

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

LOIS KING and DELORIS SIMS, on
behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

AMERICAN GENERAL FINANCE, INC.,

Defendant.

) IN THE COURT OF COMMON PLEAS
)
)

) Case No. 96-CP-38-595
)

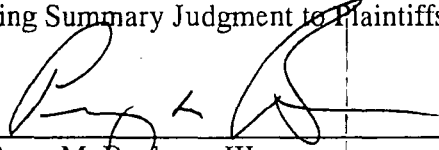
) ORDER DENYING DEFENDANT'S
) MOTION TO RECONSIDER THE
) COURT'S AMENDED ORDER
) GRANTING SUMMARY JUDGMENT
) TO PLAINTIFFS
)

This matter came before the Court pursuant to Defendant's Motion to Reconsider the Court's Amended Order Granting Summary Judgment to Plaintiffs dated July 30, 2012.

This Court has carefully reviewed the Defendant's motion to reconsider; however, the motion does not raise any issue or point of law that was previously argued or raised to the Court and it does not call the Court's attention to a possible misapprehension of its previous argument.

Therefore, the Court denies Defendant's Motion to Reconsider the Court's Amended Order dated July 18, 2012 (filed July 20, 2012) Granting Summary Judgment to Plaintiffs.

IT IS SO ORDERED.


Perry M. Buckner, III
Presiding Judge, Fourteenth Judicial Circuit

August 8, 2012
Walterboro, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)
)
LOIS KING and DELORIS SIMS, on)
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v.)
)
AMERICAN GENERAL FINANCE, INC.,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS

Case No. 96-CP-38-595

AMENDED ORDER GRANTING
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

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ORANGEBURG COUNTY, SC

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Before the Court is Plaintiffs' Motion for Summary Judgment. An Interim Order was issued on July 29, 2011 in which this Court indicated its intention to grant summary judgment for the Plaintiffs against Defendant American General Finance, Inc. ("AGF"). However, entry of judgment was deferred until such time as the Court had addressed the related issues of (i) the amount of the penalty, (ii) prejudgment interest, (iii) appropriate notice to the Class, (iv) Class administration, and (v) attorneys' fees and costs.

I. Standard of Review

Summary Judgment is appropriate when there is no genuine issue of material fact and it is clear that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. The purpose of summary judgment is to expedite the disposition of cases that do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003). In determining whether any triable issues of fact exist, the Court must view the evidence and all inferences which can be reasonably drawn therefrom in the light most favorable to the nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). The standard is high: "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

II. Procedural Background

This case is on remand from the Supreme Court of South Carolina pursuant to its Opinion of December 21, 2009. King v. American General Finance, Inc., 386 S.C. 82, 687 S.E.3d 321

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(2009). On remand, the case was assigned to Circuit Judge Diane S. Goodstein. In August 2010, the parties entered into an agreement fixing a schedule and establishing a deadline for the filing and service of motions and supporting memoranda. The agreement between counsel was approved by Judge Goodstein on September 17, 2010 and entered as an Order of the Court (the "September Order"). MMO 6-A¹.

Pursuant to the agreed schedule in the September Order, Defendant filed three motions, and Plaintiffs filed its Motion for Summary Judgment, which is the subject of this Order. At a hearing before Judge Goodstein on November 22, 2010, the parties were afforded an opportunity to argue all pending motions, and on December 12, 2010, Judge Goodstein issued her Order "(1) granting in part and denying in part Defendant's Amended Motion for Leave to Amend Answer; (2) denying Defendant's Motion to Require Plaintiffs to Give Notice to the Class; and (3) denying Defendant's Motion to Decertify the Class etc." (the "December Order"). MMO 1-E.

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Plaintiffs' Motion for Summary Judgment was heard by Judge Goodstein at the November 22 hearing. At the conclusion of the arguments of counsel, Judge Goodstein questioned whether the pending Motion for Summary Judgment, dated September 27, 2010, was appropriate in light of her ruling earlier in the day allowing Defendant to amend its pleading. Accordingly, the Court declined to rule on the pending Motion for Summary Judgment and invited Plaintiffs' counsel to file a new Motion for Summary Judgment, taking into account the pleading amendments allowed earlier in the hearing.

In response, Plaintiffs served a second Motion for Summary Judgment the following day, November 23. On December 3, 2010, Defendant tendered to Plaintiffs' counsel its amended pleading as modified to conform to American General counsels' understanding of the rulings at the November 22 hearing. Although, at the time when the November 23 motion was served, Plaintiffs' counsel had received the proposed Third Amended Answer with Defendant's proposed additional defenses, Plaintiffs had not received the final amended pleading. Before the Court today is the Plaintiff's summary judgment motion of December 3, MMO 4-D, which is essentially a renewal of Plaintiffs' September 27 and November 23, 2010 motions and which Plaintiffs' counsel stated was "being made in an abundance of caution following receipt of Defendant's amended pleading."

¹ A large portion of the various submittals on remand, consisting of motions and memoranda as well as orders, have been collected in two binders entitled "Motions and Memoranda and Orders, September 2010 – May 2011" (hereinafter "MMO").

Further argument on summary judgment was heard by Judge Goodstein on January 14, 2011, at the conclusion of which she took the matter under advisement. On February 16, 2011, prior to ruling on the pending summary judgment motion, Judge Goodstein *sua sponte* recused herself from this case. Judge Goodstein's Order of recusal states: "All rulings issued prior to [February 16] remain in effect." Recusal Order, MMO 6-C. Nine days later, on February 25, 2011, Chief Justice Toal ordered that the undersigned "be vested with exclusive jurisdiction to hear and dispose of [this] case." Order of Chief Justice, MMO 6-F. The parties were provided an opportunity to present additional argument to this Court at the hearing in the Colleton County Court House on June 9, 2011. At the conclusion of that hearing, the parties were instructed to submit proposed orders, both of which were considered prior to the issuance of the July 29 Interim order which is withdrawn and superseded by this present Order.

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Without ruling on the merits of Plaintiffs' Summary Judgment motion, this Court also heard initial arguments from counsel on the subjects of penalty and prejudgment interest. Although these arguments were held prior to a ruling on the summary judgment motion, the Court's decision to proceed was motivated solely by a desire to utilize limited court time in the most expeditious manner consistent with due process. See, e.g., Transcript of June 9, 2011 Hearing (hereinafter "June Tr.") 112:19-113:11.

After issuance of the Interim Order, a hearing was set for October 14, 2011 to take up the questions of attorneys' fees and costs and to hear additional argument on penalty. The parties were also afforded an opportunity to present witnesses. Under discovery guidelines set by this Court, each side identified no more than two expert witnesses whose reports and supporting materials were exchanged simultaneously and whose depositions were taken three days later. Defendant named Robert E. Stepp for attorneys' fees and Kenneth Cox for penalty; Plaintiffs identified Charles W. Whetstone and John P. Freeman.

At the October 14 hearing at the Colleton County Court House, T. Thomas Cottingham, III spoke on behalf of Defendant and C. Bradley Hutto the Plaintiffs. Also present were James Y. Becker and Phoebe N. Coddington for the Defendant as well as Defendant's Deputy General Counsel, James K. McMurray. Other counsel present for the Plaintiffs were Steven W. Hamm, Charles L. Dibble, Daniel W. Williams, T. Alexander Beard and Thomas M. Fryar.

An Order denying Defendant's Motion to Reconsider Summary Judgment was entered on February 22, 2012. That Order also directed parties to submit proposed orders on Class

Administration and Notice to the Class within 30 days of the date of that Order. After receiving proposed orders, this Court entered a Temporary Order on summary judgment and the related issues on May 21, 2012. After filing of that order, this Court received motions to reconsider filed by both sides.

III. Rule 63 Certification and Determination

Initially, this Court's role is informed by the terms of Rule 63, SCRCP, which provides that a "successor judge may proceed upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties." In this regard, in addition to the Opinion of the Supreme Court, I have reviewed:

1. Transcripts of the hearings before Judge Goodstein on November 22, 2010 and January 14, 2011 (hereinafter "Nov. Tr." and "Jan. Tr." respectively).
2. The various submittals on remand, consisting of motions and memoranda as well as orders, most of which have been collected in two binders entitled "Motions and Memoranda and Orders, September 2010 – May 2011" ("MMO").
3. Documents collected in a binder entitled "Appendices to Plaintiffs' Motion for Summary Judgment" ("SJ App").
4. Record on Appeal submitted to the Supreme Court ("ROA").
5. Affidavits (more than 50 have been submitted since this action was commenced).
6. Various other documents appearing in the file of this case.

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As required by Rule 63, SCRCP, I hereby certify that I am familiar with the voluminous record in this case. Further, I have determined that the proceedings may be completed without prejudice to the other parties.

IV. Discussion of Plaintiffs' Motion for Summary Judgment

In the December 21, 2009 Opinion, the Supreme Court held that "timing is the central issue in this case." The Court further held: "As a matter of law, providing the attorney preference disclosure after the completion of the credit application violated S.C. Code Ann. § 37-10-102." King, 386 S.C. at 91.

Plaintiffs advance two separate and independent theories in support of their Motion for Summary Judgment. First, Plaintiffs claim that there can be no genuine issue of material fact regarding the American General "preference" form. Form 2-91 at SJ App 6. Plaintiffs argue that there are fatal deficiencies readily apparent on the face of what is essentially a "waiver" form. Id., cf. § 37-1-107. As a result, Plaintiffs argue there only remains for the Court to make a ruling of law for the reasons discussed below.

Next, Plaintiffs contend that there can be no genuine issue of material fact regarding the Affidavit of Susan Keeper (the "Keeper Affidavit" dated 12/1/1999, ROA 1503, SJ App 7), a document voluntarily procured by American General and voluntarily submitted to the Court by American General more than a decade ago. Cottingham Aff. 14. The Keeper Affidavit is a sworn statement of an expert selected by American General and paid by American General, that recounts in great detail the qualifications of Susan Keeper's 15-member team, the process by which that team reviewed American General's mortgage loan files over a number of months, and the conclusions reached at the request of American General. As will be discussed in greater detail below, the Keeper Affidavit establishes which loan transactions fall within the Class definition originally adopted by Judge Hughston and now adopted by the Supreme Court.

A. The Defective Form

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Plaintiffs argue that there are fatal defects in the AGF form, defects that render it unacceptable as proof of compliance with the preference statute. Form 2-91 at SJ App 6. The question of American General's preference form – its "first page of the credit application" – presents a question of law. Grinnell Corp. v. Wood, 389 S.C. 350, 698 S.E.2d 796 n. 3 (2010) ("Whether a form complies with the statutory requirements is a question of law for the court.").

The significance of the form derives from the fact that it is the means by which a lender is able to demonstrate compliance with its statutory obligations. There is no mandated or prescribed form; rather there is a recommended form by which lenders can show compliance. The Department of Consumer Affairs issued a compliance form in 1983 to assist lenders in demonstrating compliance after enactment of the Attorney Preference statute. Administrative Interpretation 10.102(8)-8302 (October 11, 1983) (the "A.I."), issued by the South Carolina Department of Consumer Affairs, SJ App 5 and 6. If the Department's recommended form is used properly, the A.I. provides the lender protection from penalties. On the other hand, if the lender utilizes some other form and it is defective, the form cannot be utilized as proof of compliance. Cf. Hanover Ins. Co. v. Horace Mann Ins. Co., 301 S.C. 55, 57, 389 S.E.2d 657, 659 (1990) ("a non-conforming offer has the legal effect of no offer at all.").

While not mandatory, the A.I. form has much to recommend it. The Department of Consumer Affairs, the agency charged with enforcement of the Consumer Protection Code, promulgated the A.I., which included the form and, equally important, addressed the rationale for the form, more than 28 years ago. As discussed below, the form has been expressly approved by

the General Assembly, Act. No. 355, § 1, 1996 S.C. Acts 2187, and cited with approval by the South Carolina Supreme Court in the Davis, Tilley and King cases discussed below.

In marked contrast, the form that American General employed throughout the period of time certified by Judge Hughston was not the "safe harbor" compliance form created by the Department of Consumer Affairs at the request of lenders. SJ App 6. The American General form deviates from the compliance form offered to lenders by the Department in three very significant departures. SJ App 6.

First, the American General form contains no provision for a date to establish when the form was signed by a potential debtor. SJ App 6, ROA 0568. The Supreme Court ruled:

Timing is the central issue in this case. We construe § 37-10-102(a) as requiring the attorney preference disclosure to occur contemporaneously with the credit application. Our construction of legislative intent flows from the clear language of the statute – "the credit application on the first page thereof must contain information as is necessary to ascertain these preferences of the borrower" – and from the 1983 interpretation by the Department of Consumer Affairs.

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King, 386 S.C. at 89-90, SJ App 2. This deficiency was noted during the testimony of American General's witness, Michael Williamson, before Judge Hughston at the 1998 Class certification hearing:

MR. WILLIAMSON: WHAT I'M LOOKING AT, IT SAYS
"UNDATED, 76. WELL----

THE COURT: 76 OUT OF 216?

MR. WILLIAMSON: RIGHT; UNDATED. NOW, THE
FORMS THAT WE WERE USING
BACK THEN, THERE'S NO PLACE
FOR A DATE ON THEM. WHY
WOULD WE DATE THEM IF WE
HAD NO PLACE TO DATE THEM?

THE COURT: I DON'T KNOW.

Hearing, June 8, 1998, ROA 716.

Secondly, again deviating from the Department's compliance form, American General's form does not contain any provision that addresses the foreseeable situation where the debtor has no preference as to a specific lawyer "employed to represent the debtor in all matters of the

transaction relating to the closing of the transaction.” S.C. Code Ann. § 37-10-102(a) (Law.Co-op., 1989 Rev.). Cf. Ridenhour 30(b)(6) deposition, pp. 45-46, ROA 1067; Teel Aff.

11/01/2010². The AGF form states:

[] I have no preference as to the attorney to represent me at the closing, if this loan is approved.

2-91 at SJ App 6, ROA 1478. This stands in contrast with the recommended compliance language in the A.I.:

(b) Having been informed of this right, and having no preference I asked for assistance from (the lender) and was referred to a list of acceptable attorneys. From that list I select _____.

A.I. at S.J. App 6.

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In its discussion of § 37-10-102, the A.I. focuses on not one but two aspects of statutory compliance: “to make these rights known to the borrower (applicant) by a conspicuous disclosure and have the borrower make his preference known before he is inundated with other documents related to the transaction.” A.I. at SJ App 5 (emphasis added). In other words, for the lender to comply with the statutory requirement to “ascertain” the borrower’s preference, there must first be a disclosure by the lender and this, in turn, must elicit an informed response from the borrower. The A.I. further explains: “By having the borrower affirmatively select an attorney or insurance agent, it becomes less likely that the borrower will ultimately acquiesce to the lender’s choice of an attorney or agent for whom the borrower would have to pay, even though that attorney or agent might actually represent the interests of the lender.” A.I. at SJ App 5 (emphasis in original).

Although the statute contemplates the borrower making a selection (“the attorney . . . so chosen”), American General’s form does not address the readily foreseeable situation where the loan applicant has no particular preference. There is no provision in the AGF form that contemplates allowing the debtor to select an attorney from a list provided by American General (or any other procedure to enable the debtor to make an informed selection) when the debtor has no individual preference for a specific attorney to prepare all the required documents and conduct the closing and answer questions. For the lender to elicit “I have no preference” – and

² AGF’s affiant, Jesse E. Teel, Jr., states that 93.3 percent (3,285) of the 3,536 attorney preference forms found in 5,391 AGF loan files “indicated the borrower(s) had no preference as to an attorney.” Teel Aff. 11/01/2010, p. 8.

nothing more — does not meet the statutory requirement of ascertaining the consumer's personal selection of the attorney who is "employed to represent the debtor in all matters of the transaction relating to the closing of the transaction." AGF as a matter of continuing business practice treated the form it created and presented for signature by a debtor as authorization to have a non-lawyer prepare all documents and close real-estate-secured loans despite State v. Buyers Service, 292 S.C. 426, 357 S.E.2d 15 (1987).

Third, AGF's form is the functional equivalent of a waiver form in direct violation of S.C. Code Ann. § 37-1-107. As noted above, the first choice presented on the AGF form is "I have no preference as to the attorney to represent me at the closing, if this loan is approved." SI App 6, ROA 1478. Indeed, "waiver" is a defense that American General raised in its initial Answer in 1996 and again in its subsequent amended Answers, e.g. ROA 66, asserting as a defense an act expressly prohibited by the Consumer Protection Code. Cf. Original 1996 Answer and Second Amended Answer, ROA 66, with S.C. Code Ann. § 37-1-107. See also MMO 1-A and 1-B.

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American General's attempts to assert defenses of consent, equitable estoppel and estoppel by silence are variants of a waiver claim. These equitable defenses are at odds with several equitable principles. The equitable doctrine of "clean hands" and the equitable maxim of "he who seeks equity must do equity" apply equally to American General. Matrix Financial Services Corp. v. Frazer, 394 S.C. 134; 714 S.E.2d 532 (2011), See Ingram v. Kasey's Assoc., 328 S.C. 471, 451 S.E.2d 471 (1997). Equity will refuse to lend aid to one who has been guilty of inequitable conduct. Masonic Temple v. Ebert, 199 S.C. 5, 18 S.E.2d 584, Taff v. Smith, 114 S.C. 306, 103 S.E.2d 551.

The absence of a date on AGF's "compliance" form demonstrates AGF's company-wide systemic indifference to timely disclosure. Timing is central to a loan transaction, and a date establishes the benchmark for any computation of time. The primary purpose of the attorney preference form is to enable a lender to demonstrate that it complied with the statutory requirement of ascertaining the debtor's preference at the time of credit application. For a lender to omit a date on such a form shows indifference to the statutory requirements.

The attorney preference statute places the responsibility for compliance on the lender, not on the debtor. AGF's continued use of dateless forms demonstrates AGF's continuing indifference to the importance of timely disclosure contemplated in the preference statute.

Equally if not more important, AGF's form that provides for "I have no preference . . ." and nothing more is not a preference form: rather it is a waiver form that contravenes § 37-1-107 of the Consumer Protection Code.

American General stated in its brief and at oral arguments to the Supreme Court that it could comply with the requirements of the preference statute even if it waited until closing to get the preference form signed. Resp. Br. at 20, Tr. Oral Argument, SJ App 4. The Supreme Court soundly rejected this argument: "And the suggestion that the attorney preference disclosure may be made at closing borders on frivolity." King, 386 S.C. at 91.

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Notably, the preference form presented to Ms. Sims by American General, ROA 0568, was not the form deemed in compliance, SJ App 6, by the 1983 A.I. issued by the Department of Consumer Affairs, the state agency³ charged with construing and enforcing the Consumer Protection Code. SJ App 5. The American General form is not dated to show disclosure "prior or contemporaneously with the application form." SJ App 6, cf. King, 386 S.C. at 85, SJ App 2. In addition, the American General form does not include the disclosure that if a consumer has no specific preference for a particular attorney, the consumer will be given a "list of acceptable attorneys" or any other source from which to select an attorney to handle the transaction. Cf. the American General form, 2-91 at SJ App 6, ROA 0568, ROA 1079 et seq., with the form appearing in the 1983 A.I., A.I. at SJ App 6.

The American General form asks only if the borrower had a specific preference for an attorney "to represent me at the closing." 2-91 at SJ App 6, ROA 0568, ROA 1079 et seq. The AGF form does not advise or disclose to the borrower that a selection of "no preference" might very well mean that there will be no attorney present – for the borrower or American General – at the closing of the debtor's real-estate-secured loan transaction. Yet, the American General form implies that if the loan is approved by American General there will be an attorney to close the transaction.

In Davis v. NationsCredit Financial Services Corp., 326 S.C. 83, 484 S.E.2d 471 (1997),

³ Construction of a statute by an agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons. Lexington Law Firm v. S.C. Dep't of Consumer Affairs, 382 S.C. 580, 586, 677 S.E.2d 591, 594 (2009), Carolina Alliance for Fair Emp. v. SCDLLR, 337 S.C. 476, 490, 523 S.E.2d 795 (Ct.App. 1999), Glover by Cauthen v. Suitt Constr. Co., 318 S.C. 465, 458 S.E.2d 535 (1995); Home Health Serv., Inc. v. South Carolina Tax Comm'n, 312 S.C. 324, 440 S.E.2d 375 (1994); Laurens County Sch. Dist. 55 and 56 v. Cox, 308 S.C. 171, 417 S.E.2d 560 (1992); Jasper County Tax Assessor v. Westvaco Corp., 305 S.C. 346, 409 S.E.2d 333 (1991); Stephen v. Avins Const. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct.App. 1996).

NationsCredit had used the compliance form set forth in the 1983 A.I., and that Court addressed and approved the 1983 A.I. Moreover, the General Assembly, when it amended the Attorney Preference statute in 1996, likewise approved and endorsed the Administrative Interpretation: The "new" statute provides, "If a creditor uses a preference notice form substantially similar to a form distributed by the administrator, the form is within compliance with this section." S.C. Code Ann. § 37-10-102(a)(2).

The first case treating the attorney-preference statute in any detail was Davis, where the Supreme Court ruled:

We find that the intention of the Legislature in crafting § 37-10-102 was to protect borrowers by requiring in the credit application clear and prominent disclosure of the information necessary to ascertain the borrowers' preference as to the legal counsel employed to represent the debtor in all matters relating to the closing of the transaction.

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Davis, 326 S.C. at 86, 484 S.E.2d at 472 (1997). The Department of Consumer Affairs in the A.I. had stated that use of the form constituted compliance. Davis held that the use of the Administrative Interpretation's form constituted compliance with the law: "Thus, we find that it is not a violation of S.C. Code Ann. § 37-10-102 for a lender to use a separate piece of paper to ascertain a borrower's preferences of legal counsel and hazard insurance, rather than including a preference statement on the first page of the credit application." Id. at 87, 473; see also Tilley v. Pacesetter Corp., 333 S.C. 33, 508 S.E.2d 16 (1998). The Davis opinion does not stop with the "clear and prominent" disclosure language. Davis goes on to say: "necessary to ascertain the borrower's preference as to legal counsel employed in all matters relating to the closing of the transaction."⁴ Id. at 86, 472.

The affidavit of AGF lawyer, Mary M. Caskey, dated January 12, 2011, presents a different issue regarding the form. The Caskey affidavit questions what form was utilized within the Class. More than a decade earlier, in 1997, AGF's Rule 30(b)(6) deponent Jerry Ridenhour was called to testify about "any and all forms in use since July 1, 1982" to ascertain the attorney preference. ROA 1074. The forms produced by Defendant in response are attached to the Ridenhour deposition. ROA 1079-1082.

⁴ Davis was a matter before the Supreme Court on certified questions from the United States District Court. Davis was limited to the narrow question of whether or not the Consumer Affairs' form met the requirements of the attorney preference statute. The choices of "None" (no attorney) cited by AGF is not found in the Davis opinion and was not a question certified to the Supreme Court by the Federal District Court.

It appears that American General's lawyer in 2011 is attempting to counter the 1997 deposition response of AGF's 30(b)(6) witness. However, American General cannot vary or contradict its two Rule 30(b)(6) depositions with other depositions and later affidavits. Rainey v. American Forest and Paper Ass'n, 26 F. Supp. 2d 82 (D.D.C. 1998); United States of America v. J.M. Taylor, 166 F.R.D. 356 (M.D.N.C.) *aff'd* 166 F.R.D. 367 (1996). The Court explained in Rainey that "[b]y commissioning the [30(b)(6)] designee as the voice of the corporation, the Rule obligates a corporate party 'to prepare its designee to be able to give binding answers' in its behalf." 26 F. Supp. 2d. at 94. The Court concluded, "[t]his eleventh hour alteration is inconsistent with Rule 30(b)(6), and is precluded by it." Id. at 95. After the Rule 30(b)(6) deposition is concluded, the corporate deponent may not turn to other deposition testimony and witnesses to reevaluate and then restate its corporate position.

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In any event, a detailed examination of the Caskey affidavit reveals that it need not be in conflict with the Ridenhour Rule 30(b)(6) testimony and affidavit. It is not clear from the Caskey affidavit that the 74 files in question are contained in the Class. Caskey states that she reviewed "loan files for a selected list" in the Watterson-Prime Database. While the database has never been made a part of the record, there is reference in the record that it is comprised of 7,395 files or loan transactions. Ex. 1 to Teel Supp. Aff., 12/21/2010 (Mr. Ridenhour suggests an even higher number – "approximately 8,500" Ridenhour Aff., ¶44, 9/27/2010). Ms. Keeper in her affidavit states that, at the same time that she found that a total of 5,497 files fell within the Class definition, she also excluded a number of other files from the Class ("Consistent with the Class definition" a number of files "were excluded" Keeper Aff., ¶10, ROA 1504, SJ App 7). In other words, there are 1,898 (or more) files in the Watterson-Prime database that Ms. Keeper's team reviewed and determined were not within the Class definition. The Caskey affidavit states that the 74 files are from a "selected list" in the Watterson Prime Database; the affidavit does not state whether the 74 files are from among the 5,497 files within the Class or from the 1,898 or more files excluded from the Class. This Court notes only that the Caskey affidavit does not make it clear whether or not the files she reviewed are within the Class.

Furthermore, this Court has carefully reviewed the Defendant's motion to reconsider; however, the motion does not raise any issue or point of law that was previously argued or raised to the Court that was not previously considered and it does not call the Court's attention to a possible misapprehension of its previous argument as to the preference form.

Viewing the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party, American General, this Court concludes that there is no genuine issue of material fact as to the defective form. The Class, the moving party, is entitled to a judgment as a matter of law on the defective form argument.

B. The Keeper Affidavit

Following Judge Hughston's initial grant of Class certification in 1998, American General, on its own initiative and at its own expense, retained an outside consulting firm to conduct an internal review of American General's loan files. The engagement was not a trivial undertaking; instead, as evinced by the report of Susan Keeper, the team leader for Watterson-Prime:

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5. The data collection proceeded in two phases. The first phase was performed during August, September, and October of 1998. During that time we collected data from the loan files that AGF could locate and provide to us. Fourteen team members plus myself participated in the collection. Those fourteen people included two people who were dedicated to quality control. All of the team members were hand selected by Watterson-Prime, and each had extensive experience in lending. All of them had worked either in mortgage underwriting or mortgage servicing. One of them had a law degree. All had worked either with consumer lending or with first or second mortgage lending. The two quality control team members were among the most experienced. After the other team members collected and entered the data from the files into the database, the quality control team members re-reviewed the key documents to verify that the data was collected and entered accurately.

6. The second phase of data collection was performed during March, April, May, June, and July of 1999. During this phase we collected data from a few additional files which the AGF South Carolina branches had located since the first phase. The Watterson-Prime team for this phase was comprised of the two quality control team members from the first phase and me. We performed the data collection and quality control for this phase in the same way that we performed it during the first phase.

Affidavit of Susan Keeper, 12/1/1999, ROA 1505, SJ App 7.

The results of the review and Ms. Keeper's conclusions are contained in the Keeper Affidavit which was submitted to Judge Williams by American General in December 1999. Keeper Aff., ROA 1545. That affidavit identifies 5,497 real-estate-secured loan

transactions from more than 40 branch offices that fit the Class definition. Keeper Aff., ROA 1503, cited in Williams Decertification Order at 6, ROA 0018. American General was able to locate 4,959 loan files involving 8,328 individual borrowers, Id., ROA 0018, while 538 loan files "remain unaccounted for." See Williams Decertification Order, ROA 0018. Of the loan files located, American General identified 1,713 files that contained no Preference Form or any other information demonstrating any compliance with the Consumer Code. Id., ROA 0018. Approximately 2,491 files contained Preference Forms without dates and 755 files contained Preference Forms that were dated at a time not in compliance with the preference statute. Id., ROA 0018.

Ms. Keeper in her affidavit states that in August of 1998, Watterson-Prime was engaged by American General's law firm to collect data from several thousand loan files from all of American General's offices in South Carolina:

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Specifically, Watterson-Prime was asked to confirm that the loans were secured by real estate (or in the case of mobile home financing, that some document in the file could be interpreted to suggest that real estate was involved in the transaction), and to collect certain data from the documents contained in those loan files.

Keeper Aff., ¶13, ROA 1504, SJ App 7. Further, Ms. Keeper in her affidavit states:

10. Out of 3,246 loans containing a preference form, 2,482 preference forms were signed, but not dated (representing 4,200 borrowers), and 751 were signed and dated (representing 1,267 borrowers). Consistent with the class definition, loans with preference forms dated the same date as the application date and closed before May 30, 1996 were excluded. Similarly, loans with preference forms dated within three days after the application date and closed on or after May 30, 1996 were also excluded.

Keeper Aff., ¶10, ROA 1504, SJ App 7.

The Keeper Affidavit concludes that 5,497 loan transactions fall within the Class definition first approved by Judge Hughston in 1998 and adopted by the Supreme Court in 2009. Ms. Keeper "confirmed" that 5,497 loans were secured by real estate and that there was no evidence that the preference was provided at the time of credit application. The affidavit was voluntarily submitted to the court in 1999 – more than a decade ago – to assist American General in its argument for decertification of the Class. Cottingham Aff. ¶14. The affidavit presumably was intended to demonstrate the many variables among the Class Members and thus defeat Class

treatment. In the Circuit Court before Judge Williams, American General was successful. Decertification Order, ROA 0013, 0018. Now, however, the Supreme Court has reversed the rulings of Judge Williams and, quoting extensively from Judge Hughston, has reinstated Judge Hughston's 1998 rulings on class representatives and on the definition of the class that the two debtors represent.

Neither Judge Hughston nor the South Carolina Supreme Court chose to delve into the range of various subdivisions that the Keeper team identified in its analysis of the transactions within the class. Indeed the only "subset" of the Class is the one arising from the distinction between loans closed before May 30, 1996 and those closed on or after May 30, 1996 – a distinction dictated by the General Assembly's 1996 amendment of the preference statute and clearly set forth in the class definition and utilized by Ms. Keeper in her affidavit. SJ App 1.

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The only other question is the number of debtors embraced in the 538 missing files. This has been addressed in the affidavit of Frances W. Burns, dated September 27, 2010, ("Burns Affidavit"), in which Ms. Burns, utilizing a list prepared by American General containing details of the 538 missing files, tabulated a total of 829 debtors. American General cannot escape liability simply because the loan files are missing. This Court has reviewed the affidavit of Benton Williamson, Esq. which states that after an online search of 150 out of the 538 files, no recorded mortgages could be found. The question at issue is whether or not the borrowers intended the subject loan to be secured by a lien on their real estate, which cannot be established from an online search alone. Only the missing files themselves could determine whether or not the borrowers intended to utilize their real estate to secure their loan. Additionally, without the files, it is impossible to determine whether the Attorney Preference Statute was complied with, and American General is not exempt from liability because they lost the files.

Accordingly, this court finds that there are 9,157 members of the Class. These are the 9,157 debtors or borrowers involved in the 5,497 loan transactions ("files") identified in the Keeper Affidavit and further clarified in the Burns Affidavit. It is possible that some individuals are members of the Class more than once: a single individual could have been involved in two or more loan transactions with American General. Several of these are identified in the Burns Affidavit. However, this does not reduce the size of the Class as membership in the Class is determined by the number of individual violations of the statute.

The Keeper Affidavit is an admission under Judge Williams' unappealed Order, ROA 0035. No appeal was taken from that ruling and it is now the law of the case. Cf. Collins Entertainment, Inc. v. White, 363 S.C. 546, 556, 611 S.E.2d 262, 267 (Ct. App. 2005) ("We find Appellants cannot now complain of being prejudiced . . . because they could have raised the issue before Judge Baxley"), citing State v. Brannon, 341 S.C. 271, 275, 533 S.E.2d 345, 347 (Ct. App. 2000); cf. Rule 36(b), SCRCP.

Viewing the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party, this court concludes that there is no genuine issue of material fact as to the membership of the Class and it is clear that the Class, the moving party, is entitled to a judgment as a matter of law on the Keeper affidavit argument.

C. The Class Representatives (the Named Plaintiffs)

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The members of the Class are represented by Lois King and Deloris Sims, referred to as the "Named Plaintiffs" or the "Class Representatives." Each was found to be an adequate representative of the Class by Judge Hughston: "... the named Plaintiffs are certainly adequate to represent the interests of the class." Certification Order, ROA 0008. The Supreme Court agreed and specifically approved "the adequacy of King and Sims as class representatives." King, 386 S.C. at 91, SJ App 2.

1. Lois King

In the matter of Lois King, it is undisputed that American General never – at any time – ascertained Ms. King's preferences as to an attorney. Rather the argument regarding King has always focused on whether the King loan came within the purview of the attorney preference statute. American General's continuing position is that it never took a lien on Ms. King's real estate.

More than 12 years ago, Judge Hughston made the unequivocal finding that the King loan was a loan secured by real estate: "Each of the putative class representatives [King and Sims] in this action obtained consumer loans from AGF secured by liens on real estate." Certification Order, ROA 0002. Five years later, Judge Williams disagreed and, finding "it is undisputed that [King's] loan was not secured by a lien on real estate," granted American General's summary judgment motion. Summary Judgment Order, ROA 0040. Judge Williams had ruled:

The Court concludes that AGF is entitled to summary judgment because there is no genuine issue of material fact as to whether King's loan was secured by a lien on real estate. Construing the evidence in the light most favorable to King, it is undisputed that her loan was not secured by a lien on real estate, and consequently her loan did not trigger the attorney preference statute, S.C. Code Ann. § 37-10-102.

