of Investigations at Forensic Research Group, Inc. a financial investigative and consulting firm specializing in forensic accounting reviews, damage analysis and litigation support. I have previously been admitted as an expert witness in forensic accounting in both Federal and State Court. A copy of my CV is attached to this affidavit.
3. I was initially retained, in February 2010, by Overland Inc. as a Forensic Accountant and investigator to review various books and records relating to an apparent employee embezzlement case.
4. On 08 March 2010 I issued an Initial Report (copy attached) outlining my initial findings indicating, with a reasonable degree of accounting certainty, that the Company had sustained a loss of \$1,008,911.78 due to embezzlement by Laura Nance.
5. Subsequent to this initial report I became aware of additional losses on review of documents provided by current and prior defendants in this matter as well as discussions with US Secret Service James Motley who investigated this matter as well.
6. Based on subsequent reviews I believe that, with a reasonable degree of accounting certainty, that the total loss exceeded \$1,400,000.00.
7. During my entire engagement I never expressed an opinion or made a statement that wasn't supported by the documentation available to me at the time.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on this 27th day of October 2014.



Affiant

Before me, the undersigned authority in and for Greenville County, South Carolina personally appeared Michael F. O'Shea who is known to me and who Sworn to and subscribed before me this 27th day of October 2014.



NOTARY PUBLIC

Judith T. Sozzi
NOTARY PUBLIC
State of South Carolina
My Commission Expires August 21, 2022

My Commission Expires: _____

Michael F. O'Shea

110 Renaissance Circle
Mauldin, SC 29662

Curriculum Vitae

General:

I am an accountant and a licensed private investigator. During my years as a forensic accountant / investigator I have worked closely with such agencies as the Federal Deposit Insurance Corporation, Resolution Trust Corporation, the Office of the Controller of the Currency, the FBI, US Secret Service and ATF. I have testified in Federal Court in New Jersey, New York, Texas, South Carolina and Kansas as well as State Court in New York, New Jersey, Florida, Texas, South Carolina and Pennsylvania. I have also testified in Middlesex Crown Court in the UK on financial matters.

I have traveled extensively servicing clients in the US, UK, France, Germany, Denmark, Switzerland, Italy, Columbia and China.

Professional Experience:

1999 – Present – Forensic Research Group, Inc. – Director of Investigations

I am responsible for implementing and supervising forensic accounting, financial investigation and corporate due diligence programs. Clients include law firms, financial institutions and corporate entities. In addition to financial investigations this firm has extensive experience corporate and individual due diligence and litigation support.

1999 – 2000 - Countdown USA, Inc. – President

In late 1998 IRG (predecessor of FRG) was retained by Transmedia Europe, Ltd., a UK based holding company, to aid in the recovery of approximately seven million dollars that it had advanced against the purchase of a service company in the US. After successfully completing that assignment I accepted a two-year contract to run that company for Transmedia. During that period I negotiated the sale of Transmedia's MonsterBook subsidiary, worked with lenders and creditors to close seven unprofitable retail locations for the Company's DBS Direct subsidiary in Seattle and ultimately worked with management to close the DBS operation.

1985 – 1998 - Investigative Research Group, Inc. – Director of Investigations

This firm specialized in corporate due diligence, asset searches, bankruptcy review and loan recovery. From 1988 to 1991 the firm held a contract to provide security and investigative services to the Federal Deposit Insurance Corporation. During this period IRG participated in the closing and investigation of more than 40 insolvent institutions. In 1992 the firm was approved by the Resolution Trust Company to provide it with fraud investigation and asset recovery services. IRG normally carried a caseload in excess of 400 matters and counted numerous banks, state and federal agencies and law firms as clients. These clients included Bank of New York, Chemical Bank, Summit Bancorp, National State Bank and the New Jersey Economic Development Authority.

1981 – 1985 - OSS Services, Inc. – President

This firm provided physical security, investigative and background due diligence services to major corporate accounts including Virgin Atlantic Airways, El Al and New York Telephone.

1976 – 1981 -Deere & Company – Regional Credit Manager

I served as the New York area Credit Manager for the Construction Equipment Division. I was responsible for dealer floor plan financing as well as credit and collection activities.

1972 – 1976 -Allied Chemical Corp. - Credit Analyst

As a Credit Analyst I was responsible for credit decisions and collection activities in the southeast region for the Plastics Division.

Education:

Union College – Business Administration

Fairleigh Dickinson University – Accounting

Affiliations:

Association of Certified Fraud Examiners

American College of Forensic Examiners;
Certified - Homeland Security Level III, Accounting & Security

A.L.M.I.E. (Association of Legal, Medical and Investigative Experts) in New York
(Past Treasurer)

Association of British Investigators

Institute of Directors (UK)

Greenville County – Court Appointed Guardian ad Litem

Court Testimony:

Federal Court –

2004 – US District Court, Anderson, SC; Judge G. Ross Anderson HomeGold / Carolina Investors; Various hearings; Admitted as an expert – Forensic Accounting.

2005 – US District Court – Spartanburg; Judge Henry Floyd; BASF v. Crown Metro

2005 – US District Court – Spartanburg; Judge Henry Floyd; BASF v. Crown Metro; Admitted as an expert – Forensic Accounting.

2007 – US Bankruptcy Court – Columbia – Judge Duncan; W. Ryan Hovis, As Trustee for the Estate of John Ducate, Sr. v. Anne Ducate; Admitted as an expert – Forensic Accounting.

2008 – US Bankruptcy Court – Charleston – Chapter 7; Derivium Capital, LLC; Appointed Forensic Examiner.

2009 – US Bankruptcy Court – Spartanburg; Chapter 7; International Payment Group; Appointed as a Forensic Accountant/ Examiner.

2011 – US Bankruptcy Court – Spartanburg; Chapter 7; SD Trust; Appointed Forensic Accountant / Examiner.

State Court –

2004 – Superior Court, New Jersey, Bergen County, Independence Community Bank v. Wortley.

2005 – State of South Carolina, Greenville County, Theisen v. BB&T.

2005 – State of South Carolina, Calhoun County, Wolf v. Wolf; Admitted as an expert – Forensic Accounting.

2013 – State of South Carolina, Greenville County, Matusz v. Foothills et al; Admitted as an expert – Forensic Accounting.

2014 – State of South Carolina, Greenville County, Warpath Development, Inc. appointed as Receiver.

Other Trial –

2003 – Middlesex Crown Court, London England. Crown Prosecution v. Rapaport, Reiss et al.

Arbitration / Mediation –

2003 – Greenville Cardiology v. Anderson; Testified as an expert – Forensic Accounting.

2004 – PSA v. Sanders.

2012 – Spectrum v. Blue Fire Grill

2012 – Staiger v. Sunbelt Management

2013 – Overland, LLC v. ADP

Fraud Review / Forensic Accounting –

2003 - Advance America v. Carpenter – Investigation, Forensic accounting

2004 - Lube USA v. Revard – Forensic accounting, loss statement

2007 - American Leasing v. Manning – Fraud review, Loss statement

2008 - Hawkins v. Batts – Insurance fraud review, forensic accounting

2009 - Springbrook Behavioral Health – Fraud review, Audit Manager

2010 - Overland, LLC v. Nance – Fraud review, loss statement

2010 - First National Bank of the South – Fraud review, Loan workout

2010 - OrthAlliance v. McConnell – Expert Witness rebuttal

2011 – Trustee for Capital Investment Funding – Asset recovery, bank review

2011 – 7 Oaks Pharmaceutical v. HS Pharma – Forensic Accounting

2012 – Long v. Kiawah et al – Forensic Accounting

2012 – New York Commercial Bank - Fraud review, Loan workout

2013 – Anthony v. Urbana et al

2013 – Overland v. Bank of America et al – Forensic Accounting / Litigation Support

2014 – Blackstone et al v. Littleton - Forensic Accounting / Litigation Support

Introduction and Purpose of Report -

I, Michael F. O'Shea, do hereby submit the report contained herein in the matter of Land Rover Carolinas ("Company").

I am the Director of Investigations of Forensic Research Group, Inc. (FRGI) a financial investigation and consulting firm specializing in forensic investigations, damage analysis and bankruptcy review. I have previously been admitted as an expert witness in forensic accounting in both Federal and State Court. I have also been appointed as a forensic examiner in several bankruptcy matters.

I have been retained by counsel for Land Rover Carolinas to perform the following:

- 1) Review and analyze select checks for which the Company had filed a Fraud Affidavit and determine where these checks were deposited.
- 2) Use the information gained in the above analysis to develop a program to review and analyze the accounts payable system of the Company to locate and quantify questionable transactions:

Background -

On Friday 05 February 2010 I was asked, by William Foster an attorney at the Nelson Mullins Law Firm, to attend a meeting at the offices of Land Rover Carolinas. At the meeting it was explained that the accounting staff had reason to believe that a then former employee, Lara Nance, may have embezzled a significant amount of funds from the Company. Ms. Nance had been employed at the Company, initially in an accounts payable capacity, since May of 2006. In about October 2009 she was moved next door to a dealership owned by the Company to act in a title transfer capacity. In early February 2010 the new accounts payable clerk went to pay an invoice and noticed that a check had already been cut. She then noticed other recently written checks for which she had no invoice on file. Upon finding these checks, management filed Forgery Affidavits with their bank in an effort to stop payment on the checks.

Process -

I initially reviewed the checks that the dealership had filed Forgery Affidavits for and noticed that the majority of these checks were endorsed only with a short, illegible, notation on the back of the check. There was no account number or any other identifying mark. Eventually I found several checks, all dated subsequent to January 19, 2010, which were endorsed with a rubber stamp indicating the account number it was being deposited into. I learned that this was an account number at Sun Trust Bank. Both checks had a similar appearing signature on the

front of the check. An example of each of these checks is attached to this report as Exhibit A.

Initially I found that virtually all of the checks were payable to one of three vendors. These vendors all supply the various Company stores with service related items such as grease and parts that are frequently used and moved in and out of inventory on a regular basis. These three vendors are;

Taylor Enterprises, Inc.
DBA Southeastern Lubricants
2586 Southport Rd.
Spartanburg, SC

Atlantic British
6 Enterprise Blvd.
Clifton Park, NY

Invision Industries
PO Box 470098
Celebration, FL

I interviewed the accounts payable and accounting staff and learned that the procedure for paying an invoice is to cut a check payable to the vendor indicating the vendor's full business name and address, the invoice(s) being paid by number and the vendor number. An example of a properly issued check is attached as Exhibit B. For purposes of identification I have referred to these checks as Verified. I also found a number of checks issued to similar vendor name but without any indication of invoices or vendor numbers. These checks listed the invoice date as being the same as the check date with no indication of invoice or purchase order numbers and no vendor number. In most instances there was simply a notation "issued by Lara Nance". An example of a check issued in this manner is attached as Exhibit C. I will refer to these checks as Suspect.

Once I had identified the vendors and the differences in the checks I requested a listing, from the Company's ADP accounting system, of all checks issued to these vendors and a vendor history report indicating which checks were issued pursuant to a purchase order or invoice. I reviewed each check and, based on the format of the check, divided them into Verified and Suspect checks. I then matched up the Verified checks to a corresponding invoice or purchase order and noted the details and purpose of each.

Once the two categories had been established I entered each check into a spread sheet collated by date and store location. A listing of the Verified Checks is attached as Exhibit D. A listing of the Suspect Checks is attached as Exhibit E.

The total for each category, by vendor, is as follows:

Verified Checks:

Taylor Oil DBA SE Lubricants	\$146,881.40
Atlantic British	\$ 79,549.79
Invision Industries	<u>\$ 20,605.00</u>
Total Verified Checks	\$ 247,036.19

Suspect Checks:

Taylor Oil	\$499,058.31
Atlantic British	\$395,211.78
Invision Industries	<u>\$114,641.69</u>
Total Suspect Checks	\$1,008,911.78

Based on inspection of the Suspect Checks, and the results of outside investigation it appears, with a reasonable degree of certainty, that Lara Nance used her access to the system to issue these checks and she then deposited them into accounts that she opened, using her personal details, as DBA accounts in the names of Taylor Enterprises, Atlantic British and Invision Industries.

As mentioned elsewhere in this report, Lara Nance was moved from an accounts payable function to a position on the dealership floor in about October 2009. In this new position she no longer had check writing ability but I have been made aware of a document, allegedly prepared by her, over what appears to be the forged signature of Dr. Jack Frasher, Jr., President of Land Rover Carolinas; requesting that ADP reinstate her privileges to full access to the system as an administrator. It appears that ADP complied with the request which in turn allowed her to continue issuing checks from her terminal in the dealership.

Based on the foregoing, I can state with a reasonable degree of accounting and investigative certainty that the loss to the Company, through Lara Nance's issuance of Suspect Checks to herself, amounts to \$1,008,911.78.

Additional Losses –

I have also been made aware of the transfer of a 2006 Ford pickup truck to Lara's brother in law, Donald B. Nance, of Lexington, SC for a stated consideration of \$18,061.00. The title documents I reviewed are attached as Exhibit F. I reviewed documents in and around the time of the transfer and have concluded, with a reasonable degree of accounting certainty, that the dealership did not receive payment for this vehicle.

My opinion, based on my review and investigation to date, is that the direct losses to the Company total \$1,026,972.78:

Total Suspect Checks	\$1,008,911.78
Loss on transfer of vehicle	<u>\$ 18,061.00</u>
	\$1,026,972.78

This report summarizes my analysis based upon the work performed to date. Because the discovery process in this case is ongoing I anticipate performing additional work prior to the adjudication of this matter including, but not limited to, analysis of any expert reports, review and analysis of any further document production and the possible preparation of arbitration exhibits. Accordingly, I reserve the right to supplement and or revise this report as new information becomes available or existing information is revisited as required.

END OF REPORT

EXHIBIT A

Suspect Checks Deposited In Sun Trust

VERIFI THE AUTHENTICITY OF THIS MULTI-TONE SECURITY DOCUMENT. CHECK BACKGROUND AREA CHANGES COLOR GRADUALLY FROM TOP TO BOTTOM.

LAND ROVER 1450 LAURENS ROAD
GREENVILLE, SC 29607
(864) 232-7493

NBSC 106147
THE NATIONAL BANK OF SOUTH CAROLINA
GREENVILLE, SOUTH CAROLINA 29602

DATE: 04 JAN 10

PAY THIS AMOUNT

*****2,954	DOLLARS	78	CENTS

AMOUNT OF CHECK

*****2,954.78

TO THE ORDER OF

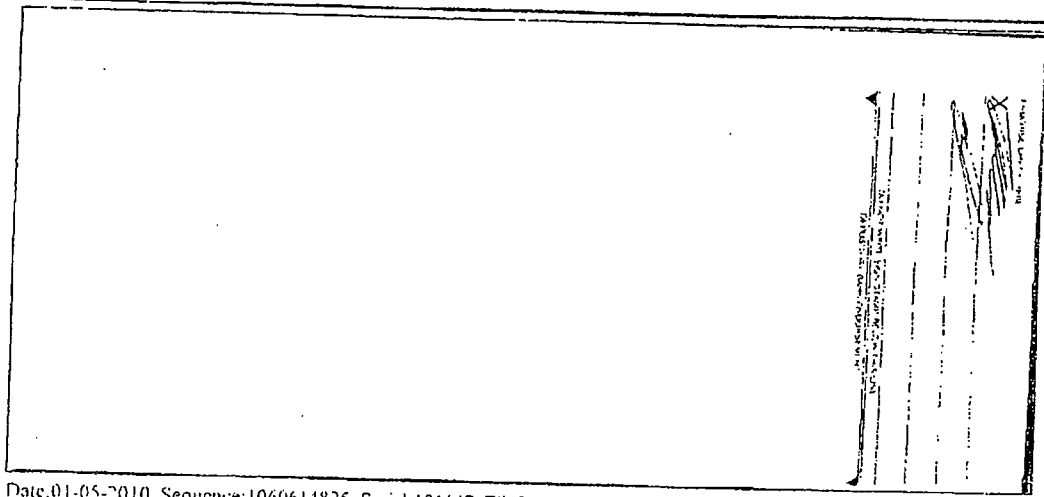
TAYLOR ENTERPRISES
2586 SOUTHPORT RD
SPARTANBURG SC 29030

DR. J. L. FRASHER, JR., PRES.

106147 106147 67-66-533

106147 106147 67-66-533

106147 106147 67-66-533



Date: 01-05-2010 Sequence: 1060614825 Serial: 106147 TR: 53200666 Account: 362523438001 TranCode: 0
Amount \$2,954.78 DbCr: D MI Account: 2523438001

<http://checkimage-prod-ha.afs.synovus.com/scripts/afs/afswb/AfsWeb.dll?Process?appli> 12726116

DELIVERY OPTIONS: Select Delivery Bill to customer Submit Select All Reset Index List

[illegible]

View TRN 31/21/2010 0000005221147105 00001956.87 D 0000129824 2805073348 D

Storage
Tier

[illegible]

<https://w1-dexpdf01.bbfnct.com/DevWeb/ImageDisplay.jsp?pageCount=6&pageNumber=1>, 1/28/2010

EXHIBIT B

Sample Verified Check

The Front Image:

Print

VERIFY THE AUTHENTICITY OF THIS MULTITONE SECURITY DOCUMENT CHECK EACH COLOUR AREA & CHANGE COLOUR GRADUALLY FROM TOP TO BOTTOM	
 1450 LAURENS ROAD GREENVILLE, SC 29607 (804) 237-7403 GREENVILLE	NBSC THE NATIONAL BANK OF SOUTH CAROLINA GREENVILLE, SOUTH CAROLINA 29601 106163 876453
DATE 04JAN10	PAY THIS AMOUNT *****1,781 OCT 1974 CENTS
AMOUNT OF CHECK *****1,781.74	
TO THE ORDER OF TAYLOR ENTERPRISES INC DBA SOUTHEASTERN LUBRICANTS 2586 SOUTHPORT RD SPARTANBURG SC 29302	
DR. J. L. FRASHER, JR., PRES 4537 <i>Hugh R. Hef</i> <i>Lincoln</i>	
106163 10532006664362523438001*	

Page 1 of 1

The Back Image:

Print

Seq: 16 Order: 000452 R/T: 611066135 Date: 01/10/10	To Deposit Amount: 1,781.74 Cnt: Taylor Enterprises Inc Disc: 0.00 Total: 1,781.74

EXHIBIT C

Sample Suspect Check

INVOICE STOCK NO.	INVOICE DATE	PURCHASE ORDER NO.	COMMENT/V.L.N.	AMOUNT	DISCOUNT ACCOUNT NO.	GR1 AMOUNT
	081009			401489	4*10030 4*13450	-2,950.00 2,950.00
				TOTAL	10030	2,950.00

DETACH AT PERFORATION BEFORE DEPOSITING CHECK

 COLUMBIA	540 Jamil Rd. 1-26 @ Piney Grove Columbia, SC 29210 (803) 731-4493	NBSC THE NATIONAL BANK OF SOUTH CAROLINA GREENVILLE, SOUTH CAROLINA 29602	401489 69-66/532
	DATE 10 AUG 09	PAY THIS AMOUNT *****2,950 DOLLARS 00 CENTS	AMOUNT OF CHECK *****2,950.00

TO
THE
ORDER
OF
INVISION INDUSTRIES
PO BOX 470698
CELEBRATION FL 34740

DR. J. L. FRASHER, JR., PRES.