Order, 08/20/2003, ROA 0040.

Applying the summary judgment standard, the Supreme Court reversed: "We make no finding on the matter of liability and merely hold that the record before us does not warrant summary judgment in favor of American General." King, 386 S.C. at 92, SJ App 2. The Supreme Court also aptly observed: "We further point out that it appears the King loan was initially intended to be secured by her real estate, and the law required the attorney preference disclosure at the time of application." Id.

#16
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Lois King and her husband Ralph Void applied for a loan on December 8, 1995. On its face the application contains information confirming that the applicants own land consisting of .78 acres in Eutawville. ROA 1105. Both borrower and lender contemplated a real-estate-secured transaction:

- The borrower. Ms. King testified that American General asked her at the time of her application whether she owned land "because they were asking for collateral." ROA 1294.
- The lender. John Darby, American General's assistant branch manager, was the primary AGF employee who worked on the King loan. ROA 1526-1527 (Darby), ROA 1036 (King), ROA 1414 (Keller). Darby's uncontroverted affidavit expressly states that American General "would have to take a mortgage on real property in order to make the requested loan to Lois King." ROA 1527, 1529. Darby further stated in his affidavit: "It was AGF's intention to take a security interest – a lien – in Ms. King's real estate." ROA 1527, 1529.

American General's documentation for Lois King's loan is consistent with the affidavit of John Darby. Beginning with the King loan application and continuing through AGF's post-closing review of its documents, American General's own documents challenge AGF's claim that the King loan was only intended to be an unsecured loan transaction.

1. December 8, 1995. In the file is a completed "Real Estate Loan Checklist." The earliest entry is December 8 indicating that the Settlement Costs booklet and Good Faith Estimate of Settlement Charges were sent on December 8. There are also references to

ordering title report and to personal inspection of real estate on December 15. To this is added insurance verification on December 26. ROA 1103.

- #17
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2. December 8. The loan application specifically notes that the applicant "owns land." ROA 1105.
 3. December 15. American General employee inspects King's real estate near Eutawville ("Personal Inspection of R/E"). ROA 1103.
 4. December 15. American General obtained a commitment for title insurance covering King's real estate near Eutawville. ROA 1103, 1457-1460.
 5. December 20. Twelve days after application, on December 20, American General's computer print-out refers to the loan as a real-estate loan. ROA 1112.
 6. December 20. AGF sent King a letter saying: "If you obtain this loan, the lender will have a mortgage on your home." ROA 1455.
 7. December 26. The application also contains a written approval notation that the King loan "can be made in the following manner: 12-26-95 (date of loan closing) - OK \$7500 using land & mobile home." ROA 1106.
 8. December 26. American General employee John Darby inspects King's real estate near Eutawville ("Personal Inspection of R/E"). ROA 1103.
 9. December 26. At the conclusion of the closing on December 26, American General provided King with a Notice of Right to Cancel and King acknowledged receipt of this notice by signing it. This Notice of Right to Cancel is required by federal law and is applicable only in real-estate-secured loan transactions. The rescission notice states: "[y]ou are entering into a transaction that will result in a mortgage or deed of trust on your home." ROA 1456.
 10. January 2, 1996. As part of the follow-up to the closing, there is a document entitled "AGF Loan Documentation List." Dated January 2, 1996, the section under the heading "Minimum to be completed for real estate secured," has the initials "JD" (John Darby) appearing beside title search, mortgage and RESPA documents.
 11. January 5. Three days later, on January 5, Branch Manager Justice also signed off on the loan documentation. ROA 1104.

As found by Judge Hughston and affirmed by the S.C. Supreme Court, I find that Lois King is an adequate class representative.

2. Deloris Sims

Ms. Sims executed a note and mortgage in the amount of \$9,262.46 to American General on May 26, 1995, at an interest rate of 25%. With her new real-estate-secured 25% loan, she paid off her then-existing unsecured 17.99% loan. The amount borrowed included involuntary unemployment insurance (\$652.46) and credit life insurance (\$1,553.00) for total insurance premiums of \$2,205.46 or 23.8% of the amount borrowed. She executed an attorney-insurance

preference form which is not dated and which does not indicate her insurance agent preference. Sims Trial ROA 0169, Ridenhour Depo. ROA 1071-1072. She applied for the loan several weeks before the closing. Sims Trial ROA 0160- 016, ROA 0150. Ms. Sims testified that American General did not ascertain her preference at the time of application and that she signed the attorney preference form at the closing after 5:00 p.m. on a Friday afternoon. Sims Trial ROA 0169-0170. Ms. Sims testified that she had never visited the American General loan office prior to the closing on Friday evening, May 25, 1995. ROA 0161- 0162. Section 37-10-102(a) required the lender to ascertain the attorney preference at the time of the application, as confirmed by the Supreme Court decision in this case.

After reviewing multiple memoranda and depositions as well as a two-day trial in 2007, ROA 0093-0640, this court views the Sims situation in much of the same light as did Judge Williams in January 2003:

#18
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With regard to the loan transaction with Sims, AGF admitted at the [12/16/2002] hearing that the undated Preference Form in the Sims loan file was signed at the loan closing. Thus, the only evidence before the Court indicates that the preference form was presented to Sims at the time of the loan closing. There is no evidence before the Court that AGF attempted to ascertain Sims's preferences at the time of application or at any other time prior to the closing.

Order, 01/10/2003 ROA 0038.

In the months following the above Order of Judge Williams, American General produced arguments about "habit" and AGF's employee Carolyn Gibson's procedures so that Judge Williams ultimately vacated his grant of Partial Summary judgment. ROA 0043-0045. Four years later, the Sims matter was tried to a jury. Eleven jurors found that the disclosure was "made by American General to Ms. Sims on May 26, 1995 the day of the closing" while one juror found that the disclosure was "before May 26, 1995." ROA 0640. American General made no attempt to prove at trial that the Sims' preference disclosure was made at the time of credit application. The Sims' trial verdict was vacated by the South Carolina Supreme Court:

... the trial court impermissibly entangled the concepts of timeliness and substantial compliance. It was error to instruct the jury on substantial compliance with respect to the timing element of the attorney preference disclosure. As a matter of law, providing the attorney preference disclosure after the completion of the credit application violated section 37-10-102. This

prejudicial error is clear in the inconsistent jury verdict forms. Accordingly, we reverse due to the trial court's error of law in permitting the timing element in section 37-10-102 to be satisfied by substantial compliance.

King at 92, 687 S.E.2d at 326, SJ App 2.

All the evidence related to Ms. Sims' specific transaction as well as any inference that can be reasonably drawn from that evidence can only lead to a conclusion that the attorney preference form was presented to and signed by Sims after credit application. Arguably counsel for American General have conceded that Ms. Sims signed its form at closing. ROA 0831-0923. The Supreme Court ruled that such a scenario was unlawful under the Code.

#19
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It is undisputed that the Sims application is dated April 19, 1995. ROA 0565. Carolyn Gibson admits Ms. Sims initially applied for the loan by phone. ROA 0278-0279. At trial, Ms. Gibson testified she had no recollection of Ms. Sims or the Sims transaction, ROA 0277. In her deposition, she testified that her "procedure" would have been to require the customer to come in and sign the attorney preference form at the same time she signed the RESPA documents. ROA 1338. The RESPA documents include Good Faith Estimate (ROA 570) and Servicing Transfer Disclosure (ROA 571) and are required by law to be signed within three days of the time of the application. ROA 1325-1326. Gibson then testified that if the customer did not come in within three days she would void the application and have the customer make a new application. ROA 284. There is no evidence of any credit application other than the April 19, 1995 copy contained in Ms. Sims' file. ROA 1342-1343.

The undated attorney preference form of Sims was not signed at the time of application as required by the statute and the Supreme Court. In fact, Sims' RESPA documents are all signed by Sims and Gibson on the date of closing, May 26, 1995, ROA 570- 571. Therefore, if Carolyn Gibson followed her normal routine (i.e. habit) of having the attorney preference signed at the same time as RESPA documents, the undated attorney preference form was signed at closing. ROA 288. This is consistent with statements by counsel for American General. (ROA 0831 and 0923). Plaintiffs' counsel have pointed out and it is undisputed that Mrs. Sims's loan was closed by a non-attorney employee of AGF, Ms. Gibson.

If AGF presented an attorney preference form dated April 19, 1995 and signed at the time of credit application, Plaintiff would have no claim. As with most of American General's

attorney preference forms, the Sims' form is undated and the form itself contains no place for a date to determine compliance.

American General has suggested that Ms. Sims's preference was ascertained at some time prior to closing. However, there is no evidence to support a claim that the preference was ascertained at the time of application as required by law. As found by Judge Hughston and affirmed by the S.C. Supreme Court, I find that Deloris Sims is an adequate class representative.

D. Discussion of American General's Responses

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This court has carefully read and examined each of the Affidavits submitted by American General. This court is mindful of its obligation to determine if the proffered Affidavits raise issues of material fact that would preclude this court from granting plaintiff's Motion for Summary Judgment. The submitted Affidavits implicate the defense asserted by American General that it is entitled to the protections afforded to creditors in the Consumer Credit Code. Specifically, American General asserts that it may avoid all liability in this case under the terms of SC Code Ann. Section 37-10-105(B) which states:

No creditor may be held liable in an action brought under this section for a violation of this chapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

S.C. Code Section 37-10-105(B).

In this case, Plaintiffs assert that American General failed to timely ascertain from its consumer debtor borrowers their individual preference as to the identity of the legal counsel "... that is employed to represent the borrower in all matters of the transaction relating to the closing of the transaction." SC Code Ann. Section 37-10-102 (a). As a result, this court must be guided by the interpretation of the law established by the Supreme Court in this case. King, 386 S.C. at 82. This court must then determine if the proffered affidavits establish "by a preponderance of evidence" that, even if Plaintiffs have established a violation of law for Ms. King and Ms. Sims, (1) American General did not intend to violate the provisions of the Code and, even more important, (2) American General established "procedures reasonably adapted to avoid the error," and (3) American General maintained those procedures. S.C. Code Ann. § 37-10-105(B).

#21
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In determining whether American General complied with the provisions of the preference statute, the Supreme Court expressly adopted the Class Certification Order of Judge Hughston and the Administrative Interpretation 10.102(8)-8302 (October 11, 1983) (the "A.I.") SJ App 5, issued by the South Carolina Department of Consumer Affairs. The A.I. and the compliance form were issued in response to requests from the lending community seeking guidance on compliance.⁵ In the King decision, the Supreme Court adopted both the reasoning and legal construction of the preference statute stated in the 1983 A.I. King, 386 S.C. at 89-90. The A.I. provides a clear compliance roadmap of how a creditor can comply with §37-10-102(a) and provides a creditor with a preference form to use to ensure compliance with the Code. The form also serves as an aid to the Court in assessing the level of lender compliance. Strongly rejecting Defendant's "substantial compliance" argument, the Court held that the attorney/insurance preference must be ascertained contemporaneously with the credit application. King, 386 S.C. at 89. The Court ruled, if a lender does not timely ascertain the preferences of a consumer borrower at the time of credit application, any later American General disclosure and ascertainment of a debtors preferences is untimely as a matter of law. King, 386 S.C. at 91. The Court noted that to do otherwise would undermine the legislative purpose of the preference statute "to protect borrowers". King, 386 S.C. at 89-90.

First, this court notes that American General chose to use an undated preference form that it drafted to use as its official preference compliance form. This court has not identified any evidentiary basis in the record or in the proffered Affidavits that meets the Code-established standard of "preponderance of evidence" as to why an American General undated compliance form meets the required statutory standard for timely Code compliance. Further, American General argues that a signed and dated form is not the only way to ascertain a borrower's preference as to an attorney for closing a real-estate-secured loan. Defendant's Motion to Reconsider and to Alter or Amend the Court's Interim Order on Summary Judgment, 8/8/2011, p. 26, n. 10. However, American General offers no evidence of how they may have complied with the statutes at issue without using a signed and dated form, and this Court finds the argument unmeritorious. By disagreeing with American General's argument here, this Court is not stating that the Defendant was under a duty to retain the documents. This Court only states

⁵ This is the second time the Supreme Court affirmed the Department of Consumer Affairs' interpretation of §37-10-102(a). See also Davis, 326 S.C. 83.

that the absence of a signed and dated preference form demonstrates to this Court the Defendant's record of compliance with the Attorney Preference Statute.

Given the "bright line" compliance timing standard established and required by the Supreme Court in this case and in the 1983 A.I., this Court has reviewed the written compliance procedures proffered by American General through its 30(b)(6) witness, Mr. Ridenhour. ROA 1076, 1078. The official American General compliance procedures require that "[t]he customer must check the appropriate box, enter the appropriate names of attorneys or agents, and sign the form prior to completion of the rest of the Application for loan." ROA 1076.

The court has also located a second American General preference compliance procedure in the record dated "3/20/96." ROA 1078. That loan closing and preparation of documents form references "FIRST PAGE MORTGAGE LOAN APPLICATION" and states that:

- #22
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- a. This form then becomes the first page of the Application for Loan.
 - b. The customer must check the appropriate box, enter the appropriate names of attorneys or agents, and sign the form prior to completion of the rest of the Application for Loan.

ROA 1078 (emphasis added).

American General established a very clear written compliance process to provide its consumer borrowers with a timely written disclosure and the opportunity to express their Code-established rights to name both the attorney and insurance agent to provide the required legal services and insurance associated with a real-estate-secured-loan from American General. This Court must determine whether the written requirements were, in fact, followed and maintained on a consistent and uniform basis.

American General's argument and briefing before the Supreme Court and the Keeper affidavit are an admission that it ignored its own procedure. Now, through its affidavits, the Defendant attempts to characterize these 9,157 violations as random occurrences or isolated events. Certainly, as noted by the Supreme Court in oral argument, if American General's failure to ascertain Ms. Sims preference were an isolated event the safe harbor defense might apply. At oral argument, the following exchange took place:

THE COURT: So if Sims was an isolated incident, y'all would have been claiming that safe harbor provision all over the place, would you not?

MR. COTTINGHAM: We haven't claimed the safe harbor provision in any of the cases. We've only had these two -

THE COURT: Well, that's because you can't make the requirement for the safe harbor, is it not?

MR. COTTINGHAM: No. I think we can. I think we can make the requirement.

THE COURT: I wasn't born yesterday and nobody on this Court was. I can't believe, Mr. Cottingham, that if a business like yours, as long as this litigation has been pending, could claim safe harbor and get out of all these cases. Y'all would have done so.

MR. COTTINGHAM: Well, we're talking about the period starting some time before 1996. We're not talking about what's going on today.

THE COURT: Well, I understand that. That's what this whole case is about . . .

#23
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Sup. Ct. oral argument 24:14-25:11.

Failing to ascertain the preference of 9,127 debtors cannot qualify as a random occurrence or an isolated event. § 37-10-105(B) governs and it states that an exception exists where the "violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid the error." S.C. Code Ann. In looking at the evidence, the Keeper affidavit is an admission of the breadth of the potential violations. Affidavits of AGF's employees stating that they did timely give the preference cannot contradict AGF's admission. Any assertion by an AGF employee that they tried to comply with the statute by following AGF's procedures carries little to no weight in light of 9,157 violations. Moreover, the affidavits do not necessarily contradict Keeper since it can be inferred that AGF may have on occasion timely ascertained the preference. This Court believes that the evidence in this case does not rise to the level of a statutory defense, thus this "bona fide error" provision is inapplicable.

This Court notes that American General required, in both of the above-referenced compliance procedures, that the customer "must check the appropriate box, enter the appropriate names of attorneys or agents, and sign the form prior to completion of the rest of the Application for Loan." In light of the compliance standard established by American General, this court again reviewed the proffered American General employee affidavits to determine if those affidavits establish by a preponderance of evidence that American General maintained and regularly

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followed the required steps it established for Code compliance. This Court has determined that the proffered affidavits do not establish the application of any consistent compliance procedures by American General to "avoid the error" of untimely preference disclosure and the related ascertainment from the "customers" of their attorney and insurance agent preferences. Several affidavits reference that the employee "believes" that a preference was given but do not state exact time that the lost or misplaced preference form might have been provided to the consumer. Notably, there is no reference to American General's requirement that the consumer "sign the form prior to the completion of the rest of the Application for Loan." Indeed, the affidavits generally reference various times after initial credit application before the consumer was even afforded the opportunity to review the undated preference form created by American General. This Court is not persuaded that the essentially "upon information and belief" declarations of American General employees regarding various loan circumstances rises to the minimal level necessary to defeat a motion for summary judgment.

Several of the employee affidavits attempt to suggest to this Court that a consumer was provided with a preference form, if at all, sometime during the process of American General making real-estate-secured loans and that such conduct was consistent with American General training. None of the affidavits state that the specific attorney was selected by the consumer borrower. Moreover, none of the affidavits state that the preference was ascertained in an timely manner as required by the statute and the Supreme Court. Most affidavits reflect that the employee did not remember the specifics of a particular loan transaction and simply state they "believed" certain actions were taken. Some affidavits confirm that a preference form was finally provided and signed at some time after the credit application. None of the Affidavits address any ongoing document retention policies of American General so that Defendant could, in fact, demonstrate Code compliance if there were a later dispute or missing documents. Those affidavits are consistent with the position that American General presented to the Supreme Court, namely, that the lender had no legal duty or obligation to "ascertain the borrower's preference before the day of closing, much less a certain number of days in advance." Resp. Br. at 20. American General attempts to ignore that the Supreme Court completely rejected American General's compliance position by stating:

The timing feature of section 37-10-102 imposes a bright-line approach which is manifestly at odds with the notion of

"substantial compliance." To permit a construction of section 37-10-102 as sanctioning the lender's furnishing the borrower with *the attorney preference disclosure after the application was completed* would undermine the legislative purpose "to protect borrowers." *Davis*, 326 S.C. at 86, 484 S.E.2d at 472; *see also McClanahan v. Richland County Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute."). And the suggestion that the attorney preference disclosure may be made at closing borders on frivolity."

King, 386 S.C. at 91.

#26
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The preference statute, as construed by the Supreme Court, requires a series of consumer protection disclosures that begins on the date of application. The bright-line approach requires dated documents to establish Code compliance, as demonstrated by the dated compliance form created by the Department of Consumer Affairs or a substantially similar form. The official American General written compliance procedures are clear and unambiguous. ROA 1076, 1078. In order to determine whether AGF maintained "procedures reasonably adapted to avoid the error", the Court has reviewed the affidavits submitted by American General. At least a scintilla of such evidence is required to indicate that it consistently followed its own operating procedures to "avoid the error" of not timely ascertaining the preferences of consumers who obtained a real estate secured loan.

Therefore, to defeat the pending summary judgment motion American General must point to some evidence that the undated attorney preference form, Trial Ex. 4, ROA 0568, complies with all required disclosures and was presented "prior to or contemporaneously with the application form" as stated in the 1983 A.I. endorsed by the Supreme Court. American General has failed to make the requisite showing to the Court to avoid summary judgment. The Court also notes that several of the proffered employee affidavits are not consistent with the Rule 30(b)(6) testimony of Mr. Ridenhour regarding the required steps established by American General for actual preference compliance. This court concludes that the employee affidavits submitted by American General fail to set forth the facts sufficient to defeat the "defective form" and "Keeper affidavit" bases of Plaintiffs' summary judgment motion.

The Court has also carefully read and examined the affidavits of attorneys who closed loans for American General. The attorney affidavits provide no comfort to the Court and reflect a somewhat disturbing and cavalier view of the attorney preference statute. Many of the affidavits contain very similar statements to the effect that the attorney arrived at the loan closing and advised the borrower(s) that he would be closing the loan and then asked if the borrower(s) wanted to proceed with the closing. This is the very same compliance approach argued by American General and strongly rejected by the Supreme Court. King, SJ App 2.

None of the attorney affidavits even address how the individual attorney was selected. Nor do any of the attorney affidavits indicate who selected the attorney. Nor do any of the attorney affidavits indicate the specific date when American General ascertained the preference of the consumer borrower. Yet the ruling by the Supreme Court was clear: "Timing is the central issue in this case." King, SJ App 2.

#26
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Advising borrowers at a loan closing that they could either proceed with the attorney selected by American General or delay the closing to receive the proceeds of the loan for some period of time until another attorney was actually selected by the borrower is exactly what the 1983 A.I. addressed and rejected as proper compliance procedure. The A.I. concluded that the General Assembly intended that the consumer be afforded the right to express their attorney and insurance agent preference before they were "inundated" with other loan-related documents. A loan closing is a document-intensive procedure in which consumer borrowers are placing their real property at risk if there is a later default. Any newly selected attorney would need sufficient time to prepare the required closing documents and conduct a review of documents with the borrowers at a later closing before the consumer could obtain the loan proceeds they sought in the first place. The fact that the attorney affidavits claim that no consumers objected to proceeding with the loan closing is hardly surprising. The consumers decided, as a practical matter, that they needed the loan proceeds then and were willing to waive their preference rights under the Code. Such conduct and results are in direct conflict with S.C. Code Ann. § 37-1-107(a) which states that a "debtor may not waive or agree to forgo rights or benefits under this title."

The Code requires that the borrower's preference be determined . . . and determined at a time when the attorney is still capable of rendering effective assistance to the borrower. The

possibility of the selection of an attorney being put off until the closing was discussed and rejected in State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987). The Supreme Court, after considering and rejecting the theoretically acceptable "fix," focused instead on the realities and pressures surrounding a real-life closing:

. . . in Coffee County Abstract and Title Co., supra, the title company was permitted to conduct real estate closings with the restriction that no legal advice or opinions be given. Chief Justice Torbert, concurring, gave instructions as to how such a closing should be handled: "If the parties to the transaction raise a legal question at the closing, the title company should stop the proceeding and instruct them to consult their attorneys." 445 So.2d at 857.

We agree this approach, in theory, would protect the public from receiving improper legal advice. However, there is in practice no way of assuring that lay persons conducting a closing will adhere to the restrictions. One handling a closing might easily be tempted to offer a few words of explanation, however innocent, rather than risk losing a fee for his or her employer.

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292 S.C. at 433-34, 357 S.E.2d at 19.

Buyers Service addressed the unauthorized practice of law eight years before the American General loan closing for Plaintiff Sims and fifteen years after the Code was amended to protect consumers in real estate transactions. But in the broader perspective, that decision is a clear statement of the Supreme Court's continuing view of the relationship between the general public - the consumers of the Consumer Protection Code - and the legal profession. The Court's concern is "not for the economic protection of legal profession. Rather, it is for the protection of the public from the potentially severe economic and emotional consequences which may flow from the erroneous preparation of legal documents or the inaccurate legal advice given by persons untrained in the law." State v. Despain, 319 S.C. 317, 320, 460 S.E.2d 576, 578 (1995), citing Buyers Service 292 S.C., 357 S.E.2d. The Supreme Court has not deviated from this position.

The Court concludes that American General has not established a dispute of a material fact necessary to defeat the Plaintiff's Motion for Summary Judgment. The affidavits submitted by American General, including the Keeper Affidavit, serve to confirm that American General itself does not know when it provided the required preference form so that it could timely ascertain the specific preferences of its prospective borrowers. The American General affidavits

confirm the data and conclusions contained in the Keeper Affidavit which constitutes an admission under the ruling of Judge Williams, ROA 0035. Based on the Court's review of the entire record in this matter, the decision by American General to use an undated preference "compliance" form, the compliance claim by American General to the Supreme Court that it had no legal duty or obligation to "ascertain the borrower's preference before the day of closing, much less a certain number of days in advance," Resp.Br. at 20, confirms that American General did not utilize or apply the correct Code compliance timing standard in the consumer loans now before the Court.

In summary, the employee affidavits submitted by American General don't provide evidence that:

- The employee in any loan transaction complied with the AGF policy that a consumer be provided with a preference form "prior to or contemporaneously with the Application Form."
- The employee in any real-estate-secured loan "prior to or contemporaneously with the Application Form" ascertained the identity of the specific attorney selected by the debtor.
- The employee required the consumer to fill out and sign the preference form "prior to completion of the Application for Loan" as required by AGF's written policies.
- The employees were trained to provide the preference form "prior to or contemporaneously with the Application Form."
- Establish that American General consistently followed its written compliance requirements in its South Carolina branches.
- Confirms that American General started with a new loan application when a loan changed to a real-estate-secured loan as stated in the Rule 30(b)(6) deposition of Mr. Ridenhour.

Additionally, in summary, the attorney affidavits submitted by American General don't provide evidence that:

- The borrower selected that attorney.
- That attorney had been selected by the borrower to represent the borrower in all matters of the transaction relating to the closing.
- The attorney confirmed that American General timely ascertained the preferences of the borrower before taking any further action.
- They were chosen by the borrower at the time American General took the loan application.
- Address the use of an undated preference form.
- Address how the attorney would confirm to the borrower that the requirements for the preference statute had been met by American General at the time of credit application.

American General made the decision to abandon its own written preference compliance standard before the Supreme Court and that approach was rejected by the Court. This Court will not ignore the rulings of the Supreme Court or the "wait to closing" compliance arguments made by American General to the Supreme Court.

American General asserts that it may avoid all liability in this case under the terms of S.C. Code Ann. § 37-10-105(B) which states:

No creditor may be held liable in an action brought under this section for a violation of this chapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

#29
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In order to assert this defense American General must be able to prove its violations of the statute were (1) not intentional; (2) resulted from bona fide error; (3) notwithstanding the maintenance (4) of procedures reasonably adapted to avoid the error. American General asserts it has presented at least a scintilla of evidence that it is entitled to this defense. The Court finds as a matter of law that Defendant has not presented sufficient evidence showing it is entitled to this defense.

According to testimony of AGF Rule 30(b)(6) deponent, Jerry Ridenhour, American General knew how to comply with the attorney preference statute. In his deposition, Ridenhour produced compliance procedures requiring that "The customer must check the appropriate box, enter the appropriate names of attorneys or agents, and sign the form prior to completion of the rest of the Application for Loan." ROA 1076. Ridenhour also produced a second American General compliance procedure in the record dated "3/20/96." ROA 1079. That loan closing and preparation of documents form refers to the "FIRST PAGE MORTGAGE LOAN APPLICATION" and states that:

- a. This form then becomes the first page of the Application for Loan.
- b. The customer must then check the appropriate box, enter the appropriate names of attorneys or agents and sign the form prior to completion of the rest of the Application for Loan.

ROA 1078. In spite of these procedures, the Keeper Affidavit by its very terms shows that there are more than 5,000 transactions where preference of the obligors was not ascertained at the time of application.

American General asserts this noncompliance is the result of an unintentional *bona fide* error. The Consumer Protection Code is helpful in addressing claims of bona fide error. For example, S.C. Code Ann. § 37-23-60 states: "Examples of a bona fide error include clerical, calculation, computer malfunction and programming, and printing errors. An error of legal judgment with respect to a person's obligations pursuant to this article is not a bona fide error."

#30
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American General argued before the Supreme Court that "it was not obligated to ascertain the borrower's preference before the day of closing" American General Br., at pp. 19-20. The Court found this argument bordered on frivolity. American General cannot rely on its legal judgment regarding what the preference statute requires to establish a bona fide error, especially when its Rule 30(b)(6) deponent testified that he knew the preference had to be obtained at the time of application. Dep. of Ridenhour.

American General could have easily adopted the attorney preference form prescribed by the 1983 A.I. of the Department of Consumer Affairs. Instead, it chose to use a form that did not evidence the timing of disclosure, even though it knew the preference had to be obtained at the time of application. This failure cannot be a bona fide error as, at best, it is based upon a legal misinterpretation of the statute.

V. Legal Issues

Before the question of an appropriate penalty can be addressed, there are two legal issues that have been presented that must be resolved. First, there is the question of whether the penalty statute applies on a "per loan" or a "per borrower" basis. In addition, there is the question of whether prejudgment interest is appropriate in this case.

A. File vs. Debtor

After further review, the Court grants Plaintiffs' request for an award of penalties on a per borrower basis. This is a 1996 case and this Court ruled in its temporary Order dated May 21, 2012 that the penalty was per transaction, but mistakenly calculated the monetary penalty on a per debtor basis instead of on a per transaction basis in that Order. Originally, this Court felt that a per transaction penalty was the proper basis under the 1996 version of the Attorney

Preference Statute. However, the Court has looked at the stipulation entered into by the attorneys for both the Plaintiffs and the Defendant on November 23, 1999 in which both sides agree that the 1997 version of the Attorney Preference Statute is controlling. While the stipulation does not bind this Court on this issue because the stipulation specifically states that they do not stipulate as to whether the penalty should be per debtor or per transaction, this Court has turned to case law that interprets the 1997 statute for guidance on how to apply the penalty.

In 2003, the Supreme Court of South Carolina established in Tilley v. Pacesetter Corp. that "[t]he 1997 amendment to § 37-10-105 changed the penalty structure to a per debtor penalty." 355 S.C. 361, 369, 585 S.E.2d 292, 296 (2003). The holding in Tilley in 2003 clearly requires the Court to apply the penalty on a per debtor basis, and because the parties stipulated that the 1997 version of the statute is controlling, this Court applies the penalty in this action on a per debtor basis. The Court reconsiders its ruling and changes its former position to per debtor, in accordance with the Supreme Court decision in Tilley, *supra*.

#31
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Plaintiffs point to Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000), and Crane v. Citicorp. Nat'l Servs., Inc., 313 S.C. 70, 437 S.E.2d 50 (1993) as further examples of when a per debtor penalty has been applied. Both cases address whether certain obligors are entitled to post-default notices of default and sale of personal property pursuant to Article 9 of the Uniform Commercial Code. The relevant law in these cases are found in the UCC, not the CPC, and they are only cited to as examples of per debtor penalty cases.

Based on the foregoing, the Court concludes that the 1997 version of the Attorney Preference Statute applies the penalty on a per debtor basis and based on the stipulation of the parties, the 1997 statute applies.

B. Prejudgment Interest

The Court has reconsidered and denies Plaintiffs' request for prejudgment interest on the statutory penalties. Under South Carolina law, prejudgment interest is recoverable only where the amount is both demandable and liquidated. See S.C. Code Ann. § 34-31-20(A) ("In all cases . . . wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum"); Future Group v. Nationsbank, 324 S.C. 89, 101, 478 S.E.2d 45, 51 (1996) ("Prejudgment interest is allowed on obligations to pay money from the time when payment is demandable, either by agreement of the parties or by operation of law, if the sum is certain or

capable of being reduced to certainty.") Plaintiffs' claim for statutory penalties under S.C. Code § 37-10-105 does not meet either requirement.

First, a claim must be demandable either by agreement of the parties or by the operation of law at some time "before entry of judgment." Future Group, 324 S.C. at 101, 478 S.E.2d at 51. See also Dixie Bell, Inc. v. Redd, 376 S.C. 361, 372, 656 S.E.2d 765, 770 (Ct. App. 2007) (there is a "necessity for an agreement between the parties when there is no operation of law to make the sum demandable"); BB&T of S.C. v. Kidwell, 350 S.C. 382, 391, 565 S.E.2d 316, 320 (Ct. App. 2002) (finding that prejudgment interest was appropriate where an amount was due and payable as of a certain date); T.W. Morton Builders v. Von Buedingen, 316 S.C. 388, 399, 450 S.E.2d 87, 93 (Ct. App. 1994) (finding that a plaintiff "had the burden of establishing a stated account and the parties' agreement, express or implied, that the account is a trust statement due at a specific point").

#32
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In this case, Plaintiffs had no right to demand payment of the statutory penalty, even the minimum statutory penalty amount of \$1,500, before the entry of judgment in this case. No agreement existed between Plaintiffs and American General that provided a demandable amount and no statutory authority creates a right to monetary recovery for Plaintiffs without a determination of both liability and the amount of the penalty. Plaintiffs' right to demand payment of any statutory penalty arises only after the entry of judgment by the Court.

Second, a claim must be liquidated in order for prejudgment interest to be awarded. A claim is liquidated when "the sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed upon by the parties." Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 133, 631 S.E.2d 252, 259 (2006) (emphasis added). See also Babb v. Rothrock, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993) ("The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose."); Beckman Concrete Contractors, Inc. v. United Fire & Cas. Co., 360 S.C. 127, 131-132, 600 S.E.2d 76, 78-79 (Ct. App. 2004) ("liquidated damages . . . cannot be changed by the proof" and "are susceptible of being made certain by mathematical calculation from known factors"). In contrast, unliquidated damages, on which prejudgment interest is not recoverable, are "[d]amages that . . . cannot be determined by a fixed formula, so they are left to the discretion of the judge or jury." Beckman Concrete, 360 S.C. at 132, 600 S.E.2d at 79 (emphasis added).

There is no statutory guidance as to how a trial court is to assess the amount of the penalty under the Attorney Preference Statute, and as evidenced by this Order, a detailed, factual analysis must be completed to determine the amount of the penalty. Because the penalty cannot be determined with mathematical certainty and requires that proof of various factors be presented to the court for a decision, prejudgment interest on any penalty is unavailable.

Based on the foregoing, the Court finds Plaintiffs are not entitled to prejudgment interest.

VI. Penalty

This case was filed over 15 years ago. It has gone up on appeal twice and was considered two times by the Supreme Court. It is overly ripe for being concluded. As discussed above, each of the plaintiff debtors by statute is entitled to an award of a penalty of \$1,500 to \$7,500. Defendant suggests starting at the lower end, at \$1,500, and Plaintiffs recommend starting at the higher end, or \$7,500. Confronted with these conflicting positions, the Court's analysis will start at the midpoint, at \$4,500, and this number will be adjusted taking into account the competing arguments of Plaintiffs and Defendant.

A. Applicable Statute

As noted above, the penalty statute, S.C. Code Ann. § 37-10-105, was amended in 1997, SJ App 1, and the parties have stipulated that, if a penalty is assessed, the "new" penalty shall apply. ROA 0076.

The 1997 amendment to § 37-10-105 changed the penalty structure and prohibits class actions. New § 37-10-105(A) provides, in relevant part,

If a creditor violates a provision of this chapter, the debtor has a cause of action, other than in a class action, to recover actual damages and also a right in an action, other than in a class action, to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars

S.C. Code Ann. § 37-10-105 (Supp. 1997 & Rev. 2002).

B. Factors to Consider in Establishing Penalty

Defendant argues that the punitive nature of the penalties provided in § 37-10-105(A) requires the Court to follow the United States Supreme Court's decision in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996). As Judge Newman explained in Flemings:

[T]he statutory penalties sought in this case are punitive in nature. The public policy purpose of awarding penalties in this case is to punish [American General] for its violations of § 37-10-102 rather than restore [Plaintiffs] to a previous position and are similar in nature to punitive damages.

Flemings, Order Awarding Damages at 3 (citing Gore). See also Hearing Def. Ex. 1 at 3.

In Gore, the United States Supreme Court identified three fact intensive guideposts for determining the measure of punitive damages and for assessing whether those damages comport with due process: (1) the degree of reprehensibility of the defendant's conduct; (2) the relationship between the penalty and actual harm suffered by the plaintiff; and (3) sanctions imposed in other cases for comparable misconduct. See Gore, 517 U.S. at 574-75. See also Mitchell v. Fortis Ins. Co., 385 S.C. 570, 686 S.E.2d 176 (2009) (holding that trial courts must follow the Gore guideposts in assessing whether punitive damages comply with due process). See also Hearing Def. Ex. 1 at 3.

#34
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1. The Degree of Reprehensibility of American General's Conduct.

The United States Supreme Court has explained that in determining whether an award of punitive damages is reasonable, the most important indicator is the degree of reprehensibility of the defendant's conduct. Gore, 517 U.S. at 559. As the Court has explained:

We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003) (citing Gore, 517 U.S. at 756-77). See also Hearing Def. Ex. 1 at 5. The Court analyzes these factors below.

The United States Supreme Court has explained that the first factor in the reprehensibility analysis is "whether the harm caused [by the defendant's conduct] was physical as opposed to economic." Id. Here, it is undisputed that the Class Members did not sustain any physical damages. Plaintiffs argue that the named Plaintiffs, Lois King and Deloris Sims, suffered economic harm from American General's conduct because they refinanced unsecured obligations at higher interest rates and were forced to purchase insurance products they did not want.

Plaintiffs also claim that the absence of an attorney of Class Members' choosing left unsophisticated borrowers vulnerable to improperly prepared loan documents. After careful review of the record, the Court agrees.

The second factor in the reprehensibility analysis is whether the defendants conduct "evinced an indifference to or a reckless disregard of the health or safety of others." Campbell, 538 U.S. at 419 (citing Gore, 517 U.S. at 756-77). Here, Plaintiffs make no claim—nor could they—that American General acted with indifference to, or with a reckless disregard of, the health or safety of the Class Members. Thus, the Court finds that this factor is irrelevant.

#35
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The next factor in the reprehensibility analysis is whether "the target of the conduct had financial vulnerability." Campbell, 538 U.S. at 419 (citing Gore, 517 U.S. at 756-77). Deloris Sims, as a named Plaintiff, sought a loan from American General to pay off an existing loan. The American General loan had an interest rate of 25% and was successfully obtained to pay off her existing loan with an interest rate of 17.99%. This could suggest, or one could infer, that Ms. Sims was financially vulnerable, but it does not mean that Ms. Sims purchased insurance or received a loan she did not want. The Court has reviewed both direct and circumstantial evidence in regards to this factor, and the inference is there are times, as with Ms. Sims, that the loan the borrower received could have been detrimental. However, this is not to say that the borrowers were pressured into the loan or purchasing insurance. The Courts finds that this factor weighs in favor of a higher penalty.

The next factor in the reprehensibility analysis is whether "the conduct involved repeated actions or was an isolated incident." Campbell, 538 U.S. at 419 (citing Gore, 517 U.S. at 756-77). In the July 29, 2011 Interim Order re: Summary Judgment, the Court concluded that American General's conduct was repeat conduct, but, as explained below, this was due to inconsistent adherence to corporate policies and procedures that were designed to ensure compliance with the Attorney Preference Statute. The Court finds that this factor weighs in favor of a statutory penalty above the median.

The final factor in the reprehensibility analysis is whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." Campbell, 538 U.S. at 419 (citing Gore, 517 U.S. at 756-77). As the Court concluded in the Interim Order re: Summary Judgment:

American General established a very clear written compliance process to provide its consumer borrowers with a timely written disclosure and the opportunity to express their Code-established

rights to name both the attorney and the insurance agent to provide the required legal services and insurance associated with a real estate secured loan from American General.

Interim Order at 20. Although compliance with those policies and procedures was inconsistent, the Court does not find that any non-compliance was intentional. American General's employees explain in their affidavits that they always did their best to comply with the Attorney Preference Statute and never intentionally failed to comply with its requirements. See Affidavit of James Graham, ¶ 17; Affidavit of Janice Davenport, ¶ 26; Affidavit of Joyce Shaw, ¶ 22; Affidavit of Lonnie Richard, ¶ 37; Affidavit of Stella Cameron, ¶ 38; Affidavit of Tammy Vaughn, ¶ 14; Affidavit of Vicki Coleman, ¶ 16; and Second Aff. of Stella Cameron, ¶ 7. See also Hearing Def. Ex. 1 at 11-25. After reviewing the evidence, this Court finds that the affidavits are not directly contradicted, but the evidence shows that widespread violations still occurred.

#36
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Moreover, the State Board of Financial Institutions—the principal state agency charged with the duty and responsibility for regulating American General in South Carolina, see S.C. Code § 37-3-506(1)—performed several reviews of American General's policies and procedures and the attorney preference forms it used. See Hearing Def. Ex. 1 at 23-25; Ridenhour Aff., ¶¶ 20-22 & Ex. 6. These reviews do not address the procedure in any lengthy detail, finding in only one instance that the “rendering of proper attorney preference on most r/e loans is questionable.” Ridenhour Aff., Ex. 6, AGF(2) 00392. While this suggests that there was a breakdown in the implementation of American General's policies, it is not clear that American General's policies and procedures were per se incorrect. American General's management relied on its own regulator to bring to its attention any significant shortcomings in complying with the Attorney Preference Statute, and the Court finds that that reliance was reasonable. Moreover, the Consumer Finance Division's implicit approval of American General's form is entitled to deference from this Court. See Lexington Law Firm v. South Carolina Dep't of Consumer Affairs, 382 S.C. 580, 677 S.E.2d 591 (2009). Based on these facts, the Court concludes that American General did not intentionally disregard its own policies and procedures. Instead, there was an unintentional breakdown in the enforcement of those policies. Because there is no evidence of intentional malice, trickery, or deceit, the Court finds that this factor weighs in favor of the minimum penalty.

To summarize, the Court concludes that of the five factors in the reprehensibility analysis that are relevant to this case, one weighs in favor of the minimum penalty and three weigh in favor of a higher penalty (the remaining factor is deemed irrelevant). Thus, the Court finds that on the issue of reprehensibility, a higher penalty is justified.

2. The Relationship Between the Penalty and Any Actual Harm
Suffered by the Plaintiffs

The second Gore guidepost requires the Court to consider the relationship between the penalty and any actual harm suffered by the Plaintiffs. Gore, 517 U.S. at 574-75. As the United States Supreme Court has explained, “[w]hen the actual damages are so small the amount allowed as exemplary damages should not be so large.” Id. at 581 n.32 (internal quotations and citation omitted).

#37
PAB
Plaintiffs offered no evidence of any compensable harm suffered by any Class Member. Indeed, Plaintiffs’ expert on penalties conceded that the Class Members suffered no such harm. See, e.g., Hearing Tr., 67:22-68:16; Freeman Dep. at 30:5-11. Moreover, the Court agrees with American General that:

No Class Member claims that she did not understand the terms of her loan or that she did not get the loan she wanted.

American General’s failure to timely make the preference disclosure did not affect any Class Member’s choice of lender, loan type, loan terms, or decision to purchase insurance.

No Class Member claims that her mortgage or note was defective, that any mortgage or deed was not properly recorded, that her loan funds were not properly disbursed, or that her title was defective.

See Hearing Def. Ex. 1 at 29. At the hearing, Plaintiffs’ penalty expert conceded these points. Hearing Tr., 70:13-16, 72:5-11, 73:2-74:18 (Mr. Freeman testifying that he is not aware of any Class Member claiming that she did not understand the terms of her loan or get the loan she wanted, admitting that he cannot testify that American General’s conduct affected any borrower’s choice of lender, loan type, loan terms, or the decision to purchase insurance, and that there is no evidence of title defects, incorrect or improperly recorded loan documents, or improper disbursement of loan funds). Ms. Sims admitted that the loan she obtained from American General was “exactly” the loan she wanted. Trial Tr., 114:6-10.

In sum, as the foregoing demonstrates, despite Plaintiffs’ allegation that the absence of an

attorney of their choosing left them vulnerable to mistakes in the loan closing, because there is no evidence of any specific economic harm to the Class Members, the Court finds that the second Gore factor, which focuses on the ratio of punitive damages to actual physical or economic harm, weighs in favor of the minimum penalty.

3. Sanctions Imposed in Other Cases for Comparable Misconduct

#38
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The third and final guidepost under Gore requires the Court to consider sanctions for comparable misconduct. See Gore, 517 U.S. at 574-75. The Court is aware of only three other cases where penalties were assessed for violations of the Attorney Preference Statute on a class-wide basis: Flemings, Bazzle, and Lackey. The Court finds these cases demonstrative, despite the factual differences. This Court is aware that in Flemings, Lackey, and Bazzle, despite conducting business in South Carolina for years, the lender, Green Tree, admitted that it made no effort to comply with the Attorney Preference Statute until 1995—thirteen years after the statute was enacted. See, e.g., Lackey, Final Order at 10-11. See also Hearing Def. Ex. 1 at 27-28. Based on that evidence, Judge Ervin concluded that “Green Tree simply chose to totally ignore the law despite learning of the requirement,” and that its “conduct r[ose] to a shocking level of callous and reckless indifference to the rights of South Carolina residents.” Id. at 13. In contrast to the Green Tree cases, American General has offered specific forms it used to at least attempt to comply with the Attorney Preference Statute. See Hearing Def. Ex. 1 at 13, 16-19.

However, while American General’s attitude toward the Attorney Preference Statute was far from the indifference that Green Tree had towards compliance, this does not outweigh the arguments put forth by the Plaintiffs.

Although there are no statutory factors, Plaintiffs’ counsel have pointed to numerous factors that support an award of the maximum penalty of \$7,500 per debtor:

1. Multiple violations. American General’s disregard of the preference statute was not limited to one or two isolated instances. The comments of the Chief Justice during oral argument make this point very clearly.
2. Widespread violations. In 1998, Mr. Williamson testified that American General had 46 branches throughout the state of South Carolina. ROA 0720 line 3. There is nothing in the record to suggest that the violations were limited to the acts of a single rogue employee or a single improperly supervised office.

- #39
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3. Duration. Likewise, there is nothing in the record to suggest that the violations of the preference statute were limited to some short period of time. Instead they continued over a period of many years. For example, although the preference statute was adopted in 1982 and the Administrative Interpretation was issued in 1983, it was not until 13 years later - in the autumn of 1996 after this class action was commenced - that American General finally revised its preference form so as to bring it into compliance with the Consumer Protection Code. Appendix 6. ROA 1479.
 4. Not inadvertent. Mr. Ridenhour testified under oath that American General knew what to do and did it. However, the record contains no support for that claim. Instead, in Ridenhour's 30(b)(6) deposition, American General admits that it knew what it should do to comply with South Carolina law, but this evidently was not done based on the voluminous evidence presented in this case.
 5. Continuing disregard for the law. Of considerable significance is the continuing nature of American General demonstrating disregard for the laws of this State. This is made more relevant by two recent cases - the Wachovia opinion out of the Court of Appeals in May and the Matrix opinion rendered by the Supreme Court in August, which cited the Wachovia case with approval. The message from the Court of Appeals and from the Supreme Court is clear. Severe penalties are appropriate for lenders who fail to observe the laws of the State of South Carolina.

In Wachovia Bank, N.A. v. Coffey (Op. No. 4685, Ct.App., filed 05/06/2010), the Court of Appeals found that Wachovia "committed the unauthorized practice of law, and, therefore, Wachovia came into court with unclean hands. . . . We therefore reach the inescapable conclusion that Wachovia . . . is barred from seeking equitable relief. Wachovia's legal causes of action are barred as well."

Matrix Financial Services Corporation v. Frazer et al., Op. No. 26859, (S.C. Sup. Ct. filed Aug. 8, 2011), authored by Chief Justice Toal, cites Wachovia with approval, and states: "Appellant also argues Matrix is not entitled to an equitable remedy because it closed the refinance loan unlawfully, and thus has unclean hands. We agree." The Court further stated:

Lenders cannot ignore established laws of this state and yet expect this Court to overlook their unlawful disregard. We take this opportunity to definitively state that a lender may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as required by our law.

394 S.C. 134, 140, 714 S.E.2d 532, 535 (2011). Matrix illustrates the continued problem of lenders not complying with consumer rights, however the equitable remedy mentioned above is not applicable to this case. The rationale that forms the basis for the above quote is also the rationale that, coupled with the other factors discussed here, dictates the imposition of a higher penalty.

Also noteworthy is the 2010 deposition of Libby Smith, an AGF employee, who testified to American General's practices and the continued disregard for South Carolina law.

- #40
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6. "Borders on frivolity." In reversing the lower court in the case at hand, the Supreme Court noted: "And the suggestion that the attorney preference disclosure may be made at closing borders on frivolity." King, 386 S.C. at 91. The tenacious and ultimately unsuccessful defense mounted by American General has kept the members of the Class from obtaining justice for more than 15 years. It is noteworthy that the Supreme Court – in a unanimous 5-0 decision – chose to make the foregoing observation. A reading of the transcript of the oral argument, excerpted above on pages 22-23, gives further insight into the Supreme Court's perception of American General's long-time business practices.

The Class Representatives argue that the members of the Class should each receive the maximum award. American General argues that the members should receive the minimum award. Ultimately, this Court finds that a penalty of \$5,000 on a per debtor basis is the appropriate penalty in light of the arguments presented by both Plaintiffs and Defendant.

VII. Attorneys' Fees

Under the American rule, attorneys' fees are not recoverable from the other party unless authorized by contract or statute. Hegler v. Gulf Ins. Co., 270 S.C. 548, 549, 243 S.E.2d 443, 444 (1978). The Attorney Preference Statute mandates that a court award reasonable attorneys' fees when a creditor has violated the statute. S.C. Code Ann. § 37-10-105(D). Plaintiffs have petitioned this Court for an award of reasonable attorney fees to be assessed against the

Defendant under the statute and also for reimbursement of reasonable costs and expenses. Oct.Tr.194: 19-22; Plaintiffs' Supplemental Petition for Attorneys Fees, 6/18/12. Plaintiffs have not specified an amount. The Court is mindful that the South Carolina Supreme Court recently explained that the principles underlying the common fund and lodestar methodologies for determining attorneys' fees are distinct, making each methodology appropriate in some cases but not in others:

#41
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A key distinction between the award of fees authorized by statute and the award of fees from a common fund is that the equitable principles underlying the common fund doctrine create a mechanism in which attorneys' fees are not assessed against the losing party by *fee-shifting*, but rather, are taken directly from the common fund or recovery and borne by the prevailing party through *fee-spreading*. To reflect this distinction, courts generally hold that a "lodestar" approach reflecting the amount of attorney time reasonably expended on the litigation results in a reasonable fee under a fee-shifting statute. Conversely, when awarding fees to be paid from a common fund, courts often use the common fund itself as a measure of the litigation's "success." These courts consequently base an award of attorneys' fees on a percentage of the common fund created, known as the "percentage-of-the-recovery" approach.

Layman v. State, 376 S.C. 434, 452-53, 658 S.E.2d 320, 330 (2008) (internal citations omitted);

Hearing Def. Ex. 1 at 39. The South Carolina Supreme Court continued:

In our view, utilizing common fund methodology when awarding attorneys' fees pursuant to a fee-shifting statute is wholly inappropriate in light of the underlying theoretical distinction between a common fund source of attorneys' fees and a statutory source of attorneys' fees. Although both sources are exceptions to the general rule that each party is responsible for the party's own attorneys' fees, the common fund doctrine is based on the equitable allocation of attorneys' fees among a benefited group, and not the shifting of the attorneys' fee burden to the losing party. This Court certainly acknowledges that a percentage-of-the-recovery approach may be appropriate under circumstances in which a court is given jurisdiction over a common fund from which it must allocate attorneys' fees among a benefited group of litigants. However, where, as here, a fee-shifting statute shifts the source of reasonable attorneys' fees entirely to the losing party, we find it both illogical and erroneous to calculate fees using the methodology justified under a fee-spreading theory.

Layman, 376 S.C. at 453-54, 658 S.E.2d at 330; Hearing Def. Ex. 1 at 40; see also Sauders v.

S.C. Pub. Serv. Auth., 2011 WL 1236163, *7 (D.S.C. 2011) (following Layman and concluding that lodestar approach applied to S.C. Code Ann. § 28-11-30—a fee-shifting statute). Based on the South Carolina Supreme Court’s discussion in Layman and the fact that S.C. Code Ann. § 37-10-105(D) is a fee-shifting statute, the Court holds that the Court should use the lodestar methodology to determine a reasonable attorneys’ fee in this case.

A. Application of the Lodestar Methodology

#42
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The lodestar methodology “is designed to reflect the reasonable time and effort involved in litigating a case, and is calculated by multiplying a reasonable hourly rate by the reasonable time expended.” Layman, 376 S.C. at 457, 658 S.E.2d at 332; Sauders, 2011 WL 1236163 at *2. The lodestar “looks to ‘the prevailing market rates in the relevant community’ . . . [and] produces an award that roughly approximates the fee that the prevailing attorneys would have received if he or she had been representing a paying client who was billed by the hour in a comparable case.” Perdue v. Kenny, 130 S. Ct. 1662, 1672 (2010) (quoting Blum v. Stenson, 465 U.S. 886, 895 (1984)). The “lodestar method yields a fee that is presumptively sufficient to achieve” a reasonable fee. Id. at 1673; see also Pa. v. Del. Valley Citizens’ Council for Clean Air, 478 U.S. 546, 565 (1986) (noting the strong presumption that the lodestar approach is the most accurate determination of reasonable attorneys’ fees in light of the intended purpose of the usual fee-shifting statute). The Court must consider six factors for determining a reasonable attorneys’ fee:

- (1) the nature, extent, and difficulty of the case;
- (2) the time necessarily devoted to the case;
- (3) the professional standing of counsel;
- (4) the contingency of compensation;
- (5) the beneficial results obtained;
- (6) the customary legal fees for similar services.

Layman, 376 S.C. at 458, 658 S.E.2d at 333.

“Using this as a starting point for reasonableness, a court may consider other factors justifying an enhancement of the lodestar figure with a ‘multiplier’ before arriving at a final amount.” Id. at 457, 658 S.E.2d at 332. The United States Supreme Court recently noted “that enhancements may be awarded in rare and exceptional circumstances.” Perdue, 130 S. Ct. at 1673 (internal quotation marks omitted). Further, the “the lodestar figure includes most, if not

all, of the relevant factors constituting a reasonable attorney's fee, and ...an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation." *Id.* (internal quotation marks and citations omitted). With these principles in mind, the Court will determine the reasonable hourly rate first, then the reasonable and necessary hours expended in this litigation, and finally the appropriate multiplier, if applicable.

1. Computation of Reasonable Hourly Rate

#43
PMB

The Court must identify a reasonable hourly rate for purposes of a lodestar calculation. *Layman, supra*, citing *Liberty Mutual Ins. Co. v. Emp. Res. Mgmt., Inc.*, 176 F. Supp. 2d 510 (D.S.C. 2001) (explaining that a reasonable hourly rate is determined by comparing the rates of the prevailing party's attorneys to the prevailing market rates in the community for similar services by lawyers of comparable standing). There is a certain incongruity involved in determining the "customary" and appropriate hourly rate for matters that are almost always filed as contingent fee cases, regardless of whether they are viewed as "common fund" or "lodestar." The named Plaintiffs in this case have executed contingency contracts in which they have agreed to a fee of one-third of the recovery. Plaintiff's Counsel have advanced all costs in this litigation without any expectation of reimbursement except in the event of recovery on behalf of the Plaintiff Class. Collectively, Class Counsel have expended their own personal funds as costs advanced in this matter, in addition to the value of the time spent by attorneys and staff members in the handling of this action. Class Counsel have devoted more than fifteen years without compensation to prosecute this case. Such time could have otherwise been devoted to fee-paying clients. Only if Class Counsel were successful could there be any prospect of payment for years of service rendered to Class Members. In these circumstances, the best indicator is to look to the rates that other courts have applied in complex cases to compensate lawyers of similar experience and standing.

a. The professional standing of counsel.

The parties agree that Plaintiffs' counsel possess a high level of skill, ability, and professional standing. Hearing Tr., 52:6-15; 168:11-13.

b. The customary legal fees for similar services.

The parties dispute the reasonable hourly rate that should apply in this case. Under the lodestar methodology, this factor requires the determination of a reasonable hourly rate for the service provided by Plaintiffs' counsel over time. The Court determines a reasonable hourly rate

by comparing the professional standing and hourly rates the prevailing party's attorneys are requesting to the prevailing market rates in the community for comparable lawyers performing similar services. Liberty Mut. Ins. Co. v. Emp. Res. Mgmt., Inc., 176 F. Supp. 2d 510, 535 (D.S.C. 2001). As the Court in Blum notes:

To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to—for convenience—as the prevailing market rate.

Blum, 465 U.S. at 896 n.11. In Layman, which was termed a “difficult” case, the Supreme Court used \$600 and \$500/hour for the lead counsel and \$200 to \$350/hour for the supporting attorneys.⁶

i. Plaintiffs Requested Rates.

#44
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Plaintiffs' counsel have submitted a formal fee petition, and have submitted current hourly rates of \$500 to \$675 per hour in their respective affidavits. Affidavit of T. Alexander Beard, at 5; Affidavit of Thomas M. Fryar, at 2; Affidavit of Steven W. Hamm, ¶ 12; Affidavit of C. Bradley Hutto, at 2; Affidavit of Daniel W. Williams, ¶ 5. Mr. Dibble did not include hourly rates in his affidavit. Affidavit of Charles L. Dibble. Their expert on attorneys' fees, Mr. Freeman, set a rate for Mr. Hamm of \$600 per hour; the other Plaintiffs' counsel at \$500 per hour; the supporting lawyers at \$250 per hour; and estimated future time at \$500 per hour for all involved. Affidavit of John P. Freeman, ¶ 43. Charles Whetstone, Plaintiffs' second expert on attorneys' fees, assigned an hourly rate of \$650 per hour for Mr. Beard, Mr. Dibble, Mr. Williams, Mr. Hutto, Mr. Hamm, Mr. Simpson, and Mr. Dong; \$300 per hour for Mr. Hamm's associates; and \$500 per hour for Mr. Fryar. Affidavit of Charles W. Whetstone, Jr., ¶10.

ii. American General's Evidence on Prevailing Market Rates.

All the hourly rates and all the legal fees paid by American General for legal services in

⁶ Several observations about the Layman case are appropriate here. (1) It was not a class action at the time of the fee award. (2) The total time from enactment of the legislation until the case was decided was only 5 months. (3) The express terms of the “state action” statute as well as the underlying public policy considerations are substantially different from those in the fee-shifting statute of the Consumer Protection Code.

the defense of this case represent relevant data for this Court to consider as it attempts to determine a reasonable fee for Plaintiffs' counsel to be assessed against American General in this complex case. The record reflects that legal fees billed to American General by outside counsel total \$3,718,088 through August 2011. Becker Aff. ¶10. The blended rate for Mr. Becker's firm over a period of 15 years was \$236/hour. The record does not reflect the individual hourly rate for the two lead defense counsel – Mr. Cottingham of Winston & Strawn⁷ and Mr. Becker⁷ of Haynsworth Sinkler Boyd. This silence was highlighted for the Court during the examination of Professor Freeman by Mr. Cottingham became somewhat inverted with Professor Freeman stating: "The real issue, for example, is what are you billing right here today? And it's not my place as a witness to ask questions, but that's unknown and I take a negative inference that you refuse to disclose it." Oct.Tr. 109:25-111:4.

iii. Current rates.

#45
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With a case of considerable length, the question arises as to how to reconcile current rates with historic rates. Plaintiffs' counsel argued that the Court should use current rates to determine the reasonable hourly rate and submitted conclusory affidavits with hourly rates they stated they would charge for this type of complex, class action litigation. Hamm Aff. ¶¶ 12; Hutto Aff. at 2; Williams Aff. ¶¶ 5; Beard Aff. at 5; Fryar Aff. at 2. Mr. Freeman testified that the use of current rates was appropriate for two reasons (1) he did not think it was "fair to basically say that you're stuck with a fee that you didn't charge"; and (2) Layman and Sauders both used current rates. Hearing Tr., 56:3-4, 8-10. Some courts have held that current rates rather than historic rates should be applied when a fee petition is submitted because of the delay in payment: "to take account of delay in payment, the hourly rate should be based on current rates rather than the rates in effect when the services were rendered." Blakely v. Continental Airlines, 2 F. Supp. 2d 598, 602 (D.N.J. 1998).

The Court concludes that it should use current rates and look at enhancing the lodestar figure with an appropriate multiplier. The Court thus determines that a reasonable hourly rate in this case is \$600.00.

2. Analysis of Reasonable Number of Hours

The Court will next determine what constitutes a reasonable number of hours necessarily

⁷ When asked whether he knew Mr. Becker's hourly rate, Mr. Stepp testified: "I think I asked him that I think its 375 or 285, something like that." Oct.Tr. 182:22-25.

expended in this case. "The reasonableness of the number of hours billed shall be determined according to: (1) the nature, extent, and difficulty of the case; and (2) the time necessarily devoted to the case." Glasscock, 304 S.C. at 161, 403 S.E.2d at 315. The Court recognizes that

Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.... Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.

Hensley v. Eckerhart, 461 U.S. 424, 434 (1983) (internal quotation marks omitted).

a. The nature, extent and difficulty of the case.

South Carolina courts must consider the complexity inherent in all class actions in determining the reasonableness of an attorney's fee. The King class action was commenced in August 1996 seeking class-wide relief on behalf of certain customers of American General Finance, Inc. for AGF's violation of the attorney preference provisions of the South Carolina Consumer Protection Code.

#46
PMB
The record in this case clearly reflects that this class action has been one of extraordinary difficulty from the outset; the fact that the attorney preference law is unique to the South Carolina Consumer Protection Code; the appeal by AGF of the initial Circuit Court Order granting Class certification, continuing disputes about access to loan files, the subsequent appeals by Plaintiffs to the South Carolina Supreme Court, the issues surrounding Class certification and decertification and recertification, and the continued protracted litigation on remand.

b. The time necessarily devoted to the case.

Filed in August 1996, more than 15 years ago, King vs. American General Finance, Inc. has occupied considerable time on the part of four different Circuit Court judges. It has been the subject of multiple appeals. This case has required Class Counsel to continuously submit motions, memoranda, briefs and argue for the Class in many different courtrooms in order to fight off well-mounted efforts by American General's talented counsel. Class Counsel were also required to engage in an expensive, time-consuming legal battle. Class Counsel have submitted affidavits and supplemental affidavits reporting 10,569.45 attorney hours devoted to the handling of this matter through May 31, 2012. In addition, the affidavits reflect approximately 1,421.8 hours of paralegal or staff time spent in the case. This effort represents an extraordinary

commitment of time directed to obtaining a beneficial result for members of the Class.

As stated previously, the beneficial results obtained must also be weighed. The benefit achieved by the Petitioners for the Plaintiff Class in the instant case is \$5,000 per debtor, which does not include the fees and costs and expenses to be awarded by this Court.

3. Calculation of Lodestar Fee

Based on the foregoing, the Court calculates the lodestar fee in this case as follows:

10,569.45 hours x \$600 = \$6,341,670.

4. Enhancement of the Lodestar fee with a Multiplier

#47
PnB

Two recent South Carolina cases resulted in the application of an enhancement to the lodestar figure. In Layman, the South Carolina Supreme Court determined the use of a multiplier was warranted due to "the expedited litigation timeline imposed by the Court, the wholly successful recovery for the entire class of TERI participants, the extraordinary sum of money returned to the TERI participants and ultimately saved by the TERI participants, and the termination of governmental acts constituting a breach of contract." 376 S.C. at 461, 658 S.E.2d at 334. In Sauders, Judge Duffy applied a multiplier based on the length of the litigation (over 17 years), the multiple appeals to "two separate Circuit Courts of Appeal, the Fourth and Federal Circuits," and the Plaintiffs' ultimate success "on their trespass and inverse condemnation claims for a total recovery of over \$219 million." 2011 WL 1236163 at *11. Both courts utilized the lodestar figure with a multiplier of 1.25 to reflect the exceptional circumstances of those cases. Id.; Layman, 376 S.C. at 461, 658 S.E.2d at 334.

Mr. Freeman advocated a multiplier of four as "in the range of appropriate multipliers for this type of case" and to account for the contingency of compensation and the result obtained. Hearing Tr., 47:13-21; 54:11-13. Mr. Freeman, however, admitted that all of the cases he relied on to support a multiplier of four were common fund cases that arose out of settlement, and that he knew of no South Carolina decision applying a multiplier of four in a lodestar case. Id. at 102:19-25; 107:18-20. Because Mr. Freeman relies on multipliers awarded in common fund cases, which have no bearing on this case under South Carolina precedent, and factors that have already been accounted for in the lodestar figure contrary to Perdue, the Court declines to apply his proposed multiplier.

In contrast, Mr. Stepp testified that a multiplier was appropriate based on the beneficial results for Plaintiffs and the contingency of compensation for Plaintiffs' counsel—two factors

that had not been accounted for in his lodestar figure. Id. at 175:13-18. Mr. Stepp stated, “Perdue makes it clear that you don’t double dip by including factors in a multiplier that you’ve already taken into account in the hourly rate.” Id. at 176:3-5. Mr. Stepp opined that based on Layman and Sauders the appropriate multiplier was 1.25. Id. at 176:8–177:12.

Using the lodestar fee of \$6,341,670 as a starting point for a reasonable fee in this case, the Court agrees that enhancing the lodestar figure through a multiplier is appropriate for two reasons. First, the Court finds that the successful recovery for the class following multiple appeals, decertification, a defense verdict in Ms. Sims’ trial, and summary judgment for American General in Ms. King’s case, warrant the application of a multiplier. Second, the contingency of the compensation and the risk of non-recovery merits an enhancement to compensate appropriately in accordance with the criteria set forth in Layman. Perdue, 130 S. Ct. at 1675; See Layman, 376 S.C. at 434, 658 S.E.2d at 320.

Therefore, taking into consideration the duration of the litigation, the multiple appeals, and the analysis in Layman and Sauders, the Court will apply a multiplier of 2.00 to the lodestar calculation in order to arrive at a reasonable fee that adequately compensates Plaintiffs’ counsel. The Court thus calculates a reasonable attorneys’ fee as follows:

Attorneys’ fees: \$6,341,670
Multiplier x 2.00
Total: \$12,683,340

This amount takes into account the following six factors for the hourly rate: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services, as discussed in this Order.

Future Attorneys’ Fees and Costs

For any hours that are expended in the future in this case, Plaintiffs’ counsel may make a supplemental fee petition. If Plaintiffs’ counsel have incurred expenses over the duration of this case, counsel may submit a request—supported by documented evidence—of such expenses to the Court in a subsequent petition.

VIII. Motion to Strike – Cox Affidavit

At the October 14, 2011 hearing, Plaintiff orally moved to strike the affidavit of American General’s expert, Kenneth R. Cox, Jr. The Court denies that motion and finds that Mr.

Cox's testimony is relevant and germane to the issue of reprehensibility, which, as explained below, is an issue this Court must consider in determining the appropriate statutory penalty.

American General submitted Mr. Cox's affidavit to respond specifically to Plaintiffs' arguments in their June 9, 2011 Power Point presentation entitled "Penalty Presentation." Plaintiffs submitted that presentation to the Court in printed form at the hearing on October 14, 2011. In his affidavit, Mr. Cox describes, among other things, American General's role in the South Carolina lending industry, general business conditions in the mortgage lending industry from 1982 to 1996, American General's loan pricing and underwriting criteria, and how and why American General offered insurance products to its borrowers. Affidavit of Kenneth R. Cox, Jr., ¶¶ 8-29.