 *** NOT NEGOTIABLE ***

ACCOUNTING COPY

EXHIBIT D

Verified Check Summary

Verified Checks - Taylor Enterprises d/b/a SE Lubricants				Invoice	Check
Check No.	Invoice Date	Check Date	Payable to:	Amount	Amount
GREENVILLE / Taylor 2010 - Checks					
106163	12/21/09	1/4/2010	Taylor Enterprises DBA SE Lubricants	1,161.68	
106163	12/22/09	1/4/2010	Taylor Enterprises DBA SE Lubricants	620.06	1,781.74
Greenville / Taylor 2010 Check Totals					1,781.74
GREENVILLE / Taylor 2009 - Checks					
103966	12/31/08	01/10/09	Taylor Enterprises DBA SE Lubricants	1,299.49	
103966	12/31/08	01/10/09	Taylor Enterprises DBA SE Lubricants	1,453.40	2,752.89
104175	02/24/09	02/24/09	Taylor Enterprises DBA SE Lubricants	1,299.49	1,299.49
104331	03/11/09	03/10/09	Taylor Enterprises DBA SE Lubricants	1,665.50	
104331	03/10/09	03/18/09	Taylor Enterprises DBA SE Lubricants	1,136.90	2,802.40
104463	03/31/09	04/10/09	Taylor Enterprises DBA SE Lubricants	1,665.50	1,665.50
104620	04/30/09	05/10/09	Taylor Enterprises DBA SE Lubricants	2,421.47	
104620	04/30/09	05/10/09	Taylor Enterprises DBA SE Lubricants	1,516.48	
104620	04/30/09	05/10/09	Taylor Enterprises DBA SE Lubricants	-1,299.49	2,638.44
104800	05/18/09	06/10/09	Taylor Enterprises DBA SE Lubricants	2,421.47	
104800	05/26/09	06/10/09	Taylor Enterprises DBA SE Lubricants	340.88	
104800	05/26/09	06/10/09	Taylor Enterprises DBA SE Lubricants	686.09	3,448.44
104999	06/30/09	07/10/09	Taylor Enterprises DBA SE Lubricants	777.56	
104999	06/30/09	07/10/09	Taylor Enterprises DBA SE Lubricants	1,337.00	2,114.56
105222	07/28/09	08/10/09	Taylor Enterprises DBA SE Lubricants	1,364.15	
105222	07/22/09	08/10/09	Taylor Enterprises DBA SE Lubricants	520.04	
105222	08/05/09	08/10/09	Taylor Enterprises DBA SE Lubricants	990.68	2,874.87
105434	08/24/09	09/10/09	Taylor Enterprises DBA SE Lubricants	369.08	
105343	08/24/09	09/10/09	Taylor Enterprises DBA SE Lubricants	804.20	1,173.28
105721	10/19/09	10/30/09	Taylor Enterprises DBA SE Lubricants	1,896.08	
105721	10/22/09	10/30/09	Taylor Enterprises DBA SE Lubricants	748.58	2,644.66
105829	03/17/09	11/17/09	Taylor Enterprises DBA SE Lubricants	380.93	380.93
105989	11/25/09	12/04/09	Taylor Enterprises DBA SE Lubricants	280.40	280.40
106034	11/24/09	12/11/09	Taylor Enterprises DBA SE Lubricants		1,923.62
Greenville / Taylor 2009 Check Totals					25,999.48
GREENVILLE / Taylor 2008 - Checks					
103826	12/18/08	12/10/08	Taylor Enterprises DBA SE Lubricants		1,175.79
102551	04/28/08	05/10/08	Taylor Enterprises DBA SE Lubricants		471.02
102737	05/26/08	06/10/08	Taylor Enterprises DBA SE Lubricants	461.50	
102737	05/26/08	06/10/08	Taylor Enterprises DBA SE Lubricants	950.69	1,412.19
102900	06/26/08	07/10/08	Taylor Enterprises DBA SE Lubricants	717.71	
102900	07/11/08	07/10/08	Taylor Enterprises DBA SE Lubricants	1,096.14	
102900	06/30/08	07/10/08	Taylor Enterprises DBA SE Lubricants	1,511.49	3,325.34
103063	07/22/08	08/10/08	Taylor Enterprises DBA SE Lubricants	486.96	
103063	07/22/08	08/10/08	Taylor Enterprises DBA SE Lubricants	966.92	1,453.88
103118	08/19/08	08/15/08	Taylor Enterprises DBA SE Lubricants		1,083.75
103315	08/22/08	09/10/08	Taylor Enterprises DBA SE Lubricants		732.20
103442	10/07/08	10/10/08	Taylor Enterprises DBA SE Lubricants	1,371.91	

103442	10/13/08	10/10/08	Taylor Enterprises DBA SE Lubricants	1,335.70	2,707.61
103646	11/10/08	11/10/08	Taylor Enterprises DBA SE Lubricants	1,371.91	
103646	11/10/08	11/10/08	Taylor Enterprises DBA SE Lubricants	1,215.00	2,586.91
100448	01/31/08	02/10/08	Taylor Enterprises DBA SE Lubricants	900.87	
100448	01/31/08	02/10/08	Taylor Enterprises DBA SE Lubricants	1,149.23	2,050.10
100633	02/21/08	03/10/08	Taylor Enterprises DBA SE Lubricants	384.72	
100633	02/21/08	03/10/08	Taylor Enterprises DBA SE Lubricants	945.67	1,330.39
100808	03/18/08	04/10/08	Taylor Enterprises DBA SE Lubricants	755.81	
100808	03/18/08	04/10/08	Taylor Enterprises DBA SE Lubricants	773.07	1,528.88
100448	01/31/08	02/10/08	Taylor Enterprises DBA SE Lubricants	900.87	
100448	01/31/08	02/10/08	Taylor Enterprises DBA SE Lubricants	1,149.23	2,050.10
100633	02/21/08	03/10/08	Taylor Enterprises DBA SE Lubricants	384.72	
100633	02/21/08	03/10/08	Taylor Enterprises DBA SE Lubricants	945.67	1,330.39
			Greenville Taylor Total 2008		23,238.55
COLUMBIA / Taylor 2010 - Checks					
402010	12/29/09	1/10/2010	Taylor Enterprises DBA SE Lubricants		1,877.72
			Columbia / Taylor 2010 Check Totals		1,877.72
COLUMBIA / Taylor 2009 - Checks					
400713	12/31/08	01/10/09	Taylor Enterprises DBA SE Lubricants	1,711.38	
400713	12/31/08	01/10/09	Taylor Enterprises DBA SE Lubricants	2,685.70	
400713	12/31/08	01/10/09	Taylor Enterprises DBA SE Lubricants	1,577.48	5,974.56
400798	01/31/09	02/10/09	Taylor Enterprises DBA SE Lubricants	1,504.24	
400798	01/31/09	02/10/09	Taylor Enterprises DBA SE Lubricants	1,894.34	3,398.58
400822	02/24/09	02/24/09	Taylor Enterprises DBA SE Lubricants	2,198.06	
400822	02/24/09	02/24/09	Taylor Enterprises DBA SE Lubricants	1,853.00	4,051.06
401454	08/12/09	08/10/09	Taylor Enterprises DBA SE Lubricants		2,145.52
401689	10/05/09	10/16/09	Taylor Enterprises DBA SE Lubricants		1,212.68
401741	10/27/09	11/09/09	Taylor Enterprises DBA SE Lubricants		1,262.66
401764	09/11/09	11/17/09	Taylor Enterprises DBA SE Lubricants	1,112.15	
401764	09/17/09	11/17/09	Taylor Enterprises DBA SE Lubricants	4,018.76	5,130.91
401859	11/17/09	12/11/09	Taylor Enterprises DBA SE Lubricants	607.54	
401859	11/24/09	12/11/09	Taylor Enterprises DBA SE Lubricants	1,831.82	2,439.36
			Columbia / Taylor 2009 Totals		25,615.33
COLUMBIA / Taylor 2008 - Checks					
400018	04/30/08	5/10/2008	Taylor Enterprises DBA SE Lubricants	336.28	
400018	04/30/08	5/10/2008	Taylor Enterprises DBA SE Lubricants	1,316.76	
400018	04/30/08	5/10/2008	Taylor Enterprises DBA SE Lubricants	80.98	1,734.02
400027	04/15/08	5/10/2008	Taylor Enterprises DBA SE Lubricants		889.91
400102	05/31/08	6/10/2008	Taylor Enterprises DBA SE Lubricants		117.97
400188	06/30/08	7/10/2008	Taylor Enterprises DBA SE Lubricants		1,511.39
400279	07/29/08	8/10/2008	Taylor Enterprises DBA SE Lubricants		117.97
400318	08/19/08	8/15/2008	Taylor Enterprises DBA SE Lubricants		1,568.38
400379	08/20/08	9/10/2008	Taylor Enterprises DBA SE Lubricants	2,231.43	
400379	08/18/08	9/10/2008	Taylor Enterprises DBA SE Lubricants	2,287.43	
400379	09/09/08	9/10/2008	Taylor Enterprises DBA SE Lubricants	81.98	4,600.84

400418	09/24/08	9/15/2008	Taylor Enterprises DBA SE Lubricants		424.72
400470	10/13/08	10/10/2008	Taylor Enterprises DBA SE Lubricants		2,124.00
400558	10/24/08	11/10/2008	Taylor Enterprises DBA SE Lubricants	1,812.39	
400558	10/31/08	11/10/2008	Taylor Enterprises DBA SE Lubricants	1,446.88	3,259.27
10277	01/31/08	2/10/2008	Taylor Enterprises DBA SE Lubricants		5.00
10376	02/22/08	3/10/2008	Taylor Enterprises DBA SE Lubricants	1,494.40	
10376	02/22/08	3/10/2008	Taylor Enterprises DBA SE Lubricants	2,024.70	3,519.10
10416	03/24/08	3/28/2008	Taylor Enterprises DBA SE Lubricants	2,102.09	
10416	03/24/08	3/28/2008	Taylor Enterprises DBA SE Lubricants	773.07	2,875.16
10277	01/31/08	2/10/2008	Taylor Enterprises DBA SE Lubricants		5.00
10376	02/22/08	3/10/2008	Taylor Enterprises DBA SE Lubricants	1,494.40	
10376	02/22/08	3/10/2008	Taylor Enterprises DBA SE Lubricants	2,024.70	3,519.10
Columbia / Taylor 2008 Totals					26,271.83
ASHEVILLE / Taylor 2010 - Checks					
239843	12/31/09	1/10/2010	Taylor Enterprises DBA SE Lubricants		1,734.60
Asheville / Taylor 2010 Totals					1,734.60
ASHEVILLE / Taylor 2009 - Checks					
238403	01/02/09	01/10/09	Taylor Enterprises DBA SE Lubricants	1,080.65	
238403	01/02/09	01/10/09	Taylor Enterprises DBA SE Lubricants	688.40	1,769.05
23850	01/27/09	02/10/09	Taylor Enterprises DBA SE Lubricants	222.56	
23850	01/26/09	02/10/09	Taylor Enterprises DBA SE Lubricants	1,004.60	1,227.16
238635	02/10/09	03/10/09	Taylor Enterprises DBA SE Lubricants	1,198.40	
238635	03/12/09	03/10/09	Taylor Enterprises DBA SE Lubricants	1,283.40	2,481.80
238707	03/31/09	04/10/09	Taylor Enterprises DBA SE Lubricants		851.00
238797	04/20/09	05/10/09	Taylor Enterprises DBA SE Lubricants		963.80
238870	06/01/09	06/10/09	Taylor Enterprises DBA SE Lubricants	1,198.40	
238870	06/01/09	06/10/09	Taylor Enterprises DBA SE Lubricants	1,283.40	2,481.80
238909	05/25/09	06/10/09	Taylor Enterprises DBA SE Lubricants		1,415.00
239024	06/09/09	07/10/09	Taylor Enterprises DBA SE Lubricants	201.96	
239024	06/15/09	07/10/09	Taylor Enterprises DBA SE Lubricants	1,197.10	1,399.06
239158	07/16/09	08/10/09	Taylor Enterprises DBA SE Lubricants	1,142.50	
239158	08/03/09	08/10/09	Taylor Enterprises DBA SE Lubricants	465.16	
239158	08/10/09	08/10/09	Taylor Enterprises DBA SE Lubricants	1,579.30	3,186.96
239271	09/04/09	09/10/09	Taylor Enterprises DBA SE Lubricants		1,370.00
239402	09/21/09	10/10/09	Taylor Enterprises DBA SE Lubricants		951.40
239562	10/13/09	11/10/09	Taylor Enterprises DBA SE Lubricants		916.80
239634	11/19/09	12/04/09	Taylor Enterprises DBA SE Lubricants		1,697.00
239652	12/04/09	12/11/09	Taylor Enterprises DBA SE Lubricants		257.00
239727	12/11/09	12/21/09	Taylor Enterprises DBA SE Lubricants		252.00
Asheville / Taylor 2009 Totals					21,219.83
ASHEVILLE / Taylor 2008 - Checks					
238268	11/24/08	12/10/2008	Taylor Enterprises DBA SE Lubricants		1,019.75
237803	01/18/08	8/10/2008	Taylor Enterprises DBA SE Lubricants		469.50
237919	08/07/08	9/10/2008	Taylor Enterprises DBA SE Lubricants	839.50	
237919	08/29/08	9/10/2008	Taylor Enterprises DBA SE Lubricants	860.00	1,699.50
238055	09/19/08	10/10/2008	Taylor Enterprises DBA SE Lubricants	1,616.15	

238055	10/07/08	10/10/2008	Taylor Enterprises DBA SE Lubricants	1,083.65	2,699.80
238168	10/30/08	11/10/2008	Taylor Enterprises DBA SE Lubricants		1,296.65
235517	02/05/08	2/5/2008	Taylor Enterprises DBA SE Lubricants		2,157.00
235674	02/21/08	3/10/2008	Taylor Enterprises DBA SE Lubricants	2,215.50	
235674	02/24/08	3/10/2008	Taylor Enterprises DBA SE Lubricants	830.55	3,046.05
235789	03/26/08	4/10/2008	Taylor Enterprises DBA SE Lubricants		761.03
237525	04/11/08	5/10/2008	Taylor Enterprises DBA SE Lubricants	900.07	
237525	04/30/08	5/10/2008	Taylor Enterprises DBA SE Lubricants	2,017.22	2,917.29
237602	05/29/08	6/10/2008	Taylor Enterprises DBA SE Lubricants		693.75
237704	06/16/08	7/10/2008	Taylor Enterprises DBA SE Lubricants	1,255.75	
237704	07/08/08	7/10/2008	Taylor Enterprises DBA SE Lubricants	1,126.25	2,382.00
			Asheville / Taylor 2008 Totals		19,142.32
			Total Validated Taylor Payments		146,881.40

Verified Checks - Atlantic British - All Stores				
Check No.	Check Date	Invoice #	Description	Check Amount
Atlantic British 2009 - Checks				
400698	01/16/09	596159		977.26
103941	01/19/09	596471		485.00
104020	01/30/09	598110		1,786.00
104222	03/06/09		Stock Water Pumps	558.75
104380	04/02/09	608596		1,416.00
400929	04/03/09	608928		329.85
104454	04/20/09	611216		94.14
104523	04/30/09	612765		1,089.00
401052	05/06/09	614090		957.45
401137	05/26/09		Re-Stock of Parts	237.67
104713	05/28/09	617007		559.00
104733	06/02/09	617960		201.83
104840	06/18/09	620549		214.85
401244	06/18/09	620789		920.75
104841	06/18/09	620882		1,288.95
401273	06/24/09	621753		347.88
401424	08/05/09	628124		986.00
105143	08/07/09	629473		754.00
105196	08/12/09	630108		507.96
401470	08/13/09	630638		334.22
105283	08/21/09	632049		1,190.90
401493	08/26/09	632830		539.20
105339	09/02/09	634098	Stock Susp Kits & Air Springs	1,243.90
401589	09/25/09		ro 31045	616.34
401607	09/29/09		Conv Kit for RO31086	1,168.19
105552	10/02/09		Stock Susp Kits & Air Springs	1,193.91
105598	10/12/09		Parts for RO 42546 Stock Spring	1,055.96
105649	10/16/09		Part for RO 42422	318.17
105707	10/27/09		Aftermarket Y Pipe for RO42623	488.10
105743	11/03/09		Part for RO 42738	72.19
401751	11/10/09		For Restock of Parts	499.75
105791	11/10/09		Diamond Plate for RO42771	130.86
401810	11/23/09		RO 31573	1,877.00
105844	11/18/09		Parts for RO 42871	555.88
106087	12/16/09		Floor Mats for we owe on Classic	203.11
			Total 2009 Atlantic British Checks	25,200.02
Atlantic British 2008 - Checks				
100210	01/07/08	537727		123.64
10261	02/07/08	543115		315.19
100415	02/12/08	543766		804.26
10313	02/20/08	544982		970.01
10316	02/22/08	545555		970.01
100513	02/22/08	545465		1,207.00

10422	03/31/08	541450	COD Part	969.92
10074	04/07/08	552331		495.50
10431	04/08/08	552615		975.80
10501	05/01/08	556890		970.01
100955	05/13/08	558357		194.36
102521	05/20/08		DIST	385.16
102611	05/29/08	560870		374.75
400062	06/02/08	561632		220.32
400081	06/05/08	682386		976.56
102930	07/16/08		RO39000	153.65
103038	08/12/08	572281		376.55
103106	08/20/08	573537		265.28
103243	09/22/08		ORDER 608479	2,623.03
103588	11/10/08	540465		1,207.00
103588	11/10/08	540468		1,587.00
103588	11/10/08	542786		904.56
103675	11/21/08	587828		1,668.00
400588	11/25/08	588223		326.05
103688	11/26/08	588507		1,089.00
103711	12/09/08	590458		497.98
103760	12/15/08	591257		1,189.21
			Total 2008 Atlantic British Checks	21,839.80
7463	01/04/07		COD Part	964.10
33053	01/11/07		Conversion Kits	1,207.00
33338	02/12/07		Air Suspension Conv Kits	1,645.80
7619	02/20/07	486522		934.40
7399	03/16/07	488055		1,559.60
7411	03/26/07	492157		969.75
7413	03/28/07	492157		969.75
7739	04/05/07	494157		965.75
33664	04/13/07	495221	COD Part	227.85
33904	06/04/07	503115	COD Invoice	1,207.00
7926	06/06/07	503718		985.40
7991	06/22/07	506374		934.40
33917	06/07/07	503819		1,692.00
33918	06/07/07	503989		983.56
34167	07/18/07	510203		852.59
34208	03/22/07	493293		1,427.80
34307	08/10/07		Hoses for Ro/36428	121.18
34387	08/21/07	515139		211.19
34573	09/21/07	520517		2,325.02
34574	09/21/07	519871		3,353.65
34576	09/24/07	520469		1,207.00
8272	10/08/07		Part Ro 24882	324.43
34625	10/02/07	521727		104.96
34722	07/20/07	510555	COD Part	1,207.00
34754	10/25/07	525499		487.00
8404	11/27/07	830803		555.61
34821	11/08/07	528210		336.00

34843	11/12/07	528454	Alr Spring Conv Kit	1,207.00
34922	09/08/07	518014		145.52
34936	11/26/07	530755		1,198.00
100012	12/10/07	533197		143.96
100003	12/06/07	532765		704.74
100013	12/10/07	533100		1,207.00
100014	12/10/07	533197		143.96
			TOTAL 2007 Atlantic British	32,509.97
			Total Validated Atlantic British Payments	79,549.79

Verified Checks - Invision Industries- All Stores					
Check No.	Check Date	Invoice #	Description	Invoice Amount	Check Amount
Invision Industries 2009 - Checks					
238511	01/13/09	165027	PO 31422	1,295.00	
238511	01/13/09	166116	PO 31309	1,295.00	2,590.00
238608	03/10/09	169539			200.00
238648	02/16/09	169539	PO 31672		1,195.00
238721	03/19/09	172859	PO32213	25.00	
238721	03/19/09	173234	PO 32214	25.00	50.00
238917	05/18/09	181036	PO 32847	1,295.00	
238917	05/15/09	182590	PO 32981	1,295.00	2,590.00
239168	08/10/09	188416	PO 33299		1,095.00
239473	10/27/09	174149	182590		135.00
239570	11/10/09	200116	PO 35026	1,095.00	
239570	11/10/09	198492	PO 34838	1,295.00	
239570	11/10/09	199123	PO 34840	1,295.00	
239570	11/10/09	199571	PO 34839	1,295.00	4,980.00
			Total 2009 Invision Industries Checks		12,835.00
Invision Industries 2007 - Checks					
33188	01/26/07	55424	CR14208		1,295.00
33894	05/31/07	59561		1,295.00	
33894	05/31/07	63496		1,295.00	2,590.00
235335	11/27/07	99848	PO27067		1,295.00
235372	12/17/07		PO 75615		1,295.00
235454	12/30/07	105154	PO 27273		1,295.00
			Total 2007 Invision Industries Checks		7,770.00
			Total Validated Invision Payments		20,605.00

EXHIBIT E

Suspect Check Summary

Suspect Checks - Taylor Enterprises					
Check No.	Invoice Date	Check Date	Payable to: Taylor Enterprises	Invoice Amount	Check Amount
Greenville 2010 Taylor Enterprises Checks					
106147	01/04/10	01/04/10	Taylor Enterprises		2,954.78
106177	01/05/10	01/05/10	Taylor Enterprises		3,157.94
106185	01/07/10	01/07/10	Taylor Enterprises		3,456.78
106196	01/11/10	01/11/10	Taylor Enterprises		2,243.07
106221	01/14/10	01/14/10	Taylor Enterprises		1,998.47
106253	01/18/10	01/18/10	Taylor Enterprises		2,451.78
106257	01/19/10	01/19/10	Taylor Enterprises		2,789.54
106295	01/20/10	01/20/10	Taylor Enterprises		2,999.65
106298	01/21/10	01/21/10	Taylor Enterprises		3,012.45
106308	01/22/10	01/22/10	Taylor Enterprises		3,245.61
106314	01/25/10	01/25/10	Taylor Enterprises		2,954.12
			Greenville 2010 Taylor Enter. Total		31,264.19
Greenville 2009 Taylor Enterprises Checks					
103989	01/10/09	01/10/09	Taylor Enterprises	2,197.84	
103989	01/10/09		Taylor Enterprises	1,184.52	
103989	01/10/09		Taylor Enterprises	957.85	4,340.21
104187	02/10/09	02/10/09	Taylor Enterprises		1,757.85
104279	03/10/09	03/10/09	Taylor Enterprises		2,187.00
104668	05/10/09	05/10/09	Taylor Enterprises		2,741.56
104864	06/19/09	06/19/09	Taylor Enterprises		2,651.34
104930	07/01/09	07/01/09	Taylor Enterprises		2,131.22
104982	07/01/09	07/01/09	Taylor Enterprises		2,457.89
105100	07/20/09	07/20/09	Taylor Enterprises		2,957.43
105142	08/07/09	08/07/09	Taylor Enterprises		1,945.61
105200	08/12/09	08/12/09	Taylor Enterprises		2,795.40
105313	08/26/09	08/26/09	Taylor Enterprises		2,951.57
105376	09/11/09	09/11/09	Taylor Enterprises		2,795.00
105484	09/15/09	09/15/09	Taylor Enterprises		2,756.94
105520	09/18/09	09/18/09	Taylor Enterprises		2,864.51
105530	09/21/09	09/21/09	Taylor Enterprises		3,115.62
105534	10/01/09	10/01/09	Taylor Enterprises		2,789.56
105708	10/05/09	10/05/09	Taylor Enterprises		2,796.10
105754	11/02/09	11/02/09	Taylor Enterprises		2,999.54
105794	11/09/09	11/09/09	Taylor Enterprises		3,094.99
105938	11/10/09	11/10/09	Taylor Enterprises		3,094.78
105902	11/10/09	11/10/09	Taylor Enterprises		3,094.56
105840	11/16/09	11/16/09	Taylor Enterprises		2,499.85
105946	11/30/09	11/30/09	Taylor Enterprises		3,012.94
105974	12/03/09	12/03/09	Taylor Enterprises		3,099.41
106010	12/08/09	12/08/09	Taylor Enterprises		3,125.74
106025	12/11/09	12/11/09	Taylor Enterprises		3,295.41
106083	12/15/09	12/15/09	Taylor Enterprises		3,197.84
106094	12/17/09	12/17/09	Taylor Enterprises		3,112.56
106133	12/28/09	12/29/09	Taylor Enterprises		3,415.67