#49
PMB
At the October 14, 2011 hearing, Plaintiffs called Mr. Cox to question him on his qualifications and to cross-examine him on the matters presented in his affidavit. At the Court's instruction, American General conducted a very brief direct examination of Mr. Cox to give Plaintiffs the opportunity to make a contemporaneous objection to the scope of Mr. Cox's testimony. Hearing Tr., 126:8-14. Plaintiffs did not make any objections during American General's direct examination, which was limited to laying the foundation for Mr. Cox's affidavit. Instead, after their cross-examination, Plaintiffs moved to strike Mr. Cox's affidavit. *Id.*, 147:9-14. The Court overruled Plaintiffs' objection to Mr. Cox's qualifications and took their motion to strike his affidavit under advisement. *Id.*, 147:23-148:4. The Court now denies that motion.

The Court has broad discretion with respect to the admission of evidence. See, e.g., Watson v. Chapman, 343 S.C. 471, 478, 540 S.E.2d 484, 487 (Ct. App. 2000); R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000). Generally, the rules of evidence are to be construed "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." S.C. R. Evid. 102.

With these principles in mind, the Court denies the motion to strike Mr. Cox's affidavit. The Court qualified Mr. Cox as an expert in mortgage lending, and, at the October 14 hearing, Plaintiffs cross-examined him on the matters presented in his affidavit. Accordingly, Plaintiffs are not prejudiced by the admission of the affidavit. Finally, the Court finds that Mr. Cox's affidavit is relevant and germane to the issue of penalties because it directly addresses the issue

of reprehensibility, an issue this Court must consider in deciding the appropriate amount of penalties. For all these reasons, Plaintiffs' motion to strike is denied.

IX. Motion to Strike – Proffer

During the June 9, 2011 hearing, counsel for AGF made a Motion to Proffer certain testimony that it claimed would support a greatly reduced penalty. At the Oct. 14, 2011 hearing, AGF presented the Court with one witness on the issue of penalty, Mr. Cox. No other witnesses were identified or called to testify before the Court. Counsel for Plaintiffs at the conclusion of the October hearing moved to strike any proffer on the grounds that the Court had not prevented AGF from offering any other testimony on the issue of penalty. Plaintiffs argued that AGF simply declined to present further testimony to the court. Oct.Tr. 153:1-7.

After reviewing the transcript of the June and October hearings, the court has determined that it will sustain the Plaintiff's Motion to Strike on the proffers raised by AGF counsel. The Court did not restrict any AGF witness from testifying and the failure of AGF to offer additional live testimony at the October hearing constitutes an abandonment of the bases upon which the proffer was made.

X. Class Administration and Notice to the Class

Turning to the details of Class Administration and Class Notice, the Court finds that the following procedure should provide for an orderly distribution of the award to the Class Members and for dealing with related questions.

1. Administration Costs. The Plaintiffs will bear the costs of class administration and notice. "Rule 23(d)(2) provides that the notice is given by the party seeking to maintain the action as a representative suit . . . The language of our rule imposes the costs of notice on the party seeking class status. This is consistent with federal practice." James F. Flanagan, South Carolina Civil Procedure, 197 (3d ed.). See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178-79 (1974) ("The usual rule is that a plaintiff must initially bear the cost of notice to the class."). The Plaintiffs bear the costs of class notice and administration until there is finality of judgment, at that time, Plaintiffs may move to recover their costs from the Defendant.

2. Funding date. For purposes of this Order, the term "Funding Date" refers to the third banking day after (a) the time for appeal has passed with no notice of appeal being filed, Rule 203, SCACR, or (b) the issuance of remittitur, according to Rule 221(b), SCACR from the appellate court approving funding, whichever occurs first.

3. Class administrator. The Plaintiffs shall engage the services of a professional class administrator (the "Administrator") after consulting with Defendant's counsel. During the administration of the award to the Class, the Administrator shall submit a written activity status report to the Court no less frequently than monthly with copies to counsel for the parties.

4. Notice to class.

Attached to this Order is a proposed Notice to Class, the general form of which is approved. Within twenty (20) days after receipt of written notice of (i) the entry of this Order or (ii) this Court's ruling on all rule 59 or similar motions, whichever is later, Plaintiffs' counsel shall resubmit to this Court the proposed Notice, modified so as to be consistent with the provisions of the Order granting summary judgment. Plaintiffs' counsel shall also submit a corresponding Notice for publication in the print media. Prior to submittal of the proposed Notices to the Court, Plaintiffs' counsel shall confer with Defendant's counsel to seek agreement on as many aspects of the Notices as practical.

#51
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(a) Notice by Mail. Administrator shall mail to each Class Member via first class mail a copy of the Notice as finally approved by this Court. Such Notice shall be placed in the United States mail within twenty (20) days of approval of the Notice. The Administrator shall file an affidavit of mailing with the Court and provide copies to counsel for the parties. Refer to parts 7(f) and (g) below for instructions regarding "Returned Mailings."

(b) Notice by Publication. The Administrator shall also cause the Publication Notice (as finally approved by the Court) to be published once per week on two (2) consecutive weeks in accordance with S.C. Code § 15-29-40, in papers of general circulation in the cities of Greenville, Columbia, and Charleston. The Publication Notice shall first be published simultaneously with the mailing of the Notice to Class Members or as soon thereafter as practicable, and in no event more than ten (10) days after Notices have been dispatched by mail. Proofs of the Notice shall be provided to counsel for the parties for review prior to publication. The Administrator shall file or cause to be filed an affidavit of publication with the Court and provide copies to counsel for the parties.

5. Opt-out rights. Each Member of the Class shall be provided with the individual right to exclude himself or herself ("opt out") from the Class by advising the Clerk of Court in writing of such a decision by a date that is to be later determined by the Court. Notices

of decisions to opt out received after such date shall be of no force or effect. The right to opt out shall be described in both mailed and published notices, as approved by the Court. If a Class Member elects to opt out, the Class Member shall not participate in the final award.

6. Objections. Any objections to Class Counsel's request for reasonable fees and costs or to the compensation for the Class representatives or to any other matters must be filed with the Clerk of Court at such date to be specified in the Mail and Publication Notices as finally approved by the Court.

7. Payments to class members.

(a) Transfer to Administrator. On the Funding Date, Defendant shall pay to Administrator as Escrow Agent for the Members of the Class, the sum of \$45,785,000.00 Dollars (the "Fund"), which equals 9,157 Members times the \$5,000.00 Penalty. This amount will be adjusted downwards to account for any Members that choose to opt out. The payment shall be via Electronic Funds Transfer (EFT) in immediately available U.S. funds.

(b) Administration of the Fund. The Fund shall be held in trust in the name of Administrator as Escrow Agent in one or more interest-bearing accounts. Each account shall clearly be designated as an "AGF Distribution Account." All interest earned on the Fund shall be added to and made a part of the Fund.

(c) Recognition Payments to Class Representatives. In recognition of the Named Plaintiffs' willingness to serve as Class Representatives and to assist in the prosecution of this case on behalf of all Class Members, the Administrator shall pay out of the Fund to Plaintiff Lois King the sum of \$45,785.00 and to Plaintiff Deloris Sims the sum of \$45,785.00, said sums being computed on the basis of \$5.00 for Plaintiff King and \$5.00 for Plaintiff Sims from each Member of the Class. These payments shall be made no later than five (5) banking days after the Funding Date, and are to be deducted from the gross payment of \$5,000.00 to each Class Member who does not opt out. These payments will be in addition to the distributions ordered below.

(d) Checks to Class Members. No later than five (5) banking days after the Funding Date, the Administrator shall pay out of the Fund to each Class Member \$4,990.00, being the net sum remaining after the recognition payments to Plaintiffs Sims and King. All payments to Class Members shall be made by check and sent via First Class, U.S.

Mail, to the addresses in the updated list of names and updated addresses referenced hereinabove. Class Counsel may include a brief explanatory letter of transmittal with each check provided.

(e) Adjustment for Opt-Outs. The Fund shall be reduced by Five Thousand (\$5,000.00) Dollars for each Class Member who elects to opt out in the manner specified in this Supplemental Order. Any monies paid into the Fund on behalf of any Class Member who timely elects to opt out shall be returned by Administrator to Defendant. Likewise, the recognition payments to the two Class Representatives will be reduced by a total of \$10.00 (2 x \$5.00) for each Opt-Out.

#53
PAB

(f) Returned Mailings. If any mailing to a Class Member is returned by the United States Postal Service (USPS), the Administrator will promptly use the National Change of Address service provided by the USPS to attempt to locate such Class Member and a current address. Once Administrator obtains an updated address from the USPS for Class Members previously not located, Administrator will again mail a check to the Class Member. If the USPS is unable to provide an updated address, Administrator will then attempt to utilize the services of a credit-reporting agency in accordance with the Federal Credit Reporting Act.

(g) Additional Location Efforts. Sixty (60) days after checks are first mailed (or as soon as practicable after this 60-day period has elapsed), the Administrator shall identify all persons whose checks have been returned and all persons whose checks have not been presented to Administrator's bank for payment. Within twenty (20) business days after identifying such persons, the Administrator, using data from a credit bureau and/or the National Change of Address service, will update addresses to locate all such persons so identified. Within twenty (20) business days after obtaining the addresses for such persons, Administrator will issue or reissue checks to any Class Members thus located. The Administrator is not required to mail checks to any person whose check is returned undeliverable until after the postal address has been updated in the manner prescribed hereinabove.

(h) Personal Identifiers. By this Order, the Court hereby authorizes the Administrator and Class Counsel to collect the Social Security numbers, dates of birth, driver's license numbers and any other identifying information of Class Members, if necessary. Such data are to be used only in connection with the disbursement of proceeds, any required tax-related filings, and related aspects of the Class administration. This Court believes this

information will be sufficient to properly administer the Class, and denies the Plaintiffs' request for a more detailed list of the Class Members.

(i) Reports. No less frequent than monthly, Administrator will provide counsel for the parties a list of checks consisting of check numbers with each check, the payee(s), the amount, and the mailing address, and date of mailing. Class Counsel shall also file with the Clerk of Court a summary affidavit setting forth the date of mailing of the checks. A copy of this affidavit shall be served upon counsel for the parties.

#54
PMB
8. Death. If Administrator is informed that any Class Member is deceased and that probate proceedings have been commenced, then the Personal Representative of the decendent shall be substituted for the deceased Class Member. If Administrator is unable to ascertain that probate proceedings have been commenced for the estate of a deceased Class Member, the spouse or co-obligor of the decedent shall be substituted for the decedent for purposes of this Supplemental Order upon presentation of proof of death, and in the case of a spouse who is not a co-obligor, proof of marriage reasonably satisfactory to Administrator. If probate proceedings were commenced and the decedent estate has been closed, the Administrator shall pay the distribution into the Probate Court where the estate was being administered; the Administrator shall inform the former Personal Representative that the funds have been forwarded to the Probate Court. If no probate proceeding were commenced and there is no spouse or co-obligor, then the amount due to the decedent shall be treated as Unclaimed Funds.

9. Bankruptcies. Administrator shall endeavor to identify each Class Member who is currently a debtor in a bankruptcy proceeding in the Bankruptcy Court for the District of South Carolina, and for such persons, Administrator shall make the checks jointly payable to the Trustee and Class Member, to be mailed to the Trustee or will issue checks as directed by the Bankruptcy Court and/or Trustee. Further, if Administrator becomes aware of any Class Member who is currently a debtor in a bankruptcy proceeding in any other jurisdiction, Administrator will make the checks jointly payable to the Trustee and Class Member, to be mailed to the Trustee or will issue checks as directed by the Bankruptcy Court and/or Trustee.

10. Unclaimed funds. All funds remaining in the Fund 270 days after the Funding Date shall be deemed unclaimed funds (the "Unclaimed Funds"). All Unclaimed Funds

shall escheat to the State of South Carolina in accordance with the South Carolina Uniform Unclaimed Property Act. See S.C. Code Ann. § 27-18-10, *et seq.*

11. Payments to Class Counsel. The Court has previously identified and approved Steven W. Hamm, Charles L. Dibble, C. Bradley Hutto, Daniel W. Williams, T. Alexander Beard and Thomas M. Fryar as Class Counsel. The Court has determined that Defendant should pay to Class Counsel attorneys fees of \$12,683,340.00 for services to the Class through May 31, 2012 with leave to petition for additional fees for services subsequent to that date and also for recovery of costs and expenses. On the Funding Date, Defendant shall make payment of all Court-approved legal fees as well as all Court-approved costs and expenses via Electronic Funds Transfer (EFT) in immediately available U.S. funds to the AGF Costs Account maintained by Class Counsel; these funds shall be disbursed by Class Counsel in accordance with their separate agreement(s).

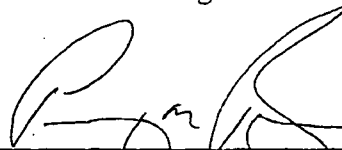
XI. Conclusion

For the reasons stated above,

1. Summary Judgment: Judgment for Plaintiffs against Defendant will be entered on two separate and independent grounds: the defective form and the Keeper Affidavit.
2. Award to Class: Defendant shall pay to the Members of the Class, on a per debtor basis, a penalty of \$5,000.00.
3. Attorneys' Fees: Pursuant to S.C. Code 37-5-202, the Court awards the sum of \$12,683,340.00 as attorneys' fees to Class Counsel.
4. Motions to Strike: the Court grants Plaintiffs' Motion to Strike Defendants' Proffer, and denies Plaintiff's Motion to Strike the Affidavit of Defendant's Expert, Mr. Cox.
5. Class Administration shall be implemented as indicated above.

This Court shall retain jurisdiction over the interpretation, effectuation, implementation and enforcement of this Order and any other matters related to this litigation.

IT IS SO ORDERED.


Perry M. Buckner, III
Judge, Fourteenth Judicial Circuit

July 18, 2012
Walterboro, SC

ELECTION TO OPT OUT OF CLASS ACTION

King v. American General Finance, Inc.
Orangeburg County, South Carolina Court of Common Pleas
Civil Action No. 96-CP-38-595

INSTRUCTIONS:

Only complete this opt-out form if you want to opt out of the class in the action known as *King v. American General Finance, Inc.*, pending in the Orangeburg County, South Carolina Court of Common Pleas, Civil Action No. 96-CP-38-595. If you opt out, you will not receive a payment.

If you do not want to opt out and you want to receive a payment, **DO NOT** complete this form.

I want to opt out of the class in the matter known as *King v. American General Finance, Inc.* I do not wish to participate in this action.

#56
p-5
Date: _____ Signature _____

Please type or print the following information:

Name: _____
FIRST MIDDLE LAST

Former Name(s) (if any): _____

Mailing Address: _____
NUMBER STREET APT.
CITY STATE ZIP

Telephone Number: _____

Mail the completed form to: [Insert Class Administrator's Address]

IMPORTANT! THIS FORM MUST BE POSTMARKED BY

OR ELSE YOU WILL LOSE YOUR RIGHT TO OPT OUT OF THE CLASS.

**COURT OF COMMON PLEAS FOR ORANGEBURG COUNTY,
SOUTH CAROLINA**

NOTICE OF PENDENCY OF CLASS ACTION

***THIS IS A COURT-AUTHORIZED NOTICE.
THIS IS NOT A SOLICITATION FROM A LAWYER.***

- #53
p2
- The purpose of this Notice is to inform you of a class action lawsuit that is now pending in the Court of Common Pleas for Orangeburg County, South Carolina. This Notice is intended to advise you of the lawsuit and of your rights with respect to the lawsuit. This Notice is not, and should not be understood as, an expression of opinion by the Court concerning the merits of the lawsuit or the defenses to the lawsuit.
 - **Read this Notice carefully and in its entirety. Your legal rights will be affected by proceedings in this lawsuit.**
 - Your rights, and the deadlines to exercise them, are explained in this Notice.
 - The Court in charge of this case still has to decide several issues. Payments will be made after the Court issues its final rulings, unless those rulings are reversed on appeal. Please be patient.

WHAT THIS NOTICE CONTAINS

BASIC INFORMATION 3

1. Why is there a notice?
2. What is this lawsuit about?
3. What is the status of the lawsuit?
4. Why is this a class action?

WHO IS IN THE CLASS? 4

5. How do I know if I am part of the Class?

CLASS BENEFITS 4

6. What will I get if I stay in the Class?
7. What am I giving up to stay in the Class?
8. How can I get a payment?
9. When will I get my payment?

EXCLUDING YOURSELF FROM THE CLASS 5

10. How do I get out of the Class?
11. If I don't exclude myself, can I sue the Defendant for the same thing later?
12. If I exclude myself from the Class, can I still get a payment?

THE LAWYERS REPRESENTING YOU 5

13. Do I have a lawyer in the case?
14. How will the lawyers be paid?

IF YOU DO NOTHING 6

15. What happens if I do nothing at all?

GETTING MORE INFORMATION 6

16. What should I do if I have moved or my situation has changed?
17. How do I get more information?

BASIC INFORMATION

1. Why is there a notice?

You have a right to know about this class action lawsuit, and about your options.

The Court in charge of this case is the Court of Common Pleas for Orangeburg County, South Carolina, and the case is called *King v. American General Finance, Inc.*, Case No. 96-CP-38-595 (the "Lawsuit"). The people who sued are called the "Plaintiffs," and the company they sued, American General Finance, Inc., now known as Springleaf Financial Services of South Carolina, Inc., is called the "Defendant."

2. What is this Lawsuit about?

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18

The Lawsuit alleges that the Defendant violated the South Carolina Consumer Protection Code in connection with certain mortgage loans made in South Carolina between August 1, 1982 and August 1, 1996. In their Complaint, the Plaintiffs claim that the Defendant failed to ascertain, prior to closing, the preference of the borrower as to the legal counsel that was employed to represent the borrower in all matters of the transaction relating to the closing of the transaction and the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage. The Defendant denies all claims made against it, denies that its practices violated any laws, and denies that the Plaintiffs are entitled to any relief.

3. What is the status of the Lawsuit?

By Order dated July 1, 1998, the Court ruled that the Lawsuit should be maintained as a class action. The South Carolina Supreme Court confirmed that decision by Order dated December 21, 2009.

By interim orders dated July 29, 2011 and February 22, 2012, the Court granted summary judgment for the Plaintiffs as to liability. This means the Court has determined that the Defendant violated the South Carolina Consumer Protection Code, that those persons falling within the Class (described in paragraph 5 below) are entitled to an award of statutory penalties, and that the Defendant must pay the lawyers representing the Plaintiffs their reasonable attorneys' fees. The Court has heard evidence on the issues of statutory penalties and attorneys' fees, and the record on those issues is now closed.

4. Why is this a class action?

In a class action, one or more people, called "class representatives," sue on behalf of people who have similar claims. All these people are a "Class" or "Class Members," except for those who exclude themselves from the Class.

WHO IS IN THE CLASS?

5. How do I know if I am part of the Class?

If you received this Notice in the mail, the Court believes you are a member of the Class.

The Court has defined the Class as follows:

All persons who, since July 1, 1982, have taken a loan from the Defendant which was secured in whole or in part by a lien on real estate in South Carolina for personal, family, or household purposes, whether recorded or not, and for whom, as of August 1, 1996, the debt was:

- a. still outstanding; or
- b. a payment had been made on the loan within the previous three years; and

for whom the Defendant failed to ascertain the attorney or insurance preference of the borrower at the time of application in the manner required by S.C. Code Ann. §37-10-102.

CLASS BENEFITS

6. What will I get if I stay in the Class?

If you stay in the Class, you will receive a payment of statutory penalties from the Defendant. The law provides for a minimum penalty of \$1,500 and a maximum penalty of \$7,500. The Court has determined that a penalty of \$5,000 per transaction or loan is appropriate in this case.

7. What am I giving up to stay in the Class?

Unless you exclude yourself from the Class, you can't sue the Defendant, continue to sue, or be part of any other lawsuit against the Defendant about the issues in this case.

8. How can I get a payment?

If you decide to remain in the Class, you do not have to do anything to get a payment. Payments will automatically be mailed if the Court's decisions are not reversed after any appeals.

9. **When will I get my payment?**

This case is not over, and the Defendant has the right to appeal. No payments will be made until all appeals have been resolved, and only if those appeals are resolved in the Plaintiffs' favor. It is not possible to predict what the appellate courts will decide. Resolving appeals can take time, and it's uncertain how long that process will take.

EXCLUDING YOURSELF FROM THE CLASS

If you don't want a payment and you want to keep the right to sue or continue to sue the Defendant on your own about the issues in this Lawsuit, then you must take steps to get out. This is called excluding yourself, or it is sometimes referred to as "opting out" of the Class.

10. **How do I get out of the Class?**

To exclude yourself from or "opt out" of the Class, complete the attached "Election to Opt Out of Class Action" form, and mail it to the Class Administrator at:

[insert Class Administrator's address]

The form must be **postmarked no later than** _____. If your form is not postmarked by _____, you will remain a member of the Class and you will be bound by the Court's orders. You will also give up your right to sue the Defendant for the claims that this Lawsuit resolves.

11. **If I don't exclude myself, can I sue the Defendant for the same thing later?**

No. Unless you exclude yourself, you give up the right to sue the Defendant for the claims that this Lawsuit resolves. If you have a pending lawsuit, speak to your lawyer in that lawsuit immediately. You must exclude yourself from this Class to continue your own lawsuit.

12. **If I exclude myself from the Class, can I still get a payment?**

No. You will not get any money if you exclude yourself from the Class.

THE LAWYERS REPRESENTING YOU

13. **Do I have a lawyer in the case?**

Yes. The Court has appointed these lawyers and firms as "Class Counsel," meaning that they were appointed to represent you and all class members: Steven W. Hamm of Richardson Plowden & Snowden, P.A.; Charles L. Dibble of Dibble Law Offices; C. Bradley Hutto of Williams & Williams; Daniel W. Williams of Bedingfield & Williams; T. Alexander Beard of Beard Law Offices; and Thomas M. Fryar of the Drose Law Firm. Their addresses appear on the last page of this Notice.

You will not be charged for these lawyers. If you want to be represented by your own lawyer, you may hire one at your own expense.

14. How will the lawyers be paid?

Class Counsel have been awarded \$10.9 million for attorneys' fees and will file a motion for costs. The fees awarded by the Court will be paid by the Defendant and will not come from the payments made to the Class.

The Court has ordered that \$10.00 be paid from each Class Member's payment to Lois King and Deloris Sims, the two Class Representatives who helped the lawyers on behalf of the Class. The Class Representatives will receive up to \$45,785 each.

IF YOU DO NOTHING

15. What happens if I do nothing at all?

Unless you exclude yourself, you won't be able to start a lawsuit, continue with a lawsuit, or be part of any other lawsuit against the Defendant about the issues in this case in the future.

GETTING MORE INFORMATION

16. What should I do if I have moved or if my situation has changed?

If you have moved, or if your situation has changed because of death or divorce, please contact the Class Administrator:

ADDRESS

17. How do I get more information?

This Notice summarizes the Lawsuit. The pleadings and other papers filed in the Lawsuit are available for inspection in the office of the Clerk of Court in the Orangeburg County Courthouse in Orangeburg, South Carolina.

Please do not call the Court or the Clerk of Court's office. If you have questions, or if you need to update your address or other information, you should call Class Counsel or contact them at:

ADDRESS
XXX-XXX-XXXX

BY ORDER OF THE COURT.

Date: _____, 2012
Walterboro, SC

Perry M. Buckner, III
Judge, Fourteenth Judicial Circuit

File
2/3
2/3

CLASS COUNSEL

Steven W. Hamm
**RICHARDSON, FLOWDEN,
& ROBINSON, P.A.**
P.O. Box 7788
Columbia, SC 29202-7788
(803) 771-4400

T. Alexander Beard
BEARD LAW OFFICES
36 Broad St., St. 201
Charleston, SC 29401
(843) 723-5152

Daniel W. Williams
BEDINGFIELD & WILLIAMS
P.O. Box 616
Barnwell, SC 29812-0616
(803) 259-2759

Charles L. Dibble
DIBBLE LAW OFFICES
P.O. Drawer 1240
Columbia, SC 29202-1240
(803) 254-0307

C. Bradley Hutto
WILLIAMS & WILLIAMS
P.O. Box 1084
Orangeburg, SC 29116-1084
(803) 534-5218

Thomas M. Fryar
DROSE LAW FIRM
2614 Burney Drive
Columbia, SC 29205-3119
(803) 779-5365

ATTORNEYS FOR DEFENDANT AMERICAN GENERAL

James Y. Becker
Sarah P. Spruill
HAYNSWORTH SINKLER BOYD, P.A.
1201 Main Street, Suite 2200
Columbia, SC 29201-3232

T. Thomas Cottingham, III
Phoebe N. Coddington
WINSTON & STRAWN, LLP
100 N. Tryon Street – 29th Floor
Charlotte, NC 28202-4000
Of counsel

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF ORANGEBURG)

Case No. 96-CP-38-595

LOIS KING and DELORIS SIMS, on)
behalf of themselves and all others)
similarly situated,)

Plaintiffs,)

v.)

AMERICAN GENERAL FINANCE, INC.,)

Defendant.)

ORDER GRANTING
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

#1
PMB

Before the Court is Plaintiffs' Motion for Summary Judgment. An Interim Order was issued on July 29, 2011 in which this Court indicated its intention to grant summary judgment for the Plaintiffs against Defendant American General Finance, Inc. ("AGF"). However, entry of judgment was deferred until such time as the Court had addressed the related issues of (i) the amount of the penalty, (ii) prejudgment interest, (iii) appropriate notice to the Class, (iv) Class administration, and (v) attorneys' fees and costs.

I. Standard of Review

Summary Judgment is appropriate when there is no genuine issue of material fact and it is clear that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC. The purpose of summary judgment is to expedite the disposition of cases that do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003). In determining whether any triable issues of fact exist, the Court must view the evidence and all inferences which can be reasonably drawn therefrom in the light most favorable to the nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). The standard is high: "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

II. Procedural Background

This case is on remand from the Supreme Court of South Carolina pursuant to its Opinion of December 21, 2009. King v. American General Finance, Inc., 386 S.C. 82, 687 S.E.3d 321

ATTEST: TRUE COPY

Wingja B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

EXHIBIT C

(2009). On remand, the case was assigned to Circuit Judge Diane S. Goodstein. In August 2010, the parties entered into an agreement fixing a schedule and establishing a deadline for the filing and service of motions and supporting memoranda. The agreement between counsel was approved by Judge Goodstein on September 17, 2010 and entered as an Order of the Court (the "September Order"). MMO 6-A¹.

Pursuant to the agreed schedule in the September Order, Defendant filed three motions, and Plaintiffs filed its Motion for Summary Judgment, which is the subject of this Order. At a hearing before Judge Goodstein on November 22, 2010, the parties were afforded an opportunity to argue all pending motions, and on December 12, 2010, Judge Goodstein issued her Order "(1) granting in part and denying in part Defendant's Amended Motion for Leave to Amend Answer; (2) denying Defendant's Motion to Require Plaintiffs to Give Notice to the Class; and (3) denying Defendant's Motion to Decertify the Class etc." (the "December Order")! MMO 1-E.

#2
PMB
Plaintiffs' Motion for Summary Judgment was heard by Judge Goodstein at the November 22 hearing. At the conclusion of the arguments of counsel, Judge Goodstein questioned whether the pending Motion for Summary Judgment, dated September 27, 2010, was appropriate in light of her ruling earlier in the day allowing Defendant to amend its pleading. Accordingly, the Court declined to rule on the pending Motion for Summary Judgment and invited Plaintiffs' counsel to file a new Motion for Summary Judgment, taking into account the pleading amendments allowed earlier in the hearing.

In response, Plaintiffs served a second Motion for Summary Judgment the following day, November 23. On December 3, 2010, Defendant tendered to Plaintiffs' counsel its amended pleading as modified to conform to American General counsels' understanding of the rulings at the November 22 hearing. Although, at the time when the November 23 motion was served, Plaintiffs' counsel had received the proposed Third Amended Answer with Defendant's proposed additional defenses, Plaintiffs had not received the final amended pleading. Before the Court today is the Plaintiff's summary judgment motion of December 3, MMO 4-D, which is essentially a renewal of Plaintiffs' September 27 and November 23, 2010 motions and which Plaintiffs' counsel stated was "being made in an abundance of caution following receipt of Defendant's amended pleading."

¹ A large portion of the various submittals on remand, consisting of motions and memoranda as well as orders, have been collected in two binders entitled "Motions and Memoranda and Orders, September 2010 – May 2011" (hereinafter "MMO").

Further argument on summary judgment was heard by Judge Goodstein on January 14, 2011, at the conclusion of which she took the matter under advisement. On February 16, 2011, prior to ruling on the pending summary judgment motion, Judge Goodstein *sua sponte* recused herself from this case. Judge Goodstein's Order of recusal states: "All rulings issued prior to [February 16] remain in effect." Recusal Order, MMO 6-C. Nine days later, on February 25, 2011, Chief Justice Toal ordered that the undersigned "be vested with exclusive jurisdiction to hear and dispose of [this]case." Order of Chief Justice, MMO 6-F. The parties were provided an opportunity to present additional argument to this Court at the hearing in the Colleton County Court House on June 9, 2011. At the conclusion of that hearing, the parties were instructed to submit proposed orders, both of which were considered prior to the issuance of the July 29 Interim order which is withdrawn and superseded by this present Order.

#3
PnB
Without ruling on the merits of Plaintiffs' Summary Judgment motion, this Court also heard initial arguments from counsel on the subjects of penalty and prejudgment interest. Although these arguments were held prior to a ruling on the summary judgment motion, the Court's decision to proceed was motivated solely by a desire to utilize limited court time in the most expeditious manner consistent with due process. See, e.g., Transcript of June 9, 2011 Hearing (hereinafter "June Tr.") 112:19-113:11.

After issuance of the Interim Order, a hearing was set for October 14, 2011 to take up the questions of attorneys' fees and costs and to hear additional argument on penalty. The parties were also afforded an opportunity to present witnesses. Under discovery guidelines set by this Court, each side identified no more than two expert witnesses whose reports and supporting materials were exchanged simultaneously and whose depositions were taken three days later. Defendant named Robert E. Stepp for attorneys' fees and Kenneth Cox for penalty; Plaintiffs identified Charles W. Whetstone and John P. Freeman.

At the October 14 hearing at the Colleton County Court House, T. Thomas Cottingham, III spoke on behalf of Defendant and C. Bradley Hutto the Plaintiffs. Also present were James Y. Becker and Phoebe N. Coddington for the Defendant as well as Defendant's Deputy General Counsel, James K. McMurray. Other counsel present for the Plaintiffs were Steven W. Hamm, Charles L. Dibble, Daniel W. Williams, T. Alexander Beard and Thomas M. Fryar.

An Order denying Defendant's Motion to Reconsider Summary Judgment was entered on February 22, 2012. That Order also directed parties to submit proposed orders on Class

Administration and Notice to the Class within 30 days of the date of that Order.

III. Rule 63 Certification and Determination

Initially, this Court's role is informed by the terms of Rule 63, SCRCF, which provides that a "successor judge may proceed upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties." In this regard, in addition to the Opinion of the Supreme Court, I have reviewed:

1. Transcripts of the hearings before Judge Goodstein on November 22, 2010 and January 14, 2011 (hereinafter "Nov. Tr." and "Jan. Tr." respectively).
2. The various submittals on remand, consisting of motions and memoranda as well as orders, most of which have been collected in two binders entitled "Motions and Memoranda and Orders, September 2010 – May 2011" ("MMO").
3. Documents collected in a binder entitled "Appendices to Plaintiffs' Motion for Summary Judgment" ("SJ App").
4. Record on Appeal submitted to the Supreme Court ("ROA").
5. Affidavits (more than 50 have been submitted since this action was commenced).
6. Various other documents appearing in the file of this case.

#4
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As required by Rule 63, SCRCF, I hereby certify that I am familiar with the voluminous record in this case. Further, I have determined that the proceedings may be completed without prejudice to the other parties.

IV. Discussion of Plaintiffs' Motion for Summary Judgment

In the December 21, 2009 Opinion, the Supreme Court held that "timing is the central issue in this case." The Court further held: "As a matter of law, providing the attorney preference disclosure after the completion of the credit application violated S.C. Code Ann. § 37-10-102." King, 386 S.C. at 91.

Plaintiffs advance two separate and independent theories in support of their Motion for Summary Judgment. First, Plaintiffs claim that there can be no genuine issue of material fact regarding the American General "preference" form. Form 2-91 at SJ App 6. Plaintiffs argue that there are fatal deficiencies readily apparent on the face of what is essentially a "waiver" form. Id., cf. § 37-1-107. As a result, Plaintiffs argue there only remains for the Court to make a ruling of law for the reasons discussed below.

Next, Plaintiffs contend that there can be no genuine issue of material fact regarding the Affidavit of Susan Keeper (the "Keeper Affidavit" dated 12/1/1999, ROA 1503, SJ App 7), a document voluntarily procured by American General and voluntarily submitted to the Court by

American General more than a decade ago. Cottingham Aff. ¶4. The Keeper Affidavit is a sworn statement of an expert selected by American General and paid by American General, that recounts in great detail the qualifications of Susan Keeper's 15-member team, the process by which that team reviewed American General's mortgage loan files over a number of months, and the conclusions reached at the request of American General. As will be discussed in greater detail below, the Keeper Affidavit establishes which loan transactions fall within the Class definition originally adopted by Judge Hughston and now adopted by the Supreme Court.