106138	12/30/09	12/30/09	Taylor Enterprises		3,214.79
106100	12/21/09	12/21/09	Taylor Enterprises		3,412.97
			Taylor Greenville Total 2009		89,705.86
Greenville 2008 Taylor Enterprises Checks					
103778	12/15/08	12/15/08	Taylor Enterprises	1,299.99	
103778	12/15/08	12/15/08	Taylor Enterprises	2,098.08	
103778	12/15/08	12/15/08	Taylor Enterprises	1,853.00	5,251.07
103858	12/30/08	12/30/08	Taylor Enterprises		1,787.00
100932	05/01/08	05/01/08	Taylor Enterprises		1,374.00
102754	06/10/08	06/10/08	Taylor Enterprises		1,157.82
103209	09/05/08	09/05/08	Taylor Enterprises		1,745.87
103331	09/10/08	09/10/08	Taylor Enterprises	1,787.51	
103331	09/10/08	09/10/08	Taylor Enterprises	932.57	
103331	09/10/08	09/10/08	Taylor Enterprises	1,204.76	3,924.84
103483	10/15/08	10/15/08	Taylor Enterprises	1,598.32	
103483	10/15/08	10/15/08	Taylor Enterprises	1,581.39	3,179.71
103561	11/03/08	11/03/08	Taylor Enterprises	1,754.00	
103561	11/03/08	11/03/08	Taylor Enterprises	1,345.00	
103561	11/03/08	11/03/08	Taylor Enterprises	957.51	4,056.51
103767	12/10/08	12/10/08	Taylor Enterprises		2,797.57
100298	01/15/08	01/15/08	Taylor Enterprises		1,408.24
100308	01/10/08	01/10/08	Taylor Enterprises		1,588.02
100886	03/18/08	03/18/08	Taylor Enterprises	1,302.03	
100886	03/18/08	03/18/08	Taylor Enterprises	991.87	
100886	03/18/08	03/18/08	Taylor Enterprises	982.71	3,276.61
100298	01/15/08	01/15/08	Taylor Enterprises		1,408.24
100308	01/10/08	01/10/08	Taylor Enterprises		1,588.02
			Greenville Taylor Total 2008		34,543.52
Columbia 2010 Taylor Enterprises Checks					
401942	1/4/2010	01/04/10	Taylor Enterprises		2,999.81
401952	1/5/2010	01/05/10	Taylor Enterprises		3,612.74
401957	1/10/2010	01/10/10	Taylor Enterprises		3,684.57
401963	1/11/2010	01/11/10	Taylor Enterprises		2,243.06
401980	1/14/2010	01/14/10	Taylor Enterprises		2,457.82
401992	1/18/2010	01/18/10	Taylor Enterprises		2,612.74
401995	1/19/2010	01/19/10	Taylor Enterprises		2,879.46
402026	1/20/2010	01/20/10	Taylor Enterprises		3,545.12
402028	1/21/2010	01/21/10	Taylor Enterprises		2,987.63
402042	1/22/2010	01/22/10	Taylor Enterprises		3,089.74
402046	1/25/2010	01/25/10	Taylor Enterprises		3,045.69
			Columbia Taylor Total 2010		33,158.38

Asheville 2010 Taylor Enterprises Checks					
239760	1/4/2010	01/04/10	Taylor Enterprises		3,089.56
239771	1/5/2010	01/05/10	Taylor Enterprises		3,512.87
239779	1/7/2010	01/07/10	Taylor Enterprises		3,951.24
239786	1/11/2010	01/11/10	Taylor Enterprises		3,612.98
239817	1/15/2010	01/15/10	Taylor Enterprises		2,430.22
239832	1/18/2010	01/18/10	Taylor Enterprises		2,681.47
239834	1/19/2010	01/19/10	Taylor Enterprises		2,956.87
239867	1/20/2010	01/20/10	Taylor Enterprises		3,145.61
239868	1/21/2010	01/21/10	Taylor Enterprises		3,562.12
239881	1/22/2010	01/22/10	Taylor Enterprises		3,456.91
239882	1/25/2010	01/25/10	Taylor Enterprises		3,254.87
			Asheville Taylor Total 2010		35,654.72
Asheville 2009 Taylor Enterprises Checks					
238321	01/04/09	01/04/09	Taylor Enterprises	2,485.70	
238321	01/04/09	01/04/09	Taylor Enterprises	2,188.09	4,673.79
238423	01/10/09	01/10/09	Taylor Enterprises		3,635.39
238557	02/27/09	02/27/09	Taylor Enterprises		1,954.00
238588	03/10/09	03/10/09	Taylor Enterprises		1,758.00
238609	03/31/09	03/31/09	Taylor Enterprises		2,197.00
238674	04/01/09	04/01/09	Taylor Enterprises		1,791.57
238861	05/10/09	05/10/09	Taylor Enterprises		1,754.82
238944	06/10/09	06/10/09	Taylor Enterprises		1,941.10
238958	06/19/09	06/19/09	Taylor Enterprises		2,981.67
239052	07/01/09	07/01/09	Taylor Enterprises		2,947.56
238986	07/01/09	07/01/09	Taylor Enterprises		2,154.80
239007	07/01/09	07/01/09	Taylor Enterprises		2,957.63
239058	07/10/09	07/10/09	Taylor Enterprises		2,754.13
237742	07/10/09	07/10/09	Taylor Enterprises		2,748.65
239060	07/21/09	07/21/09	Taylor Enterprises		2,451.80
239091	07/20/09	07/20/09	Taylor Enterprises		1,796.23
239118	08/07/09	08/07/09	Taylor Enterprises		2,105.60
239144	08/12/09	08/12/09	Taylor Enterprises		2,754.65
239214	08/26/09	08/26/09	Taylor Enterprises		2,157.40
239240	09/01/09	09/01/09	Taylor Enterprises		2,999.57
239244	09/08/09	09/08/09	Taylor Enterprises		2,175.00
239252	09/11/09	09/11/09	Taylor Enterprises		3,145.00
239320	09/15/09	09/15/09	Taylor Enterprises		2,794.51
239344	09/18/09	09/18/09	Taylor Enterprises		3,113.20
239347	09/21/09	09/21/09	Taylor Enterprises		2,956.42
239351	10/01/09	10/01/09	Taylor Enterprises		3,012.54
239474	10/05/09	10/05/09	Taylor Enterprises		3,045.12
239500	11/02/09	11/02/09	Taylor Enterprises		3,115.24
239586	11/10/09	11/10/09	Taylor Enterprises		2,999.86
239523	11/09/09	11/09/09	Taylor Enterprises		3,125.96
239607	11/10/09	11/10/09	Taylor Enterprises		3,187.45
239546	11/16/09	11/16/09	Taylor Enterprises		3,125.46
239611	11/30/09	11/30/09	Taylor Enterprises		3,195.78

239614	12/01/09	12/01/09	Taylor Enterprises		3,465.71
239622	12/03/09	12/03/09	Taylor Enterprises		3,129.64
239640	12/08/09	12/08/09	Taylor Enterprises		3,296.85
239646	12/11/09	12/11/09	Taylor Enterprises		3,512.61
239705	12/15/09	12/15/09	Taylor Enterprises		3,312.56
239717	12/17/09	12/17/09	Taylor Enterprises		3,125.46
239719	12/21/09	12/21/09	Taylor Enterprises		3,497.85
239743	12/28/09	12/28/09	Taylor Enterprises		3,745.19
239751	12/30/09	12/30/09	Taylor Enterprises		3,456.78
			Asheville Taylor Total 2009		120,049.55
Asheville 2008 Taylor Enterprises Checks					
238218	12/01/08	12/01/08	Taylor Enterprises		4225.52
237782	08/01/08	08/01/08	Taylor Enterprises	1,555.75	
237782	08/01/08	08/01/08	Taylor Enterprises	1,726.25	3,282.00
237981	09/10/08	09/01/08	Taylor Enterprises		3,700.00
237989	10/01/08	10/01/08	Taylor Enterprises		1,783.43
238008	10/03/08	10/03/08	Taylor Enterprises		2,987.59
238085	10/10/08	10/10/08	Taylor Enterprises	1,255.75	
238085	10/10/08	10/10/08	Taylor Enterprises	1,726.25	2,982.00
238089	10/15/08	10/15/08	Taylor Enterprises		2,992.62
238200	11/10/08	11/10/08	Taylor Enterprises	1,299.49	
238200	11/10/08	11/10/08	Taylor Enterprises	2,198.06	
238200	11/10/08	11/10/08	Taylor Enterprises	1,853.00	5,350.55
235408	01/04/08	01/04/08	Taylor Enterprises		2,331.20
235424	11/11/08	01/11/08	Taylor Enterprises		3,346.49
235612	02/26/08	02/26/08	Taylor Enterprises		2,290.50
235648	03/06/08	03/06/08	Taylor Enterprises	2,250.15	
235648	03/06/08	03/06/08	Taylor Enterprises	950.35	3,200.50
235697	03/10/08	03/10/08	Taylor Enterprises		3,346.49
235727	03/24/08	03/24/08	Taylor Enterprises	793.97	
235727	03/24/08	03/24/08	Taylor Enterprises	2,281.79	
235727	03/24/08	03/24/08	Taylor Enterprises	895.71	3,971.47
237564	05/30/08	05/30/08	Taylor Enterprises		1,874.32
237585	06/02/08	06/02/08	Taylor Enterprises	1,170.84	
237585	06/02/08	06/02/08	Taylor Enterprises	870.56	2,041.40
237624	06/10/08	06/10/08	Taylor Enterprises		1,357.42
237631	06/14/08	06/14/08	Taylor Enterprises	1,147.52	
237631	06/14/08	06/14/08	Taylor Enterprises	958.72	2,106.24
			Asheville Taylor Total 2008		53,169.74
			Total Suspect Taylor Checks		499,058.31

Suspect Checks - Atlantic British - All Stores		
2010 Atlantic British Suspect Checks		
Check No.	Check Date	Check Amount
239761	1/4/2010	3,564.78
106148	01/04/10	3,245.78
401943	01/04/10	3,654.78
239775	01/06/10	3,879.45
401954	01/06/10	3,587.49
239780	01/07/10	3,521.87
106186	01/07/10	3,589.74
401958	01/07/10	3,654.87
239787	01/11/10	3,498.71
239804	01/12/10	3,245.77
106213	01/12/10	1,754.23
401974	01/12/10	2,854.71
106222	01/14/10	2,542.18
239816	01/15/10	3,003.56
401981	01/15/10	2,564.78
402094	02/17/10	508.75
Total 2010 Checks		48,671.45
2009 Atlantic British Suspect Checks		
400731	01/15/09	2,187.54
103984	01/15/09	2,357.00
104007	01/21/09	2,757.43
400738	01/22/09	2,987.00
400828	02/10/09	2,197.00
238539	02/10/09	1,954.00
238482	02/10/09	2,757.00
400835	02/10/09	1,975.00
104151	02/10/09	1,758.00
104202	02/10/09	2,197.00
238556	02/27/09	2,157.00
400874	03/02/09	2,187.52
238587	03/05/09	1,954.00
400880	03/05/09	2,957.00
400886	03/10/09	2,457.00
238596	03/16/09	2,943.57
238671	04/01/09	2,987.56
238681	04/01/09	1,945.11
400928	04/01/09	2,451.07
104389	04/01/09	2,145.06
104406	04/01/09	2,456.21
400980	04/10/09	2,497.12
238702	04/22/09	2,985.67
238829	05/10/09	2,451.36
401121	05/10/09	2,745.61
238869	05/25/09	2,451.00

401161	05/25/09	2,951.62
238873	06/01/09	2,794.12
401174	06/01/09	294.28
238935	06/05/09	2,249.81
401218	06/05/09	2,741.23
104824	06/05/09	2,974.56
401276	06/10/09	2,951.24
238942	06/18/09	2,751.34
238965	06/25/09	2,654.21
401284	06/25/09	2,792.53
239005	07/01/09	2,762.13
401340	07/01/09	2,987.54
104978	07/01/09	2,813.23
239057	07/10/09	2,957.83
239085	07/10/09	2,964.10
401373	07/10/09	2,754.32
105024	07/10/09	2,794.10
401394	07/10/09	3,451.00
105075	07/10/09	2,954.78
239106	08/03/09	3,147.00
401419	08/03/09	2,957.45
105123	08/03/09	3,041.21
239120	08/07/09	2,867.94
401430	08/07/09	3,152.87
105145	08/07/09	2,997.82
239208	08/14/09	2,965.55
401488	08/14/09	3,122.56
105289	08/14/09	3,417.56
239225	08/31/09	2,999.54
401504	08/31/09	3,457.84
239241	09/01/09	2,154.60
401510	09/01/09	3,094.51
239243	09/08/09	2,979.84
401531	09/08/09	3,104.00
239249	09/10/09	2,975.64
239310	09/10/09	3,151.82
401538	09/10/09	2,757.12
401569	09/10/09	3,121.57
105372	09/10/09	3,145.97
105455	09/10/09	2,979.84
239324	09/15/09	3,095.84
401584	09/15/09	3,184.12
105487	09/18/09	2,564.31
239469	10/01/09	2,994.56
239492	10/01/09	3,045.12
401707	10/01/09	3,025.41
401721	10/01/09	2,994.10
105706	10/01/09	3,145.61
105738	10/10/09	2,954.78
239526	11/10/09	3,095.20
401755	11/10/09	3,564.12
105804	11/10/09	3,295.74

239604	11/20/09	3,099.14
401811	11/20/09	3,164.59
105932	11/20/09	3,546.87
401822	12/01/09	3,299.74
105953	12/01/09	3,456.98
239627	12/04/09	3,567.81
401828	12/04/09	3,421.85
105977	12/04/09	3,154.78
239638	12/07/09	3,564.91
401837	12/07/09	3,494.73
239644	12/10/09	3,697.41
401843	12/10/09	3,321.91
106005	12/07/09	3,145.98
106020	12/10/09	3,456.87
239663	12/14/09	3,851.97
401866	12/14/09	3,631.54
106040	12/14/09	3,561.74
239716	12/16/09	3,456.97
401899	12/16/09	3,246.51
106093	12/16/09	3,645.12
239734	12/21/09	3,612.45
401909	12/21/09	3,874.12
106119	12/21/09	3,598.74
239735	12/22/09	3,874.51
401908	12/22/09	3,598.74
106120	12/22/09	3,561.78
401929	12/29/09	3,945.12
106135	12/29/09	3,697.84
Total 2009 Checks		313,594.68
2008 Atlantic British Suspect Checks		
235631	2/29/2008	1,207.00
237625	6/10/2008	2,684.67
237630	6/14/2008	3,112.16
237651	6/16/2008	2,295.81
237675	7/7/2008	3,391.00
237743	7/10/2008	2,748.65
237890	9/5/2008	1,747.00
400363	9/11/2008	568.00
237955	9/15/2008	2,202.82
237978	9/19/2008	2,287.00
103244	09/22/08	366.00
237994	10/01/08	2,252.98
103692	11/21/08	1,787.00
238215	12/01/08	1,784.00
238241	12/10/08	1,874.56
Total 2008 Checks		30,308.65
2007 Atlantic British Suspect Checks		
34533	09/14/07	1,637.00
34733	07/27/07	1,000.00

	2,637.00
Total Suspect Atlantic British Checks	395,211.78

Invision Industries

GREENVILLE Checks - Invision Industries

Check No.	Check Date	Check Amount
401489	08/10/09	2,950.00
401530	08/10/09	2,150.00
401583	09/15/09	3,912.00
401610	09/21/09	2,995.00
401727	11/06/09	2,995.61
401769	11/18/09	3,294.61
401826	12/02/09	3,956.47
401901	12/18/09	3,491.45
401914	12/23/09	3,852.14

29,597.28 Columbia

106190	01/08/10	3,512.91
401960	01/08/10	3,681.42
106219	01/13/10	2,798.41
401975	01/21/10	2,145.29
401977	01/13/10	2,201.59

10,826.71 Columbia

105293	08/01/09	3,150.00
105485	09/15/09	2,982.10
105531	09/21/09	3,425.76
105768	11/06/09	3,199.87
105846	11/18/09	3,450.00
105964	12/02/09	3,564.21
106097	12/18/09	3,694.45
106126	12/23/09	3,945.78
106134	12/28/09	3,654.12

31,066.29 Greenville

106190	01/08/10	3,512.91
106219	01/13/10	2,798.41

6,311.32 Greenville

239209	08/10/09	2,750.00
239242	08/10/09	1,794.00
239321	09/15/09	3,159.00
239348	09/21/09	3,045.00
239505	11/06/09	3,512.41

239547	11/18/09	2,995.64	
239616	12/02/09	3,194.78	
239718	12/18/09	3,621.31	
239737	12/23/09	3,745.19	
239745	12/29/09	3,894.45	
		31,711.78	Asheville
239782	01/08/10	3,871.42	
239812	01/13/10	1,256.89	
		5,128.31	Asheville
Total Invision Checks - All Stores			114,641.69

EXHIBIT F

Suspect Vehicle Transfer



1450 Laurens Road
Greenville, SC 29607
Tel: (864) 232-7400
(864) 232-3380
www.landrovercarolinas.com

GREENVILLE

RETAIL BUYER'S ORDER

Name: GONALD H HANCE		Salesperson: RELANTE R HANCE	
Model: 2012 PLATINUM SPRING RD		Chassis:	
City: LEXINGTON SC 29073	State:	Zip:	County:
Employer:		Pickup:	
Home Address:			
Date: 12/04/09		Sheet No: 93780	
Salesperson: Deack			

PURCHASE	☒ NEW ☐ DEMO ☐ PRE-OWNED ☐ FACTORY CAR	Year: 2005	Make: FORD	Body Type: F150 PICKUP	Series:	PRICE (including taxes, license, and title): 17497.00
	Options:	Serial No.: 1FTPX12V66N889206	Color: BLACK	Exterior:	Interior:	Additional Options:
	Mileage: 47190					

TRADE	Year: N/A	Make:	Body Type:	Series:	TOTAL: 17497.00
	Options:	Serial No.:	Color:	Exterior:	Interior:
	Mileage:				

BALANCE DUE TO:	Name & Address:	LIEN:	Name & Address:	Balance Owed on Trade-in: N/A
		CASH		Title and License: 99.00
				Service X Processing Fees: \$225.00
				TOTAL: 18061.00
INSURANCE INFORMATION	Company Name:	Policy #:	Effective Dates:	Service Agreement: N/A
				Insurance: N/A
				TOTAL: 18061.00
				Cash on Delivery: N/A
				BALANCE DUE: 18061.00

READ CAREFULLY: Land Rover Greenville agrees to sell and the Buyer agrees to purchase the vehicle as above described at the price set forth. The Buyer shall make full payment of the entire balance due on or before **12/04/09**. This order constitutes the entire agreement between the parties and may not be changed except by an instrument in writing signed by the party to be charged.

Signature: *Gonald H Hance* X *Deack*
Greenville
Must be accompanied by an instrument in writing.

USED CAR CONTRACTUAL DISCLOSURE STATEMENT: "The information you see on the window form-Buyer's Guide for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in the contract of sale."

NEW VEHICLE

DISCLAIMER OF WARRANTIES: I have read, understood and accept all provisions of the Manufacturer's Warranty Statement covering this new vehicle that I am purchasing. Furthermore, I understand that all warranties on this vehicle are those of the manufacturer. The seller, Land Rover Greenville, Inc., hereby expressly disclaims all warranties, whether expressed or implied, including any express warranty of merchantability or fitness for a particular purpose and I understand that the seller, Land Rover Greenville, Inc., is not assuming any liability in connection with the sale of this vehicle. This disclaimer in no way affects the provisions of the manufacturer's warranty.

Agreed on between the undersigned buyer and dealer, this document is a part of my separate financial institution or credit sale agreement. I understand that I am entering into a credit sale agreement and agree that if I am not a resident of the state in which I am purchasing the vehicle, I am entering into a credit sale agreement. If the Retail Financing Agreement is not accepted by a third party, financial institution, you must immediately return the vehicle to the dealer, and the entire transaction is governed by this agreement and the Retail Financing Agreement and this agreement shall be null and void.

SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES

ASSIGNMENT OF A VEHICLE

I hereby certify that the motor vehicle described herein has been assigned to the assignee named herein and that the assignor is not the owner of the vehicle. The assignor is not the owner of the vehicle. The assignor is not the owner of the vehicle. The assignor is not the owner of the vehicle.

The undersigned hereby certifies that the vehicle described herein has been assigned to the assignee named herein and that the assignor is not the owner of the vehicle. The assignor is not the owner of the vehicle. The assignor is not the owner of the vehicle.

Name of Assignor: Donald B. Nance or Melanic R. Nance Date: Dec 2009

Name of Assignee: Land Power Equipment Leasing Address: 1450 Laurens Rd Greenville SC 29607

Signature of Assignor: [Signature] Signature of Assignee: [Signature]

Hand Print Name of Assignor: Donald B. Nance Hand Print Name of Assignee: [Signature]

ASSIGNMENT BY DEALER WHO SELLER AT TIME

The undersigned hereby certifies that the vehicle described herein has been assigned to the assignee named herein and that the assignor is not the owner of the vehicle. The assignor is not the owner of the vehicle. The assignor is not the owner of the vehicle.

Name of Assignor: [Signature] Name of Assignee: [Signature]

Signature of Assignor: [Signature] Signature of Assignee: [Signature]

Hand Print Name of Assignor: [Signature] Hand Print Name of Assignee: [Signature]

ASSIGNMENT BY DEALER WHO SELLER AT TIME

The undersigned hereby certifies that the vehicle described herein has been assigned to the assignee named herein and that the assignor is not the owner of the vehicle. The assignor is not the owner of the vehicle. The assignor is not the owner of the vehicle.

Name of Assignor: [Signature] Name of Assignee: [Signature]

Signature of Assignor: [Signature] Signature of Assignee: [Signature]

Hand Print Name of Assignor: [Signature] Hand Print Name of Assignee: [Signature]

ASSIGNMENT BY DEALER WHO SELLER AT TIME

The undersigned hereby certifies that the vehicle described herein has been assigned to the assignee named herein and that the assignor is not the owner of the vehicle. The assignor is not the owner of the vehicle. The assignor is not the owner of the vehicle.

Name of Assignor: [Signature] Name of Assignee: [Signature]

Signature of Assignor: [Signature] Signature of Assignee: [Signature]

Hand Print Name of Assignor: [Signature] Hand Print Name of Assignee: [Signature]

NO ADDITIONAL RE-ASSIGNMENT PERMITTED. LAST ASSIGNEE MUST RETITLE BEFORE DISPOSAL

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Overland, Inc., d/b/a Land Rover
Greenville,

Plaintiff,

v.

Lara Marie Nance, Charlie Andrew Nance
Roger Fields, ADP Dealer Services Group,
Piedmont Automotive of Anderson, Inc.
d/b/a Piedmont Chrysler Jeep Dodge,
Piedmont Automotive of Anderson South
Carolina, LLC d/b/a Apex Automotive,
Synovus Financial Corporation d/b/a NBSC,
Brach Banking and Trust Company, Bank of
America Corporation, and Suntrust Banks,
Inc.

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
C.A. No.: 2010-CP-23-5880

**THIRD AMENDED SUMMONS
(JURY TRIAL DEMANDED)**

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
JULIE B. WICKENSHER
2012 AUG 10 P 12:55

TO THE DEFENDANTS ABOVE NAMED:

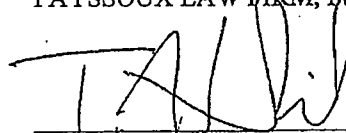
YOU ARE HEREBY SUMMONED and required to answer the THIRD AMENDED COMPLAINT in this action, a copy of which is attached hereto and herewith served upon you, and to serve a copy of your Answer to the Complaint upon the subscriber at 209 East Washington Street, Greenville, South Carolina, 29601, within thirty (30) days after the service thereof, exclusive of the day of such service. If you fail to answer the Third Amended Complaint within this thirty (30) day period, the Plaintiff will apply to the Court for the relief demanded in the Complaint and judgment will be taken against you by default.

IN THE EVENT YOU ARE AN INFANT OVER FOURTEEN YEARS OF AGE OR AN IMPRISONED PERSON, you are further summoned and notified to apply for the appointment of a Guardian ad Litem to represent you in this action 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 herein.

IN THE EVENT YOU ARE AN INFANT UNDER FOURTEEN YEARS OF AGE OR ARE INCOMPETENT OR INSANE, then you and the Guardian or Committee are further summoned and notified to apply for the appointment of a Guardian ad Litem to represent said infant under fourteen years of age or said incompetent or insane person within thirty (30) day 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 herein.

FAYSSOUX LAW FIRM, P.A.



James W. Fayssoux, Jr., SC Bar #16659

T. Hunt Reid / S.C. Bar #77538

P.O. Box 10207

Greenville, SC 29603

(864) 233-0445

(864) 672-6702 (fax)

wally@fayssouxlaw.com

hunter@fayssouxlaw.com

Attorneys for Plaintiff

Dated: August 9, 2012
Greenville, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
C.A. No.: 2010-CP-23-5880

Overland, Inc., d/b/a Land Rover
Greenville,)

**THIRD AMENDED COMPLAINT
(JURY TRIAL DEMANDED)**

Plaintiff,)

v.)

Lara Marie Nance, Charlie Andrew Nance)
Roger Fields, ADP Dealer Services Group,)
Piedmont Automotive of Anderson, Inc.)
d/b/a Piedmont Chrysler Jeep Dodge,)
Piedmont Automotive of Anderson South)
Carolina, LLC d/b/a Apex Automotive,)
Synovus Financial Corporation d/b/a NBSC,)
Brach Banking and Trust Company, Bank of)
America Corporation, and Suntrust Banks,)
Inc.)

Defendants.)

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
AUG. 9. WICKENSMEIER
2012 AUG 10 P 12:55

COMES NOW Plaintiff who, commencing this action against the above-named
Defendants, will show unto the Court as follows:

Parties, Jurisdiction and Venue

1. Plaintiff Overland, Inc. is a business corporation organized and existing under the laws of the State of South Carolina, and at all times relevant to this action, was and is in the business of operating an automobile dealership at 1450 Laurens Road, Greenville County, South Carolina, 29607, doing business as Land Rover Greenville (hereinafter, "Plaintiff" or "Land Rover").

2. Upon information and belief, Defendant Lara Marie Nance ("LMN") is a citizen and resident of City of Townville, Anderson County, South Carolina.

3. Upon information and belief, Defendant Charlie Andrew Nance ("CAN") is a citizen and resident of City of Townville, Anderson County, South Carolina.

4. Upon information and belief, Defendant Roger Fields ("RF") is a citizen and resident of the State of Georgia.

5. Upon information and belief, Defendant ADP Dealer Services Group, a division of ADP, Inc. (hereinafter "ADPDS"), is a Delaware corporation that regularly transacts business in Greenville County and in the State of South Carolina.

6. Upon information and belief, Defendant Piedmont Automotive of Anderson, Inc., is a corporation organized and existing under the laws of the State of South Carolina, and at all times relevant to this action, was and is in the business of operating an automobile dealership at 4015 Clemson Boulevard, Anderson County, South Carolina, doing business as Piedmont Chrysler Jeep Dodge (hereinafter "Piedmont Auto").

7. Upon information and belief, Defendant Piedmont Automotive of Anderson, South Carolina, LLC, is a limited liability company organized and existing under the laws of the State of South Carolina, and at all times relevant to this action, was and is in the business of operating an automobile dealership at 4015 Clemson Boulevard, Anderson County, South Carolina, doing business as Apex Automotive (hereinafter "Apex Auto").

8. Upon information and belief, Defendant Synovus Financial Corporation is a corporation duly organized and existing under the laws of the State of Georgia and a national bank organized and existing under the banking laws of the United States, having its principal place of business in the State of Georgia or in one of the United States, that regularly transacts business in Greenville County and the State of South Carolina, and at all times relevant to this action, was and is a banking institution doing business as NBSC (hereinafter "NBSC").

9. Upon information and belief, Defendant Branch Banking and Trust Company (hereinafter "BB&T") is a corporation duly organized and existing under the laws of the State of North Carolina and a national bank organized and existing under the banking laws of the United States, having its principal place of business in the State of North Carolina or in one of the United States, that regularly transacts business in Greenville County and the State of South Carolina.

10. Upon information and belief, Defendant Bank of America Corporation (hereinafter "BOA") is a corporation duly organized and existing under the laws of the State of North Carolina and a national bank organized and existing under the banking laws of the United States, having its principal place of business in the State of North Carolina or in one of the United States, that regularly transacts business in Greenville County and the State of South Carolina.

11. Upon information and belief, Defendant Suntrust Banks, Inc. (hereinafter "SunTrust") is a corporation duly organized and existing under the laws of the State of Georgia and a national bank organized and existing under the banking laws of the United States, having its principal place of business in the State of Georgia or in one of the United States, that regularly transacts business in Greenville County and the State of South Carolina.

12. The events giving rise to this action took place in Greenville County and Anderson County, South Carolina.

13. That jurisdiction and venue are proper in Greenville County, South Carolina.

Factual Background

14. This action arises due to the numerous events which began on or about July 2007 at Land Rover's Greenville dealership, when a former employer, Defendant LMN, embezzled approximately \$1,282,000.00 from Land Rover and through the assistance, negligence, failures and misconduct by some or all of the named co-defendants. In addition LMN laundered and spent the converted funds at various locations until in or around February 2010, resulting in the arrest of Defendant LMN on or about June 8, 2010 for wire fraud in violation of 18 U.S.C. §1343.

15. Defendant LMN pled guilty in US v. Lara Marie Nance, Case No. 6:10-cr-00634HMH, on February 14, 2010, admitting to the following facts as part of her scheme or plan to defraud Land Rover:

- a. That LMN, a former employer of Land Rover, did knowingly devise scheme and artifice to defraud Land Rover and to obtain monies by means of false and fraudulent pretenses, representations, and promises to Land Rover, and converted said monies to her own use.
- b. That on or about October 26, 2009, in violation of 18 U.S.C. §1343 (wire fraud) and in furtherance of her scheme and artifice, LMN knowingly transmitted in interstate commerce a faxed letter bearing the forged signature of "J.F." to Defendant ADPDS, requesting that she have expanded access to Plaintiff's computer and accounts payable systems, which Defendant ADPDS granted. Such access was critical to the scheme or plans to defraud Land Rover so that LMN could maintain access to the accounts payable system after she was terminated from the accounts payable system by Land Rover.
- c. That LMN used her work computer and access to Land Rover's accounts

payable systems through ADPDS to print unauthorized business checks from Land Rover, drawn on Land Rover's accounts at NBSC and BB&T, and she deposited these checks, totaling in excess of \$1,282,000.00, into personal and business accounts LMN established at local bank branches of SunTrust, BOA, BB&T, and Community South using either her name, a legitimate company name to which she was not authorized to use, or a fictitious company name, all under her control.

d. That as part of the scheme and plan, LMN used said monies to purchase 26 vehicles from Defendants Piedmont and Apex Auto. That at the time of each purchase, LMN would title most of the vehicles in the names of family and/or friends, she would then collect small sums of money from each person in order to make the sales appear legitimate to the persons in whose name the vehicles were titled. After resale of said vehicles, LMN deposited the proceeds into her bank accounts.

e. That LMN used the remainder of the illegitimate funds to purchase various gifts, including gifts to employees of Piedmont Auto and Apex Auto, meals, and other various personal items.

Improper conduct of Piedmont/Apex, LMN, CAN and RF.

16. In addition, Defendants CAN and RF had access to the LMN's bank accounts, CAN and RF knowingly used said monies and converted the illegitimate funds for their personal use, and CAN and RF did knowingly facilitate or collaborate with LMN's plan or scheme by purchasing multiple automobiles from Piedmont Auto and Apex Auto.

17. Defendants LMN, CAN and RF, in furtherance of the fraudulent plan and scheme, also purchased multiple automobiles from Steve White Motors of SC, Inc., Bradshaw Automotive Group, Inc. and Toyota of Greenville, Inc. with said funds.

18. Defendants LMN, CAN and RF, in furtherance of the fraudulent plan and scheme, also purchased various items from Jewelry Warehouse, as well as one 2006 Ford truck.

19. As a part of the fraudulent scheme or plan to defraud Plaintiff, Defendants LMN, CAN and RF, then resold said automobiles to friends and family members, and ultimately deposited the proceeds into various bank accounts under these Defendants' control.

20. At all relevant times herein, Defendants LMN, CAN and RF, in concert with one another, executed the scheme and plan as outlined above to defraud Plaintiff and to obtain Plaintiff's monies by intentional misrepresentations, fictitious invoices and forged checks, and these said Defendants converted to their own use approximately One Million, Two Hundred and Eighty-Two Thousand, Seven Hundred and Forty-Nine and 90/100 Dollars (\$1,282,749.90) before Plaintiff's discovery of said scheme and plan.

21. At all relevant times herein, Defendants LMN, CAN and RF collaborated with Defendants Piedmont Auto and Apex Auto to purchase 26 vehicles from their dealerships.

22. In or around December 2008, LMN and CAN presented to Piedmont Auto/Apex Auto for the purpose of buying a vehicle and met with Steven Albert, an employee of Piedmont Auto/Apex Auto. LMN and CAN were unable to purchase this vehicle after one or more lending institutions declined to extend credit to LMN and CAN due to the bad credit history and low credit scores of LMN and CAN, and after Rich Kirby, a general sales manager at Piedmont Auto/Apex Auto, declined the transaction.

23. Later, in or around June 19, 2009, LMN and CAN returned to Piedmont Auto/Apex Auto, met with Steven Albert, and they failed to purchase another vehicle for the reasons cited in Paragraph 19 hereinabove. Then, LMN and CAN offered to purchase the same vehicle in cash by tendering a personal check to Piedmont Auto/Apex Auto, which it accepted.

24. From in or around June 19, 2009 until January 31, 2010, LMN, CAN and RF returned to Piedmont Auto/Apex Auto and purchased an additional 26 vehicles. During these relevant periods, each of the 26 vehicles were purchased by LMN, CAN and/or RF tendering a personal check or a check drawn on a fictitious business account at SunTrust or Bank of America payable to Piedmont Auto and/or Apex Auto. LMN, CAN and/or RF would leave the dealership with the vehicle and then an employee of Piedmont Auto/Apex Auto would exchange these said checks for certified funds at a local branch of Bank of America or SunTrust, and deposit the proceeds in its own accounts.

25. Towards the end of this buying spree, Piedmont Auto/Apex Auto actually accepted checks from LMN that were drawn on Bank Accounts in the name of "Taylor Enterprises" and other fictitious companies that Piedmont Auto/Apex Auto either knew or should have known to be sham entities for which LMN used to perpetuate her fraud.

26. During the relevant periods of purchase from Piedmont Auto/Apex Auto, Lynn Smith, a general sales manager of Piedmont Auto/Apex Auto would initiate contact with LMN and invite her to purchase additional vehicles and tell LMN she needed to help "move some inventory." In addition, LMN earned the nickname of "golden goose," by other employees at the Piedmont Auto/Apex Auto dealerships and at a local branch for Bank of America, and LMN provided Piedmont Auto and Apex Auto employees with various gifts.

27. In furtherance of fraud, Piedmont Auto/Apex Auto management ignored their statutory obligations required under S.C. Code §56-15-40 ("The Dealers Act"), never notified the individual salesman that they either knew or were suspicious of the fraudulent nature of the purchases, completely altered their credit checks and buy worthiness standards to allow LMN to purchase the vehicles, changed financing and purchase protocols to facilitate LMN's fraud and

played an essential role in laundering the stolen funds, all while making record profits and selling more vehicles to LMN than any other customer in the history of their business.

Improper conduct by Defendant ADPDS.

28. At all times relevant to this action, Defendant ADPDS maintained a fiduciary relationship through the parties contractual agreement identified at the Master Service Agreement and attached hereto as Exhibit A.

29. Defendant ADPDS provided Land Rover with accounting and payment software and related computing programs and systems in support of Land Rover's business operations.

30. In or around July 2007, LMN began manipulating ADPDS' accounting programs in order to prepare fraudulent checks in Land Rover's computer system. ADPDS provided Land Rover with accounting and check writing programs that were faulty and easily manipulated.

31. In or around October, 2009, LMN's access to ADPDS' accounting system was reduced or terminated by Land Rover. Later, in or around October 26, 2009, LMN contacted several employees at ADPDS requesting renewed or expanded access to the accounting systems and after transmitting a forged letter from Land Rover she was granted "system administrator functions" by ADPDS, which were critical to her fraudulent scheme.

32. That during these relevant periods, employees of ADPDS communicated with LMN privately by means of her personal cell phone number and work email address. ADPDS did not contact any other employees, principals or managers at Land Rover to notify or disclose these communications or otherwise provide notice that LMN was granted expansive access as outlined above.

Improper conduct by the bank defendants.

33. At all times relevant to this action, Land Rover maintained business accounts at NBSC and BB&T for its dealership.

34. As part of its policy in maintaining and safeguarding checking accounts, NBSC and BB&T utilizes signature cards of the authorized user(s) of the account. The purpose of the signature cards is to allow NBSC to compare the signature on a check or instrument to the signature of the authorized user(s) to prevent and ensure that there is no forgery.

35. At no time was LMN ever an authorized user or signor on the signature cards for Land Rover's NBSC or BB&T accounts.

36. Land Rover had adequate measures in place to conduct, maintain and safeguard its accounting records and balances, and to prevent unauthorized and fraudulent transactions. The measures included auditing the accounting internally and externally, as well as limiting authorized signors on Land Rover's NBSC and BB&T accounts to persons different than the accounting clerks processing invoices and writing checks for payment.

37. Despite not being an authorized user, LMN embezzled at least One Million, Two Hundred and Eighty-Two Thousand Dollars (\$1,282,000.00), collectively, from Land Rover's NBSC and BB&T accounts between July 2007 and January 2010 by writing numerous fraudulent checks and forging J.F.'s endorsement.

38. LMN's deceptive and concealing conduct prevent the reasonable detection of her action from Land Rover, and Land Rover's principal and business managers were reasonably without knowledge of LMN's embezzlement scheme.

39. In addition, and at all times relevant to this action, LMN opened and maintain several business checking accounts at BOA and Suntrust with the account name "Taylor

Enterprises," "Invision Industries" and "Atlantic British" (known vendors of Land Rover) or "Lara M. Nance."

40. During these periods and while employed at Land Rover, LMN executed the above outlined fraudulent scheme by preparing fraudulent checks and invoices in Land Rover's computer system, and made the checks payable to known vendors of Land Rover (e.g., Taylor Enterprises, Atlantic British), to whom no money was actually owed. The fraudulent checks were for dollar amounts that were consistent with the legitimate checks to those vendors.

41. LMN would then forge the signature of Land Rover's principal, "J.F.", on the front of the check, and then forge the indorsement of the unintended payee (Land Rover's various vendors) on the reverse side of the check.

42. The unauthorized checks were drawn on Land Rover's bank accounts at NBSC. She then deposited the funds into her bank accounts at BOA and Suntrust.

43. NBSC paid and honored hundreds of said checks with forged signatures, and BOA and Suntrust transferred hundreds of checks with forged indorsements, totaling approximately \$1,282,000.00, before Land Rover was aware of the scheme.

44. As a direct and proximate result of the actions and inactions by the Defendants named herein, Land Rover suffered significant pecuniary loss by having to reimburse the outstanding monies owed on overdue accounts that were embezzled from Land Rover. This amounted to at least One Million, Two Hundred and Eighty-Two Thousand Dollars (\$1,282,000.00) from Land Rover's NBSC accounts. In addition, upon information and belief, Land Rover also suffered damages in excess of One Million, Two Hundred and Eighty-Two Thousand Dollars (\$1,282,000.00) in the form of late fees and charges directly and proximately related to the overdue accounts of Land Rover.

45. As a direct and proximate result of these Defendants' numerous acts and/or omissions, including the negligent, reckless and grossly negligent failure to adequately and properly maintain and protect Land Rover's business and Land Rover's accounts as alleged throughout this Complaint, the Plaintiff has suffered significant damages, and is entitled to a full recovery of both actual and punitive damages, as well as all costs and fees associated therewith.

FOR A FIRST CAUSE OF ACTION
AS TO DEFENDANT LARA NANCE
(Fraud and Intentional Misrepresentation)

46. All the foregoing allegations are hereby repeated, realleged, and incorporated by reference as if set forth verbatim herein.

47. Representations made by Defendant LMN to Plaintiff, its agents and/or employees of Plaintiff, regarding Plaintiff's inventory, business accounts and company checks were false and fraudulent.

48. The misrepresentations regarding Plaintiff's inventory, business accounts and company checks were material and critical to the Defendant's scheme or plan.

49. Defendant LMN was aware that said misrepresentations were false and fraudulent, and LMN intended that Plaintiff rely on said misrepresentations.

50. Plaintiff was unaware of the falsity of said misrepresentations and had the right to rely, and did in fact rely, upon said misrepresentations.

51. The acts of Defendant LMN in defrauding Plaintiff were reckless, wanton and performed in conscious and willful disregard of Plaintiff's rights over its money.

52. Defendant's acts proximately caused damages to Plaintiff, including the loss of approximately \$1,282,000.00 in cash, loss of business and business interruption, increased finance charges and interest rates on Plaintiff's floor finance plan with multiple banking

institutions, loss of capital from bank loans, loss of reputation, loss of good will, and accordingly, Plaintiff is entitled to an award of actual, consequential and punitive damages, as well as an award of a constructive trust and accounting over said monies, together with prejudgment interest.

FOR A SECOND CAUSE OF ACTION
AS TO LARA NANCE, CHARLIE NANCE AND ROGER FIELDS
(Conversion)

53. All the foregoing allegations are hereby repeated, realleged and incorporated by reference as if set forth verbatim herein.

54. Plaintiff owned and controlled certain monies within Plaintiff's business accounts, of which Defendants gained possession by Defendants' fraudulent scheme and plan.

55. Defendants LMN, CAN and RF purchased multiple automobiles, gifts, meals, and jewelry with Plaintiff's monies, resold the automobiles and property items, and then deposited the proceeds from these sales into various bank accounts controlled by Defendants, collectively, thereby converting the Plaintiff's monies and the proceeds derived thereof into Defendants' own use.

56. Defendants LMN, CAN and RF gained control and possession of Plaintiff's property in a fraudulent and deceptive manner and without Plaintiff's permission, and these Defendants retained possession of Plaintiff's property.

57. Defendants LMN, CAN and RF acts were intentional, reckless and in conscious disregard of Plaintiff's rights over said monies.

58. As a result of the conversion of Plaintiff's monies and proceeds from the car sales referenced herein, Plaintiff was damaged in the following manners, to wit: the loss of approximately \$1,282,000.00 in cash, loss of business and business interruption, increased

finance charges and interest rates on Plaintiff's floor finance plan with multiple banking institutions, loss of reputation, and loss of good, and such losses caused Plaintiff to default on various bank loans thereby incurring penalties, late charges, and increased interest rates.

59. Accordingly, Plaintiff is entitled to an award of actual, consequential and punitive damages from these Defendants.

FOR A THIRD CAUSE OF ACTION
AS TO LARA NANCE, CHARLIE NANCE, ROGER FIELDS, PIEDMONT AUTO AND
APEX AUTO
(Civil Conspiracy)

60. All the foregoing allegations are hereby repeated, realleged and incorporated by reference as if set forth verbatim herein.

61. Defendants LMN, CAN and RF, working in concert with one another, and in concert with Defendants Piedmont Auto and Apex Auto, combined for the purpose of injuring Plaintiff.

62. During the relevant periods, Piedmont Auto and Apex Auto had actual knowledge that LMN was a part-time employee of Land Rover and constructive knowledge that LMN was embezzling large sums of money from Land Rover. LMN disclosed her employment with Land Rover to Defendants Piedmont Auto and Apex Auto and their employees when she provided Lynn Smith and Steve Albert, among other employees, with a copy of her Land Rover paystubs, and Defendants Piedmont Auto and Apex Auto knew or should have known that the funds used by LMN; CAN and RF were illegitimate when she purchased over \$475,000.00 in vehicles while LMN only earned approximately \$30,000.00 in annual salary. This was further evidenced by Piedmont Auto and Apex Auto's initial refusal to sell automobiles to LMN based upon her poor credit and lack of income to support any purchase.

63. As a part of the common plan or scheme between these Defendants, LMN, CAN or RF would select a vehicle from Piedmont Auto and Apex Auto's lots, tender Piedmont Auto/ Apex Auto with a personal check for the entire sticker price of each vehicle, and leave with the vehicle. Then, Steven Albert or Lynn Smith, both employees of Piedmont Auto and Apex Auto, would exchange the personal check for certified funds at a local branch for Bank of America or SunTrust, and then deposit the same into bank accounts of Defendants Piedmont Auto or Apex Auto.

64. In furtherance of the common plan or scheme designed by LMN, CAN, and RF, and shared with Defendants Piedmont Auto and Apex Auto, LMN would provide employees of Piedmont Auto and Apex Auto various gifts and personal property items, including but not limited to LMN's purchase of a washing machine and other appliances to further induce and reward them for allowing her to continue laundering the stolen funds.

65. The overall plan or scheme designed by these Defendants was for LMN to embezzle funds from Land Rover, deposit them into bank accounts controlled by LMN, CAN and/or RF, and to exchange the funds for collateral, i.e., vehicles, to make the transactions appear legitimate and thereby deprive Land Rover of money rightfully owned by it.