A. The Defective Form

Plaintiffs argue that there are fatal defects in the AGF form, defects that render it unacceptable as proof of compliance with the preference statute. Form 2-91 at SJ App 6. The question of American General's preference form – its “first page of the credit application” – presents a question of law. Grinnell Corp. v. Wood, 389 S.C. 350, 698 S.E.2d 796 n. 3 (2010) (“Whether a form complies with the statutory requirements is a question of law for the court.”).

#5
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The significance of the form derives from the fact that it is the means by which a lender is able to demonstrate compliance with its statutory obligations. There is no mandated or prescribed form; rather there is a recommended form by which lenders can show compliance. The Department of Consumer Affairs issued a compliance form in 1983 to assist lenders in demonstrating compliance after enactment of the Attorney Preference statute. Administrative Interpretation 10.102(8)-8302 (October 11, 1983) (the “A.I.”), issued by the South Carolina Department of Consumer Affairs, SJ App 5 and 6. If the Department's recommended form is used properly, the A.I. provides the lender protection from penalties. On the other hand, if the lender utilizes some other form and it is defective, the form cannot be utilized as proof of compliance. Cf. Hanover Ins. Co. v. Horace Mann Ins. Co., 301 S.C. 55, 57, 389 S.E.2d 657, 659 (1990) (“a non-conforming offer has the legal effect of no offer at all.”).

While not mandatory, the A.I. form has much to recommend it. The Department of Consumer Affairs, the agency charged with enforcement of the Consumer Protection Code, promulgated the A.I., which included the form and, equally important, addressed the rationale for the form, more than 28 years ago. As discussed below, the form has been expressly approved by the General Assembly, Act. No. 355, § 1, 1996 S.C. Acts 2187, and cited with approval by the South Carolina Supreme Court in the Davis, Tilley and King cases discussed below.

In marked contrast, the form that American General employed throughout the period of

time certified by Judge Hughston was not the "safe harbor" compliance form created by the Department of Consumer Affairs at the request of lenders. SJ App 6. The American General form deviates from the compliance form offered to lenders by the Department in three very significant departures. SJ App 6.

First, the American General form contains no provision for a date to establish when the form was signed by a potential debtor. SJ App 6, ROA 0568. The Supreme Court ruled:

Timing is the central issue in this case. We construe § 37-10-102(a) as requiring the attorney preference disclosure to occur contemporaneously with the credit application. Our construction of legislative intent flows from the clear language of the statute – "the credit application on the first page thereof must contain information as is necessary to ascertain these preferences of the borrower" – and from the 1983 interpretation by the Department of Consumer Affairs.

#6
P-6
King, 386 S.C. at 89-90, SJ App 2. This deficiency was noted during the testimony of American General's witness, Michael Williamson, before Judge Hughston at the 1998 Class certification hearing:

MR. WILLIAMSON: WHAT I'M LOOKING AT, IT SAYS
"UNDATED, 76. WELL----

THE COURT: 76 OUT OF 216?

MR. WILLIAMSON: RIGHT; UNDATED. NOW, THE
FORMS THAT WE WERE USING
BACK THEN, THERE'S NO PLACE
FOR A DATE ON THEM. WHY
WOULD WE DATE THEM IF WE
HAD NO PLACE TO DATE THEM?

THE COURT: I DON'T KNOW.

Hearing, June 8, 1998, ROA 716.

Secondly, again deviating from the Department's compliance form, American General's form does not contain any provision that addresses the foreseeable situation where the debtor has no preference as to a specific lawyer "employed to represent the debtor in all matters of the transaction relating to the closing of the transaction." S.C. Code Ann. § 37-10-102(a) (Law.Co-op., 1989 Rev.). Cf. Ridenhour 30(b)(6) deposition, pp. 45-46, ROA 1067; Teel Aff.

11/01/2010². The AGF form states:

[] I have no preference as to the attorney to represent me at the closing, if this loan is approved.

2-91 at SJ App 6, ROA 1478. This stands in contrast with the recommended compliance language in the A.I.:

- (b) Having been informed of this right, and having no preference I asked for assistance from (the lender) and was referred to a list of acceptable attorneys. From that list I select _____.

A.I. at S.J. App 6.

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In its discussion of § 37-10-102, the A.I. focuses on not one but two aspects of statutory compliance: “to make these rights known to the borrower (applicant) by a conspicuous disclosure and have the borrower make his preference known before he is inundated with other documents related to the transaction.” A.I. at SJ App 5 (emphasis added). In other words, for the lender to comply with the statutory requirement to “ascertain” the borrower’s preference, there must first be a disclosure by the lender and this, in turn, must elicit an informed response from the borrower. The A.I. further explains: “By having the borrower affirmatively select an attorney or insurance agent, it becomes less likely that the borrower will ultimately acquiesce to the lender’s choice of an attorney or agent for whom the borrower would have to pay, even though that attorney or agent might actually represent the interests of the lender.” A.I. at SJ App 5 (emphasis in original).

Although the statute contemplates the borrower making a selection (“the attorney . . . so chosen”), American General’s form does not address the readily foreseeable situation where the loan applicant has no particular preference. There is no provision in the AGF form that contemplates allowing the debtor to select an attorney from a list provided by American General (or any other procedure to enable the debtor to make an informed selection) when the debtor has no individual preference for a specific attorney to prepare all the required documents and conduct the closing and answer questions. For the lender to elicit “I have no preference” – and nothing more – does not meet the statutory requirement of ascertaining the consumer’s personal selection of the attorney who is “employed to represent the debtor in all matters of the

² AGF’s affiant, Jesse E. Teel, Jr., states that 93.3 percent (3,285) of the 3,536 attorney preference forms found in 5,391 AGF loan files “indicated the borrower(s) had no preference as to an attorney.” Teel Aff. 11/01/2010, p. 8.

transaction relating to the closing of the transaction.” AGF as a matter of continuing business practice treated the form it created and presented for signature by a debtor as authorization to have a non-lawyer prepare all documents and close real-estate-secured loans despite State v. Buyers Service, 292 S.C. 426, 357 S.E.2d 15 (1987).

Third, AGF’s form is the functional equivalent of a waiver form in direct violation of S.C. Code Ann. § 37-1-107. As noted above, the first choice presented on the AGF form is “I have no preference as to the attorney to represent me at the closing, if this loan is approved.” SJ App 6, ROA 1478. Indeed, “waiver” is a defense that American General raised in its initial Answer in 1996 and again in its subsequent amended Answers, e.g. ROA 66, asserting as a defense an act expressly prohibited by the Consumer Protection Code. Cf. Original 1996 Answer and Second Amended Answer, ROA 66, with S.C. Code Ann. § 37-1-107. See also MMO 1-A and 1-B.

#8
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American General’s attempts to assert defenses of consent, equitable estoppel and estoppel by silence are variants of a waiver claim. These equitable defenses are at odds with several equitable principles. The equitable doctrine of “clean hands” and the equitable maxim of “he who seeks equity must do equity” apply equally to American General. Matrix Financial Services Corp. v. Frazer, 394 S.C. 134; 714 S.E.2d 532 (2011), See Ingram v. Kasey’s Assoc., 328 S.C. 471, 451 S.E.2d 471 (1997). Equity will refuse to lend aid to one who has been guilty of inequitable conduct. Masonic Temple v. Ebert, 199 S.C. 5, 18 S.E.2d 584, Taff v. Smith, 114 S.C. 306, 103 S.E.2d 551.

The absence of a date on AGF’s “compliance” form demonstrates AGF’s company-wide systemic indifference to timely disclosure. Timing is central to a loan transaction, and a date establishes the benchmark for any computation of time. The primary purpose of the attorney preference form is to enable a lender to demonstrate that it complied with the statutory requirement of ascertaining the debtor’s preference at the time of credit application. For a lender to omit a date on such a form shows indifference to the statutory requirements.

The attorney preference statute places the responsibility for compliance on the lender, not on the debtor. AGF’s continued use of dateless forms demonstrates AGF’s continuing indifference to the importance of timely disclosure contemplated in the preference statute. Equally if not more important, AGF’s form that provides for “I have no preference . . .” and nothing more is not a preference form: rather it is a waiver form that contravenes § 37-1-107 of

the Consumer Protection Code.

American General stated in its brief and at oral arguments to the Supreme Court that it could comply with the requirements of the preference statute even if it waited until closing to get the preference form signed. Resp. Br. at 20, Tr. Oral Argument, SJ App 4. The Supreme Court soundly rejected this argument: "And the suggestion that the attorney preference disclosure may be made at closing borders on frivolity." King, 386 S.C. at 91.

Notably, the preference form presented to Ms. Sims by American General, ROA 0568, was not the form deemed in compliance, SJ App 6, by the 1983 A.I. issued by the Department of Consumer Affairs, the state agency³ charged with construing and enforcing the Consumer Protection Code. SJ App 5. The American General form is not dated to show disclosure "prior or contemporaneously with the application form." SJ App 6, cf. King, 386 S.C. at 85, SJ App 2. In addition, the American General form does not include the disclosure that if a consumer has no specific preference for a particular attorney, the consumer will be given a "list of acceptable attorneys" or any other source from which to select an attorney to handle the transaction. Cf. the American General form, 2-91 at SJ App 6, ROA 0568, ROA 1079 et seq., with the form appearing in the 1983 A.I., A.I. at SJ App 6.

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The American General form asks only if the borrower had a specific preference for an attorney "to represent me at the closing." 2-91 at SJ App 6, ROA 0568, ROA 1079 et seq. The AGF form does not advise or disclose to the borrower that a selection of "no preference" might very well mean that there will be no attorney present – for the borrower or American General – at the closing of the debtor's real-estate-secured loan transaction. Yet, the American General form implies that if the loan is approved by American General there will be an attorney to close the transaction.

In Davis v. NationsCredit Financial Services Corp., 326 S.C. 83, 484 S.E.2d 471 (1997), NationsCredit had used the compliance form set forth in the 1983 A.I., and that Court addressed and approved the 1983 A.I. Moreover, the General Assembly, when it amended the Attorney

³ Construction of a statute by an agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons. Lexington Law Firm v. S.C. Dep't of Consumer Affairs, 382 S.C. 580, 586, 677 S.E.2d 591, 594 (2009), Carolina Alliance for Fair Emp. v. SCDLLR, 337 S.C. 476, 490, 523 S.E.2d 795 (Ct.App. 1999), Glover by Cauthen v. Suitt Constr. Co., 318 S.C. 465, 458 S.E.2d 535 (1995); Home Health Serv., Inc. v. South Carolina Tax Comm'n, 312 S.C. 324, 440 S.E.2d 375 (1994); Laurens County Sch. Dists. 55 and 56 v. Cox, 308 S.C. 171, 417 S.E.2d 560 (1992); Jasper County Tax Assessor v. Westvaco Corp., 305 S.C. 346, 409 S.E.2d 333 (1991); Stephen v. Avins Const. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct.App. 1996).

Preference statute in 1996, likewise approved and endorsed the Administrative Interpretation: The "new" statute provides, "If a creditor uses a preference notice form substantially similar to a form distributed by the administrator, the form is within compliance with this section." S.C. Code Ann. § 37-10-102(a)(2).

The first case treating the attorney-preference statute in any detail was Davis, where the Supreme Court ruled:

We find that the intention of the Legislature in crafting § 37-10-102 was to protect borrowers by requiring in the credit application clear and prominent disclosure of the information necessary to ascertain the borrowers' preference as to the legal counsel employed to represent the debtor in all matters relating to the closing of the transaction.

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Davis, 326 S.C. at 86, 484 S.E.2d at 472 (1997). The Department of Consumer Affairs in the A.I. had stated that use of the form constituted compliance. Davis held that the use of the Administrative Interpretation's form constituted compliance with the law: "Thus, we find that it is not a violation of S.C. Code Ann. § 37-10-102 for a lender to use a separate piece of paper to ascertain a borrower's preferences of legal counsel and hazard insurance, rather than including a preference statement on the first page of the credit application." Id. at 87, 473; see also Tilley v. Pacesetter Corp., 333 S.C. 33, 508 S.E.2d 16 (1998). The Davis opinion does not stop with the "clear and prominent" disclosure language. Davis goes on to say: "necessary to ascertain the borrower's preference as to legal counsel employed in all matters relating to the closing of the transaction."⁴ Id. at 86, 472.

The affidavit of AGF lawyer, Mary M. Caskey, dated January 12, 2011, presents a different issue regarding the form. The Caskey affidavit questions what form was utilized within the Class. More than a decade earlier, in 1997, AGF's Rule 30(b)(6) deponent Jerry Ridenhour was called to testify about "any and all forms in use since July 1, 1982" to ascertain the attorney preference. ROA 1074. The forms produced by Defendant in response are attached to the Ridenhour deposition. ROA 1079-1082.

It appears that American General's lawyer in 2011 is attempting to counter the 1997 deposition response of AGF's 30(b)(6) witness. However, American General cannot vary or

⁴ Davis was a matter before the Supreme Court on certified questions from the United States District Court. Davis was limited to the narrow question of whether or not the Consumer Affairs' form met the requirements of the attorney preference statute. The choices of "None" (no attorney) cited by AGF is not found in the Davis opinion and was not a question certified to the Supreme Court by the Federal District Court.

contradict its two Rule 30(b)(6) depositions with other depositions and later affidavits. Rainey v. American Forest and Paper Ass'n, 26 F. Supp. 2d 82 (D.D.C. 1998); United States of America v. J.M. Taylor, 166 F.R.D. 356 (M.D.N.C.) *aff'd* 166 F.R.D. 367 (1996). The Court explained in Rainey that “[b]y commissioning the [30(b)(6)] designee as the voice of the corporation, the Rule obligates a corporate party ‘to prepare its designee to be able to give binding answers’ in its behalf.” 26 F. Supp. 2d. at 94. The Court concluded, “[t]his eleventh hour alteration is inconsistent with Rule 30(b)(6), and is precluded by it.” Id. at 95. After the Rule 30(b)(6) deposition is concluded, the corporate deponent may not turn to other deposition testimony and witnesses to reevaluate and then restate its corporate position.

#11
KR
In any event, a detailed examination of the Caskey affidavit reveals that it need not be in conflict with the Ridenhour Rule 30(b)(6) testimony and affidavit. It is not clear from the Caskey affidavit that the 74 files in question are contained in the Class. Caskey states that she reviewed “loan files for a selected list” in the Watterson-Prime Database. While the database has never been made a part of the record, there is reference in the record that it is comprised of 7,395 files or loan transactions. Ex. 1 to Teel Supp. Aff., 12/21/2010 (Mr. Ridenhour suggests an even higher number – “approximately 8,500” Ridenhour Aff., ¶44, 9/27/2010). Ms. Keeper in her affidavit states that, at the same time that she found that a total of 5,497 files fell within the Class definition, she also excluded a number of other files from the Class (“Consistent with the Class definition” a number of files “were excluded” Keeper Aff., ¶10, ROA 1504, SJ App 7). In other words, there are 1,898 (or more) files in the Watterson-Prime database that Ms. Keeper’s team reviewed and determined were not within the Class definition. The Caskey affidavit states that the 74 files are from a “selected list” in the Watterson Prime Database; the affidavit does not state whether the 74 files are from among the 5,497 files within the Class or from the 1,898 or more files excluded from the Class.

Furthermore, this Court has carefully reviewed the Defendant’s motion to reconsider; however, the motion does not raise any issue or point of law that was previously argued or raised to the Court that was not previously considered and it does not call the Court’s attention to a possible misapprehension of its previous argument as to the preference form.

Viewing the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party, American General, this Court concludes that there is no genuine issue of material fact as to the defective form. The Class, the

moving party, is entitled to a judgment as a matter of law on the defective form argument.

B. The Keeper Affidavit

Following Judge Hughston's initial grant of Class certification in 1998, American General, on its own initiative and at its own expense, retained an outside consulting firm to conduct an internal review of American General's loan files. The engagement was not a trivial undertaking; instead, as evinced by the report of Susan Keeper, the team leader for Watterson-Prime:

#12
PmB

5. The data collection proceeded in two phases. The first phase was performed during August, September, and October of 1998. During that time we collected data from the loan files that AGF could locate and provide to us. Fourteen team members plus myself participated in the collection. Those fourteen people included two people who were dedicated to quality control. All of the team members were hand selected by Watterson-Prime, and each had extensive experience in lending. All of them had worked either in mortgage underwriting or mortgage servicing. One of them had a law degree. All had worked either with consumer lending or with first or second mortgage lending. The two quality control team members were among the most experienced. After the other team members collected and entered the data from the files into the database, the quality control team members re-reviewed the key documents to verify that the data was collected and entered accurately.

6. The second phase of data collection was performed during March, April, May, June, and July of 1999. During this phase we collected data from a few additional files which the AGF South Carolina branches had located since the first phase. The Watterson-Prime team for this phase was comprised of the two quality control team members from the first phase and me. We performed the data collection and quality control for this phase in the same way that we performed it during the first phase.

Affidavit of Susan Keeper, 12/1/1999, ROA 1505, SJ App 7.

The results of the review and Ms. Keeper's conclusions are contained in the Keeper Affidavit which was submitted to Judge Williams by American General in December 1999. Keeper Aff., ROA 1545. That affidavit identifies 5,497 real-estate-secured loan transactions from more than 40 branch offices that fit the Class definition. Keeper Aff., ROA 1503, cited in Williams Decertification Order at 6, ROA 0018. American General was able to locate 4,959 loan files involving 8,328 individual borrowers, Id., ROA 0018, while 538 loan files

"remain unaccounted for." See Williams Decertification Order, ROA 0018. Of the loan files located, American General identified 1,713 files that contained no Preference Form or any other information demonstrating any compliance with the Consumer Code. Id., ROA 0018. Approximately 2,491 files contained Preference Forms without dates and 755 files contained Preference Forms that were dated at a time not in compliance with the preference statute. Id., ROA 0018.

Ms. Keeper in her affidavit states that in August of 1998, Watterson-Prime was engaged by American General's law firm to collect data from several thousand loan files from all of American General's in South Carolina:

Specifically, Watterson-Prime was asked to confirm that the loans were secured by real estate (or in the case of mobile home financing, that some document in the file could be interpreted to suggest that real estate was involved in the transaction), and to collect certain data from the documents contained in those loan files.

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RB
Keeper Aff., ¶13, ROA 1504, SJ App 7. Further, Ms. Keeper in her affidavit states:

10. Out of 3,246 loans containing a preference form, 2,482 preference forms were signed, but not dated (representing 4,200 borrowers), and 751 were signed and dated (representing 1,267 borrowers). Consistent with the class definition, loans with preference forms dated the same date as the application date and closed before May 30, 1996 were excluded. Similarly, loans with preference forms dated within three days after the application date and closed on or after May 30, 1996 were also excluded.

Keeper Aff., ¶10, ROA 1504, SJ App 7.

The Keeper Affidavit concludes that 5,497 loan transactions fall within the Class definition first approved by Judge Hughston in 1998 and adopted by the Supreme Court in 2009. Ms. Keeper "confirmed" that 5,497 loans were secured by real estate and that there was no evidence that the preference was provided at the time of credit application. The affidavit was voluntarily submitted to the court in 1999 – more than a decade ago – to assist American General in its argument for decertification of the Class. Cottingham Aff. ¶14. The affidavit presumably was intended to demonstrate the many variables among the Class Members and thus defeat Class treatment. In the Circuit Court before Judge Williams, American General was successful. Decertification Order, ROA 0013, 0018. Now, however, the Supreme Court has reversed the rulings of Judge Williams and, quoting extensively from Judge Hughston, has reinstated Judge

Hughston's 1998 rulings on class representatives and on the definition of the class that the two debtors represent.

Neither Judge Hughston nor the South Carolina Supreme Court chose to delve into the range of various subdivisions that the Keeper team identified in its analysis of the transactions within the class. Indeed the only "subset" of the Class is the one arising from the distinction between loans closed before May 30, 1996 and those closed on or after May 30, 1996 – a distinction dictated by the General Assembly's 1996 amendment of the preference statute and clearly set forth in the class definition and utilized by Ms. Keeper in her affidavit. SJ App 1.

The only other question is the number of debtors embraced in the 538 missing files. This has been addressed in the uncontroverted affidavit of Frances W. Burns, dated September 27, 2010 ("Burns Affidavit"), in which Ms. Burns, utilizing a list prepared by American General containing details of the 538 missing files, tabulated a total of 829 debtors.

#14
PnB
Accordingly, this court finds that there are 9,157 members of the Class. These are the 9,157 debtors or borrowers involved in the 5,497 loan transactions ("files") identified in the Keeper Affidavit and further clarified in the Burns Affidavit. It is possible that some individuals are members of the Class more than once: a single individual could have been involved in two or more loan transactions with American General. Several of these are identified in the Burns Affidavit. However, this does not reduce the size of the Class as membership in the Class is determined by the number of individual violations of the statute.

The Keeper Affidavit is an admission under Judge Williams' unappealed Order, ROA 0035. No appeal was taken from that ruling and it is now the law of the case. Cf. Collins Entertainment, Inc. v. White, 363 S.C. 546, 556, 611 S.E.2d 262, 267 (Ct. App. 2005) ("We find Appellants cannot now complain of being prejudiced . . . because they could have raised the issue before Judge Baxley"), citing State v. Brannon, 341 S.C. 271, 275, 533 S.E.2d 345, 347 (Ct. App. 2000); cf. Rule 36(b), SCRCP.

Viewing the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party, this court concludes that there is no genuine issue of material fact as to the membership of the Class and it is clear that the Class, the moving party, is entitled to a judgment as a matter of law on the Keeper affidavit argument.

C. The Class Representatives (the Named Plaintiffs)

The members of the Class are represented by Lois King and Deloris Sims, referred to as the "Named Plaintiffs" or the "Class Representatives." Each was found to be an adequate representative of the Class by Judge Hughston: "... the named Plaintiffs are certainly adequate to represent the interests of the class." Certification Order, ROA 0008. The Supreme Court agreed and specifically approved "the adequacy of King and Sims as class representatives." King, 386 S.C. at 91, SJ App 2.

1. Lois King

In the matter of Lois King, it is undisputed that American General never – at any time – ascertained Ms. King's preferences as to an attorney. Rather the argument regarding King has always focused on whether the King loan came within the purview of the attorney preference statute. American General's continuing position is that it never took a lien on Ms. King's real estate.

#15
Pn B

More than 12 years ago, Judge Hughston made the unequivocal finding that the King loan was a loan secured by real estate: "Each of the putative class representatives [King and Sims] in this action obtained consumer loans from AGF secured by liens on real estate." Certification Order, ROA 0002. Five years later, Judge Williams disagreed and, finding "it is undisputed that [King's] loan was not secured by a lien on real estate," granted American General's summary judgment motion. Summary Judgment Order, ROA 0040. Judge Williams had ruled:

The Court concludes that AGF is entitled to summary judgment because there is no genuine issue of material fact as to whether King's loan was secured by a lien on real estate. Construing the evidence in the light most favorable to King, it is undisputed that her loan was not secured by a lien on real estate, and consequently her loan did not trigger the attorney preference statute, S.C. Code Ann. § 37-10-102.

Order, 08/20/2003, ROA 0040.

Applying the summary judgment standard, the Supreme Court reversed: "We make no finding on the matter of liability and merely hold that the record before us does not warrant summary judgment in favor of American General." King, 386 S.C. at 92, SJ App 2. The Supreme Court also aptly observed: "We further point out that it appears the King loan was

initially intended to be secured by her real estate, and the law required the attorney preference disclosure at the time of application.” Id.

Lois King and her husband Ralph Void applied for a loan on December 8, 1995. On its face the application contains information confirming that the applicants own land consisting of .78 acres in Eutawville. ROA 1105. Both borrower and lender contemplated a real-estate-secured transaction:

- The borrower. Ms. King testified that American General asked her at the time of her application whether she owned land “because they were asking for collateral.” ROA 1294.
- The lender. John Darby, American General’s assistant branch manager, was the primary AGF employee who worked on the King loan. ROA 1526-1527 (Darby), ROA 1036 (King), ROA 1414 (Keller). Darby’s uncontroverted affidavit expressly states that American General “would have to take a mortgage on real property in order to make the requested loan to Lois King.” ROA 1527, 1529. Darby further stated in his affidavit: “It was AGF’s intention to take a security interest – a lien – in Ms. King’s real estate.” ROA 1527, 1529.

American General’s documentation for Lois King’s loan is consistent with the affidavit of John Darby. Beginning with the King loan application and continuing through AGF’s post-closing review of its documents, American General’s own documents challenge AGF’s claim that the King loan was only intended to be an unsecured loan transaction.

1. December 8, 1995. In the file is a completed “Real Estate Loan Checklist.” The earliest entry is December 8 indicating that the Settlement Costs booklet and Good Faith Estimate of Settlement Charges were sent on December 8. There are also references to ordering title report and to personal inspection of real estate on December 15. To this is added insurance verification on December 26. ROA 1103.
2. December 8. The loan application specifically notes that the applicant “owns land.” ROA 1105.
3. December 15. American General employee inspects King’s real estate near Eutawville (“Personal Inspection of R/E”). ROA 1103.
4. December 15. American General obtained a commitment for title insurance covering King’s real estate near Eutawville. ROA 1103, 1457-1460.
5. December 20. Twelve days after application, on December 20, American General’s computer print-out refers to the loan as a real-estate loan. ROA 1112.
6. December 20. AGF sent King a letter saying: “If you obtain this loan, the lender will have a mortgage on your home.” ROA 1455.
7. December 26. The application also contains a written approval notation that the King

- loan "can be made in the following manner: 12-26-95 (date of loan closing) – OK \$7500 using land & mobile home." ROA 1106.
8. December 26. American General employee John Darby inspects King's real estate near Eutawville ("Personal Inspection of R/E"). ROA 1103.
9. December 26. At the conclusion of the closing on December 26, American General provided King with a Notice of Right to Cancel and King acknowledged receipt of this notice by signing it. This Notice of Right to Cancel is required by federal law and is applicable only in real-estate-secured loan transactions. The rescission notice states: "[y]ou are entering into a transaction that will result in a mortgage or deed of trust on your home." ROA 1456.
10. January 2, 1996. As part of the follow-up to the closing, there is a document entitled "AGF Loan Documentation List." Dated January 2, 1996, the section under the heading "Minimum to be completed for real estate secured," has the initials "JD" (John Darby) appearing beside title search, mortgage and RESPA documents.
11. January 5. Three days later, on January 5, Branch Manager Justice also signed off on the loan documentation. ROA 1104.

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Viewing the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party, this court concludes that there is no genuine issue of material fact and that King, the moving party, is entitled to a judgment as a matter of law.

2. Deloris Sims

Ms. Sims executed a note and mortgage in the amount of \$9,262.46 to American General on May 26, 1995, at an interest rate of 25%. With her new real-estate-secured 25% loan, she paid off her then-existing unsecured 17.99% loan. The amount borrowed included involuntary unemployment insurance (\$652.46) and credit life insurance (\$1,553.00) for total insurance premiums of \$2,205.46 or 23.8% of the amount borrowed. She executed an attorney-insurance preference form which is not dated and which does not indicate her insurance agent preference. Sims Trial ROA 0169, RIdenhour Depo. ROA 1071-1072. She applied for the loan several weeks before the closing. Sims Trial ROA 0160- 016, ROA 0150. Ms. Sims testified that American General did not ascertain her preference at the time of application and that she signed the attorney preference form at the closing after 5:00 p.m. on a Friday afternoon. Sims Trial ROA 0169-0170. Ms. Sims testified that she had never visited the American General loan office prior to the closing on Friday evening, May 25, 1995. ROA 0161- 0162. Section 37-10-102(a) required the lender to ascertain the attorney preference at the time of the application, as

confirmed by the Supreme Court decision in this case.

After reviewing multiple memoranda and depositions as well as a two-day trial in 2007, ROA 0093-0640, this court views the Sims situation in much of the same light as did Judge Williams in January 2003:

With regard to the loan transaction with Sims, AGF admitted at the [12/16/2002] hearing that the undated Preference Form in the Sims loan file was signed at the loan closing. Thus, the only evidence before the Court indicates that the preference form was presented to Sims at the time of the loan closing. There is no evidence before the Court that AGF attempted to ascertain Sims's preferences at the time of application or at any other time prior to the closing.

Order, 01/10/2003 ROA 0038.

#B
PnB
In the months following the above Order of Judge Williams, American General produced arguments about "habit" and AGF's employee Carolyn Gibson's procedures so that Judge Williams ultimately vacated his grant of Partial Summary judgment. ROA 0043-0045. Four years later, the Sims matter was tried to a jury. Eleven jurors found that the disclosure was "made by American General to Ms. Sims on May 26, 1995 the day of the closing" while one juror found that the disclosure was "before May 26, 1995." ROA 0640. American General made no attempt to prove at trial that the Sims' preference disclosure was made at the time of credit application. The Sims' trial verdict was vacated by the South Carolina Supreme Court:

. . . the trial court impermissibly entangled the concepts of timeliness and substantial compliance. It was error to instruct the jury on substantial compliance with respect to the timing element of the attorney preference disclosure. As a matter of law, providing the attorney preference disclosure after the completion of the credit application violated section 37-10-102. This prejudicial error is clear in the inconsistent jury verdict forms. Accordingly, we reverse due to the trial court's error of law in permitting the timing element in section 37-10-102 to be satisfied by substantial compliance.

King at 92, 687 S.E.2d at 326, SJ App 2.

All the evidence related to Ms. Sims' specific transaction as well as any inference that can be reasonably drawn from that evidence can only lead to a conclusion that the attorney preference form was presented to and signed by Sims after credit application. Arguably counsel for American General have conceded that Ms. Sims signed its form at closing. ROA 0831-0923.

The Supreme Court ruled that such a scenario was unlawful under the Code.

#19
PMB

It is undisputed that the Sims application is dated April 19, 1995. ROA 0565. Carolyn Gibson admits Ms. Sims initially applied for the loan by phone. ROA 0278-0279. At trial, Ms. Gibson testified she had no recollection of Ms. Sims or the Sims transaction, ROA 0277. In her deposition, she testified that her "procedure" would have been to require the customer to come in and sign the attorney preference form at the same time she signed the RESPA documents. ROA 1338. The RESPA documents include Good Faith Estimate (ROA 570) and Servicing Transfer Disclosure (ROA 571) and are required by law to be signed within three days of the time of the application. ROA 1325-1326. Gibson then testified that if the customer did not come in within three days she would void the application and have the customer make a new application. ROA 284. There is no evidence of any credit application other than the April 19, 1995 copy contained in Ms. Sims' file. ROA 1342-1343.

The undated attorney preference form of Sims was not signed at the time of application as required by the statute and the Supreme Court. In fact, Sims' RESPA documents are all signed by Sims and Gibson on the date of closing, May 26, 1995, ROA 570- 571. Therefore, if Carolyn Gibson followed her normal routine (i.e. habit) of having the attorney preference signed at the same time as RESPA documents, the undated attorney preference form was signed at closing. ROA 288. This is consistent with statements by counsel for American General. (ROA 0831 and 0923). Plaintiffs' counsel have pointed out and it is undisputed that Mrs. Sims's loan was closed by a non-attorney employee of AGF, Ms. Gibson.

If AGF presented an attorney preference form dated April 19, 1995 and signed at the time of credit application, Plaintiff would have no claim. As with most of American General's attorney preference forms, the Sims' form is undated and the form itself contains no place for a date to determine compliance.

American General has suggested that Ms. Sims's preference was ascertained at some time prior to closing. However, there is no evidence to support a claim that the preference was ascertained at the time of application as required by law. Viewing the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party, this court concludes that there is no genuine issue of material fact and that Sims, the moving party, is entitled to a judgment as a matter of law.

D. Discussion of American General's Responses

This court has carefully read and examined each of the Affidavits submitted by American General. This court is mindful of its obligation to determine if the proffered Affidavits raise issues of material fact that would preclude this court from granting plaintiff's Motion for Summary Judgment. The submitted Affidavits implicate the defense asserted by American General that it is entitled to the protections afforded to creditors in the Consumer Credit Code. Specifically, American General asserts that it may avoid all liability in this case under the terms of SC Code Ann. Section 37-10-105(B) which states:

No creditor may be held liable in an action brought under this section for a violation of this chapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

S.C. Code Section 37-10-105(B).

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PB
In this case, Plaintiffs assert that American General failed to timely ascertain from its consumer debtor borrowers their individual preference as to the identity of the legal counsel "... that is employed to represent the borrower in all matters of the transaction relating to the closing of the transaction." SC Code Ann. Section 37-10-102 (a). As a result, this court must be guided by the interpretation of the law established by the Supreme Court in this case. King, 386 S.C. at 82. This court must then determine if the proffered affidavits establish "by a preponderance of evidence" that, even if Plaintiffs have established a violation of law for Ms. King and Ms. Sims, (1) American General did not intend to violate the provisions of the Code and, even more important, (2) American General established "procedures reasonably adapted to avoid the error," and (3) American General maintained those procedures. S.C. Code Ann. § 37-10-105(B).

In determining whether American General complied with the provisions of the preference statute, the Supreme Court expressly adopted the Class Certification Order of Judge Hughston and the Administrative Interpretation 10.102(8)-8302 (October 11, 1983) (the "A.I.") SJ App 5, issued by the South Carolina Department of Consumer Affairs. The A.I. and the compliance form were issued in response to requests from the lending community seeking guidance on compliance.⁵ In the King decision, the Supreme Court adopted both the reasoning and legal

⁵ This is the second time the Supreme Court affirmed the Department of Consumer Affairs' interpretation of §37-10-102(a). See also Davis, 326 S.C. 83.

construction of the preference statute stated in the 1983 A.I. King, 386 S.C. at 89-90. The A.I. provides a clear compliance roadmap of how a creditor can comply with §37-10-102(a) and provides a creditor with a preference form to use to ensure compliance with the Code. The form also serves as an aid to the Court in assessing the level of lender compliance. Strongly rejecting Defendant's "substantial compliance" argument, the Court held that the attorney/insurance preference must be ascertained contemporaneously with the credit application. King, 386 S.C. at 89. The Court ruled, if a lender does not timely ascertain the preferences of a consumer borrower at the time of credit application, any later American General disclosure and ascertainment of a debtors preferences is untimely as a matter of law. King, 386 S.C. at 91. The Court noted that to do otherwise would undermine the legislative purpose of the preference statute "to protect borrowers". King, 386 S.C. at 89-90.

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PWB
First, this court notes that American General chose to use an undated preference form that it drafted to use as its official preference compliance form. This court has not identified any evidentiary basis in the record or in the proffered Affidavits that meets the Code-established standard of "preponderance of evidence" as to why an American General undated compliance form meets the required statutory standard for timely Code compliance. Further, American General argues that a signed and dated form is not the only way to ascertain a borrower's preference as to an attorney for closing a real-estate-secured loan. Defendant's Motion to Reconsider and to Alter or Amend the Court's Interim Order on Summary Judgment, 8/8/2011, p. 26, n. 10. However, American General offers no evidence of how they may have complied with the statutes at issue without using a signed and dated form, and this Court finds the argument unmeritorious.

Given the "bright line" compliance timing standard established and required by the Supreme Court in this case and in the 1983 A.I., this Court has reviewed the written compliance procedures proffered by American General through its 30(b)(6) witness, Mr. Ridenhour. ROA 1076, 1078. The official American General compliance procedures require that "[t]he customer must check the appropriate box, enter the appropriate names of attorneys or agents, and sign the form prior to completion of the rest of the Application for loan." ROA 1076.

The court has also located a second American General preference compliance procedure in the record dated "3/20/96." ROA 1078. That loan closing and preparation of documents form references "FIRST PAGE MORTGAGE LOAN APPLICATION" and states that:

- a. This form then becomes the first page of the Application for Loan.
- b. The customer must check the appropriate box, enter the appropriate names of attorneys or agents, and sign the form prior to completion of the rest of the Application for Loan.

ROA 1078 (emphasis added).

American General established a very clear written compliance process to provide its consumer borrowers with a timely written disclosure and the opportunity to express their Code-established rights to name both the attorney and insurance agent to provide the required legal services and insurance associated with a real-estate-secured-loan from American General. This Court must determine whether the written requirements were, in fact, followed and maintained on a consistent and uniform basis.

#22
PAB
American General's argument and briefing before the Supreme Court and the Keeper affidavit are an admission that it ignored its own procedure. Now, through its affidavits, the Defendant attempts to characterize these 9,157 violations as random occurrences or isolated events. Certainly, as noted by the Supreme Court in oral argument, if American General's failure to ascertain Ms. Sims preference were an isolated event the safe harbor defense might apply. At oral argument, the following exchange took place:

THE COURT: So if Sims was an isolated incident, y'all would have been claiming that safe harbor provision all over the place, would you not?

MR. COTTINGHAM: We haven't claimed the safe harbor provision in any of the cases. We've only had these two -

THE COURT: Well, that's because you can't make the requirement for the safe harbor, is it not?

MR. COTTINGHAM: No. I think we can. I think we can make the requirement.

THE COURT: I wasn't born yesterday and nobody on this Court was. I can't believe, Mr. Cottingham, that if a business like yours, as long as this litigation has been pending, could claim safe harbor and get out of all these cases. Y'all would have done so.

MR. COTTINGHAM: Well, we're talking about the period starting some time before 1996. We're not talking about what's going on today.

THE COURT: Well, I understand that. That's what this whole case is about . . .

Sup. Ct. oral argument 24:14-25:11.

As a matter of law, failing to ascertain the preference of 9,127 debtors cannot qualify as a random occurrence or an isolated event. The Good-Faith exception was not intended to shield such flagrant widespread violations. The Keeper affidavit is an admission on the part of AGF. Affidavits of AGF's employees stating that they did timely give the preference cannot contradict AGF's admission. Any assertion by an AGF employee that they tried to comply with the statute by following AGF's procedures carries no weight in light of 9,157 violations. Moreover, the affidavits do not necessarily contradict Keeper since it can be inferred that AGF may have on occasion timely ascertained the preference.

#23
P.B.

This Court notes that American General required, in both of the above-referenced compliance procedures, that the customer "must check the appropriate box, enter the appropriate names of attorneys or agents, and sign the form prior to completion of the rest of the Application for Loan." In light of the compliance standard established by American General, this court again reviewed the proffered American General employee affidavits to determine if those affidavits establish by a preponderance of evidence that American General maintained and regularly followed the required steps it established for Code compliance. This Court has determined that the proffered affidavits do not establish the application of any consistent compliance procedures by American General to "avoid the error" of untimely preference disclosure and the related ascertainment from the "customers" of their attorney and insurance agent preferences. Several affidavits reference that the employee "believes" that a preference was given but do not state exact time that the lost or misplaced preference form might have been provided to the consumer. Notably, there is no reference to American General's requirement that the consumer "sign the form prior to the completion of the rest of the Application for Loan." Indeed, the affidavits generally reference various times after initial credit application before the consumer was even afforded the opportunity to review the undated preference form created by American General. This Court is not persuaded that the essentially "upon information and belief" declarations of American General employees regarding various loan circumstances rises to the minimal level necessary to defeat a motion for summary judgment.

Several of the employee affidavits attempt to suggest to this Court that a consumer was provided with a preference form, if at all, sometime during the process of American General making real-estate-secured loans and that such conduct was consistent with American General

#24
PMB

training. None of the affidavits state that the specific attorney was selected by the consumer borrower. Moreover, none of the affidavits state that the preference was ascertained in an timely manner as required by the statute and the Supreme Court. Most affidavits reflect that the employee did not remember the specifics of a particular loan transaction and simply state they "believed" certain actions were taken. Some affidavits confirm that a preference form was finally provided and signed at some time after the credit application. None of the Affidavits address any ongoing document retention policies of American General so that Defendant could, in fact, demonstrate Code compliance if there were a later dispute or missing documents. Those affidavits are consistent with the position that American General presented to the Supreme Court, namely, that the lender had no legal duty or obligation to "ascertain the borrower's preference before the day of closing, much less a certain number of days in advance." Resp. Br. at 20. American General attempts to ignore that the Supreme Court completely rejected American General's compliance position by stating:

The timing feature of section 37-10-102 imposes a bright-line approach which is manifestly at odds with the notion of "substantial compliance." To permit a construction of section 37-10-102 as sanctioning the lender's furnishing the borrower with *the attorney preference disclosure after the application was completed* would undermine the legislative purpose "to protect borrowers." *Davis*, 326 S.C. at 86, 484 S.E.2d at 472; *see also McClanahan v. Richland County Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute."). And the suggestion that the attorney preference disclosure may be made at closing borders on frivolity."

King, 386 S.C. at 91.

The preference statute, as construed by the Supreme Court, requires a series of consumer protection disclosures that begins on the date of application. The bright-line approach requires dated documents to establish Code compliance, as demonstrated by the dated compliance form created by the Department of Consumer Affairs or a substantially similar form. The official American General written compliance procedures are clear and unambiguous. ROA 1076, 1078. In order to determine whether AGF maintained "procedures reasonably adapted to avoid the error", the Court has reviewed the affidavits submitted by American General. At least a scintilla

of such evidence is required to indicate that it consistently followed its own operating procedures to "avoid the error" of not timely ascertaining the preferences of consumers who obtained a real estate secured loan.

Therefore, to defeat the pending summary judgment motion American General must point to some evidence that the undated attorney preference form, Trial Ex. 4, ROA 0568, complies with all required disclosures and was presented "prior to or contemporaneously with the application form" as stated in the 1983 A.I. endorsed by the Supreme Court. American General has failed to make the requisite showing to the Court to avoid summary judgment. The Court also notes that several of the proffered employee affidavits are not consistent with the Rule 30(b)(6) testimony of Mr. Ridenhour regarding the required steps established by American General for actual preference compliance. This court concludes that the employee affidavits submitted by American General fail to set forth the facts sufficient to defeat the "defective form" and "Keeper affidavit" bases of Plaintiffs' summary judgment motion.

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The Court has also carefully read and examined the affidavits of attorneys who closed loans for American General. The attorney affidavits provide no comfort to the Court and reflect a somewhat disturbing and cavalier view of the attorney preference statute. Many of the affidavits contain very similar statements to the effect that the attorney arrived at the loan closing and advised the borrower(s) that he would be closing the loan and then asked if the borrower(s) wanted to proceed with the closing. This is the very same compliance approach argued by American General and strongly rejected by the Supreme Court. King, SJ App 2.

None of the attorney affidavits even address how the individual attorney was selected. Nor do any of the attorney affidavits indicate who selected the attorney. Nor do any of the attorney affidavits indicate the specific date when American General ascertained the preference of the consumer borrower. Yet the ruling by the Supreme Court was clear: "Timing is the central issue in this case." King, SJ App 2.

Advising borrowers at a loan closing that they could either proceed with the attorney selected by American General or delay the closing to receive the proceeds of the loan for some period of time until another attorney was actually selected by the borrower is exactly what the 1983 A.I. addressed and rejected as proper compliance procedure. The A.I. concluded that the General Assembly intended that the consumer be afforded the right to express their attorney and

insurance agent preference before they were "inundated" with other loan-related documents. A loan closing is a document-intensive procedure in which a consumer borrowers are placing their real property at risk if there is a later default. Any newly selected attorney would need sufficient time to prepare the required closing documents and conduct a review of documents with the borrowers at a later closing before the consumer could obtain the loan proceeds they sought in the first place. The fact that the attorney affidavits claim that no consumers objected to proceeding with the loan closing is hardly surprising. The consumers decided, as a practical matter, that they needed the loan proceeds then and were willing to waive their preference rights under the Code. Such conduct and results are in direct conflict with S.C. Code Ann. § 37-1-107(a) which states that a "debtor may not waive or agree to forgo rights or benefits under this title."

#26
P.S.
The Code requires that the borrower's preference be determined . . . and determined at a time when the attorney is still capable of rendering effective assistance to the borrower. The possibility of the selection of an attorney being put off until the closing was discussed and rejected in State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987). The Supreme Court, after considering and rejecting the theoretically acceptable "fix," focused instead on the realities and pressures surrounding a real-life closing:

. . . in Coffee County Abstract and Title Co., supra, the title company was permitted to conduct real estate closings with the restriction that no legal advice or opinions be given. Chief Justice Torbert, concurring, gave instructions as to how such a closing should be handled: "If the parties to the transaction raise a legal question at the closing, the title company should stop the proceeding and instruct them to consult their attorneys." 445 So.2d at 857.

We agree this approach, in theory, would protect the public from receiving improper legal advice. However, there is in practice no way of assuring that lay persons conducting a closing will adhere to the restrictions. One handling a closing might easily be tempted to offer a few words of explanation, however innocent, rather than risk losing a fee for his or her employer.

292 S.C. at 433-34, 357 S.E.2d at 19.

Buyers Services addressed the unauthorized practice of law eight years before the American General loan closing for Plaintiff Sims and fifteen years after the Code was amended to protect consumers in real estate transactions. But in the broader perspective, that decision is a

clear statement of the Supreme Court's continuing view of the relationship between the general public - the consumers of the Consumer Protection Code - and the legal profession. The Court's concern is "not for the economic protection of legal profession. Rather, it is for the protection of the public from the potentially severe economic and emotional consequences which may flow from the erroneous preparation of legal documents or the inaccurate legal advice given by persons untrained in the law." State v. Despain, 319 S.C. 317, 320, 460 S.E.2d 576, 578 (1995), citing Buyers Service 292 S.C., 357 S.E.2d. The Supreme Court has not deviated from this position.

#27
P.B.

The Court concludes that American General has not established a dispute of a material fact necessary to defeat the Plaintiff's Motion for Summary Judgment. The affidavits submitted by American General, including the Keeper Affidavit, serve to confirm that American General itself does not know when it provided the required preference form so that it could timely ascertain the specific preferences of its prospective borrowers. The American General affidavits confirm the data and conclusions contained in the Keeper Affidavit which constitutes an admission under the ruling of Judge Williams, ROA 0035. Based on the Court's review of the entire record in this matter, the decision by American General to use an undated preference "compliance" form, the compliance claim by American General to the Supreme Court that it had no legal duty or obligation to "ascertain the borrower's preference before the day of closing, much less a certain number of days in advance," Resp.Br. at 20, confirms that American General did not utilize or apply the correct Code compliance timing standard in the consumer loans now before the Court.

In summary, the employee affidavits submitted by American General don't provide evidence that:

- The employee in any loan transaction complied with the AGF policy that a consumer be provided with a preference form "prior to or contemporaneously with the Application Form."
- The employee in any real-estate-secured loan "prior to or contemporaneously with the Application Form" ascertained the identity of the specific attorney selected by the debtor.
- The employee required the consumer to fill out and sign the preference form "prior to completion of the Application for Loan" as required by AGF's written policies.
- The employees were trained to provide the preference form "prior to or contemporaneously with the Application Form."

- Establish that American General consistently followed its written compliance requirements in its South Carolina branches.
- Confirms that American General started with a new loan application when a loan changed to a real-estate-secured loan as stated in the Rule 30(b)(6) deposition of Mr. Ridenhour.

Additionally, in summary, the attorney affidavits submitted by American General don't provide evidence that:

- The borrower selected that attorney.
- That attorney had been selected by the borrower to represent the borrower in all matters of the transaction relating to the closing.
- The attorney confirmed that American General timely ascertained the preferences of the borrower before taking any further action.
- They were chosen by the borrower at the time American General took the loan application.
- Address the use of an undated preference form.
- Address how the attorney would confirm to the borrower that the requirements for the preference statute had been met by American General at the time of credit application.

#28
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American General made the decision to abandon its own written preference compliance standard before the Supreme Court and that approach was rejected by the Court. This Court will not ignore the rulings of the Supreme Court or the "wait to closing" compliance arguments made by American General to the Supreme Court.

American General asserts that it may avoid all liability in this case under the terms of S.C. Code Ann. § 37-10-105(B) which states:

No creditor may be held liable in an action brought under this section for a violation of this chapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

In order to assert this defense American General must be able to prove its violations of the statute were (1) not intentional; (2) resulted from bona fide error; (3) notwithstanding the maintenance (4) of procedures reasonably adapted to avoid the error. American General asserts it has presented at least a scintilla of evidence that it is entitled to this defense. The Court finds as a matter of law that Defendant has not presented any evidence showing it is entitled to this defense.

According to testimony of AGF Rule 30(b)(6) deponent, Jerry Ridenhour, American General knew how to comply with the attorney preference statute. In his deposition, Ridenhour produced compliance procedures requiring that "The customer must check the appropriate box, enter the appropriate names of attorneys or agents, and sign the form prior to completion of the rest of the Application for Loan." ROA 1076. Ridenhour also produced a second American General compliance procedure in the record dated "3/20/96." ROA 1079. That loan closing and preparation of documents form refers to the "FIRST PAGE MORTGAGE LOAN APPLICATION" and states that:

- a. This form then becomes the first page of the Application for Loan.
- b. The customer must then check the appropriate box, enter the appropriate names of attorneys or agents and sign the form prior to completion of the rest of the Application for Loan.

#29
PMB
ROA 1078. In spite of these procedures, the Keeper Affidavit by its very terms shows that there are more than 5,000 transactions where preference of the obligors was not ascertained at the time of application.

American General asserts this noncompliance is the result of an unintentional *bona fide* error. The Consumer Protection Code is helpful in addressing claims of bona fide error. For example, S.C. Code Ann. § 37-23-60 states: "Examples of a bona fide error include clerical, calculation, computer malfunction and programming, and printing errors. An error of legal judgment with respect to a person's obligations pursuant to this article is not a bona fide error."

American General argued before the Supreme Court that "it was not obligated to ascertain the borrower's preference before the day of closing" American General Br., at pp. 19-20. The Court found this argument bordered on frivolity. American General cannot rely on its legal judgment regarding what the preference statute requires to establish a bona fide error, especially when its Rule 30(b)(6) deponent testified that he knew the preference had to be obtained at the time of application. Dep. of Ridenhour.

American General could have easily adopted the attorney preference form prescribed by the 1983 A.I. of the Department of Consumer Affairs. Instead, it chose to use a form that did not evidence the timing of disclosure, even though it knew the preference had to be obtained at the

time of application. This failure cannot be a bona fide error as, at best, it is based upon a legal misinterpretation of the statute.

V. Legal Issues

Before the question of an appropriate penalty can be addressed, there are two legal issues that have been presented that must be resolved. First, there is the question of whether the penalty statute applies on a "per loan" or a "per borrower" basis. In addition, there is the question of whether prejudgment interest is appropriate in this case.

A. File vs. Debtor

#30
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The Court rejects Plaintiffs' request for an award of penalties on a per borrower basis. Other courts and arbitrators have rejected Plaintiffs' position that it should be per borrower. See Green Tree Financial Corp. v. Flemings, Richland County Case No. 96-CP-40-4282; Bazzle v. Green Tree Financial Corp., Dorchester County Case No. 97-CP-18-258; and Lackey, et al. v. Green Tree Financial Corp., et al., Barnwell County Case No. 96-CP-06-073. Cases that have awarded penalties pursuant to S.C. Code § 37-10-105(A) have done so on a per transaction basis. See Flemings, Order Awarding Damages on Defendants' Counterclaim at 5 (Feb. 10, 2002); Bazzle, Final Order and Award in Arbitration, at 5-6 (July 24, 2002); and Lackey, Final Order and Award in Arbitration, at 5-6 (July 24, 2002). See also Hearing Def. Ex. 1 at 32-33. The Court agrees.

S.C. Code Ann. § 37-10-105(A) provides: "If a creditor violates a provision of this chapter, the debtor has a cause of action to recover actual damages and . . . a penalty in an amount determined by the court . . ." "Debtor" is defined by S.C. Code Ann. § 37-1-301(14) as "any person who is an obligor in a credit transaction, including any cosigner, comaker, guarantor, endorsee, or surety." As Judge Newman explained in Flemings:

The term "debtor" as used in the Attorney Preference Statute is singular and all-inclusive. It includes co-debtors, guarantors, and others. To adopt the interpretation urged by [Plaintiffs] would lead to an absurd result. The statute also says the debtor is entitled to an award of actual damages. If damages are incurred by co-debtors, the damage would be joint and several. It is not reasonable to suggest double or triple awards of actual damages depending on the number of co-debtors.

Flemings, Order Awarding Damages at 5 (emphasis added). See also Bazzle, Final Order at 5; Lackey, Final Order at 5 (“any penalty assessed by the arbitrator for violations of the preference statute [will] be on a per-transaction basis”).

The Court also agrees with Judge Newman’s observation that “the argument for multiple penalties for one transaction is contrary to the express policy of the Consumer Protection Code to make South Carolina’s practices consistent with [the] Federal Truth in Lending [Act].” Flemings, Order Awarding Damages at 5 (citing S.C. Code Ann. §§ 37-1-102(f) and 37-1-302)). Since the enactment of the Consumer Protection Code, TILA has been amended to clarify that courts may award only one penalty per transaction. See 15 U.S.C. § 1640(d) (providing that “[w]hen there are multiple obligors in a consumer credit transaction or consumer lease, there shall be no more than one recovery of damages under subsection (a)(2) of this section for a violation of this subchapter.”). Nevertheless, even before the statutory amendment, TILA’s language was similar to that found in S.C. Code Ann. § 37-10-105 and the Fourth Circuit Court of Appeals interpreted the statute to provide for only one recovery per transaction:

#31
PnB

In this home improvement loan to the husband and wife, subject to their right of rescission, the creditor was required to make disclosures to each of them. Thus, the district court reasoned that each was entitled to \$1,000 as the statutory penalty. However, this neglects the fact that there was but one credit transaction, and the plaintiffs were joint obligors of that joint obligation. The Congress was careful to provide a maximum statutory penalty, and it is not to be lightly supposed that the statutory maximum is to be doubled, trebled, or quadrupled depending on the number of the joint obligors in a single consumer credit transaction.

Powers v. Sims & Levin, 542 F.2d 1216, 1219 (4th Cir. 1976) (emphasis added).⁶

Plaintiffs have not presented the Court with any contrary authority, and their reliance on Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000), and Crane v. Citicorp. Nat’l Servs., Inc., 313 S.C. 70, 437 S.E.2d 50 (1993), is misplaced. Both cases address whether

⁶ The Fourth Circuit’s interpretation is consistent with the interpretations of other federal courts. See Herrera v. First Nat’l Sav. & Loan. Assoc., 805 F.2d 896 (10th Cir. 1986) (where joint and several obligors on loan show TILA violation on disclosure statement, only one statutory penalty is recoverable); Milhollin v. Ford Motor Credit Co., 588 F.2d 753 (9th Cir. 1978), *rev’d on other grounds*, 444 U.S. 555 (1980) (husband and wife who were co-obligors on loan were entitled to only one civil penalty for transaction); Mason v. Gen. Fin. Corp., 542 F.2d 1226 (4th Cir. 1976) (same); Sheppard v. Quality Siding & Window Factory, 730 F. Supp. 1295, 1299 (D. Del. 1990) (“Despite the number of obligors or the number of disclosure violations, a creditor can only be liable for one statutory penalty for failure to disclose per transaction.”); Wise Furniture v. Dehning, 343 N.W.2d 26 (Minn. 1984) (recognizing there is only one recovery for a given credit transaction under TILA, regardless of the number of violations).

certain obligors are entitled to post-default notices of default and sale of personal property pursuant to Article 9 of the Uniform Commercial Code. The notice required under the Attorney Preference Statute is a pre-transaction notice, when co-borrowers are making one loan application – for one loan, with one disclosure form, and typically with only one attorney representing both borrowers. Brockbank and Crane are inapposite.

Based on the foregoing, the Court agrees with Judge Newman and Judge Ervin and concludes, “the proper interpretation of the Attorney Preference Statute is to assess one penalty per transaction.” Flemings, Order Awarding Damages at 5. See also Bazzle, Final Order at 5; Lackey, Final Order at 5 (“any penalty assessed by the arbitrator for violations of the preference statute [will] be on a per-transaction basis”).

B. Prejudgment Interest

#32
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The Court denies Plaintiffs’ request for prejudgment interest on the statutory penalties. Under South Carolina law, prejudgment interest is recoverable only where the amount is both demandable and liquidated. See S.C. Code Ann. § 34-31-20(A) (“In all cases . . . wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum”); Future Group v. Nationsbank, 324 S.C. 89, 101, 478 S.E.2d 45, 51 (1996) (“Prejudgment interest is allowed on obligations to pay money from the time when payment is demandable, either by agreement of the parties or by operation of law, if the sum is certain or capable of being reduced to certainty.”) Plaintiffs’ claim for statutory penalties under S.C. Code § 37-10-105 does not meet either requirement.

First, a claim must be demandable either by agreement of the parties or by the operation of law at some time “before entry of judgment.” Future Group, 324 S.C. at 101, 478 S.E.2d at 51. See also Dixie Bell, Inc. v. Redd, 376 S.C. 361, 372, 656 S.E.2d 765, 770 (Ct. App. 2007) (there is a “necessity for an agreement between the parties when there is no operation of law to make the sum demandable”); BB&T of S.C. v. Kidwell, 350 S.C. 382, 391, 565 S.E.2d 316, 320 (Ct. App. 2002) (finding that prejudgment interest was appropriate where an amount was due and payable as of a certain date); T.W. Morton Builders v. Von Buedingen, 316 S.C. 388, 399, 450 S.E.2d 87, 93 (Ct. App. 1994) (finding that a plaintiff “had the burden of establishing a stated account and the parties’ agreement, express or implied, that the account is a trust statement due at a specific point”).

In this case, Plaintiffs had no right to demand payment of the statutory penalty, even the minimum statutory penalty amount of \$1,500, before the entry of judgment in this case. No agreement existed between Plaintiffs and American General that provided a demandable amount and no statutory authority creates a right to monetary recovery for Plaintiffs without a determination of both liability and the amount of the penalty. Plaintiffs' right to demand payment of any statutory penalty arises only after the entry of judgment by the Court.

#33
P.B.

Second, a claim must be liquidated in order for prejudgment interest to be awarded. A claim is liquidated when "the sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed upon by the parties." Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 133, 631 S.E.2d 252, 259 (2006) (emphasis added). See also Babb v. Rothrock, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993) ("The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose."); Beckman Concrete Contractors, Inc. v. United Fire & Cas. Co., 360 S.C. 127, 131-132, 600 S.E.2d 76, 78-79 (Ct. App. 2004) ("liquidated damages . . . cannot be changed by the proof" and "are susceptible of being made certain by mathematical calculation from known factors"). In contrast, unliquidated damages, on which prejudgment interest is not recoverable, are "[d]amages that . . . cannot be determined by a fixed formula, so they are left to the discretion of the judge or jury." Beckman Concrete, 360 S.C. at 132, 600 S.E.2d at 79 (emphasis added).

There is no statutory guidance as to how a trial court is to assess the amount of the penalty under the Attorney Preference Statute, and as evidenced by this Order, a detailed, factual analysis must be completed to determine the amount of the penalty. Because the penalty cannot be determined with mathematical certainty and requires that proof of various factors be presented to the court for a decision, prejudgment interest on any penalty is unavailable.

Based on the foregoing, the Court finds Plaintiffs are not entitled to prejudgment interest.

VI. Penalty

This case was filed over 15 years ago. It has gone up on appeal twice and was considered two times by the Supreme Court. It is overly ripe for being concluded. As discussed above, each of the plaintiff debtors by statute is entitled to an award of a penalty of \$1,500 to \$7,500. Defendant suggests starting at the lower end, at \$1,500, and Plaintiffs recommend starting at the higher end, or \$7,500. Confronted with these conflicting positions, the Court's analysis will start

at the midpoint, at \$4,500, and this number will be adjusted taking into account the competing arguments of Plaintiffs and Defendant.

A. Applicable Statute

As noted above, the penalty statute, S.C. Code Ann. § 37-10-105, was amended in 1997, SJ App 1, and the parties have stipulated that, if a penalty is assessed, the “new” penalty shall apply. ROA 0076.

The 1997 amendment to § 37-10-105 changed the penalty structure and prohibits class actions. New § 37-10-105(A) provides, in relevant part,

If a creditor violates a provision of this chapter, the debtor has a cause of action, other than in a class action, to recover actual damages and also a right in an action, other than in a class action, to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars

#34
PnB
S.C. Code Ann. § 37-10-105 (Supp. 1997 & Rev. 2002).

B. Factors to Consider in Establishing Penalty

Defendant argues that the punitive nature of the penalties provided in § 37-10-105(A) requires the Court to follow the United States Supreme Court’s decision in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996). As Judge Newman explained in Flemings:

[T]he statutory penalties sought in this case are punitive in nature. The public policy purpose of awarding penalties in this case is to punish [American General] for its violations of § 37-10-102 rather than restore [Plaintiffs] to a previous position and are similar in nature to punitive damages.

Flemings, Order Awarding Damages at 3 (citing Gore). See also Hearing Def. Ex. 1 at 3.

In Gore, the United States Supreme Court identified three fact intensive guideposts for determining the measure of punitive damages and for assessing whether those damages comport with due process: (1) the degree of reprehensibility of the defendant’s conduct; (2) the relationship between the penalty and actual harm suffered by the plaintiff; and (3) sanctions imposed in other cases for comparable misconduct. See Gore, 517 U.S. at 574-75. See also Mitchell v. Fortis Ins. Co., 385 S.C. 570, 686 S.E.2d 176 (2009) (holding that trial courts must

follow the Gore guideposts in assessing whether punitive damages comply with due process).
See also Hearing Def. Ex. 1 at 3.

1. The Degree of Reprehensibility of American General's Conduct.

The United States Supreme Court has explained that in determining whether an award of punitive damages is reasonable, the most important indicator is the degree of reprehensibility of the defendant's conduct. Gore, 517 U.S. at 559. As the Court has explained:

We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

#35
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State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003) (citing Gore, 517 U.S. at 756-77). See also Hearing Def. Ex. 1 at 5. The Court analyzes these factors below.

The United States Supreme Court has explained that the first factor in the reprehensibility analysis is "whether the harm caused [by the defendant's conduct] was physical as opposed to economic." Id. Here, it is undisputed that the Class Members did not sustain any physical damages. Plaintiffs argue that the named Plaintiffs, Lois King and Deloris Sims, suffered economic harm from American General's conduct because they refinanced unsecured obligations at higher interest rates and were forced to purchase insurance products they did not want. Plaintiffs also claim that the absence of an attorney of Class Members' choosing left unsophisticated borrowers vulnerable to improperly prepared loan documents. After careful review of the record, the Court agrees.

The second factor in the reprehensibility analysis is whether the defendants conduct "evinced an indifference to or a reckless disregard of the health or safety of others." Campbell, 538 U.S. at 419 (citing Gore, 517 U.S. at 756-77). Here, Plaintiffs make no claim—nor could they—that American General acted with indifference to, or with a reckless disregard of, the health or safety of the Class Members. Thus, the Court finds that this factor is irrelevant.

The next factor in the reprehensibility analysis is whether "the target of the conduct had financial vulnerability." Campbell, 538 U.S. at 419 (citing Gore, 517 U.S. at 756-77). Deloris Sims, as a named Plaintiff, sought a loan from American General to pay off an existing loan.

The American General loan had an interest rate of 25% and was successfully obtained to pay off her existing loan with an interest rate of 17.99%. This alone suggests that Ms. Sims was financially vulnerable. Further analysis is unnecessary and the Courts finds that this factor weighs in favor of the maximum penalty.

The next factor in the reprehensibility analysis is whether “the conduct involved repeated actions or was an isolated incident.” Campbell, 538 U.S. at 419 (citing Gore, 517 U.S. at 756-77). In the July 29, 2011 Interim Order re: Summary Judgment, the Court concluded that American General’s conduct was repeat conduct, but, as explained below, this was due to inconsistent adherence to corporate policies and procedures that were designed to ensure compliance with the Attorney Preference Statute. The Court finds that this factor weighs in favor of a statutory penalty above the median.

The final factor in the reprehensibility analysis is whether “the harm was the result of intentional malice, trickery, or deceit, or mere accident.” Campbell, 538 U.S. at 419 (citing Gore, 517 U.S. at 756-77). As the Court concluded in the Interim Order re: Summary Judgment:

American General established a very clear written compliance process to provide its consumer borrowers with a timely written disclosure and the opportunity to express their Code-established rights to name both the attorney and the insurance agent to provide the required legal services and insurance associated with a real estate secured loan from American General.

Interim Order at 20. Although compliance with those policies and procedures was inconsistent, the Court does not find that any non-compliance was intentional. American General’s employees explain in their affidavits that they always did their best to comply with the Attorney Preference Statute and never intentionally failed to comply with its requirements. See Affidavit of James Graham, ¶ 17; Affidavit of Janice Davenport, ¶ 26; Affidavit of Joyce Shaw, ¶ 22; Affidavit of Lonnie Richard, ¶ 37; Affidavit of Stella Cameron, ¶ 38; Affidavit of Tammy Vaughn, ¶ 14; Affidavit of Vicki Coleman, ¶ 16; and Second Aff. of Stella Cameron, ¶ 7. See also Hearing Def. Ex. 1 at 11-25. This testimony is uncontested.

Moreover, the State Board of Financial Institutions—the principal state agency charged with the duty and responsibility for regulating American General in South Carolina, see S.C. Code § 37-3-506(1)—never found an issue with American General’s policies and procedures or with the attorney preference forms it used. See Hearing Def. Ex. 1 at 23-25; Ridenhour Aff., ¶¶

20-22 & Ex. 6. American General's management relied on its own regulator to bring to its attention any significant shortcomings in complying with the Attorney Preference Statute, and the Court finds that that reliance was reasonable. Moreover, the Consumer Finance Division's implicit approval of American General's form is entitled to deference from this Court. See Lexington Law Firm v. South Carolina Dep't of Consumer Affairs, 382 S.C. 580, 677 S.E.2d 591 (2009). Based on these facts, the Court concludes that American General did not intentionally disregard its own policies and procedures. Instead, there was an unintentional breakdown in the enforcement of those policies. Because there is no evidence of intentional malice, trickery, or deceit, the Court finds that this factor weighs in favor of the minimum penalty.

To summarize, the Court concludes that of the five factors in the reprehensibility analysis that are relevant to this case, one weighs in favor of the minimum penalty and three weigh in favor of the maximum (the remaining factor is deemed irrelevant). Thus, the Court finds that on the issue of reprehensibility, a higher penalty is justified.