66. Defendants' collective acts proximately caused damages to Plaintiff, including but not limited to, the loss of approximately \$475,000.00 in cash, loss of business and business interruption caused by the alleged conspiracy, increased finance charges and interest rates on Plaintiff's floor finance plan with multiple banking institutions, loss of reputation, and loss of goodwill, and additional special damages and losses which caused Plaintiff to default on various bank loans thereby incurring penalties, late charges, and increased interest rates.

67. Accordingly, Plaintiff is entitled to an award of actual, consequential, special and punitive damages from these Defendants.

FOR A FOURTH CAUSE OF ACTION
AS TO DEFENDANTS PIEDMONT AUTO AND APEX AUTO
(Unfair Trade Practices)
(S.C. Code §39-5-10)

68. All the foregoing allegations are hereby repeated, realleged and incorporated by reference as if set forth verbatim herein.

69. This action is brought pursuant to South Carolina Code Ann §39-5-10, et seq., the South Carolina Unfair Trade Practices Act.

70. Plaintiff would show that Defendants Piedmont Auto and Apex Auto have willfully engaged in unfair methods of competition and unfair or deceptive acts and practices in the conduct of their trade or commerce, including, but not limited to, the following:

- a. Transacting business with fraudulent money;
- b. Transacting business with individuals without using appropriate or reasonable credit screening or other financial verification procedures prior to transacting business;
- c. Receiving various personal gifts from Defendant LMN in exchange for the purchase of multiple vehicles or other gratuities;
- d. Receiving various personal gifts from Defendant LMN which Defendants Piedmont Auto and Apex Auto or their agents knew, or in the exercise of due diligence should have known, were obtained fraudulently;
- e. By selling Defendants LMN, CAN and RF multiple vehicles over and above fair market value;
- f. By selling Defendants LMN, CAN and RF multiple vehicles prior to placing them on the market for other consumers; and
- g. By allowing Defendants LMN, CAN and RF to use and possess multiple vehicles without paying for them;

h. In obtaining money, goods, services, anything of value, or any other benefit from Defendants LMN, CAN and RF, on account of or in relation to the sale of motor vehicles without such benefits being promptly accounted for and transmitted to the motor vehicle dealer;

i. In accepting incomplete instruments or checks as consideration for vehicles and then exchanging the checks for certified funds at various banks; and

j. By altering and abandoning established credit and sales practices to specifically accommodate and facilitate LMN's money laundering.

71. Defendants Piedmont Auto and Apex Auto's actions are in violation and breach of the South Carolina Unfair Trade Practices Act.

72. Defendants' conduct, which was willful, intentional, and reckless, affects the public's interest including, in knowingly transacting business with fraudulent money, in failing to report known embezzlement or fraudulent scheme, and in exchanging fraudulent checks for certified funds, and such conduct is capable of repetition and was in fact repeated.

73. As a direct and proximate result of Defendants' conduct, Plaintiff has suffered damages and is informed and believes that it is entitled to an award of damages, including, but not limited to, loss of cash, loss of business interruption, lost profits, diminished value and marketability of repossessed cars, attorney's fees and costs, treble damages and such other damages as may be shown through discovery in this action.

FOR A FIFTH CAUSE OF ACTION
AS TO DEFENDANTS PIEDMONT AUTO AND APEX AUTO
(Violation of S.C. Code § 56-15-40, Regulation of Manufacturers, Distributors and Dealers)

74. All the foregoing allegations are hereby repeated, realleged and incorporated by reference as if set forth verbatim herein.

75. This action is brought pursuant to South Carolina Code Ann §56-15-40, et seq., Regulation of Manufacturers, Distributors and Dealers Act. At all times relevant to this action Defendants Piedmont Auto and Apex Auto were automobile dealers actively engaging, directly or indirectly, in purposeful contacts within this State for the offering or advertising for sale motor vehicles within this State.

76. Plaintiff would show that Defendants Piedmont Auto and Apex Auto have willfully engaged in arbitrary, unconscionable, unfair, deceptive and bad faith in the conduct of their trade or commerce, including, but not limited to, the following:

- a. Transacting business with fraudulent money;
- b. Transacting business with individuals without using appropriate or reasonable credit screening and other authorization protocols below the industry standards prior to transacting business;
- c. Receiving various personal gifts from Defendant LMN in exchange for the purchase of multiple vehicles or other gratuities;
- d. Receiving various personal gifts from Defendant LMN which Defendants Piedmont Auto and Apex Auto or their agents knew, or in the exercise of due diligence should have known, were obtained fraudulently;
- e. By selling Defendants LMN, CAN and RF multiple vehicles over and above fair market value;
- f. By contacting Defendants LMN, CAN and RF and soliciting the purchase of multiple vehicles by offering to sell vehicles prior to placing them on the market for other consumers;
- g. By allowing Defendants LMN, CAN and RF to use and possess multiple vehicles without paying for them;
- h. In obtaining money, goods, services, anything of value, or any other

benefit from Defendants LMN, CAN and RF, on account of or in relation to the sale of motor vehicles without such benefits being promptly accounted for and transmitted to the motor vehicle dealer; and

i. In accepting incomplete instruments or checks as consideration for vehicles and then exchanging the checks for certified funds at various banks.

77. The conduct and actions of Defendants Piedmont Auto and Apex Auto as set forth above are in violation and breach of the Act and this action is brought pursuant to South Carolina Code Ann §56-15-40, et seq., Regulation of Manufacturers, Distributors and Dealers Act.

78. Plaintiff is also an automobile dealer within the scope of said Act and Plaintiff is a member of the class of persons or dealers sought to be protected by the Act. Further, Defendants' conduct, which was willful, intentional, malicious and reckless, affects the public interest and is capable of repetition. As a result of Defendants Piedmont Auto and Apex Auto's willful, intentional, malicious and reckless conduct in violation of South Carolina Code Ann §56-15-40, et seq., Regulation of Manufacturers, Distributors and Dealers Act, Plaintiff was injured in his business or property, suffering from the loss of cash, loss of capital, loss of business and business interruption, increased finance charges and interest rates on Plaintiff's floor finance plan with multiple lending institutions, loss of reputation, and loss of good, and such losses caused Plaintiff to default on various bank loans thereby incurring penalties, late charges, and increased interest rates, and therefore Plaintiff is entitled to the following relief:

- a. recovery of double the actual damages sustained by him;
- b. recovery of the cost of suit, including reasonable attorney's fee; and
- c. punitive damages not to exceed three times the actual damages.

FOR A SIXTH CAUSE OF ACTION
AS TO DEFENDANTS PIEDMONT AUTO AND APEX AUTO
(Negligence and Gross Negligence)

79. All the foregoing allegations are hereby repeated, realleged and incorporated by reference as if set forth verbatim herein.

80. At all times relevant to this action, Defendants Piedmont Auto and Apex Auto were automobile dealers actively engaging, directly or indirectly, in purposeful contacts within this State for the offering or advertising for sale motor vehicles within this State.

81. Accordingly, Defendants Piedmont and Apex owed a statutorily imposed duty to Plaintiff and the public at large to comply with South Carolina Code of Laws Code Ann §56-15-40, et seq., Regulation of Manufacturers, Distributors and Dealers Act ("Dealer Act"), to not transact any business in an unconscionable or unreasonable manner or in bad faith.

82. The Defendants' conduct and acts of bad faith were in violation of the Dealer Act as set forth herein.

83. Plaintiff is also an automobile dealer within the scope of the Dealer Act and Plaintiff is a member of the class of persons or dealers sought to be protected by this statute.

84. That prior to selling LMN, CAN and RF any of its vehicles, Defendants Piedmont Auto and Apex Auto also had a duty to use ordinary and due care in operating their business, including care to implement and execute reasonably appropriate credit and/or financial screening and other prudent monitoring procedures, or to otherwise refrain from accepting money from LMN after having notice that she did not possess legitimate funds.

85. That during the relevant periods, LMN and CAN submitted credit applications, or Defendants' employees submitted credit applications on behalf of LMN and CAN, which were denied by various financial lenders due to poor credit history and/or insufficient proof of income, and Defendants Piedmont Auto and Apex Auto received and reviewed the results of said applications providing it with notice that LMN, CAN and RF did not possess the requisite funds

to purchase one or many vehicles. Before LMN and CAN purchased any vehicles from Defendants' dealerships, Rich Kirby, a general sales manager, had previously refused to transact business with LMN and CAN for the same reasons cited hereinabove, but Lynn Smith and other employees continued to sell vehicles to LMN, CAN and RF anyway.

86. In addition, Defendants and their employees knew or should have known that LMN was a part-time employee of Land Rover and failed to inquire further into the legitimacy or source of her money.

87. Defendants Piedmont Auto and Apex Auto knew, or should have known through the exercise of due care and the implementation of reasonably appropriate credit and/or financial screening and other prudent monitoring procedures, that Defendants LMN, CAN and RF were transacting business with money obtained fraudulently or through illegal or illegitimate channels.

88. Defendants Piedmont Auto and Apex Auto, having failed to exercise due care, or any care whatsoever, prior to engaging in business transactions with Defendants LMN, CAN and RF, accepted unauthorized and fraudulent checks from said defendants for the purchase of multiple automobiles, as well as accepting various gifts from LMN, CAN and RF. Under these circumstances, it was unconscionable, unreasonable and in bad faith for Defendants Piedmont Auto and Apex Auto to accept any money or gifts from LMN, CAN and RF.

89. Defendants Piedmont Auto and Apex Auto violated §56-15-40 of the Dealers Act and breached their statutorily imposed duties, in the following manners, to wit:

- a. Transacting business with fraudulent money;
- b. Transacting business with individuals without using appropriate or reasonable credit screening and other authorization protocols below the industry standards prior to transacting business;
- c. Receiving various personal gifts from Defendant LMN in exchange for the

purchase of multiple vehicles or other gratuities;

d. Receiving various personal gifts from Defendant LMN which Defendants Piedmont Auto and Apex Auto or their agents knew, or in the exercise of due diligence should have known, were obtained fraudulently;

e. By selling Defendants LMN, CAN and RF multiple vehicles over and above fair market value;

f. By contacting Defendants LMN, CAN and RF and soliciting the purchase of multiple vehicles by offering to sell vehicles prior to placing them on the market for other consumers;

g. By allowing Defendants LMN, CAN and RF to use and possess multiple vehicles without paying for them;

h. In obtaining money, goods, services, anything of value, or any other benefit from Defendants LMN, CAN and RF, on account of or in relation to the sale of motor vehicles without such benefits being promptly accounted for and transmitted to the motor vehicle dealer; and

i. In accepting incomplete instruments or checks as consideration for vehicles and then exchanging the checks for certified funds at various banks.

90. Defendants Piedmont Auto and Apex Auto, having breached their duty to exercise due care and the statutorily imposed duties pursuant to §56-15-40 the Dealers Act, facilitated the unauthorized and fraudulent transactions engaged in by the Defendants LMN, CAN and RF with Defendants Piedmont Auto and Apex Auto for the purchase of multiple automobiles, and in so doing, did directly and proximately contribute to Plaintiff's injuries and damages.

91. As a direct and proximately result of the Defendants' negligent, grossly negligent, reckless, willful and wanton conduct, the Plaintiff suffered damages, including but not limited to: loss of cash, loss of business capital, loss of business and business interruption, financial

hardship, increased finance charges and interest rates on Plaintiff's floor finance plan with multiple lending institutions, loss of reputation, and loss of good, and such losses caused Plaintiff to default on various bank loans thereby incurring penalties, late charges, and increased interest rates.

92. Accordingly, Plaintiff is informed and believes it is entitled to actual and punitive damages in an amount to be determined by the Trier of Fact.

FOR A SEVENTH CAUSE OF ACTION
AS TO DEFENDANTS PIEDMONT AUTO AND APEX AUTO
(Negligent Hiring and Supervision)

93. All the foregoing allegations are hereby repeated, realleged and incorporated by reference as if set forth verbatim herein.

94. In addition, the aforementioned occurrences in Paragraphs 16 through 26 were caused wholly and solely by reason of the negligence, gross negligence, recklessness and carelessness of Defendants Piedmont Auto and Apex Auto in the ownership, operation and control of their dealerships, supervisors and agents, managing services and/or their training, hiring, and retention of employees of their dealerships, and without any fault or negligence on the part of the Plaintiff contributing thereto.

95. Certain employees, including but not limited to Steve Albert and Lynn Smith, of Defendants Piedmont Auto and Apex Auto engaged in conduct to intentionally harm Plaintiff by knowingly transacting in business with the monies fraudulently obtained by Defendants LMN, CAN and RF, who, collectively, engaged in a scheme to defraud Plaintiff.

96. Defendants Piedmont Auto and Apex Auto owed a duty to Plaintiff and the public at large to comply with South Carolina Code of Laws Code Ann §56-15-40, et seq., Regulation

of Manufacturers, Distributors and Dealers Act, and these Defendants conduct and acts of bad faith were in violation of the Act.

97. Also, Defendants Piedmont Auto and Apex Auto owed a duty to Plaintiff to hire, train and supervise their employees so that such employees used ordinary care in transacting automobile purchases in a reasonably prudent manner, and Defendants' officers, directors, managers, servants, and/or agents, while on the premises of Defendants' dealerships, knowingly sold twenty-six (26) automobiles to Defendants LMN, CAN and RF after having received or should have received notice that LMN, CAN and RF did not possess requisite funds to purchase said automobiles or that Defendants LMN, CAN and RF possessed such funds fraudulently.

98. That during the relevant periods, LMN and CAN submitted credit applications or Defendants' employees submitted credit applications on behalf of LMN and CAN, which were denied by various financial lenders due to poor credit history and/or insufficient income, and Defendants Piedmont Auto and Apex Auto received and reviewed the results of said applications providing them with notice that LMN, CAN and RF did not possess the requisite funds to purchase one or many vehicles. Before LMN or CAN purchased the first vehicle from Defendants' dealership, Rich Kirby, a general sales manager at Defendants' dealership, Rich Kirby, had previously refused to transact business with LMN and CAN for the same reasons cited hereinabove, but Lynn Smith and Steve Albert continued to sell vehicles to them anyways.

99. In addition, Defendants and their employees, including Lynn Smith and Steve Albert, knew that LMN was an employee of Land Rover, yet they failed to inquire further into the legitimacy or source of her money, and it was reasonably foreseeable under these circumstances that Land Rover could be injured by Defendants' breach of its duties.

100. Defendants Piedmont Auto and Apex Auto were and are in the business of automobile sales and Steven Albert and Lynn Smith, employees of Defendants, acted outside the scope of their employment when these persons accepted gifts from LMN, CAN and RF, and when they accepted personal and/or incomplete checks from LMN, CAN and RF, knowing that such funds were obtained fraudulently, and then exchanged said checks for certified funds at local branches of Bank of America and SunTrust in order to replace said checks, and deposited the proceeds in its business accounts.

101. Defendants had the ability and duty to control their employees during such transactions and check exchanges, and knew or through the exercise of reasonable care and due diligence should have known of the necessity and opportunity to exercise such control over their employees, and such failures resulted in injury to Plaintiff in the following manners to wit: loss of cash, loss of capital, loss of business and business interruption, increased finance charges and interest rates on Plaintiff's floor finance plan with multiple lending institutions, loss of reputation, and loss of good, and such losses caused Plaintiff to default on various bank loans thereby incurring penalties, late charges, and increased interest rates.

102. At all times relevant herein, Defendants Piedmont Auto and Apex Auto had an obligation to protect the rights of the Plaintiff and to provide reasonable management, control and oversight at their dealerships and over their employees.

103. At all times relevant herein, Defendants Piedmont Auto and Apex Auto negligently breached their duties owed to Plaintiff by knowingly transacting business with fraudulent monies, by accepting gifts from LMN, CAN and/or RF, and by accepting incomplete checks and exchanging them for certified funds at local branch banks.

104. As a result of the foregoing acts and/or omissions, Plaintiff was subjected to Defendants Piedmont Auto and Apex Auto's negligence, causing Plaintiff to suffer the above injuries, which were reasonable foreseeable under the circumstances.

105. As a direct and proximate cause of the Defendants' acts and/or omissions, Plaintiff suffered the above injuries.

106. By reason of the foregoing, Plaintiff was damaged and Plaintiff is entitled to actual, direct, consequential, punitive damages for the same.

FOR A EIGHTH CAUSE OF ACTION
AS TO ADPDS
(Negligence, Gross Negligence and Recklessness)

107. All the foregoing allegations are hereby repeated, realleged and incorporated by reference as if set forth verbatim herein.

108. The parties have a fiduciary relationship in addition to their contractual relationship based upon the private and sensitive nature of the information, materials and tasks entrusted to Defendant ADPDS.

109. The Defendant ADPDS, at all times relevant to this litigation, was charged with the duty of reasonable care to maintain, monitor, verify and control Land Rover employee's access to its computing programs and accounting systems and was responsible for reporting and verifying with Land Rover any changes, modifications or other alterations in any employee's access to said computing and accounting systems.

110. The Defendant ADPDS breached its duty of due care to Plaintiff in the following manners, to wit:

- a. By failing to use reasonable and appropriate verification and authorization

protocols in allowing Defendant LMN expanded access to Land Rover's computing and accounting systems;

b. By allowing Defendant LMN expanded access to the same without authorization or verification from Land Rover, after Land Rover removed LMN's access to the same;

c. By accepting the forged signature of Land Rover's principal, which Defendant ADPDS knew or through the exercise of due care and diligence reasonably should have known was forged;

d. By allowing Defendant LMN to have access to and control over company check writing programs without the authorization and permission of Land Rover; and

e. In communicating with Defendant LMN privately by means of her personal cell phone number and work email address, including communications with LMN during hours outside its normal business operations;

111. Defendant Lara Marie Nance did use that unauthorized access to Land Rover's computer and accounting systems, and unauthorized access to Land Rover's company check drafting programs, to engage in fraudulent business transactions and the embezzlement of \$1,282,000.00.

112. The unauthorized and fraudulent acts and transactions engaged in by the Defendant LMN with Defendants Piedmont Auto and Apex Auto and other businesses were facilitated by Defendant ADPDS's failure to reasonably execute its duty of due care in maintaining, monitoring, verifying and controlling access to Plaintiff's computing and accounting systems, as well as reporting and verifying with Plaintiff any changes, modifications or other alterations in any individual's access to said computing and accounting systems.

113. As a result of Defendant ADPDS' breach of its duties, ADPDS directly and proximately caused damages to Plaintiff, including but not limited to, the loss of approximately \$1,282,000.00 in cash; loss of business and business interruption caused by the alleged conspiracy, increased finance charges and interest rates on Plaintiff's floor finance plan with multiple banking institutions, loss of reputation, and loss of good, and such losses caused Plaintiff to default on various bank loans thereby incurring penalties, late charges, and increased interest rates.

114. As a direct and proximately result of the Defendant's negligent, reckless, willful and wanton conduct, the Plaintiff was damaged and is entitled to actual and punitive damages in an amount to be determined by the Trier of Fact.

FOR A NINTH CAUSE OF ACTION
AS TO DEFENDANT ADPDS
(Breach of Contract)

115. All the foregoing allegations are hereby repeated, realleged and incorporated by reference as if set forth verbatim herein.

116. At all times relevant to this litigation, Plaintiff and Defendant ADPDS were mutually bound in contract by the terms of a Master Service Agreement (attached hereto as Exhibit A) (hereinafter "MSA") entered into by the parties in 1995 for the license and use of certain accounting and payment software and computing programs as well as technical support from ADPDS.

117. That pursuant to the terms of the MSA, Defendant ADPDS was obligated to provide Plaintiff with computing programs and accounting systems, and to provide services related thereto, including but not limited to the maintenance, monitoring, supervising, verifying and controlling access to the same.

118. Without justification for doing so, through their above-referenced acts and/or omissions, Defendant ADPDS materially breached the terms of the contract, in the following manners, to wit:

a. By disclosing confidential information contained within Land Rover's "client files" to a subordinate employee at Land Rover whom ADPDS knew or should have known was not permitted access to Land Rover's "client files," in contravention of Paragraph 9A of the MSA;

b. By failing to provide Land Rover with reasonable security provisions to ensure that access to Land Rover's "client files" would be provided exclusively to Land Rover, and in failing to implement or make necessary updates to ADPDS' protocols and procedures to ensure file security, in contravention of Paragraph 9B of the MSA;

c. By failing to take reasonable precautions to prevent the loss of or alteration of Land Rover's "client files" maintained and controlled by ADPDS, and in failing to maintain related protocols and procedures for the identification of authorized users of and within its accounting and payment software and computing programs as represented by ADPDS when distributing confidential and/or sensitive information, in contravention of Paragraph 9C and 9D of the MSA;

d. By failing to defer to Land Rover's principals and/or managers when granting access to its accounting and payment software and related programs, in contravention of stated policies;

e. By granting access to Land Rover's "client files" and other confidential and sensitive financial information to an unauthorized employee of Land Rover in contravention of ADPDS' stated policies and prior representations;

f. By granting access to Land Rover's "client files" and other confidential and sensitive financial information without written consent from the general manager or principal of Land Rover, and in contravention of ADPDS' stated policies and prior representations;

g. By making user updates and changes to Land Rover's accounting and payment software and related computing programs without written consent from the general manager or principal of Land Rover;

h. By failing to authenticate or verifying the requested access to Land Rover's "client files" and accounting and payment software and related programs by Defendant LMN, as referenced in Paragraph 15 hereinabove, in contravention of ADPDS' stated policies and prior representations; and

i. In ADPDS' failure to maintain, monitor, and supervise Land Rover's computing programs and accounting systems, by granting Defendant LMN access to Land Rover's computing programs and accounting systems without authorization from Land Rover, by omitting to follow verification and authorization protocols for granting certain persons access to Land Rover's computing programs and accounting systems, in contravention of its stated policies, prior representations and the implied covenant of good faith and fair dealing.

119. The breach of contract by Defendant ADPDS has directly and proximately caused Plaintiff to suffer damages in the following manners to wit: the loss of approximately \$1,282,000.00 in cash, loss of business and business interruption, increased finance charges and interest rates on Plaintiff's floor finance plan with multiple banking institutions, loss of

reputation, and loss of good, and such losses caused Plaintiff to default on various bank loans thereby incurring penalties, late charges, and increased interest rates.

120. As a result of ADPDS' breach of the MSA, Plaintiff is entitled to an award of actual, consequential and incidental damages, together with prejudgment interest.

FOR A TENTH CAUSE OF ACTION
AS TO DEFENDANT ADPDS
(Breach of Fiduciary Duty)

121. All the foregoing allegations are hereby repeated, realleged and incorporated by reference as if set forth verbatim herein.