#37
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2. The Relationship Between the Penalty and Any Actual Harm Suffered by the Plaintiffs

The second Gore guidepost requires the Court to consider the relationship between the penalty and any actual harm suffered by the Plaintiffs. Gore, 517 U.S. at 574-75. As the United States Supreme Court has explained, "[w]hen the actual damages are so small the amount allowed as exemplary damages should not be so large." Id. at 581 n.32 (internal quotations and citation omitted).

Plaintiffs offered no evidence of any compensable harm suffered by any Class Member. Indeed, Plaintiffs' expert on penalties conceded that the Class Members suffered no such harm. See, e.g., Hearing Tr., 67:22-68:16; Freeman Dep. at 30:5-11. Moreover, the Court agrees with American General that:

No Class Member claims that she did not understand the terms of her loan or that she did not get the loan she wanted.

American General's failure to timely make the preference disclosure did not affect any Class Member's choice of lender, loan type, loan terms, or decision to purchase insurance.

No Class Member claims that her mortgage or note was defective, that any mortgage or deed was not properly recorded, that her loan funds were not properly disbursed, or that her title was defective.

See Hearing Def. Ex. 1 at 29. At the hearing, Plaintiffs' penalty expert conceded these points. Hearing Tr., 70:13-16, 72:5-11, 73:2-74:18 (Mr. Freeman testifying that he is not aware of any Class Member claiming that she did not understand the terms of her loan or get the loan she wanted, admitting that he cannot testify that American General's conduct affected any borrower's choice of lender, loan type, loan terms, or the decision to purchase insurance, and that there is no evidence of title defects, incorrect or improperly recorded loan documents, or improper disbursement of loan funds). Ms. Sims admitted that the loan she obtained from American General was "exactly" the loan she wanted. Trial Tr., 114:6-10.

#38
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In sum, as the foregoing demonstrates, despite Plaintiffs' allegation that the absence of an attorney of their choosing left them vulnerable to mistakes in the loan closing, because there is no evidence of any specific economic harm to the Class Members, the Court finds that the second Gore factor, which focuses on the ratio of punitive damages to actual physical or economic harm, weighs in favor of the minimum penalty.

3. Sanctions Imposed in Other Cases for Comparable Misconduct

The third and final guidepost under Gore requires the Court to consider sanctions for comparable misconduct. See Gore, 517 U.S. at 574-75. The Court is aware of only three other cases where penalties were assessed for violations of the Attorney Preference Statute on a class-wide basis: Flemings, Bazzle, and Lackey. The Court finds these cases demonstrative, despite the factual differences. This Court is aware that in Flemings, Lackey, and Bazzle, despite conducting business in South Carolina for years, the lender, Green Tree, admitted that it made no effort to comply with the Attorney Preference Statute until 1995—thirteen years after the statute was enacted. See, e.g., Lackey, Final Order at 10-11. See also Hearing Def. Ex. 1 at 27-28. Based on that evidence, Judge Ervin concluded that "Green Tree simply chose to totally ignore the law despite learning of the requirement," and that its "conduct r[ose] to a shocking level of callous and reckless indifference to the rights of South Carolina residents." Id. at 13. In contrast to the Green Tree cases, American General has offered specific forms it used to at least attempt to comply with the Attorney Preference Statute. See Hearing Def. Ex. 1 at 13, 16-19.

However, while American General's attitude toward the Attorney Preference Statute was far from the indifference that Green Tree had towards compliance, this does not outweigh the

arguments put forth by the Plaintiffs.

Although there are no statutory factors, Plaintiffs' counsel have pointed to numerous factors that support an award of the maximum penalty of \$7,500 per debtor:

1. Multiple violations. American General's disregard of the preference statute was not limited to one or two isolated instances. The comments of the Chief Justice during oral argument make this point very clearly.
2. Widespread violations. In 1998, Mr. Williamson testified that American General had 46 branches throughout the state of South Carolina. ROA 0720 line 3. There is nothing in the record to suggest that the violations were limited to the acts of a single rogue employee or a single improperly supervised office.
3. Duration. Likewise, there is nothing in the record to suggest that the violations of the preference statute were limited to some short period of time. Instead they continued over a period of many years. For example, although the preference statute was adopted in 1982 and the Administrative Interpretation was issued in 1983, it was not until 13 years later - in the autumn of 1996 after this class action was commenced - that American General finally revised its preference form so as to bring it into compliance with the Consumer Protection Code. Appendix 6. ROA 1479.
4. Not inadvertent. Mr. Ridenhour testified under oath that American General knew what to do and did it. However, the record contains no support for that claim. Instead, in Ridenhour's 30(b)(6) deposition, American General admits that it knew what it should do to comply with South Carolina law, but this evidently was not done based on the voluminous evidence presented in this case.
5. Continuing disregard for the law. Of considerable significance is the continuing nature of American General demonstrating disregard for the laws of this State. This is made all the more relevant by two recent cases - the Wachovia opinion out of the Court of Appeals in May and the Matrix opinion rendered by the Supreme Court in August, which cited the Wachovia case with approval. The message from the Court of Appeals and from the Supreme Court is clear. Severe penalties are appropriate for lenders who fail to observe the laws of the State of South Carolina.

In Wachovia Bank, N.A. v. Coffey (Op. No. 4685, Ct.App., filed 05/06/2010), the Court of Appeals found that Wachovia “committed the unauthorized practice of law, and, therefore, Wachovia came into court with unclean hands. . . . We therefore reach the inescapable conclusion that Wachovia . . . is barred from seeking equitable relief. Wachovia’s legal causes of action are barred as well.”

Matrix Financial Services Corporation v. Frazer et al., Op. No. 26859, (S.C. Sup. Ct. filed Aug. 8, 2011), authored by Chief Justice Toal, cites Wachovia with approval, and states: “Appellant also argues Matrix is not entitled to an equitable remedy because it closed the refinance loan unlawfully, and thus has unclean hands. We agree.” The Court further stated:

Lenders cannot ignore established laws of this state and yet expect this Court to overlook their unlawful disregard. We take this opportunity to definitively state that a lender may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as required by our law.

394 S.C. 134, 140, 714 S.E.2d 532, 535 (2011). The rationale that forms the basis for that statement is also the rationale that, coupled with the other factors discussed here, dictates the imposition of a higher penalty.

Also noteworthy is the 2010 deposition of Libby Smith, an AGF employee, who testified to American General’s practices and the continued disregard for South Carolina law.

6. “Borders on frivolity.” In reversing the lower court in the case at hand, the Supreme Court noted: “And the suggestion that the attorney preference disclosure may be made at closing borders on frivolity.” King, 386 S.C. at 91. The tenacious and ultimately unsuccessful defense mounted by American General has kept the members of the Class from obtaining justice for more than 14 years. It is noteworthy that the Supreme Court – in a unanimous 5-0 decision – chose to make the foregoing observation. A reading of the transcript of the oral argument, excerpted above, gives further insight into the Supreme Court’s perception of American General’s long-time business practices.

The Class Representatives argue that the members of the Class should each receive the maximum award. American General argues that the members should receive the minimum

award. Ultimately, this Court finds that a penalty of \$5,000 on a per transaction basis is the appropriate penalty in light of the arguments presented by both Plaintiffs and Defendant.

VII. Attorneys' Fees

Under the American rule, attorneys' fees are not recoverable from the other party unless authorized by contract or statute. Hegler v. Gulf Ins. Co., 270 S.C. 548, 549, 243 S.E.2d 443, 444 (1978). The Attorney Preference Statute mandates that a court award reasonable attorneys' fees when a creditor has violated the statute. S.C. Code Ann. § 37-10-105(D). Plaintiffs have petitioned this Court for an award of reasonable attorney fees to be assessed against the Defendant under the statute and also for reimbursement of reasonable costs and expenses. Oct.Tr.194: 19-22. Plaintiffs have not specified an amount. The Court is mindful that the South Carolina Supreme Court recently explained that the principles underlying the common fund and lodestar methodologies for determining attorneys' fees are distinct, making each methodology appropriate in some cases but not in others:

A key distinction between the award of fees authorized by statute and the award of fees from a common fund is that the equitable principles underlying the common fund doctrine create a mechanism in which attorneys' fees are not assessed against the losing party by *fee-shifting*, but rather, are taken directly from the common fund or recovery and borne by the prevailing party through *fee-spreading*. To reflect this distinction, courts generally hold that a "lodestar" approach reflecting the amount of attorney time reasonably expended on the litigation results in a reasonable fee under a fee-shifting statute. Conversely, when awarding fees to be paid from a common fund, courts often use the common fund itself as a measure of the litigation's "success." These courts consequently base an award of attorneys' fees on a percentage of the common fund created, known as the "percentage-of-the-recovery" approach.

Layman v. State, 376 S.C. 434, 452-53, 658 S.E.2d 320, 330 (2008) (internal citations omitted);

Hearing Def. Ex. 1 at 39. The South Carolina Supreme Court continued:

In our view, utilizing common fund methodology when awarding attorneys' fees pursuant to a fee-shifting statute is wholly inappropriate in light of the underlying theoretical distinction between a common fund source of attorneys' fees and a statutory source of attorneys' fees. Although both sources are exceptions to the general rule that each party is responsible for the party's own attorneys' fees, the common fund doctrine is based on the

equitable allocation of attorneys' fees among a benefited group, and not the shifting of the attorneys' fee burden to the losing party. This Court certainly acknowledges that a percentage-of-the-recovery approach may be appropriate under circumstances in which a court is given jurisdiction over a common fund from which it must allocate attorneys' fees among a benefited group of litigants. However, where, as here, a fee-shifting statute shifts the source of reasonable attorneys' fees entirely to the losing party, we find it both illogical and erroneous to calculate fees using the methodology justified under a fee-spreading theory.

#42
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Layman, 376 S.C. at 453-54, 658 S.E.2d at 330; Hearing Def. Ex. 1 at 40; see also Sauders v. S.C. Pub. Serv. Auth., 2011 WL 1236163, *7 (D.S.C. 2011) (following Layman and concluding that lodestar approach applied to S.C. Code Ann. § 28-11-30—a fee-shifting statute). Based on the South Carolina Supreme Court's discussion in Layman and the fact that S.C. Code Ann. § 37-10-105(D) is a fee-shifting statute, the Court holds that the Court should use the lodestar methodology to determine a reasonable attorneys' fee in this case.

A. Application of the Lodestar Methodology

The lodestar methodology "is designed to reflect the reasonable time and effort involved in litigating a case, and is calculated by multiplying a reasonable hourly rate by the reasonable time expended." Layman, 376 S.C. at 457, 658 S.E.2d at 332; Sauders, 2011 WL 1236163 at *2. The lodestar "looks to 'the prevailing market rates in the relevant community' . . . [and] produces an award that roughly approximates the fee that the prevailing attorneys would have received if he or she had been representing a paying client who was billed by the hour in a comparable case." Perdue v. Kenny, 130 S. Ct. 1662, 1672 (2010) (quoting Blum v. Stenson, 465 U.S. 886, 895 (1984)). The "lodestar method yields a fee that is presumptively sufficient to achieve" a reasonable fee. Id. at 1673; see also Pa. v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986) (noting the strong presumption that the lodestar approach is the most accurate determination of reasonable attorneys' fees in light of the intended purpose of the usual fee-shifting statute). The Court must consider six factors for determining a reasonable attorneys' fee:

- (1) the nature, extent, and difficulty of the case;
- (2) the time necessarily devoted to the case;
- (3) the professional standing of counsel;
- (4) the contingency of compensation;

- (5) the beneficial results obtained;
- (6) the customary legal fees for similar services.

Layman, 376 S.C. at 458, 658 S.E.2d at 333.

#43
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“Using this as a starting point for reasonableness, a court may consider other factors justifying an enhancement of the lodestar figure with a ‘multiplier’ before arriving at a final amount.” Id. at 457, 658 S.E.2d at 332. The United States Supreme Court recently noted “that enhancements may be awarded in rare and exceptional circumstances.” Perdue, 130 S. Ct. at 1673 (internal quotation marks omitted). Further, the “the lodestar figure includes most, if not all, of the relevant factors constituting a reasonable attorney’s fee, and ...an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation.” Id. (internal quotation marks and citations omitted). With these principles in mind, the Court will determine the reasonable hourly rate first, then the reasonable and necessary hours expended in this litigation, and finally the appropriate multiplier, if applicable.

1. Computation of Reasonable Hourly Rate

The Court must identify a reasonable hourly rate for purposes of a lodestar calculation. Layman, *supra*, citing Liberty Mutual Ins. Co. v. Emp. Res. Mgmt., Inc., 176 F. Supp. 2d 510 (D.S.C. 2001) (explaining that a reasonable hourly rate is determined by comparing the rates of the prevailing party’s attorneys to the prevailing market rates in the community for similar services by lawyers of comparable standing). There is a certain incongruity involved in determining the “customary” and appropriate hourly rate for matters that are almost always filed as contingent fee cases, regardless of whether they are viewed as “common fund” or “lodestar.” The named Plaintiffs in this case have executed contingency contracts in which they have agreed to a fee of one-third of the recovery. Plaintiff’s Counsel have advanced all costs in this litigation without any expectation of reimbursement except in the event of recovery on behalf of the Plaintiff Class. Collectively, Class Counsel have expended their own personal funds as costs advanced in this matter, in addition to the value of the time spent by attorneys and staff members in the handling of this action. Class Counsel have devoted more than fifteen years without compensation to prosecute this case. Such time could have otherwise been devoted to fee-paying clients. Only if Class Counsel were successful could there be any prospect of payment for years of service rendered to Class Members. In these circumstances, the best indicator is to look to the rates that other courts have applied in complex cases to compensate lawyers of similar

experience and standing.

a. The professional standing of counsel.

The parties agree that Plaintiffs' counsel possess a high level of skill, ability, and professional standing. Hearing Tr., 52:6-15; 168:11-13.

b. The customary legal fees for similar services.

#44
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The parties dispute the reasonable hourly rate that should apply in this case. Under the lodestar methodology, this factor requires the determination of a reasonable hourly rate for the service provided by Plaintiffs' counsel over time. The Court determines a reasonable hourly rate by comparing the professional standing and hourly rates the prevailing party's attorneys are requesting to the prevailing market rates in the community for comparable lawyers performing similar services. Liberty Mut. Ins. Co. v. Emp. Res. Mgmt., Inc., 176 F. Supp. 2d 510, 535 (D.S.C. 2001). As the Court in Blum notes:

To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to—for convenience—as the prevailing market rate.

Blum, 465 U.S. at 896 n.11. In Layman, which was termed a “difficult” case, the Supreme Court used \$600 and \$500/hour for the lead counsel and \$200 to \$350/hour for the supporting attorneys.⁷

i. Plaintiffs Requested Rates.

Plaintiffs' counsel have not submitted a formal fee petition, but submitted current hourly rates of \$500 to \$675 per hour in their respective affidavits. Affidavit of T. Alexander Beard, at 5; Affidavit of Thomas M. Fryar, at 2; Affidavit of Steven W. Hamm, ¶ 12; Affidavit of C. Bradley Hutto, at 2; Affidavit of Daniel W. Williams, ¶ 5. Mr. Dibble did not include hourly rates in his affidavit. Affidavit of Charles L. Dibble. Their expert on attorneys' fees, Mr. Freeman, set a rate for Mr. Hamm of \$600 per hour; the other Plaintiffs' counsel at \$500 per

⁷ Several observations about the Layman case are appropriate here. (1) It was not a class action at the time of the fee award. (2) The total time from enactment of the legislation until the case was decided was only 5 months. (3) The express terms of the “state action” statute as well as the underlying public policy considerations are substantially different from those in the fee-shifting statute of the Consumer Protection Code.

hour; the supporting lawyers at \$250 per hour; and estimated future time at \$500 per hour for all involved. Affidavit of John P. Freeman, ¶ 43. Charles Whetstone, Plaintiffs' second expert on attorneys' fees, assigned an hourly rate of \$650 per hour for Mr. Beard, Mr. Dibble, Mr. Williams, Mr. Hutto, Mr. Hamm, Mr. Simpson, and Mr. Dong; \$300 per hour for Mr. Hamm's associates; and \$500 per hour for Mr. Fryar. Affidavit of Charles W. Whetstone, Jr., ¶10.

ii. American General's Evidence on Prevailing Market Rates.

#45
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All the hourly rates and all the legal fees paid by American General for legal services in the defense of this case represent relevant data for this Court to consider as it attempts to determine a reasonable fee for Plaintiffs' counsel to be assessed against American General in this complex case. The record reflects that legal fees billed to American General by outside counsel total \$3,718,088 through August 2011. Becker Aff. ¶10. The blended rate for Mr. Becker's firm over a period of 15 years was \$236/hour. The record does not reflect the individual hourly rate for the two lead defense counsel – Mr. Cottingham of Winston & Strawn and Mr. Becker⁸ of Haynsworth Sinkler Boyd. This silence was highlighted for the Court during the examination of Professor Freeman by Mr. Cottingham became somewhat inverted with Professor Freeman stating: "The real issue, for example, is what are you billing right here today? And it's not my place as a witness to ask questions, but that's unknown and I take a negative inference that you refuse to disclose it." Oct.Tr. 109:25-111:4.

iii. Current rates.

With a case of long duration such as this, the question arises as to how to reconcile current rates with historic rates. Plaintiffs' counsel argued that the Court should use current rates to determine the reasonable hourly rate and submitted conclusory affidavits with hourly rates they stated they would charge for this type of complex, class action litigation. Hamm Aff. ¶¶ 12; Hutto Aff. at 2; Williams Aff. ¶¶ 5; Beard Aff. at 5; Fryar Aff. at 2. Mr. Freeman testified that the use of current rates was appropriate for two reasons (1) he did not think it was "fair to basically say that you're stuck with a fee that you didn't charge"; and (2) Layman and Sauders both used current rates. Hearing Tr., 56:3-4, 8-10. Some courts have held that current rates rather than historic rates should be applied when a fee petition is submitted because of the delay

⁸ When asked whether he knew Mr. Becker's hourly rate, Mr. Stepp testified: "I think I asked him that I think its 375 or 285, something like that." Oct.Tr. 182:22-25.

in payment: "to take account of delay in payment, the hourly rate should be based on current rates rather than the rates in effect when the services were rendered." Blakely v. Continental Airlines, 2 F. Supp. 2d 598, 602 (D.N.J. 1998).

The Court concludes that it should use current rates and look at enhancing the lodestar figure with an appropriate multiplier. The Court thus determines that a reasonable hourly rate in this case is \$600.00.

2. Analysis of Reasonable Number of Hours

The Court will next determine what constitutes a reasonable number of hours necessarily expended in this case. "The reasonableness of the number of hours billed shall be determined according to: (1) the nature, extent, and difficulty of the case; and (2) the time necessarily devoted to the case." Glasscock, 304 S.C. at 161, 403 S.E.2d at 315. The Court recognizes that

#46
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Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission... Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.

Hensley v. Eckerhart, 461 U.S. 424, 434 (1983) (internal quotation marks omitted).

a. The nature, extent and difficulty of the case.

South Carolina courts must consider the complexity inherent in all class actions in determining the reasonableness of an attorney's fee. The King class action was commenced in August 1996 seeking class-wide relief on behalf of certain customers of American General Finance, Inc. for AGF's violation of the attorney preference provisions of the South Carolina Consumer Protection Code.

The record in this case clearly reflects that this class action has been one of extraordinary difficulty from the outset; the fact that the attorney preference law is unique to the South Carolina Consumer Protection Code; the appeal by AGF of the initial Circuit Court Order granting Class certification, continuing disputes about access to loan files, the subsequent appeals by Plaintiffs to the South Carolina Supreme Court, the issues surrounding Class certification and decertification and recertification, and the continued protracted litigation on remand.

b. The time necessarily devoted to the case.

Filed in August 1996, more than 15 years ago, King vs. American General Finance, Inc.

has occupied considerable time on the part of four different Circuit Court judges. It has been the subject of multiple appeals. This case has required Class Counsel to continuously submit motions, memoranda, briefs and argue for the Class in many different courtrooms in order to fight off well-mounted efforts by American General's talented counsel. Class Counsel were also required to engage in an expensive, time-consuming legal battle. Class Counsel have submitted affidavits and supplemental affidavits reporting 9,100 attorney hours devoted to the handling of this matter through October 31, 2011. In addition, the affidavits reflect approximately 1,250 hours of paralegal or staff time spent in the case. This effort represents an extraordinary commitment of time directed to obtaining a beneficial result for members of the Class.

As stated previously, the beneficial results obtained must also be weighed. The benefit achieved by the Petitioners for the Plaintiff Class in the instant case is \$5,000 per transaction, which does not include the fees and costs and expenses to be awarded by this Court.

#47
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3. Calculation of Lodestar Fee

Based on the foregoing, the Court calculates the lodestar fee in this case as follows:
 $9,100 \text{ hours} \times \$600 = \$5,460,000.$

4. Enhancement of the Lodestar fee with a Multiplier

Two recent South Carolina cases resulted in the application of an enhancement to the lodestar figure. In Layman, the South Carolina Supreme Court determined the use of a multiplier was warranted due to "the expedited litigation timeline imposed by the Court, the wholly successful recovery for the entire class of TERI participants, the extraordinary sum of money returned to the TERI participants and ultimately saved by the TERI participants, and the termination of governmental acts constituting a breach of contract." 376 S.C. at 461, 658 S.E.2d at 334. In Sauders, Judge Duffy applied a multiplier based on the length of the litigation (over 17 years), the multiple appeals to "two separate Circuit Courts of Appeal, the Fourth and Federal Circuits," and the Plaintiffs' ultimate success "on their trespass and inverse condemnation claims for a total recovery of over \$219 million." 2011 WL 1236163 at *11. Both courts utilized the lodestar figure with a multiplier of 1.25 to reflect the exceptional circumstances of those cases. Id.; Layman, 376 S.C. at 461, 658 S.E.2d at 334.

Mr. Freeman advocated a multiplier of four as "in the range of appropriate multipliers for this type of case" and to account for the contingency of compensation and the result obtained. Hearing Tr., 47:13-21; 54:11-13. Mr. Freeman, however, admitted that all of the cases he relied

on to support a multiplier of four were common fund cases that arose out of settlement, and that he knew of no South Carolina decision applying a multiplier of four in a lodestar case. Id. at 102:19-25; 107:18-20. Because Mr. Freeman relies on multipliers awarded in common fund cases, which have no bearing on this case under South Carolina precedent, and factors that have already been accounted for in the lodestar figure contrary to Perdue, the Court declines to apply his proposed multiplier.

In contrast, Mr. Stepp testified that a multiplier was appropriate based on the beneficial results for Plaintiffs and the contingency of compensation for Plaintiffs' counsel—two factors that had not been accounted for in his lodestar figure. Id. at 175:13-18. Mr. Stepp stated, “Perdue makes it clear that you don’t double dip by including factors in a multiplier that you’ve already taken into account in the hourly rate.” Id. at 176:3-5. Mr. Stepp opined that based on Layman and Sauders the appropriate multiplier was 1.25. Id. at 176:8–177:12.

#48
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Using the lodestar fee of \$5,460,000 as a starting point for a reasonable fee in this case, the Court agrees that enhancing the lodestar figure through a multiplier is appropriate for two reasons. First, the Court finds that the long duration of this litigation and the successful recovery for the class following multiple appeals, decertification, a defense verdict in Ms. Sims’ trial, and summary judgment for American General in Ms. King’s case, warrant the application of a multiplier. Second, the contingency of the compensation and the risk of non-recovery merits an enhancement to compensate for delay in payment of fees. Perdue, 130 S. Ct. at 1675

Therefore, taking into consideration the duration of the litigation, the multiple appeals, and the analysis in Layman and Sauders, the Court will apply a multiplier of 2.00 to the lodestar calculation in order to arrive at a reasonable fee that adequately compensates Plaintiffs’ counsel. The Court thus calculates a reasonable attorneys’ fee as follows:

Attorneys’ fees:	\$5,460,000
Multiplier	<u>x 2.00</u>
Total:	\$10,920,000

This amount takes into account the following six factors for the hourly rate: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services, as discussed in this Order.

Future Attorneys’ Fees and Costs

For any hours that are expended in the future in this case, Plaintiffs' counsel may make a supplemental fee petition. If Plaintiffs' counsel have incurred expenses over the duration of this case, counsel may submit a request—supported by documented evidence—of such expenses to the Court in a subsequent petition.

VIII. Motion to Strike – Cox Affidavit

At the October 14, 2011 hearing, Plaintiff orally moved to strike the affidavit of American General's expert, Kenneth R. Cox, Jr. The Court denies that motion and finds that Mr. Cox's testimony is relevant and germane to the issue of reprehensibility, which, as explained below, is an issue this Court must consider in determining the appropriate statutory penalty.

American General submitted Mr. Cox's affidavit to respond specifically to Plaintiffs' arguments in their June 9, 2011 Power Point presentation entitled "Penalty Presentation." Plaintiffs submitted that presentation to the Court in printed form at the hearing on October 14, 2011. In his affidavit, Mr. Cox describes, among other things, American General's role in the South Carolina lending industry, general business conditions in the mortgage lending industry from 1982 to 1996, American General's loan pricing and underwriting criteria, and how and why American General offered insurance products to its borrowers. Affidavit of Kenneth R. Cox, Jr., ¶¶ 8-29.

At the October 14, 2011 hearing, Plaintiffs called Mr. Cox to question him on his qualifications and to cross-examine him on the matters presented in his affidavit. At the Court's instruction, American General conducted a very brief direct examination of Mr. Cox to give Plaintiffs the opportunity to make a contemporaneous objection to the scope of Mr. Cox's testimony. Hearing Tr., 126:8-14. Plaintiffs did not make any objections during American General's direct examination, which was limited to laying the foundation for Mr. Cox's affidavit. Instead, after their cross-examination, Plaintiffs moved to strike Mr. Cox's affidavit. *Id.*, 147:9-14. The Court overruled Plaintiffs' objection to Mr. Cox's qualifications and took their motion to strike his affidavit under advisement. *Id.*, 147:23-148:4. The Court now denies that motion.

The Court has broad discretion with respect to the admission of evidence. See, e.g., Watson v. Chapman, 343 S.C. 471, 478, 540 S.E.2d 484, 487 (Ct. App. 2000); R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000). Generally, the rules of evidence are to be construed "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the

law of evidence to the end that the truth may be ascertained and proceedings justly determined.”
S.C. R. Evid. 102.

With these principles in mind, the Court denies the motion to strike Mr. Cox’s affidavit. The Court qualified Mr. Cox as an expert in mortgage lending, and, at the October 14 hearing, Plaintiffs cross-examined him on the matters presented in his affidavit. Accordingly, Plaintiffs are not prejudiced by the admission of the affidavit. Finally, the Court finds that Mr. Cox’s affidavit is relevant and germane to the issue of penalties because it directly addresses the issue of reprehensibility, an issue this Court must consider in deciding the appropriate amount of penalties. For all these reasons, Plaintiffs’ motion to strike is denied.

IX. Motion to Strike – Proffer

#50
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During the June 9, 2011 hearing, counsel for AGF made a Motion to Proffer certain testimony that it claimed would support a greatly reduced penalty. At the Oct. 14, 2011 hearing, AGF presented the Court with one witness on the issue of penalty, Mr. Cox. No other witnesses were identified or called to testify before the Court. Counsel for Plaintiffs at the conclusion of the October hearing moved to strike any proffer on the grounds that the Court had not prevented AGF from offering any other testimony on the issue of penalty. Plaintiffs argued that AGF simply declined to present further testimony to the court. Oct.Tr. 153:1-7.

After reviewing the transcript of the June and October hearings, the court has determined that it will sustain the Plaintiff’s Motion to Strike on the proffers raised by AGF counsel. The Court did not restrict any AGF witness from testifying and the failure of AGF to offer additional live testimony at the October hearing constitutes an abandonment of the bases upon which the proffer was made.

X. Class Administration and Notice to the Class

Turning to the details of Class Administration and Class Notice, the Court finds that the following procedure should provide for an orderly distribution of the award to the Class Members and for dealing with related questions.

1. Administration Costs. The Plaintiffs will bear the costs of class administration and notice. “Rule 23(d)(2) provides that the notice is given by the party seeking to maintain the action as a representative suit . . . The language of our rule imposes the costs of notice on the party seeking class status. This is consistent with federal practice.” James F.

Flanagan, South Carolina Civil Procedure, 197 (3d ed.). See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178-79 (1974) ("The usual rule is that a plaintiff must initially bear the cost of notice to the class.").

2. Funding date. For purposes of this Order, the term "Funding Date" refers to the third banking day after (a) the time for appeal has passed with no notice of appeal being filed, Rule 203, SCACR, or (b) the issuance of remittitur, according to Rule 221(b), SCACR from the appellate court approving funding, whichever occurs first.

3. Class administrator. The parties shall engage the services of a professional class administrator (the "Administrator") to be selected by the parties. During the administration of the award to the Class, the Administrator shall submit a written activity status report to the Court no less frequently than monthly with copies to counsel for the parties.

4. Notice to class.

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PMB
Attached to this Order is a proposed Notice to Class, the general form of which is approved. Within ten (10) days of the date of this Order, Plaintiffs' counsel shall resubmit to this Court the proposed Notice, modified so as to be consistent with the provisions of the Order granting summary judgment. Plaintiffs' counsel shall also submit a corresponding Notice for publication in the print media. Prior to submittal of the proposed Notices to the Court, Plaintiffs' counsel shall confer with Defendant's counsel to seek agreement on as many aspects of the Notices as practical.

(a) Notice by Mail. Administrator shall mail to each Class Member via first class mail a copy of the Notice as finally approved by this Court. Such Notice shall be placed in the United States mail within five (5) days of approval of the Notice. The Administrator shall file an affidavit of mailing with the Court and provide copies to counsel for the parties. Refer to parts 7(f) and (g) below for instructions regarding "Returned Mailings."

(b) Notice by Publication. The Administrator shall also cause the Publication Notice (as finally approved by the Court) to be published once per week on two (2) consecutive weeks in accordance with S.C. Code § 15-29-40, in papers of general circulation in the cities of Greenville, Columbia, and Charleston. The Publication Notice shall first be published simultaneously with the mailing of the Notice to Class Members or as soon thereafter as practicable, and in no event more than ten (10) days after Notices have been dispatched by mail. Proofs of the Notice shall be provided to counsel for the parties for review prior to

publication. The Administrator shall file or cause to be filed an affidavit of publication with the Court and provide copies to counsel for the parties.

5. Opt-out rights. Each Member of the Class shall be provided with the individual right to exclude himself or herself ("opt out") from the Class by advising the Clerk of Court in writing of such a decision by a date that is to be later determined by the Court. Notices of decisions to opt out received after such date shall be of no force or effect. The right to opt out shall be described in both mailed and published notices, as approved by the Court. If a Class Member elects to opt out, the Class Member shall not participate in the final award.

6. Objections. Any objections to Class Counsel's request for reasonable fees and costs or to the compensation for the Class representatives or to any other matters must be filed with the Clerk of Court within twenty (20) days of the first publication of the Publication Notice.

7. Payments to class members.

(a) Transfer to Administrator. On the Funding Date, Defendant shall pay to Administrator as Escrow Agent for the Members of the Class, the sum of \$45,785,000.00 Dollars (the "Fund"), which equals 9,157 Members times the \$5,000.00 Penalty. This amount will be adjusted downwards to account for any Members that choose to opt out. The payment shall be via Electronic Funds Transfer (EFT) in immediately available U.S. funds.

(b) Administration of the Fund. The Fund shall be held in trust in the name of Administrator as Escrow Agent in one or more interest-bearing accounts. Each account shall clearly be designated as an "AGF Distribution Account." All interest earned on the Fund shall be added to and made a part of the Fund.

(c) Recognition Payments to Class Representatives. In recognition of the Named Plaintiffs' willingness to serve as Class Representatives and to assist in the prosecution of this case on behalf of all Class Members, the Administrator shall pay out of the Fund to Plaintiff Lois King the sum of \$45,785.00 and to Plaintiff Deloris Sims the sum of \$45,785.00, said sums being computed on the basis of \$5.00 for Plaintiff King and \$5.00 for Plaintiff Sims from each Member of the Class. These payments shall be made no later than five (5) banking days after the Funding Date, and are to be deducted from the gross payment of \$5,000.00 to each Class Member who does not opt out. These payments will be in addition to the distributions ordered below.

(d) Checks to Class Members. No later than five (5) banking days after the Funding Date, the Administrator shall pay out of the Fund to each Class Member \$4,990.00, being the net sum remaining after the recognition payments to Plaintiffs Sims and King. All payments to Class Members shall be made by check and sent via First Class, U.S. Mail, to the addresses in the updated list of names and updated addresses referenced hereinabove. Class Counsel may include a brief explanatory letter of transmittal with each check provided.

(e) Adjustment for Opt-Outs. The Fund shall be reduced by Five Thousand (\$5,000.00) Dollars for each Class Member who elects to opt out in the manner specified in this Supplemental Order. Any monies paid into the Fund on behalf of any Class Member who timely elects to opt out shall be returned by Administrator to Defendant. Likewise, the recognition payments to the two Class Representatives will be reduced by a total of \$10.00 (2 x \$5.00) for each Opt-Out.