122. The parties have a fiduciary relationship in addition to their contractual relationship based upon the private and sensitive nature of the information, materials and tasks entrusted to Defendant ADPDS.

123. Due to the special confidence placed upon ADPDS in maintaining and controlling access to the Plaintiff's payroll, accounts payable and other sensitive financial information, said Defendant is duty bound to act in good faith and with due regard to the Plaintiff's interest.

124. As a result of ADPDS' breach of their fiduciary duty and the resulting damages, Plaintiff is entitled to an award of actual, consequential and incidental damages, together with prejudgment interest.

FOR AN ELEVENTH CAUSE OF ACTION
AS TO NBSC AND BB&T
(Negligence, Gross Negligence & Recklessness)
(S.C. Code §§36-3-404, 36-3-405, 36-3-406)

125. All the foregoing allegations are repeated, realleged and incorporated by reference as if set forth verbatim herein.

126. Defendants, which had duties to exercise ordinary care, good faith and fair dealing in the handling of the above-described transactions, negligently and recklessly failed to properly utilize, compare and process the signature cards and account ownership information so that no one other than the authorized users signed and accessed funds from Plaintiff's accounts.

127. Further, Defendant NBSC, with gross negligence and recklessness, permitted NBSC to withdraw funds from the Plaintiff's respective accounts in the form of checks, despite its knowledge and possession of ownership information regarding the accounts and the signature cards, despite its knowledge and possession of corporate checks bearing an obvious forgery, and despite Land Rovers' specific request to provide cancelled checks with the Plaintiff's NBSC statements.

128. In so doing, Defendant NBSC failed to exercise ordinary care in handling the above-described transactions.

129. Had Defendant NBSC employed reasonable procedures for ensuring that its systems reflected accurate ownership and signature authority regarding the accounts, and employed reasonable procedures for utilizing and safeguarding that information, NBSC would have had such information to deny Nance access to the accounts. But for such failure to exercise such ordinary care, all or substantially all of the losses described herein would have been avoided.

130. As a direct and proximate result of the aforesaid negligence, gross negligence and recklessness of NBSC, Plaintiff has been damaged in the amount of at least One Million Two Hundred Eighty-Two Thousand and 00/100 (\$1,282,000.00) Dollars.

131. Accordingly, Plaintiff demands judgment against Defendant NBSC for the sum of at least \$1,282,000.00, together with proximate consequential damages, interest, expenses, and the costs of this action, and for such further relief as the Court deems just.

FOR A TWELTH CAUSE OF ACTION
AS TO NBSC AND BB&T
(Conversion)
(S.C. CODE § 36-3-420(2008) AND 36-3-419(1962))

132. All the foregoing allegations are repeated, realleged and incorporated by reference as if set forth verbatim herein.

133. At all relevant times herein, Land Rover maintained its business accounts for its Greenville, South Carolina dealership at Defendant NBSC pursuant to an account agreement(s) and/or banking authorization(s). The agreement(s) and/or banking authorization(s) with respect to the Plaintiff's accounts, between Plaintiff and Defendant, required Defendant to act in accordance with Plaintiff's instructions and with reasonable commercial standards of the banking industry, including the duty to exercise ordinary care in the paying or taking of negotiable instruments pursuant to South Carolina Code of Laws, Title 36, Chapter 3, et seq.

134. Defendant NBSC issued checks to Land Rover for these accounts, and Land Rover provided Defendant NBSC with the names of persons authorized to endorse or otherwise sign checks or drafts on behalf of and for Land Rover and it submitted signature proofs of each person so authorized.

135. LMN was not an authorized user or endorser of the said Land Rover accounts at NBSC. All checks relevant to this action contained unauthorized signatures or obvious forgeries pursuant to S.C. Code §36-3-403.

136. In addition to the foregoing, LMN unambiguously altered drafts by generating checks bearing unauthorized changes or modifications to said instruments, including altered numbers and/or words.

137. LMN presented and deposited said checks at BOA and SunTrust, and Defendant NBSC accepted for withdrawal of funds from Plaintiff's accounts, and charged against the accounts the above-described fraudulent checks, which were not properly payable.

138. Defendant NBSC had notice that LMN was not a person entitled to demand or enforce payment upon Land Rover checks or drafts or to otherwise receive payments from Land Rover's accounts at NBSC.

139. Despite notice of the same, and in disregard of the duties owed to Plaintiff, Defendants paid the above-described charges and debited the Plaintiff's accounts even though the charges bore no authorized endorsement or an obvious forgery.

140. Defendant NBSC breached its duty to exercise reasonable and ordinary care by paying upon checks which were not properly payable. Defendant NBSC's conduct and resulting breach of its duty were caused wholly and solely by reason of the negligence, recklessness and carelessness of Defendant NBSC, and without any fault or negligence on the part of the Plaintiff contributing thereto.

141. As a direct and proximate result of the aforesaid conversion by NBSC, Plaintiff has been damaged in the amount of at least One Million Two Hundred Eighty-Two Thousand and 00/100 (\$1,282,000.00) Dollars.

142. Accordingly, Plaintiff demands judgment against Defendant NBSC for the sum of at least \$1,282,000.00, together with proximate consequential damages, interest, expenses, and the costs of this action, and for such further relief as the Court deems just.

FOR A THIRTEENTH CAUSE OF ACTION
AS TO NBSC AND BB&T
(Breach of Contract)

143. All the foregoing allegations are repeated, realleged and incorporated by reference as if set forth verbatim herein.

144. The deposit agreement(s) and/or banking authorization(s) with respect to the Plaintiff's accounts, between Plaintiff and Defendant, required Defendant to act in accordance with Plaintiff's instructions and with reasonable commercial standards of the banking industry.

145. In paying the above-described charges that bore unauthorized signatures, Defendant breached their respective contract(s) with Plaintiff, including its duty of fair dealing implicit in the contract(s).

146. As a direct and proximate result of the aforesaid breach of contract by NBSC, Plaintiff has been damaged in the amount of at least One Million Two Hundred Eighty-Two Thousand and 00/100 (\$1,282,000.00) Dollars.

147. Accordingly, Plaintiff demands judgment against Defendants NBSC for the sum of at least \$1,282,000.00, together with proximate consequential damages, interest, expenses, and the costs of this action, and for such further relief as the Court deems just.

FOR A FOURTEENTH CAUSE OF ACTION
AS TO NBSC AND BB&T
(Violation of U.C.C. §1-203)

148. All the foregoing allegations are repeated, realleged and incorporated by references as is if set forth verbatim herein.

149. Defendant accepted for withdrawal of funds from the Accounts, and charged against the Accounts, the above-described checks, counter checks, and credit card charges, which were not properly payable.

150. Defendant paid the above-described charges and debited the Accounts despite the fact that the charges bore no authorized signatures.

151. In paying the above-described charges that bore unauthorized signatures, Defendant breached its obligations of good faith.

152. As a direct and proximate result of the aforesaid violations, Plaintiff has suffered damages.

153. Accordingly, Plaintiff demands judgment against Defendant NBSC for the sum of at least \$1,282,000.00, together with proximate consequential damages, interest, expenses, and the costs of this action, and for such further relief as the Court deems just.

FOR A FIFTEENTH CAUSE OF ACTION
AS TO NBSC AND BB&T
(Violation of S.C. Unfair Trade Practices Act)

154. All the foregoing allegations are repeated, realleged and incorporated by reference as if set forth verbatim herein.

155. At all relevant times, Defendant have operated under a system that manages its respective customers' financial affairs through a comprehensive system of links between and among accounts and services, but fails to properly coordinate information and protections through these various linked accounts. Thus, Defendant willfully administers a system that lacks that lacks sufficient safeguards to protect its customers from suffering a stream of damages and damages and harm when Defendant fails to properly process and maintain information in its its systems.

156. At all relevant times, Defendant has willfully operated a customer service system that is designed to impede and discourage its customers from seeking redress for Defendant's errors, and from seeking relief from repeated errors in the future.

157. Defendant's actions constitute deceptive and unfair trade practices as defined in S.C. Code Ann. §39-5-20.

158. As a direct and proximate result of the aforesaid violation of the S.C. Unfair Trade Practices Act by NBSC, Plaintiff has been damaged in the amount of at least One Million Two Hundred Eighty-Two Thousand and 00/100 (\$1,282,000.00) Dollars.

159. Plaintiff demands judgment against Defendant NBSC for treble actual damages, punitive damages, interest, expenses, attorney's fees and costs, and for such further relief as the Court deems just.

FOR A SIXTEENTH CAUSE OF ACTION
AS TO NBSC AND BB&T
(Breach of Fiduciary Duty)

160. All the foregoing allegations are hereby repeated, realleged incorporated by reference as if set forth verbatim herein.

161. The parties have a fiduciary relationship based upon the private and sensitive nature of the information, materials and funds entrusted to Defendant NBSC.

162. Due to the special confidence placed upon NBSC in maintaining, safe guarding and controlling access to the Plaintiff's funds and other sensitive financial information, said Defendant is duty bound to act in good faith and with due regard to the Plaintiff's interest.

163. As a result of NBSC's breach of their fiduciary duty and the resulting damages, Plaintiff is entitled to an award of actual, consequential and incidental damages, together with prejudgment interest.

FOR AN SEVENTEENTH CAUSE OF ACTION
AS TO BOA and SUNTRUST
(Negligence, Gross Negligence & Recklessness)
(S.C. Code §§36-3-404, 36-3-405, 36-3-406)

164. All foregoing allegations are hereby repeated, realleged and incorporated by

165. Defendants BOA and Suntrust, which had duties to exercise ordinary care, good faith and fair dealing in the handling of the above-described transactions, and implementing commercially reasonable bank procedures for opening checking accounts, negligently and recklessly failed to properly utilize its own rules and policies by permitting LMN to open unauthorized corporate checking accounts in the names of established businesses.

166. Further, Defendants BOA and Suntrust, with gross negligence, recklessness and a want of ordinary care, repeatedly deposited corporate checks bearing forged signatures and forged indorsements into her accounts at BOA and Suntrust, and by repeatedly transferring said forgeries to Defendant NBSC.

167. In so doing, Defendants BOA and Suntrust failed to exercise ordinary care in opening checking accounts and in the handling the above-described transactions and failed to implement commercially reasonable bank procedures for depositing and transferring corporate checks.

168. Had Defendants BOA and Suntrust employed reasonable procedures for ensuring that checking accounts would not be opened or maintained by an individual in the names of established and known business, and had BOA and Suntrust utilized reasonable procedures for depositing corporate checks, Defendants BOA and Suntrust would have had sufficient information to deny LMN from maintain fraudulent accounts and deny LMN from depositing authorized checks, thereby preventing her fraudulent scheme. But for such failures to exercise such ordinary care and commercially reasonable bank procedures, all or substantially all of the losses described herein would have been avoided.

169. As a direct and proximate result of the aforesaid negligence, gross negligence and recklessness of BOA and Suntrust, Land Rover has been damaged in the amount of at least One

recklessness of BOA and Suntrust, Land Rover has been damaged in the amount of at least One Million Two Hundred Eighty-Two Thousand and 00/100 (\$1,282,000.00) Dollars.

170. Accordingly, Plaintiff demands judgment against Defendant NBSC for the sum of at least \$1,282,000.00, together with proximate consequential damages, interest, expenses, and the costs of this action, and for such further relief as the Court deems just.

FOR A EIGHTEENTH CAUSE OF ACTION
AS TO BOA and SUNTRUST
(Conversion)
(S.C. Code § 36-3-420(2008) and 36-3-419(1962))

171. All the foregoing allegations are repeated, realleged and incorporated by reference as if set forth verbatim herein.

172. Defendants BOA and Suntrust, which had duties to exercise ordinary care, good faith and fair dealing in the handling of the above-described transactions, and implementing commercially reasonable bank procedures for opening checking accounts and depositing corporate checks, are required to act in accordance with commercially reasonable banking procedures and bank industry standards, including the duty to exercise ordinary care in the paying or taking of negotiable instruments pursuant to South Carolina Code of Laws, Title 36, Chapter 3, et seq.

173. Defendants BOA and Suntrust transferred Land Rover's corporate checks bearing forged indorsements to NBSC and deposited Land Rover's funds from the unauthorized corporate checks into accounts controlled by LMN at BOA and Suntrust, both of which were not properly payable.

174. Defendants BOA and Suntrust transferred and deposited the above-described checks despite the fact that the checks bore unauthorized signatures and forged indorsements. By transferring and depositing said checks that were not properly payable, Defendants BOA and

Suntrust breached their duties of ordinary care and good faith and fair dealing in the handling of the above-described transactions, and implementing commercially reasonable bank procedures for opening checking accounts, transferring and depositing corporate checks.

175. Defendants' BOA and Suntrust conduct and resulting breach of its duties were caused wholly and solely by reason of the negligence, recklessness and carelessness of Defendant BOA and Suntrust, and without any fault or negligence on the part of the Plaintiff contributing thereto.

176. As a direct and proximate result of the aforementioned conversion by BOA and Suntrust, Plaintiff has been damaged in the amount of at least One Million Two Hundred Eighty-Two Thousand and 00/100 (\$1,282,000.00) Dollars.

177. Accordingly, Plaintiff demands judgment against Defendants BOA and Suntrust for the sum of at least \$1,282,000.00, together with proximate consequential damages, interest, expenses, and the costs of this action, and for such further relief as the Court deems just.

FOR A NINETEENTH CAUSE OF ACTION

AS TO BOA and Suntrust

(Violation of U.C.C. §1-203)

178. All the foregoing allegations are hereby repeated, realleged and incorporated by reference as if set forth verbatim herein.

179. Defendants BOA and Suntrust accepted for withdrawal of funds from the Accounts, and charged against the Accounts, the above-described checks, counter checks, and credit card charges, which were not properly payable. Defendants BOA and Suntrust transferred and deposited the proceeds from the above-described checks despite the fact that the charges bore no authorized endorsement.

180. In paying the above-described charges that bore unauthorized signatures,

Defendants BOA and Suntrust breached its obligations of good faith.

181. As a direct and proximate result of the aforesaid violations, Plaintiff has suffered damages.

182. Accordingly, Plaintiff demands judgment against Defendant BOA and Suntrust for the sum of at least One Million Two Hundred Eighty-Two Thousand and 00/100 (\$1,282,000.00) Dollars, together with proximate consequential damages, interest, expenses, and the costs of this action, and for such further relief as the Court deems just.

FOR A FIFTEENTH CAUSE OF ACTION
AS TO BOA and Suntrust
(Violation of S.C. Unfair Trade Practices Act)

183. All the foregoing allegations are hereby repeated, realleged and incorporated by reference as if set forth verbatim herein.

184. At all relevant times, Defendants BOA and Suntrust have operated under a system that manages its respective customers' financial affairs through a comprehensive system of links between and among its deposit accounts and drawee or payor banks, but fails to properly coordinate information and protections through these various linked accounts. Thus, Defendants willfully administered a system that lacks sufficient safeguards to protect drawee or payor banks, and the public at large, from suffering a stream of damages and harm when Defendants BOA and Suntrust failed to properly process and maintain information in its systems.

185. At all relevant times, Defendants has willfully operated a customer service system that is designed to impede and discourage third parties from seeking redress for Defendants' errors, and from seeking relief from repeated errors in the future.

186. Defendant's actions constitute deceptive and unfair trade practices as defined in S.C. Code Ann. §39-5-20.

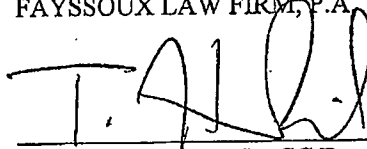
187. As a direct and proximate result of the aforesaid violation of the S.C. Unfair Trade Practices Act by BOA and Suntrust, Plaintiff has been damaged in the amount of at least One Million Two Hundred Eighty-Two Thousand and 00/100 (\$1,282,000.00) Dollars.

188. Plaintiff demands judgment against Defendants BOA and Suntrust for treble actual damages, punitive damages, interest, expenses, attorney's fees and costs, and for such further relief as the Court deems just.

WHEREFORE, Plaintiff prays judgment against all Defendants for actual, consequential, and punitive damages to be determined by the Trier of Fact, and for such other and further relief as this court may deem just and equitable.

****Signature Page to Follow****

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Attorneys for Plaintiff

Dated: August 9, 2012
Greenville, South Carolina

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

Overland, Inc., d/b/a Land Rover Greenville,)

Plaintiff,)

vs.)

C.A. No.: 2010-CP-23-5880

Lara Marie Nance; Charlie Andrew Nance;)
Roger Fields; ADP Dealer Services Group;)
Piedmont Automotive of Anderson South)
Carolina, LLC d/b/a Apex Automotive;)
Synovus Financial Corporation d/b/a NBSC;)
Branch Banking and Trust Company; Bank)
of America Corporation; and Suntrust)
Banks, Inc.,)

Defendants.)

**ANSWER OF BANK OF AMERICA
CORPORATION TO THIRD AMENDED COMPLAINT**

Defendant Bank of America Corporation (BAC), answering in full the Third Amended Complaint (Complaint) against it (which is the only pleading against it as of this date), respectfully alleges as follows. Except as otherwise defined herein, all capitalized words or terms shall have the same meanings ascribed to them in the Complaint.

FOR A FIRST DEFENSE

1. BAC is the holding or parent company for Bank of America, N.A. (B of A), among other subsidiary and affiliate corporations.

2. BAC does not process checks; it is B of A that processes checks, including the ones put in issue in this case by the Complaint.

Driscoll Sheedy, P.A.
Attorneys at Law

00097850.5

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3. The Complaint against BAC should be dismissed with prejudice pursuant to Rule 12(b)(6), SCRPC, for failure to state facts sufficient to constitute a cause of action against BAC.

FOR A SECOND DEFENSE

4. BAC hereby incorporates by reference all of the foregoing allegations as fully as if set forth verbatim herein.

5. In paragraph 42 of its Third Amended Complaint, Plaintiff alleged that BAC accepted for deposit into accounts of an employee of Plaintiff unauthorized checks drawn on accounts of Plaintiff.

6. As alleged, BAC had a contractual duty to its customer (the employee), and not to Plaintiff.

7. The alleged claims of Plaintiff against BAC under UCC 3-404, 3-405 and 3-406 are not causes of action available to Plaintiff but just defenses which BAC may assert against Plaintiff.

8. Because the checks accepted for deposit were drawn on the accounts of Plaintiff, it has no conversion claim against BAC.

9. Plaintiff has no claim under UCC 1-203 either; Articles 3 and 4 of the UCC prescribe exclusively the duties of a depository bank in accepting checks for deposit, and the Articles are not varied or supplemented by UCC 1-203.

10. Likewise, the South Carolina Unfair Trade Practices Act does not create any different standard for check processing from that which is contained in Articles 3 and 4 of the UCC.

11. Thus, Plaintiff has failed to state any legally cognizable cause of action against BAC and, therefore, the Third Amended Complaint against BAC should be dismissed with prejudice

Driscoll Sheedy, P.A.
Attorneys at Law

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pursuant to Rule 12(b)(6), SCRCF.

FOR A THIRD DEFENSE

12. BAC hereby incorporates by reference all of the foregoing allegations as fully as if set forth verbatim herein.

13. BAC lacks sufficient knowledge and information to form a belief as to the allegations of paragraphs 1 through 9, inclusive, and, therefore, denies such allegations.

14. In response to paragraph 10, BAC admits that it is organized pursuant to the laws of the state of North Carolina but denies that it transacts retail banking business in Greenville County, South Carolina; B of A is the correct legal entity that processes checks, including in Greenville County. The remaining allegations of paragraph 10 are denied. Further answering paragraph 10, BAC is a bank holding company, not a national bank.

15. BAC lacks sufficient knowledge and information to form a belief as to the allegations of paragraphs 11 and 12 and, therefore, denies such allegations.

16. Paragraph 13 contains a legal conclusion as to proper venue and jurisdiction, to which no response is required. BAC, however, does reserve all of its rights with respect to venue and jurisdiction.

17. BAC lacks sufficient knowledge and information to form a belief as to the allegations of paragraphs 14 through 41, inclusive, and, therefore, denies such allegations. Further answering paragraph 39, BAC has not identified as of the date of this responsive pleading accounts in the name of LMN or any of the alleged businesses.

18. In response to paragraph 42, BAC admits that LMN may have deposited checks into

bank accounts at B of A. The remaining allegations of paragraph 42 are denied.

19. BAC lacks sufficient knowledge and information to form a belief as to the allegations of paragraphs 43 through 45, inclusive, and, therefore, denies such allegations. Further answering paragraph 43, B of A as depositary bank had no duty to investigate maker or issuer indorsements on any checks presented at a B of A branch that were drawn on another bank.

20. In response to paragraph 46, BAC hereby realleges and reaffirms all of its foregoing allegations, admissions and denials set forth in paragraphs 1 through 19, inclusive, hereof as fully as if set forth verbatim herein.

21. The allegations contained in paragraphs 47 through 52, inclusive, are not lodged against BAC and do not require a response from BAC. To the extent a response is required, such allegations are denied.

22. In response to paragraph 53, BAC hereby realleges and reaffirms all of its foregoing allegations, admissions and denials contained in paragraphs 1 through 21, inclusive, hereof as fully as if set forth verbatim herein.

23. The allegations contained in paragraphs 54 through 59, inclusive, are not lodged against BAC and do not require a response from BAC. To the extent a response is required, such allegations are denied.

24. In response to paragraph 60, BAC hereby realleges and reaffirms all of its foregoing allegations, admissions and denials contained in paragraphs 1 through 23, inclusive, hereof as fully as if set forth verbatim herein.

25. The allegations contained in paragraphs 61 through 67, inclusive, are not lodged

against BAC and do not require a response from BAC. To the extent a response is required, such allegations are denied.

26. In response to paragraph 68, BAC hereby realleges and reaffirms all of its foregoing allegations, admissions and denials contained in paragraphs 1 through 25, inclusive, hereof as fully as if set forth verbatim herein.

27. The allegations contained in paragraphs 69 through 73, inclusive, are not lodged against BAC and do not require a response from BAC. To the extent a response is required, such allegations are denied.

28. In response to paragraph 74, BAC hereby realleges and reaffirms all of its foregoing allegations, admissions and denials contained in paragraphs 1 through 27, inclusive, hereof as fully as if set forth verbatim herein.

29. The allegations contained in paragraphs 75 through 78, inclusive, are not lodged against BAC and do not require a response from BAC. To the extent a response is required, such allegations are denied.

30. In response to paragraph 79, BAC hereby realleges and reaffirms all of its foregoing allegations, admissions and denials contained in paragraphs 1 through 29, inclusive, hereof as fully as if set forth verbatim herein.

31. The allegations contained in paragraphs 80 through 92, inclusive, are not lodged against BAC and do not require a response from BAC. To the extent a response is required, such allegations are denied.

32. In response to paragraph 93, BAC hereby realleges and reaffirms all of its foregoing

allegations, admissions and denials contained in paragraphs 1 through 31, inclusive, hereof as fully as if set forth verbatim herein.

33. The allegations contained in paragraphs 94 through 106, inclusive, are not lodged against BAC and do not require a response from BAC. To the extent a response is required, such allegations are denied.

34. In response to paragraph 107, BAC hereby realleges and reaffirms all of its foregoing allegations, admissions and denials contained in paragraphs 1 through 33, inclusive, hereof as fully as if set forth verbatim herein.

35. The allegations contained in paragraphs 108 through 114, inclusive, are not lodged against BAC and do not require a response from BAC. To the extent a response is required, such allegations are denied.

36. In response to paragraph 115, BAC hereby realleges and reaffirms all of its foregoing allegations, admissions and denials contained in paragraphs 1 through 35, inclusive, hereof as fully as if set forth verbatim herein.

37. The allegations contained in paragraphs 116 through 120, inclusive, are not lodged against BAC and do not require a response from BAC. To the extent a response is required, such allegations are denied.

38. In response to paragraph 121, BAC hereby realleges and reaffirms all of its foregoing allegations, admissions and denials contained in paragraphs 1 through 37, inclusive, hereof as fully as if set forth verbatim herein.

39. The allegations contained in paragraphs 122 through 124, inclusive, are not lodged

against BAC and do not require a response from BAC. To the extent a response is required, such allegations are denied.

40. In response to paragraph 125, BAC hereby realleges and reaffirms all of its foregoing allegations, admissions and denials contained in paragraphs 1 through 39, inclusive, hereof as fully as if set forth verbatim herein.

41. The allegations contained in paragraphs 126 through 131, inclusive, are not lodged against BAC and do not require a response from BAC. To the extent a response is required, such allegations are denied.

42. In response to paragraph 132, BAC hereby realleges and reaffirms all of its foregoing allegations, admissions and denials contained in paragraphs 1 through 41, inclusive, hereof as fully as if set forth verbatim herein.

43. The allegations contained in paragraphs 133 through 136, inclusive, are not lodged against BAC and do not require a response from BAC. To the extent a response is required, such allegations are denied.

44. Although the allegations set forth in paragraph 137 are lodged against NBSC and BB&T, paragraph 137 contains factual averments as to actions of BAC which BAC denies.

45. The allegations contained in paragraphs 138 through 142, inclusive, are not lodged against BAC and do not require a response from BAC. To the extent a response is required, such allegations are denied.

46. In response to paragraph 143, BAC hereby realleges and reaffirms all of its foregoing allegations, admissions and denials contained in paragraphs 1 through 45, inclusive, hereof as fully

as if set forth verbatim herein.

47. The allegations contained in paragraphs 144 through 147, inclusive, are not lodged against BAC and do not require a response from BAC. To the extent a response is required, such allegations are denied.

48. In response to paragraph 148, BAC hereby realleges and reaffirms all of its foregoing allegations, admissions and denials contained in paragraphs 1 through 47, inclusive, hereof as fully as if set forth verbatim herein.

49. The allegations contained in paragraphs 149 through 153, inclusive, are not lodged against BAC and do not require a response from BAC. To the extent a response is required, such allegations are denied.

50. In response to paragraph 154, BAC hereby realleges and reaffirms all of its foregoing allegations, admissions and denials contained in paragraphs 1 through 49, inclusive, hereof as fully as if set forth verbatim herein.

51. The allegations contained in paragraphs 155 through 159, inclusive, are not lodged against BAC and do not require a response from BAC. To the extent a response is required, such allegations are denied.

52. In response to paragraph 160, BAC hereby realleges and reaffirms all of its foregoing allegations, admissions and denials contained in paragraphs 1 through 51, inclusive, hereof as fully as if set forth verbatim herein.

53. The allegations contained in paragraphs 161 through 163, inclusive, are not lodged against BAC and do not require a response from BAC. To the extent a response is required, such

allegations are denied.

54. In response to paragraph 164, BAC hereby realleges and reaffirms all of its foregoing allegations, admissions and denials contained in paragraphs 1 through 53, inclusive, hereof as fully as if set forth verbatim herein.

55. The allegations contained in paragraphs 165 through 170, inclusive, are denied. Further answering these paragraphs, any duty of BAC or B of A is set forth in and governed by the Uniform Commercial Code as adopted by South Carolina and the deposit agreements applicable to each account opened at B of A. B of A is not required or even able to verify maker indorsements when the items presented to B of A as the depository institution are not drawn on accounts with B of A. BAC avers that, if Plaintiff is entitled to anything from BAC, which BAC denies, Plaintiff may not recover any consequential or incidental damages under any theory of relief.

56. In response to paragraph 171, BAC hereby realleges and reaffirms all of its foregoing allegations, admissions and denials contained in paragraphs 1 through 55, inclusive, hereof as fully as if set forth verbatim herein.

57. The allegations of paragraphs 172 through 177, inclusive, are denied. Further answering these paragraphs, any duty of BAC or B of A is set forth in and governed by the Uniform Commercial Code as adopted by South Carolina and the deposit agreements applicable to each account opened at B of A. Plaintiff as maker or drawee has no conversion claim against BAC.

58. In response to paragraph 178, BAC hereby realleges and reaffirms all of its foregoing allegations, admissions and denials contained in paragraphs 1 through 57, inclusive, hereof as fully as if set forth verbatim herein.

Driscoll Sheedy, P.A.
Attorneys at Law

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59. The allegations of paragraphs 179 through 182, inclusive, are denied. Further answering these paragraphs, any duty of BAC or B of A is set forth in and governed by the Uniform Commercial Code as adopted by South Carolina and the deposit agreements applicable to each account opened at B of A. BAC also avers that, if Plaintiff is entitled to anything from BAC, which BAC denies, Plaintiff may not recover any consequential or incidental damages under any theory of relief.

60. In response to paragraph 183, BAC hereby realleges and reaffirms all of its foregoing allegations, admissions and denials contained in paragraphs 1 through 59, inclusive, hereof as fully as if set forth verbatim herein.

61. The allegations of paragraphs 184 through 188, inclusive, are denied.

FOR A FOURTH DEFENSE

62. BAC hereby incorporates by reference all of the foregoing allegations, admissions and denials as fully as if set forth verbatim herein.

63. Plaintiff's claims against BAC arise exclusively from or pertain to forged or unauthorized payee indorsements on the checks presented to BAC for deposit.

64. Any claims of Plaintiff for forged or unauthorized payee indorsements on the checks are redressable only under the Uniform Commercial Code as adopted by statute in South Carolina (UCC).

65. All claims of Plaintiff based on the common law should, therefore, be dismissed pursuant to Rule 12(b)(6), SCRPC, for failure to state facts sufficient to constitute a cause of action.

FOR A FIFTH DEFENSE

66. BAC hereby incorporates by reference all of the foregoing allegations, admissions and denials as fully as if set forth verbatim herein.

67. It is alleged in the Complaint that the checks were not indorsed by Plaintiff as maker or someone authorized to act on Plaintiff's behalf as maker.

68. Because the checks were deposited at a bank branch of B of A, as the depository bank it had no ability or duty to verify the authenticity of the maker or drawee indorsements on any of the checks at issue in this action.

69. Hence, BAC is not liable to Plaintiff for any forged maker or drawee indorsements on the checks.

FOR A SIXTH DEFENSE

70. BAC hereby reiterates all of the foregoing allegations, admissions and denials as fully as if set forth verbatim herein.

71. Upon information and belief, using Plaintiff's accounts payable systems, LMN wrote checks on Plaintiff's accounts at NBSC and BB&T to the various payees identified in the Complaint.

72. Upon information and belief, the payees identified on the checks are fictitious.

73. Upon information and belief, LMN did not intend the entities identified as payees on any of the checks to have any interest in the checks.

74. Upon information and belief, LMN indorsed each of the checks in the name of the fictitious payees.

75. As a result, LMN's indorsements of the checks are effective as the indorsements of

the named payees, entitling B of A to use reasonable commercial standards to process and pay the checks.

76. Because LMN's indorsements are effective as the indorsements of the named payees, Plaintiff's claims against BAC should be dismissed with prejudice.

FOR A SEVENTH DEFENSE

77. BAC hereby reiterates all of the foregoing allegations, admissions and denials as fully as if set forth verbatim herein.

78. Upon information and belief, LMN was an employee of Plaintiff with access to Plaintiff's computer and accounts payable systems.

79. Upon information and belief, LMN caused checks to be issued to fictitious payees from which she benefitted.

80. Upon information and belief, LMN indorsed those checks in the names of the fictitious payees.

81. As a result, LMN's indorsements of the checks are effective as the indorsements of the named payees, entitling B of A to use reasonable commercial standards to process and pay the checks.

82. Because LMN's indorsements are effective as the indorsements of the named payees, Plaintiff's claims against BAC are barred by the padded payroll rule and should be dismissed with prejudice.

FOR AN EIGHTH DEFENSE

83. BAC hereby reiterates all of the foregoing allegations, admissions and denials as fully

as if set forth verbatim herein.

84. Plaintiff failed to exercise ordinary care which substantially contributed to the unauthorized signatures on the checks.

85. Hence, since B of A used reasonable commercial standards to process and pay the checks, Plaintiff is precluded from any recovery against BAC.

FOR A NINTH DEFENSE

86. BAC hereby incorporates by reference all of the foregoing allegations, admissions and denials as fully as if set forth verbatim herein.

87. Plaintiff is the maker or drawee of all checks at issue in the above captioned action.

88. As maker or drawee of the checks, Plaintiff is not entitled to pursue an action for conversion under S.C. Code Ann. § 36-3-420.

89. Plaintiff's cause of action against BAC for conversion based on any checks deposited at B of A should be dismissed with prejudice.

FOR A TENTH DEFENSE

90. BAC hereby reiterates all of the foregoing admissions, denials and allegations as fully as if set forth verbatim herein.

91. Because Plaintiff's claims against BAC arise exclusively from or pertain to forged or unauthorized signatures on the checks, any claim of Plaintiff falls within Articles 3 and 4 of the UCC, and Plaintiff is not subject to any different or additional obligation of good faith under S.C. Code Ann. § 36-1-203.

92. Plaintiff's Fourteenth Cause of Action against BAC based on S.C. Code Ann. § 36-1-

203 should, therefore, be dismissed with prejudice pursuant to Rule 12(b)(6).

FOR AN ELEVENTH DEFENSE

93. BAC hereby reiterates all of the foregoing admissions, denials and allegations as fully as if set forth verbatim herein.

94. Policies and procedures implemented by B of A, including check cashing, and the implementation thereof are specifically allowed under applicable law.

95. Plaintiff's Fifteenth Cause of Action against BAC should be dismissed with prejudice.

FOR A TWELFTH DEFENSE

96. BAC hereby reiterates all of the foregoing allegations, admissions and denials as fully as if set forth verbatim herein.

97. Should there be any basis for drawee or payor bank liability to Plaintiff on the checks, any liability of BAC for such checks would be no greater than the drawee or payor bank liability to Plaintiff.

98. Plaintiff as customer of the drawee or payor banks had a statutory duty which may be varied by agreement to discover and report any unauthorized signatures on any checks drawn on the accounts of Plaintiff.

99. This lawsuit filed on July 21, 2010 is an action by Plaintiff for recovery on checks drawn between 2007 and 2010 by the same wrongdoer.

100. Plaintiff has failed to fulfill its statutory duty which may be varied by agreement to discover and report unauthorized signatures on checks drawn on its accounts.

101. As a result of the failure of Plaintiff to discover and report in a timely fashion the

alleged unauthorized signatures on checks drawn on its accounts, Plaintiff is precluded from any recovery on checks which were not timely reported to the drawee or payor banks as unauthorized.

FOR A THIRTEENTH DEFENSE

102. BAC hereby reiterates all of the foregoing allegations, admissions and denials as fully as if set forth verbatim herein.

103. Plaintiff is not entitled to a recovery on any checks where the proceeds thereof directly or indirectly benefitted Plaintiff without its renouncing such benefit.

104. The claims of Plaintiff may be barred, in whole or in part, by the doctrine of ratification.

FOR A FOURTEENTH DEFENSE

105. BAC hereby reiterates all of the foregoing allegations, admissions and denials as fully as if set forth verbatim herein.

106 Under S.C. Code Ann. § 36-3-420(c), in the event BAC is found liable for the checks, such liability to Plaintiff is no greater than the face amount of each of the checks.

WHEREFORE, having fully answered the Complaint, BAC asks that the claims against it be dismissed with prejudice, for an award of its costs, and for such other and further relief as appears to the Court to be proper.

Charlotte, NC

Date: 10/11/12

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
Overland, Inc. d/b/a Land Rover Greenville,	)	
	)	
Plaintiff,	)	
	)	DEFENDANT SUNTRUST BANKS,
vs.	)	INC.'S ANSWER TO THE THIRD
	)	AMENDED COMPLAINT
Lara Marie Nance, Charlie Andrew Nance	)	
Roger Fields, ADP Dealer Services Group,	)	C.A. No.: 2010-CP-23-5880
Piedmont Automotive of Anderson, Inc. d/b/a	)	
Piedmont Chrysler Jeep Dodge, Piedmont	)	
Automotive of Anderson South Carolina, LLC	)	(JURY TRIAL DEMANDED)
d/b/a Apex Automotive, Synovus Financial	)	
Corporation d/b/a NBSC, Branch Banking and	)	
Trust Company, Bank of America Corporation,	)	
and SunTrust Banks, Inc.,	)	
	)	
Defendants.	)	
	)	

Defendant SunTrust Banks, Inc., ("SunTrust"), answering the Third Amended Complaint of the Plaintiff, Overland, Inc. d/b/a Land Rover Greenville ("Plaintiff"), would respectfully allege and show unto the Court:

FOR A FIRST DEFENSE

1. The allegations of Paragraphs 1 through 10 do not pertain to SunTrust, and therefore no response on the part of SunTrust is required. To the extent a response is required from SunTrust, it does not have sufficient information either to admit or deny the allegations of Paragraphs 1 through 10, and therefore denies the same.

2. In response to Paragraph 11, SunTrust admits that it is organized pursuant to the laws of the state of Georgia but denies that it transacts any retail banking business in Greenville County, South Carolina. SunTrust is a financial services holding company, not a national bank,

and its subsidiary, SunTrust Bank, is the correct legal entity that processes checks, including in Greenville County. The remaining allegations of Paragraph 11 are denied.

3. The allegations of Paragraph 13 contain legal conclusions for which no response is required. To the extent a response is required, SunTrust responds that it does not have sufficient information to either admit or deny the allegations, and therefore denies the same.

4. SunTrust denies the allegations of Paragraph 14 that Defendant LMN's alleged embezzlement is in any way attributable to any act or omission of SunTrust. SunTrust does not have sufficient information either to admit or deny the remaining allegations of Paragraph 14, and therefore denies the same.

5. SunTrust does not have sufficient information either to admit or deny the allegations of Paragraphs 15 through 41, inclusive, and therefore denies the same. Further answering Paragraph 39, SunTrust admits Defendant LMN maintained certain accounts with SunTrust Bank, SunTrust's subsidiary which provides retail banking services. SunTrust does not have sufficient information either to admit or deny the remaining allegations of Paragraph 39, and therefore denies the same.

6. SunTrust admits that Defendant LMN may have deposited checks into bank accounts maintained at SunTrust. The remaining allegations of Paragraph 42 are denied.

7. SunTrust does not have sufficient information either to admit or deny the allegations of Paragraph 43, and the same are therefore denied.

8. SunTrust does not have sufficient information either to admit or deny the allegations of Paragraph 44, and therefore denies the same.

9. SunTrust does not have sufficient information either to admit or deny the allegations of Paragraph 45, and therefore denies the same.

10. In response to Paragraph 46, SunTrust hereby re-alleges and incorporates its responses to the allegations of Paragraphs 1 through 45 of the Complaint.

11. The allegations contained in Paragraphs 47 through 52, inclusive, do not pertain to SunTrust and therefore do not require a response from SunTrust. To the extent a response is required, SunTrust does not have sufficient information either to admit or deny the allegations, and therefore denies the same.

12. In response to Paragraph 53, SunTrust hereby re-alleges and incorporates its responses to the allegations of Paragraphs 1 through 52 of the Complaint.

13. The allegations contained in Paragraphs 54 through 59, inclusive, do not pertain to SunTrust and therefore do not require a response from SunTrust. To the extent a response is required, SunTrust does not have sufficient information either to admit or deny the allegations, and therefore denies the same.

14. In response to Paragraph 60, SunTrust hereby re-alleges and incorporates its responses to the allegations of Paragraphs 1 through 59 of the Complaint.

15. The allegations contained in Paragraphs 61 through 67, inclusive, do not pertain to SunTrust and therefore do not require a response from SunTrust. To the extent a response is required, SunTrust does not have sufficient information either to admit or deny the allegations, and therefore denies the same.

16. In response to Paragraph 68, SunTrust hereby re-alleges and incorporates its responses to the allegations of Paragraphs 1 through 67 of the Complaint.

17. The allegations contained in Paragraphs 69 through 73, inclusive, do not pertain to SunTrust and therefore do not require a response from SunTrust. To the extent a response is

required, SunTrust does not have sufficient information either to admit or deny the allegations, and therefore denies the same.

18. In response to Paragraph 74, SunTrust hereby re-alleges and incorporates its responses to the allegations of Paragraphs 1 through 73 of the Complaint.

19. The allegations contained in Paragraphs 75 through 78, inclusive, do not pertain to SunTrust and therefore do not require a response from SunTrust. To the extent a response is required, SunTrust does not have sufficient information either to admit or deny the allegations, and therefore denies the same.

20. In response to Paragraph 79, SunTrust hereby re-alleges and incorporates its responses to the allegations of Paragraphs 1 through 78 of the Complaint.

21. The allegations contained in Paragraphs 80 through 92, inclusive, do not pertain to SunTrust and therefore do not require a response from SunTrust. To the extent a response is required, SunTrust does not have sufficient information either to admit or deny the allegations, and therefore denies the same.

22. In response to Paragraph 93, SunTrust hereby re-alleges and incorporates its responses to the allegations of Paragraphs 1 through 92 of the Complaint.

23. The allegations contained in Paragraphs 94 through 106, inclusive, do not pertain to SunTrust and therefore do not require a response from SunTrust. To the extent a response is required, SunTrust does not have sufficient information either to admit or deny the allegations, and therefore denies the same.

24. In response to Paragraph 107, SunTrust hereby re-alleges and incorporates its responses to the allegations of Paragraphs 1 through 106 of the Complaint.

25. The allegations contained in Paragraphs 108 through 114, inclusive, do not pertain to SunTrust and therefore do not require a response from SunTrust. To the extent a response is required, SunTrust does not have sufficient information either to admit or deny the allegations, and therefore denies the same.

26. In response to Paragraph 115, SunTrust hereby re-alleges and incorporates its responses to the allegations of Paragraphs 1 through 114 of the Complaint.

27. The allegations contained in Paragraphs 116 through 120, inclusive, do not pertain to SunTrust and therefore do not require a response from SunTrust. To the extent a response is required, SunTrust does not have sufficient information either to admit or deny the allegations, and therefore denies the same.

28. In response to Paragraph 121, SunTrust hereby re-alleges and incorporates its responses to the allegations of Paragraphs 1 through 120 of the Complaint.

29. The allegations contained in Paragraphs 122 through 124, inclusive, do not pertain to SunTrust and therefore do not require a response from SunTrust. To the extent a response is required, SunTrust does not have sufficient information either to admit or deny the allegations, and therefore denies the same.

30. In response to Paragraph 125, SunTrust hereby re-alleges and incorporates its responses to the allegations of Paragraphs 1 through 124 of the Complaint.

31. The allegations contained in Paragraphs 126 through 131, inclusive, do not pertain to SunTrust and therefore do not require a response from SunTrust. To the extent a response is required, SunTrust does not have sufficient information either to admit or deny the allegations, and therefore denies the same.

32. In response to Paragraph 132, SunTrust hereby re-alleges and incorporates its responses to the allegations of Paragraphs 1 through 131 of the Complaint.

33. The allegations contained in Paragraphs 133 through 136, inclusive, do not pertain to SunTrust and therefore do not require a response from SunTrust. To the extent a response is required, SunTrust does not have sufficient information either to admit or deny the allegations, and therefore denies the same.

34. In response to Paragraph 137, SunTrust hereby re-alleges and incorporates its responses to the allegations of Paragraphs 1 through 136 of the Complaint.

35. The allegations contained in Paragraphs 138 through 142, inclusive, do not pertain to SunTrust and therefore do not require a response from SunTrust. To the extent a response is required, SunTrust does not have sufficient information either to admit or deny the allegations, and therefore denies the same.

36. In response to Paragraph 143, SunTrust hereby re-alleges and incorporates its responses to the allegations of Paragraphs 1 through 142 of the Complaint.

37. The allegations contained in Paragraphs 144 through 147, inclusive, do not pertain to SunTrust and therefore do not require a response from SunTrust. To the extent a response is required, SunTrust does not have sufficient information either to admit or deny the allegations, and therefore denies the same.

38. In response to Paragraph 148, SunTrust hereby re-alleges and incorporates its responses to the allegations of Paragraphs 1 through 147 of the Complaint.

39. The allegations contained in Paragraphs 149 through 153, inclusive, do not pertain to SunTrust and therefore do not require a response from SunTrust. To the extent a

response is required, SunTrust does not have sufficient information either to admit or deny the allegations, and therefore denies the same.

40. In response to Paragraph 154, SunTrust hereby re-alleges and incorporates its responses to the allegations of Paragraphs 1 through 153 of the Complaint.

41. The allegations contained in Paragraphs 155 through 159, inclusive, do not pertain to SunTrust and therefore do not require a response from SunTrust. To the extent a response is required, SunTrust does not have sufficient information either to admit or deny the allegations, and therefore denies the same.

42. In response to Paragraph 160, SunTrust hereby re-alleges and incorporates its responses to the allegations of Paragraphs 1 through 159 of the Complaint.

43. The allegations contained in Paragraphs 161 through 163, inclusive, do not pertain to SunTrust and therefore do not require a response from SunTrust. To the extent a response is required, SunTrust does not have sufficient information either to admit or deny the allegations, and therefore denies the same.

44. In response to Paragraph 164, SunTrust hereby re-alleges and incorporates its responses to the allegations of Paragraphs 1 through 163 of the Complaint.

45. SunTrust denies the allegations contained in Paragraph 165.

46. SunTrust denies the allegations contained in Paragraph 166.

47. SunTrust denies the allegations contained in Paragraph 167.

48. SunTrust denies the allegations contained in Paragraph 168.

49. SunTrust denies the allegations contained in Paragraph 169.

50. The allegations contained in Paragraph 170 pertain to Defendant NBSC, not SunTrust, and therefore do not require a response from SunTrust. To the extent a response is

required, SunTrust denies the allegations contained in Paragraph 170 and further maintains that if Plaintiff is entitled to any recovery from SunTrust, which SunTrust vigorously denies, Plaintiff may not recover any consequential or incidental damages under any theory of relief.

51. In response to Paragraph 171, SunTrust hereby re-alleges and incorporates its responses to the allegations of Paragraphs 1 through 170 of the Complaint.

52. SunTrust denies the allegations contained in Paragraph 172. SunTrust further maintains that any duty of SunTrust is governed by the South Carolina Commercial Code, S.C. Code 36-1-101 *et seq.*, and the deposit agreements applicable to each account opened at SunTrust, and that Plaintiff, as the issuer, has no conversion claim against SunTrust pursuant to S.C. Code § 36-3-419 or 36-3-420.

53. SunTrust denies the allegations contained in Paragraph 173.

54. SunTrust denies the allegations contained in Paragraph 174.

55. SunTrust denies the allegations contained in Paragraph 175.

56. SunTrust denies the allegations contained in Paragraph 176.

57. SunTrust denies the allegations contained in Paragraph 177. SunTrust further maintains that if Plaintiff is entitled to any recovery from SunTrust, which SunTrust vigorously denies, Plaintiff may not recover any consequential or incidental damages under any theory of relief.

58. In response to Paragraph 178, SunTrust hereby re-alleges and incorporates its responses to the allegations of Paragraphs 1 through 177 of the Complaint.

59. SunTrust denies the allegations contained in Paragraph 179. SunTrust further maintains that any duty of SunTrust is governed by the South Carolina Commercial Code, S.C. Code § 36-1-101 *et seq.*, and the deposit agreements applicable to each account opened at

SunTrust. SunTrust further asserts that Chapters 3 and 4 of the South Carolina Commercial Code prescribe the duties of a depository bank in accepting checks for deposit, and these chapters are not varied or supplemented by UCC § 1-203.

60. SunTrust denies the allegations of Paragraph 180.

61. SunTrust denies the allegations of Paragraph 181.

62. SunTrust denies the allegations of Paragraph 182 and further maintains that Plaintiff may not recover any consequential or incidental damages under any theory of relief.

63. In response to Paragraph 183, SunTrust hereby re-alleges and incorporates its responses to the allegations of Paragraphs 1 through 182 of the Complaint.

64. SunTrust denies the allegations of Paragraph 184.

65. SunTrust denies the allegations of Paragraph 185.

66. SunTrust denies the allegations of Paragraph 186.

67. SunTrust denies the allegations of Paragraph 187.

68. SunTrust denies the allegations of Paragraph 188.

69. SunTrust denies each and every allegation of the Third Amended Complaint not specifically admitted, modified, or explained herein above.

FOR A SECOND DEFENSE

70. SunTrust re-alleges each and every allegation of its previous defenses consistent with this Second Defense.

71. The Third Amended Complaint fails to state facts sufficient to constitute a cause of action against SunTrust and should be dismissed pursuant to Rule 12(b)(6), SCRPC.

FOR A THIRD DEFENSE

72. SunTrust re-alleges each and every allegation of its previous defenses consistent with this Third Defense.

73. The Third Amended Complaint is barred, in whole or in part, by the doctrine of estoppel.

FOR A FOURTH DEFENSE

74. SunTrust re-alleges each and every allegation of its previous defenses consistent with this Fourth Defense.

75. The Third Amended Complaint is barred, in whole or in part, by the waiver.

FOR A FIFTH DEFENSE

76. SunTrust re-alleges each and every allegation of its previous defenses consistent with this Fifth Defense.

77. Plaintiff is precluded under S.C. Code Ann. § 36-3-406 from asserting the alleged forgery against SunTrust because Plaintiff's failure to exercise ordinary care substantially contributed to the forgery.

FOR A SIXTH DEFENSE

78. SunTrust re-alleges each and every allegation of its previous defenses consistent with this Sixth Defense.

79. Plaintiff's alleged injuries were proximately caused by the conduct of parties other than SunTrust, or by parties over whom SunTrust had no control, or by the superseding or intervening actions of others.

FOR A SEVENTH DEFENSE

80. SunTrust re-alleges each and every allegation of its previous defenses consistent with this Seventh Defense.

81. SunTrust alleges that, even assuming it was negligent in any respect, and that any such negligence was the proximate cause of Plaintiff's injuries and damages, all of which is expressly denied, and admitted solely for the purposes of this defense and no other, Plaintiff's injuries and damages were also due to the Plaintiff's own negligence, gross negligence, recklessness, willfulness and/or wantonness, which negligence and/or recklessness combined and concurred with any alleged negligence on the part of SunTrust, and acted as greater than fifty percent (50%) cause thereof. Accordingly, Plaintiff's claim against SunTrust is barred.

82. Alternatively, even if the Plaintiff's negligence and/or recklessness contributed as a fifty percent (50%) or less cause of its injuries and damages, Plaintiff's recover should be reduced in proportion to the extent to which its own negligence and/or recklessness contributed to cause such injuries and damages.

FOR AN EIGHTH DEFENSE

83. SunTrust re-alleges each and every allegation of its previous defenses consistent with this Eighth Defense.

84. Upon information and belief, Defendant Lara M. Nance wrote checks on Plaintiff's accounts at NBSC and BB&T and was a person whose intent determined to whom the checks were payable.

85. Upon information and belief, Defendant Lara M. Nance caused checks to be issued to fictitious payees and/or did not intend the entities identified as payees on any of the checks to have any interest in the checks.

86. Upon information and belief, Defendant Lara M. Nance indorsed each of the checks in the name of the payees or directed each check be deposited in a depository bank account in a name substantially similar to that of the payee.

87. Defendant Lara M. Nance's indorsements of the checks are effective as the indorsements of the named payees, entitling SunTrust to use ordinary care to process and pay the checks.

88. Since Defendant Lara M. Nance's indorsements are effective as the indorsements of the named payees, Plaintiff's claims against SunTrust should be dismissed pursuant to S.C. Code Ann. § 36-3-404.

FOR A NINTH DEFENSE

89. SunTrust re-alleges each and every allegation of its previous defenses consistent with this Ninth Defense.

90. Upon information and belief, Defendant Lara M. Nance was an employee of Plaintiff with access to Plaintiff's computer system and accounts payable system.

91. Upon information and belief, Defendant Lara M. Nance caused checks to be issued to entities determined by Defendant Lara M. Nance.

92. Upon information and belief, Defendant Lara M. Nance indorsed those checks in the names of the payees or directed the checks to be deposited in a depository bank to an account in a name substantially similar to the name of the payee.

93. Defendant Lara M. Nance's indorsements of the checks are effective as the indorsements of the named payees, entitling SunTrust to use ordinary care to process and pay the checks.

94. Since Defendant Lara M. Nance's indorsements are effective as the indorsements of the named payees, Plaintiff's claims against SunTrust should be dismissed pursuant to S.C. Code Ann. § 36-3-405.

FOR A TENTH DEFENSE

95. SunTrust re-alleges each and every allegation of its previous defenses consistent with this Tenth Defense.

96. Plaintiff is the maker or drawee of all checks at issue in this action.

97. As maker or drawee of the checks, Plaintiff is not entitled to pursue an action for conversion under S.C. Code Ann. § 36-3-420 against a depository bank.

98. Plaintiff's claim for conversion against SunTrust based on any checks deposited at SunTrust should be dismissed.

FOR AN ELEVENTH DEFENSE

99. SunTrust re-alleges each and every allegation of its previous defenses consistent with this Eleventh Defense.

100. Plaintiff's claims against SunTrust pertaining to any forged or unauthorized signatures on the checks alleged falls within Chapters 3 and 4 of the South Carolina Commercial Code, and SunTrust is not subject to any different or additional obligation of good faith under S.C. Code Ann. § 36-1-203.

FOR A TWELFTH DEFENSE

101. SunTrust re-alleges each and every allegation of its previous defenses consistent with this Twelfth Defense.

102. SunTrust would show that any actions taken by SunTrust and/or procedures followed by SunTrust concerning the Plaintiff were taken in good faith, in a reasonable manner,

and that said actions and/or procedures were commercially reasonable and in compliance with any laws and contracts.

FOR A THIRTEENTH DEFENSE

103. SunTrust re-alleges each and every allegation of its previous defenses consistent with this Thirteenth Defense.

104. Plaintiff, as a customer of the drawee or payor banks, had a statutory duty which may be varied by agreement to discover and report any unauthorized signatures on any checks drawn on the accounts of Plaintiff.

105. This lawsuit filed on July 21, 2010 is an action by Plaintiff for recover on checks drawn between 2007 and 2010 by the same wrongdoer.

106. Plaintiff has failed to satisfy its statutory duty, which may be varied by agreement, to discover and report unauthorized signatures drawn on its accounts.

107. Plaintiff's failure to discover and report in a timely fashion the alleged unauthorized signatures on any checks drawn on its accounts precludes Plaintiff's recover on such checks under S.C. Code Ann. § 36-4-406.

FOR A FOURTEENTH DEFENSE

108. SunTrust re-alleges each and every allegation of its previous defenses consistent with this Fourteenth Defense.

109. SunTrust's alleged acts, which are expressly denied, do not affect the public interest and are essentially private in nature and, therefore, the South Carolina Unfair Trade Practices Act is inapplicable.

FOR A FIFTEENTH DEFENSE

110. SunTrust re-alleges each and every allegation of its previous defenses consistent with this Fifteenth Defense.

111. The damages recoverable by the Plaintiff, if any, must be reduced by any amount of damages caused by Plaintiff's failure to mitigate such damages in whole or in part.

FOR A SIXTEENTH DEFENSE

112. SunTrust re-alleges each and every allegation of its previous defenses consistent with this Sixteenth Defense.

113. SunTrust denies that Plaintiff is entitled to any relief, however, if such relief is granted by this Court, SunTrust would be entitled to a set off or recoupment of funds recovered from other entities or parties, including any insurance proceeds payable to the Plaintiff as a result of the acts or omissions alleged in the Complaint.

FOR A SEVENTEENTH DEFENSE

114. SunTrust re-alleges each and every allegation of its previous defenses consistent with this Seventeenth Defense.

115. Plaintiff's claims for punitive damages are barred because there is no conduct that rises to the level required to sustain punitive damages.

116. Further, the punitive damages sought by the Plaintiff are unconstitutional under the excessive fines clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and in violation of the South Carolina Constitution.

FOR AN EIGHTEENTH DEFENSE

117. SunTrust re-alleges each and every allegation of its previous defenses consistent with this Eighteenth Defense.

118. At all times relevant herein, SunTrust was a Holder in Due Course, having taken the subject instruments for value, in good faith, and without actual or constructive knowledge of any defenses or adverse claims related to the subject instrument.

FOR A NINETEENTH DEFENSE

119. SunTrust re-alleges each and every allegation of its previous defenses consistent with this Nineteenth Defense.

120. Under S.C. Code § 36-3-420(c), should Plaintiff be entitled to any recovery from SunTrust, which SunTrust vigorously denies, such recovery to Plaintiff may be no greater than the face amount of the checks.

WHEREFORE, having fully answered the Third Amended Complaint of the Plaintiff, the Defendant, SunTrust Banks, Inc., prays that the same be dismissed with costs, and for such other and further relief as may be just and proper.

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November 19, 2012

Attorneys for Defendant, SunTrust Banks, Inc.

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Overland, Inc. d/b/a Land Rover Greenville,

Plaintiff,

vs.

Lara Marie Nance, Charlie Andrew Nance
Roger Fields, ADP Dealer Services Group,
Piedmont Automotive of Anderson, Inc. d/b/a
Piedmont Chrysler Jeep Dodge, Piedmont
Automotive of Anderson South Carolina, LLC
d/b/a Apex Automotive, Synovus Financial
Corporation d/b/a NBSC, Branch Banking and
Trust Company, Bank of America Corporation,
and SunTrust Banks, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

**NOTICE OF AND MOTION FOR
JUDGMENT ON THE PLEADINGS AS
TO THE SEVENTEENTH CAUSE OF
ACTION AGAINST DEFENDANT
SUNTRUST BANKS, INC.**

C.A. No.: 2010-CP-23-5880

(JURY TRIAL DEMANDED)

**TO: JAMES W. FAYSSOUX, JR., ESQ. AND T. HUNTER REID, ESQ.,
ATTORNEYS FOR PLAINTIFF OVERLAND, INC. D/B/A LAND ROVER
GREENVILLE**

PLEASE TAKE NOTICE that Defendant SunTrust Banks, Inc., ("SunTrust"), by and through its undersigned counsel, will move before the Resident or Presiding Judge of the Greenville County Court of Common Pleas, for an order, pursuant to Rule 12(c), South Carolina Rules of Civil Procedure, dismissing with prejudice the Seventeenth Cause of Action to the extent this Cause of Action is alleged against SunTrust.

SunTrust and co-Defendant Bank of America ("B of A") are similarly situated in this case and Plaintiff has asserted identical causes of action against SunTrust and B of A. As with B of A, Plaintiff did not have an account at SunTrust between July 2007 and February 2010 when the alleged embezzlement by its employee, Lara Marie Nance, occurred. (Third A. Compl. at 4, ¶14). Additionally, Plaintiff brought this action against SunTrust because Ms. Nance had an

account at SunTrust into which she deposited checks that she forged on Plaintiff's accounts (Id. at 4, ¶15(c)). SunTrust and was not a drawee, but rather a depository bank, in the instant matter. SunTrust and Ms. Nance had a contract for banking services – no contract for banking services exists or has ever existed between SunTrust and Plaintiff for the period of July 2007 to February 2010. The foregoing is undisputed from the factual allegations, inferences and conclusions therefrom in the Third Amended Complaint. *See Home Builders Ass'n of S.C. v. Sch. Dist. No. 2 of Dorchester Cnty.*, 405 S.C. 458, 460, 748 S.E.2d 230, 231 (2013) (“A judgment on the pleadings shall be granted ‘where there is no issue of fact raised by the complaint that would entitle the plaintiff to judgment if resolved in plaintiff's favor.’” (quoting *Sapp v. Ford Motor Co.*, 386 S.C. 143, 687 S.E.2d 47 (2009))).

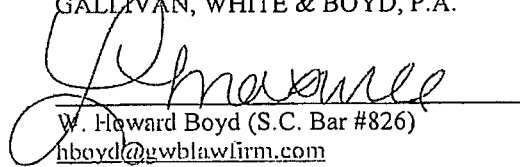
SunTrust joins B of A's *Motion for Judgment on the Pleadings as to Seventeenth Cause of Action against Bank of America* (the “B of A Motion”), previously filed with the Court. As with B of A, it is undisputed that SunTrust had no contract with plaintiff nor did SunTrust owe any duty to Plaintiff. It is well-settled South Carolina law that SunTrust does not have any common law duty to Plaintiff, a non-customer drawer on the forged checks, because UCC Articles 3 and 4, which govern the rights, duties, and liabilities among drawees, depositories, drawers, and payees with respect to check processing, completely displace any common law on check processing. Additionally, SunTrust owed Plaintiff no duties of ordinary care, good faith and fair dealing, and to practice commercially reasonable bank procedures with regard to activities undertaken by Ms. Nance on her account at SunTrust after her forgeries were deposited because SunTrust had no relationship with Plaintiff and Plaintiff has not alleged that Ms. Nance's account at SunTrust was a trust or similar account for Plaintiff. Finally, Plaintiff's Seventeenth Cause of Action alleges it is pursuant to S.C. Code Ann. §§ 36-3-404, -405, and -

406, which are statutory defenses for banks to assert if a customer or payee brings an action against them, not grounds for a cause of action against a bank. Therefore, the Seventeenth Cause of Action against SunTrust – whether it is for imposter and fictitious payee (S.C. Code Ann. § 36-3-404), the padded payroll rule (S.C. Code Ann. § 36-3-405), and negligence contributing to the forgeries (S.C. Code Ann. § 36-3-406), or just a common law tort claim – has no legal basis and should be dismissed.

Due to their similar nature, legal bases, and requested relief, SunTrust respectfully requests this motion be heard at the hearing on B of A's Motion.

WHEREFORE, based on the foregoing, and for the reasons set forth in B of A's Motion, Defendant SunTrust's Motion for Judgment on the Pleadings as to the Seventeenth Cause of Action should be granted.

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March ¹²~~11~~, 2014

Attorneys for Defendant, SunTrust Banks, Inc.

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

Overland, Inc., d/b/a Land Rover Greenville,))

Plaintiff,))

vs.))

C.A. No.: 2010-CP-23-5880

Lara Marie Nance; Charlie Andrew Nance;)
Roger Fields; Synovus Financial)
Corporation d/b/a NBSC; Branch Banking)
and Trust Company; Bank of America)
Corporation; and SunTrust Banks, Inc.,)

Defendants.))

**NOTICE OF AND MOTION FOR JUDGMENT ON THE PLEADINGS
AS TO SEVENTEENTH CAUSE OF ACTION AGAINST BANK OF AMERICA**

To: Plaintiff and its counsel, James W. Fayssoux, Jr. and T. Hunter Reid

PLEASE TAKE NOTICE that pursuant to Rule 12(c), SCRCP, defendant Bank of America Corporation (B of A), through its undersigned counsel, hereby moves, at such time and place as is convenient to the Court and counsel, for entry of an order dismissing with prejudice the Seventeenth Cause of Action to the extent this Cause of Action is against B of A.¹

Plaintiff did not have an account at B of A between July 2007 and February 2010 when the alleged embezzlement by its employee Nance occurred. (Third Amended Complaint, p.4, ¶ 14). B of A is sued in this action because the convicted embezzler defendant Nance had accounts at B of A into which she deposited checks that she forged on the accounts of Plaintiff. (*Id.*, p.4, ¶ 15c.). B

¹ To the extent the Seventeenth Cause of Action is against defendant Suntrust Banks, Inc., B of A is obviously not seeking dismissal of the Cause of Action on behalf of Suntrust.

of A is not a drawee for Plaintiff; B of A is a depository for Nance. B of A and Nance had a contract for banking services. No contract for banking services exists or has ever existed between B of A and Plaintiff for the period July 2007 to February 2010. This is indisputable from the factual allegations, inferences and conclusions therefrom in the Third Amended Complaint.

It is well-settled South Carolina law that B of A does not have any common law duty to Plaintiff, a non-customer, drawer on the forged checks. UCC Articles 3 and 4 govern exclusively the rights, duties and liabilities among drawees, depositories, drawers (such as Plaintiff), and payees with respect to check processing (including forgeries). These two Articles completely displace any common law on check processing. The extensive, well-articulated, risk-shifting provisions in Articles 3 and 4 provide for claims by payees against depositories and drawees (UCC 3-420 for conversion), and for claims by drawers (customers) against their own bank that a check is not properly payable (UCC 4-401). Payees, depositories, drawees and drawers are the universe of those with an interest in a forged check. So there are two redressable fact patterns under Articles 3 and 4 where victims of forgeries may sue banks, i.e., for conversion or for not properly payable. There are no claims for non-customer, drawers against depository banks. Nor should there be. Customers can sue their own banks. (For the checks drawn on accounts of Plaintiff regardless of where such checks were deposited, Plaintiff is limited by law to suing its own banks.)

As for the other one-half of the Seventeenth Cause of Action, B of A owes Plaintiff no duties of ordinary care, good faith and fair dealing, and commercially reasonable bank procedures for activities by Nance on her two accounts at B of A after her forgeries were deposited. (*Id.*, pp. 37-38, ¶¶ 165-170). Nance's accounts at B of A are not alleged by Plaintiff to have been trust or similar

accounts for Plaintiff. B of A had no relationship with Plaintiff. Plaintiff has pleaded throughout the Third Amended Complaint that Nance's deposits into her B of A accounts of checks drawn on Plaintiff's accounts were unauthorized by Plaintiff. (*Id.*, pp. 37, ¶ 165). Unless Plaintiff wishes to now recast its pleading and entire theory of the case that Nance's accounts were authorized by Plaintiff for its benefit with the knowledge and assent of B of A, Plaintiff has no rights or interest in the activities on Nance's accounts. B of A owes no duties to Plaintiff for what Nance did or failed to do with money in her accounts.

Furthermore, the Seventeenth Cause of Action says that it is pursuant to UCC 3-404, 3-405 and 3-406. (*Id.*, p. 36, ¶ 164). Under Articles 3 and 4, when banks are sued by payees or customers, banks have as statutory defenses to those claims impostor and fictitious payee (UCC 3-404), the padded payroll rule (UCC 3-405), and negligence contributing to the forgeries (UCC 3-406). UCC 3-404, 3-405 and 3-406 are defenses or shields, not causes of action or swords. As a victim of forgeries, Plaintiff has no causes of action against B of A for impostor and fictitious payee (UCC 3-404), the padded payroll rule (UCC 3-405), and negligence contributing to the forgeries (UCC 3-406).

Because it is indisputable that B of A had no contract with Plaintiff nor did B of A owe any duty to Plaintiff, the Seventeenth Cause of Action against B of A, whether it is for impostor and fictitious payee (UCC 3-404), the padded payroll rule (UCC 3-405) and negligence contributing to the forgeries (UCC 3-406), or just a garden-variety, common law tort claim, has no legal basis and should be dismissed.

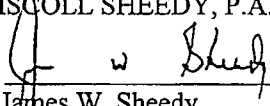
WHEREFORE, for the foregoing reasons, the Seventeenth Cause of Action against B of A

should be dismissed.

Charlotte, NC

Date: 3/1/14

DRISCOLL SHEEDY, P.A.

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