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(f) Returned Mailings. If any mailing to a Class Member is returned by the United States Postal Service (USPS), the Administrator will promptly use the National Change of Address service provided by the USPS to attempt to locate such Class Member and a current address. Once Administrator obtains an updated address from the USPS for Class Members previously not located, Administrator will again mail a check to the Class Member. If the USPS is unable to provide an updated address, Administrator will then attempt to utilize the services of a credit-reporting agency in accordance with the Federal Credit Reporting Act.

(g) Additional Location Efforts. Sixty (60) days after checks are first mailed (or as soon as practicable after this 60-day period has elapsed), the Administrator shall identify all persons whose checks have been returned and all persons whose checks have not been presented to Administrator's bank for payment. Within twenty (20) business days after identifying such persons, the Administrator, using data from a credit bureau and/or the National Change of Address service, will update addresses to locate all such persons so identified. Within twenty (20) business days after obtaining the addresses for such persons, Administrator will issue or reissue checks to any Class Members thus located. The Administrator is not required to mail checks to any person whose check is returned undeliverable until after the postal address has been updated in the manner prescribed hereinabove.

(h) Personal Identifiers. By this Order, the Court hereby authorizes the Administrator and Class Counsel to collect the Social Security numbers, dates of birth, driver's license numbers and any other identifying information of Class Members, if necessary. Such data are to be used only in connection with the disbursement of proceeds, any required tax-related filings, and related aspects of the Class administration.

(i) Reports. No less frequent than monthly, Administrator will provide counsel for the parties a list of checks consisting of check numbers with each check, the payee(s), the amount, and the mailing address, and date of mailing. Class Counsel shall also file with the Clerk of Court a summary affidavit setting forth the date of mailing of the checks. A copy of this affidavit shall be served upon counsel for the parties.

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RB
8. Death. If Administrator is informed that any Class Member is deceased and that probate proceedings have been commenced, then the Personal Representative of the decedent shall be substituted for the deceased Class Member. If Administrator is unable to ascertain that probate proceedings have been commenced for the estate of a deceased Class Member, the spouse or co-obligor of the decedent shall be substituted for the decedent for purposes of this Supplemental Order upon presentation of proof of death, and in the case of a spouse who is not a co-obligor, proof of marriage reasonably satisfactory to Administrator. If probate proceedings were commenced and the decedent estate has been closed, the Administrator shall pay the distribution into the Probate Court where the estate was being administered; the Administrator shall inform the former Personal Representative that the funds have been forwarded to the Probate Court. If no probate proceeding were commenced and there is no spouse or co-obligor, then the amount due to the decedent shall be treated as Unclaimed Funds.

9. Bankruptcies. Administrator shall endeavor to identify each Class Member who is currently a debtor in a bankruptcy proceeding in the Bankruptcy Court for the District of South Carolina, and for such persons, Administrator shall make the checks jointly payable to the Trustee and Class Member, to be mailed to the Trustee or will issue checks as directed by the Bankruptcy Court and/or Trustee. Further, if Administrator becomes aware of any Class Member who is currently a debtor in a bankruptcy proceeding in any other jurisdiction, Administrator will make the checks jointly payable to the Trustee and Class Member, to be mailed to the Trustee or will issue checks as directed by the Bankruptcy Court and/or Trustee.

10. Unclaimed funds. All funds that are not claimed by a Class Member shall escheat to the State of South Carolina in accordance with the South Carolina Uniform Unclaimed Property Act. See S.C. Code Ann. § 27-18-10, *et seq.*

XI. Conclusion

For the reasons stated above,

1. Summary Judgment: Judgment for Plaintiffs against Defendant will be entered on two separate and independent grounds: the defective form and the Keeper Affidavit.

2. Award to Class: Defendant shall pay to the Members of the Class, on a per transaction basis, a penalty of \$5,000.

3. Attorneys' Fees: Pursuant to S.C. Code 37-5-202, the Court awards the sum of \$10,920,000.00 as attorneys' fees to Class Counsel.

4. Motions to Strike: the Court grants Plaintiffs' Motion to Strike Defendants' Proffer, and denies Plaintiff's Motion to Strike the Affidavit of Defendant's Expert, Mr. Cox.

5. Class Administration shall be implemented as indicated above.

This Court shall retain jurisdiction over the interpretation, effectuation, implementation and enforcement of this Order and any other matters related to this litigation.

IT IS SO ORDERED.



Perry M. Buckner, III
Judge, Fourteenth Judicial Circuit

21
May 15, 2012
Walterboro, SC

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG
LOIS KING and DELORIS SIMS, on
behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

AMERICAN GENERAL FINANCE, INC.,

Defendant.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 1996-CP-38-00595

INTERIM ORDER

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On July 29, 2011, the Court entered its Order denying (1) Defendant's Renewed Motion to Decertify the Class, or Require Separate Trials, or Require Subclasses and (2) Defendant's Renewed Motion for Leave to Amend Answer and Counterclaim, both of which were filed on March 16, 2011. In the same Order, the Court also granted Plaintiff's Motion to Quash, dated April 4, 2011. American General Finance, Inc. has now filed Defendant's Motion to Reconsider and to Alter or Amend the Court's Order Denying Defendant's Renewed Motion for Leave to Amend and Renewed Motion to Decertify. This Court has carefully considered Defendant's motion and has also reviewed the memoranda accompanying the initial motions, as well as reviewed the entire record in this matter which is voluminous.

In its Rule 59 Motion, American General again discusses the June 20, 2011 decision of the United States Supreme Court in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011). The Dukes case was first raised with this court by American General's counsel in a letter on July 1, 2011, and was considered prior to the issuance of this Court's July 29, 2011 order. Defendant's reliance on Dukes is misplaced.

Dukes involved allegations of discrimination against women in violation of Title VII of the Civil Rights Act of 1964, allegations that require inquiry into the reasons for millions of employment decisions – a highly subjective inquiry. The case before the Court now, on the other hand, requires a far more limited and objective inquiry. Brought under a specific section of the South Carolina Consumer Protection Code, § 37-10-102, the sole question in the present case is

ATTEST: TRUE COPY

Wingja B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

EXHIBIT D

whether American General failed to ascertain the borrowers' preferences at the time of credit application as required by law.

In this case, the common question is whether American General complied with the attorney preference statute by ascertaining the preference of closing attorney/insurance agent at the time of application. The S.C. Supreme Court, in re-certifying the class retroactive to Judge Hughston's 1998 order, has already found commonality exists in this case. Judge Hughston and the S.C. Supreme Court unanimously found the requirements of SCRCP Rule 23 satisfied. The decision in the Dukes case does not alter these conclusions. Further, the decision in Dukes regarding Federal Rules of Civil Procedure 23(a) and (b)(2) does not alter the requirements of South Carolina Rule of Civil Procedure 23, which is markedly different from its federal counterpart. Littlefield v. S.C. Forestry Comm'n, 337 S.C. 348, 354, 523 S.E.2d 781, 784 (1999) ("Our state class action rule differs significantly from its federal counterpart."). See also Salmonsens v. CGD, Inc., 377 S.C. 422, 454, 661 S.E.2d 81, 88 (2008) (South Carolina's rule "provides a trial court with broader discretion" than does the federal rule.).

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After carefully reviewing the Dukes opinion, this Court concluded in July of 2011 that nothing in Dukes should affect the current posture of King v. American General. My further review of Dukes in light of American General's Rule 59 motion does not alter that conclusion.

Additionally, the Court has carefully reviewed the arguments put forth by Defendant in regards to the motion to reconsider summary judgment. Summary Judgment was granted on two separate and independent grounds: the defective form and the Keeper Affidavit. After careful review, and in viewing the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party, American General, this Court concludes that there is no genuine issue of material fact as to the defective form and as to the membership of the Class. The Class, the moving party, is entitled to a judgment as a matter of law on the defective form argument and on the Keeper affidavit argument. This Court also finds that Ms. Sims and Ms. King are suitable class representatives.

In that I have not identified any error in my consideration of Defendant's motion and in my review of the memoranda accompanying the initial motions, the motion to reconsider is DENIED.

Further, the parties are hereby ordered to submit proposed written Orders relating to class administration and class notice within 30 days from the date of this Order to me at P.O. Drawer

470, Walterboro, SC 29488 copying opposing counsel on the proposed Orders. The Court will review the proposed orders for purposes of making a future determination on these issues. This Court still has the issues of class administration, class notices, penalties, attorneys' fees, and prejudgment interest before it, and this is not a final order.

IT IS SO ORDERED.



Perry M. Buckner, III
Judge, Fourteenth Judicial Circuit

February 22, 2012
Walterboro, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	Case No. 96-CP-38-595
	)	
LOIS KING and DELORIS SIMS, on behalf	)	
of themselves and all others	)	
similarly situated,	)	
	)	
Plaintiffs,	)	INTERIM ORDER
	)	
v.	)	RE: SUMMARY JUDGMENT
	)	
AMERICAN GENERAL FINANCE, INC.,	)	
	)	
Defendant.	)	

Before this court is Plaintiffs' Motion for Summary Judgment. Argument was heard at the Colleton County Courthouse on June 9, 2011 with T. Thomas Cottingham, III representing Defendant and C. Bradley Hutto for Plaintiffs. Also present were James Y. Becker, Phoebe N. Coddington, Mary M. Caskey and Stacie C. Knight for the Defendant as well as Defendant's Deputy General Counsel, James K. McMurray. Other counsel present for the Plaintiffs were Steven W. Hamm, Charles L. Dibble, Daniel W. Williams and T. Alexander Beard.

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I. Standard of Review

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCF. The purpose of summary judgment is to expedite the disposition of cases that do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003). In determining whether any triable issues of fact exist, this court must view the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). The standard is high: "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a

motion for summary judgment.” *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

II. Procedural Background

On remand from the Supreme Court of South Carolina, this case was originally assigned to Circuit Court Judge Diane S. Goodstein. In August 2010, the parties entered into an agreement fixing a schedule and establishing a deadline for the filing and service of motions and supporting memoranda. The agreement between counsel was approved by Judge Goodstein on September 17, 2010 and entered as an Order of the court. *MMO 6-A*.

Pursuant to the agreed schedule in the September Order, Defendant filed three motions, and Plaintiffs filed its Motion for Summary Judgment, which is the subject of this Order. At a hearing before Judge Goodstein on November 22, 2010, the parties were afforded an opportunity to argue all pending motions, and on December 12, 2010, Judge Goodstein issued her Order “(1) granting in part and denying in part Defendant’s Amended Motion for Leave to Amend Answer; denying Defendant’s Motion to Require Plaintiffs to Give Notice to the Class; and (3) denying Defendant’s Motion to Decertify the Class etc.” *MMO 1-E*.

Plaintiffs’ Motion for Summary Judgment was heard by Judge Goodstein at the November 22 hearing. At the conclusion of the arguments of counsel, Judge Goodstein questioned whether the pending Motion for Summary Judgment, dated September 27, 2010, was appropriate in light of her ruling earlier in the day allowing Defendant to amend its pleading. Accordingly, the court declined to rule on the pending Motion for Summary Judgment and invited Plaintiffs’ counsel to file a new Motion for Summary Judgment, taking into account the pleading amendments allowed earlier in the hearing.

In response, Plaintiffs served a second Motion for Summary Judgment the following day, November 23. On December 3, 2010, Defendant tendered to Plaintiffs’ counsel its amended pleading as modified to conform to American General counsels’ understanding of the rulings at the November 22 hearing. Although, at the time when the November 23 motion was served, Plaintiffs’ counsel had received the proposed Third

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Amended Answer with Defendant's proposed additional defenses, Plaintiffs had not received the final amended pleading. Before this court today is the Plaintiffs' summary judgment motion of December 3, *MMO 4-D*, which is essentially a renewal of Plaintiffs' September 27 and November 23, 2010 motions and which Plaintiffs' counsel stated was "being made in an abundance of caution following receipt of Defendant's amended pleading."

Further argument on summary judgment was heard by Judge Goodstein on January 14, 2011, at the conclusion of which she took the matter under advisement. On February 16, 2011, prior to ruling on the pending summary judgment motion, Judge Goodstein *sua sponte* recused herself from this case. Judge Goodstein's Order of recusal states: "All rulings issued prior to [February 16] remain in effect." *Recusal Order, MMO 6-C*. Nine days later, on February 25, 2011, Chief Justice Jean Hoefer Toal ordered that the undersigned "be vested with exclusive jurisdiction to hear and dispose of [this] case." *Order of Chief Justice, MMO 6-F*. The parties were provided an opportunity to present additional argument to this court at the hearing in the Colleton County Courthouse on June 9, 2011.

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III. Rule 63 certification and determination

Initially, this court's role is informed by the terms of Rule 63, SCRPC, which provides that a "successor judge may proceed upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties." In this regard, in addition to the Opinion of the Supreme Court, this court has reviewed:

1. Transcripts of the hearings before Judge Goodstein on November 22, 2010 and January 14, 2011.
2. The various submittals on remand, consisting of motions and memoranda as well as orders, most of which have been collected in two binders entitled "Motions and Memoranda and Orders, September 2010 – May 2011" (hereinafter "MMO").
3. Documents collected in a binder entitled "Appendices to Plaintiffs' Motion for Summary Judgment" ("SJ App").

4. Record on Appeal submitted to the Supreme Court ("ROA").
5. Affidavits (more than 40 have been submitted since this action was commenced).
6. Various other documents appearing in the file of this case.

As required by Rule 63, SCRPC, this court hereby certifies that it is familiar with the voluminous record in this case. Further, this court has determined that the proceedings may be completed without prejudice to the parties.

IV. Discussion of Plaintiffs' Motion for Summary Judgment

In the December 21, 2009 Opinion, the Supreme Court held that "timing is the central issue in this case." The Court further held: "As a matter of law, providing the attorney preference disclosure after the completion of the credit application violated S.C. Code Ann. § 37-10-102." *King*, 386 S.C. at 91.

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Plaintiffs advance two separate and independent theories in support of their Motion for Summary Judgment. First, Plaintiffs claim that there can be no genuine issue of material fact regarding the American General "preference" form. *SJ App 6*. Plaintiffs argue the fatal deficiencies are readily apparent on the face of what is essentially a "waiver" form. *Id.*, cf. §37-1-107. As a result, Plaintiffs argue there only remains for this court to make a ruling of law for the reasons discussed below.

Next, Plaintiffs contend that there can be no genuine issue of material fact regarding the Affidavit of Susan Keeper (the "Keeper Affidavit" dated 12/01/1999, *ROA 1503*, *SJ App 7*), a document voluntarily procured by American General and voluntarily submitted to the court by American General more than a decade ago. The affidavit is a sworn statement of an expert selected solely by American General, paid by American General, that recounts in great detail the qualifications of Susan Keeper's team, the process by which that team reviewed American General's mortgage loan files over a number of months, and the conclusions reached at the request of American General. As will be discussed in greater detail below, the Keeper Affidavit establishes which loan transactions

fall within the class definition originally adopted by Judge Hughston and now adopted by the Supreme Court.

A. The Defective Form

The question of American General's preference form – its “first page of the credit application” – presents a question of law. *SJ App 6*. Plaintiffs argue that there are fatal defects in the American General form, defects that render it unacceptable as proof of compliance with the preference statute.

It is noteworthy that the form that American General employed throughout the period of time certified by Judge Hughston was not the “safe harbor” compliance form created by the Department of Consumer Affairs at the request of lenders. *SJ App 6*. The American General form deviates from the example offered to lenders by the Department in three very significant departures. *SJ App 6*.

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First, the American General form contains no provision for a date to establish when the form was signed by a potential debtor. *SJ App 6, ROA 0568*. The Supreme Court ruled:

“Timing is the central issue in this case. We construe § 37-10-102(a) as requiring the attorney preference disclosure to occur contemporaneously with the credit application. Our construction of legislative intent flows from the clear language of the statute – ‘the credit application on the first page thereof must contain information as is necessary to ascertain these preferences of the borrower’ – and from the 1983 interpretation by the Department of Consumer Affairs.”

King, 386 S.C. at 89-90, SJ App 2.

This deficiency was noted during the testimony of American General's witness, Michael Williamson, before Judge Hughston at the 1998 class certification hearing:

MR. WILLIAMSON: WHAT I'M LOOKING AT, IT SAYS "UNDATED,
76 . WELL---

THE COURT: 76 OUT OF 216?

MR. WILLIAMSON: RIGHT; UNDATED. NOW, THE FORMS THAT
WE WERE USING BACK THEN, THERE'S NO
PLACE FOR A DATE ON THEM. WHY WOULD

WE DATE THEM IF WE HAD NO PLACE TO
DATE THEM?

THE COURT:

I DON'T KNOW.

Hearing, June 8, 1998, ROA 716.

Secondly, again deviating from the Department's compliance form, American General's form does not contain any provision that addresses the frequent situation where the debtor has no preference as to a specific lawyer to assist in the transaction. There is no disclosure provision that allows a debtor to select an attorney from a list provided by American General when the debtor has no individual preference for a specific attorney to prepare all the required documents and conduct the closing and answer questions. American General as a matter of continuing business practice treated the form it created and presented for signature by a debtor as authorization to have a non-lawyer prepare all documents and close real-estate-secured loans despite State v. Buyers Service Co., 292 S.C. 426, 357 S.E.2d 15 (1987).

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Third, American General's form is the functional equivalent of a waiver form in direct violation of S.C. Code Ann. § 37-1-107. The first choice presented on the AGF form is:

"I have no preference as to the attorney to represent me at the closing, if this loan is approved."

SI App 6, ROA 1478. Indeed, "waiver" is a defense that American General raised in its initial Answer in 1996 and again in its subsequent amended Answers, e.g. *ROA 66*, asserting as a defense an act expressly prohibited by the Consumer Protection Code. *Cf.* original 1996 Answer and Second Amended Answer, *ROA 66*, with S.C. Code Ann. § 37-1-107.

The absence of a date on American General's "compliance" form demonstrates American General's company-wide systemic indifference to timely disclosure. Time is central to a loan transaction, and a date establishes the benchmark for any computations of time. The primary purpose of the attorney preference form is to enable a lender to demonstrate that it complied with the statutory requirement of ascertaining the debtor's

preference at the time of credit application. For a lender to omit a date on such a form shows indifference to the statutory requirements.

The attorney preference statute places the responsibility for compliance on the lender, not on the debtor. American General's continued use of dateless forms demonstrates American General's continuing indifference to the importance of timely disclosure contemplated in the preference statute. Equally, if not more important, American General's form that provides for "I have no preference ..." and nothing more is not a preference form: rather it is a waiver form that contravenes § 37-1-107 of the Consumer Protection Code.

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American General stated in its brief and at oral arguments to the Supreme Court of South Carolina that it could comply with the requirements of the preference statute even if it waited until closing to get the preference form signed. *Resp.Br. at 20, Tr. Oral Argument, SJ App 4*. The Supreme Court soundly rejected this argument: "And the suggestion that the attorney preference disclosure may be made at closing borders on frivolity." *King, 386 S.C. at 91*.

Notably, the preference form presented to Ms. Sims by American General, ROA 0568, was not the form deemed in compliance, *SJ App 6*, by the 1983 A. 1. issued by the Department of Consumer Affairs, the state agency¹ charged with construing and enforcing the Consumer Protection Code. *SJ App 5*. The American General form is not dated to show disclosure "prior or contemporaneously with the application form." *SJ App 6, cf. King, 386 S.C. at 85*. In addition, the American General form does not include the disclosure that if a consumer has no specific preference for a particular attorney, the consumer will be given a "list of acceptable attorneys" from which to select an attorney to

¹ Construction of a statute by an agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons. *Lexington Law Firm v. S.C. Dep't of Consumer Affairs*, 382 S.C. 580, 586, 677 S.E.2d 591, 594 (2009), *Carolina Alliance for Fair Emp. v. SCDLLR*, 337 S.C. 476, 490, 523 S.E.2d 795 (Cl.App. 1999), *Glover by Cauthen v. Suitt Constr. Co.*, 318 S.C. 465, 458 S.E.2d 535 (1995); *Home Health Serv., Inc. v. South Carolina Tax Comm'n*, 312 S.C. 324, 440 S.E.2d 375 (1994); *Laurens County Sch. Dis. 55 and 56 v. Cox*, 308 S.C. 171, 417 S.E.2d 560 (1992); *Jasper County Tax Assessor v. Westvaco Corp.*, 305 S.C. 346, 409 S.E.2d 333 (1991); *Stephen v. Avins Const. Co.*, 324 S.C. 334, 478 S.E.2d 74 (Cl.App. 1996).

handle the transaction. Compare the American General form, *ROA 1079 et seq.*, with the form appearing in the 1983 A.I. *SJ App 6*.

The American General form asks only if the borrower had a specific preference for an attorney "to represent me at the closing". *ROA 0568*. The AGF form does not advise or disclose to the borrower that American General might not even use an attorney in the debtor's real estate secured loan transaction. In fact, the American General form states that if the loan is approved by American General there would be an attorney to close the transaction. Of course, the preference statute requires that any lawyer used is chosen by the consumer debtor at time of credit application. See, S.C. Code §37-10-102(a).

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Pnb
In *Davis v. NationsCredit Financial Services Corp.*, 326 S.C. 83, 484 S.E.2d 471 (1997), NationsCredit had used the compliance form set forth in the 1983 A.I., and that court addressed and approved the 1983 A.I. Moreover, the General Assembly, when it amended the Attorney Preference statute in 1996, likewise approved and endorsed the Administrative Interpretation: The "new" statute provides:

If a creditor uses a preference notice form substantially similar to a form distributed by the administrator, the form is within compliance with this section.

S.C. Code Ann. §37-10-102(a)(2) (West Group, 1999 Supp.).

As noted above, the first case treating the attorney-preference statute in any detail was *Davis*, where the Supreme Court ruled:

We find that the intention of the Legislature in crafting § 37-10-102 was to protect borrowers by requiring in the credit application clear and prominent disclosure of the information necessary to ascertain the borrower's preference as to the legal counsel employed to represent the debtor in all matters relating to the closing of the transaction.

Id. *Davis* held that the use of the Administrative Interpretation's form constituted compliance with the law: "Thus, we find that it is not a violation of S.C. Code Ann. §37-10-102 for a lender to use a separate place of paper to ascertain a borrower's preferences of legal counsel and hazard insurance, rather than including a preference statement on first

page of the credit application." See also Tilley v. Pacesetter Corp., 333 S.C. 33, 508 S.E.2d 16 (1998).

Here, unlike in Davis, the form is not substantially similar to the form distributed by the A.I. The burden of proof for this statutory affirmative defense rests with the lender. If the requirement of maintaining procedures reasonably adapted to comply with the law has not been met, then the questions of American General's intentions or *bona fide* errors is never reached. The numerous affidavits of American General's personnel which appear in the Record on Appeal confirm that American General's practices were not in compliance with the Supreme Court decision in this case. *ROA 1464 et seq.*

Viewing the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party, this court concludes that there is no genuine issue of material fact as to the defective form and that the Class, the moving party, is entitled to a judgment as a matter of law on the defective form argument.

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B. The Keeper Affidavit

Following Judge Hughston's initial grant of class certification in 1998, American General, on its own initiative and at its own expense, retained an outside consulting firm to conduct an internal review of American General's loan files. The engagement was not a trivial undertaking as evinced by the report of Susan Keeper, the team leader for Watterson-Prime:

"5. The data collection proceeded in two phases. The first phase was performed during August, September, and October of 1998. During that time we collected data from the loan files that AGF could locate and provide to us. Fourteen team members plus myself participated in the collection. Those fourteen people included two people who were dedicated to quality control. All of the team members were hand selected by Watterson-Prime, and each had extensive experience in lending. All of them had worked either in mortgage underwriting or mortgage servicing. One of them had a law degree. All had worked either with consumer lending or with first or second mortgage lending. The two quality control team members were among the most experienced. After the other team members collected and entered the data from the files into the database, the quality control team members re-reviewed the key documents

to verify that the data was collected and entered accurately.

"6. The second phase of data collection was performed during March, April, May, June, and July of 1999. During this phase we collected data from a few additional files which the AGF South Carolina branches had located since the first phase. The Watterson-Prime team for this phase was comprised of the two quality control team members from the first phase and me. We performed the data collection and quality control for this phase in the same way that we performed it during the first phase."

Affidavit of Susan S. Keeper, dated 12/01/1999, ROA 1505, SJ App 7.

10
B-13

The results of the review are contained in the Keeper Affidavit which was submitted to Judge Williams by American General in December 1999. *Keeper Affidavit, ROA 1545*. That affidavit identifies 5,497 real-estate-secured loan transactions within the class period from more than 40 branch offices. *Keeper Affidavit, ROA 1503, cited in Williams Decertification Order at 6, ROA 0018*. American General was able to locate 4,959 loan files involving 8,328 individual borrowers, *Id., ROA 0018*, while 538 loan files "remain unaccounted for." *See Williams Decertification Order, ROA 0018*. Of the loan files located, American General identified 1,713 files that contained no Preference Form or any other information demonstrating any compliance with the Consumer Code. *Id., ROA 0018*. Approximately 2,491 files contained Preference Forms without dates and 755 files contained Preference Forms that were dated at a time not in compliance with the preference statute. *Id., ROA 0018*.

Ms. Keeper in her affidavit states that in August of 1998, Watterson-Prime was engaged by American General's law firm to collect data from several thousand loan files from all of American General's in South Carolina:

"Specifically, Watterson-Prime was asked to confirm that the loans were secured by real estate (or in the case of mobile home financing, that some document in the file could be interpreted to suggest that real estate was involved in the transaction), and to collect certain data from the documents contained in those loan files."

Keeper Affidavit, ¶13, ROA 1504, SJ App 7. Further, Ms. Keeper in her Affidavit states:

"10. Out of 3,246 loans containing a preference form, 2,482 preference forms were signed, but not dated (representing 4,200 borrowers), and 751 were signed and dated (representing 1,267 borrowers). Consistent

with the class definition, loans with preference forms dated the same date as the application date and closed before May 30, 1996 were excluded. Similarly, loans with preference forms dated within three days after the application date and closed on or after May 30, 1996 were also excluded.”

ROA 0018.

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The Keeper Affidavit concludes that 5,497 loan transactions fall within the Class definition first approved by Judge Hughston in 1998 and adopted by the Supreme Court in 2009. Ms. Keeper “confirmed” that 5,497 loans were secured by real estate and that there was no evidence that the preference was provided at the time of credit application. The affidavit was voluntarily submitted to the court in 1999 – more than a decade ago – to assist American General in its argument for decertification of the Class. The affidavit was intended to demonstrate the many variables among the class members and thus defeat class treatment. In the Circuit Court before Judge Williams, American General was successful. *Decertification Order*, ROA 0013, 0018. Now, however, the Supreme Court has reversed the rulings of Judge Williams and, quoting extensively from Judge Hughston, has reinstated Judge Hughston’s 1998 rulings on class representatives and on the definition of the class that the two debtors represent.

Neither Judge Hughston nor the South Carolina Supreme Court chose to delve into the range of variations subdivisions that the Keeper team identified in its analysis of the transactions within the class. Indeed the only “subset” of the Class is the one arising from the distinction between loans closed before May 30, 1996 and those closed on or after May 30, 1996 – a distinction dictated by the General Assembly’s 1996 amendment of the preference statute and clearly set forth in the class definition and utilized by Ms. Keeper in her affidavit. *SJ App 1*.

The only other question is the number of debtors embraced in the 538 missing files. This has been addressed in the uncontroverted affidavit of Frances W. Burns, dated September 27, 2010 (“Burns Affidavit”), in which Ms. Burns, utilizing a list prepared by American General containing details of the 538 missing files, tabulated a total of 829 debtors.

Accordingly, this court finds that there are 9,157 members of the Class. These are the 9,157 debtors or borrowers involved in the 5,497 loan transactions ("files") identified in the Keeper Affidavit and further clarified in the Burns Affidavit. It is possible that some individuals are members of the Class more than once: a single individual could have been involved in two or more loan transactions with American General. Several of these are identified in the Burns Affidavit. However, this does not reduce the size of the Class as membership in the Class is determined by the number of individual violations of the statute. Likewise, multiple violations of the statute are not rewarded with a single penalty.

Viewing the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party, this court concludes that there is no genuine issue of material fact as to the membership of the Class and it is clear that the Class, the moving party, is entitled to a judgment as a matter of law on the Keeper affidavit argument.

#12
P-B

C. The Class Representatives (the Named Plaintiffs)

The members of the Class are represented by Lois King and Deloris Sims, referred to as the "Named Plaintiffs" or the "Class Representatives. Each was found to be an adequate representative of the Class by Judge Hughston: "... the named Plaintiffs are certainly adequate to represent the interests of the class." *Certification Order, ROA 0008*. The Supreme Court agreed and specifically approved "the adequacy of King and Sims as class representatives." *King*, 386 S.C. at 91.

1. Lois King

In the matter of Lois King, it is undisputed that American General never – at any time – ascertained Ms. King's preferences as to an attorney. Rather the argument regarding King has always focused on whether the King loan came within the purview of the attorney preference statute. American General's continuing position is that it never took a lien on Ms. King's real estate.

More than 12 years ago, Judge Hughston made the unequivocal finding that the King loan was a loan secured by real estate: "Each of the putative class representatives [King and Sims] in this action obtained consumer loans from AGF secured by liens on real estate." *Certification Order, ROA 0002*. Five years later, Judge Williams disagreed and, finding "it is undisputed that [King's] loan was not secured by a lien on real estate," granted American General's summary judgment motion. *Summary Judgment Order, ROA 0040*. Judge Williams had ruled:

The Court concludes that AGF is entitled to summary judgment because there is no genuine issue of material fact as to whether King's loan was secured by a lien on real estate. Construing the evidence in the light most favorable to King, it is undisputed that her loan was not secured by a lien on real estate, and consequently her loan did not trigger the attorney preference statute, S.C. Code Ann. § 37-10-102.

Order, 08/20/2003, ROA 0040.

#13
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Applying the summary judgment standard, the Supreme Court reversed: "We make no finding on the matter of liability and merely hold that the record before us does not warrant summary judgment in favor of American General." *King*, 386 S.C. at 92, *SJ App 2*. The Supreme Court also aptly observed: "We further point out that it appears the King loan was initially intended to be secured by her real estate, and the law required the attorney preference disclosure at the time of application." *Id.*

Lois King and her husband Ralph Void applied for a loan on December 8, 1995. On its face the application contains information confirming that the applicants own land consisting of .78 acres in Eutawville. *ROA 1105*. Both borrower and lender contemplated a real-estate secured transaction:

- The borrower. Ms. King testified that American General asked her at the time of her application whether she owned land "because they were asking for collateral." *ROA 1294*.
- The lender. John Darby, American General's assistant branch manager, was the primary AGF employee who worked on the King loan. *ROA 1526-1527 (Darby), ROA 1036 (King), ROA 1414 (Keller)*. Darby's uncontroverted affidavit expressly states that American General "would have to take a mortgage on real property in order to make the requested loan to Lois King." *ROA 1527, 1529*. Darby further stated in

his affidavit: "It was AGF's intention to take a security interest - a lien - in Ms. King's real estate." ROA 1527, 1529.

American General's documentation for Lois King's loan is consistent with the affidavit of John Darby. Beginning with the King loan application and continuing through American General's post-closing review of its documents, American General's own documents contradict American General's claim that the King loan was only intended to be an unsecured loan transaction.

1. December 8, 1995. In the file is a completed "Real Estate Loan Checklist." The earliest entry is December 8 indicating that the Settlement Costs booklet and Good Faith Estimate of Settlement Charges were sent on December 8. There are also references to ordering title report and to personal inspection of real estate on December 15. To this is added insurance verification on December 26.
ROA 1103.
2. December 8. The loan application specifically notes that the applicant "owns land."
ROA 1105.
3. December 15. American General employee inspects King's real estate near Eutawville ("Personal Inspection of R/E").
ROA 1103.
4. December 15. American General obtained a commitment for title insurance covering King's real estate near Eutawville.
ROA 1103, 1457-1460.
5. December 20. Twelve days after application, on December 20, American General's computer print-out refers to the loan as a real-estate loan.
ROA 1112.
6. December 20. AGF sent King a letter saying:
"If you obtain this loan, the lender will have a mortgage on your home."
ROA 1455.
7. December 26. The application also contains a written approval notation that the King loan "can be made in the following manner:
12-26-95 (date of loan closing) - OK \$7500 using land & mobile home."
ROA 1106.
8. December 26. American General employee John Darby inspects King's real estate near Eutawville ("Personal Inspection of R/E").
ROA 1103.

#14
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9. December 26. At the conclusion of the closing on December 26, American General provided King with a Notice of Right to Cancel and King acknowledged receipt of this notice by signing it. This Notice of Right to Cancel is required by federal law and is applicable only in real-estate-secured loan transactions. The rescission notice states:

“[y]ou are entering into a transaction that will result in a mortgage or deed of trust on your home.”

ROA 1456.

10. January 2, 1996. As part of the follow-up to the closing, there is a document entitled “AGF Loan Documentation List.” Dated January 2, 1996, the section under the heading “Minimum to be completed for real estate secured,” has the initials “JD” (John Darby) appearing beside title search, mortgage and RESPA documents.

11. January 5. Three days later, on January 5, Branch Manager Justice also signed off on the loan documentation. *ROA 1104.*

Viewing the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party, this court concludes that there is no genuine issue of material fact and that King, the moving party, is entitled to a judgment as a matter of law.

#15
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2. Deloris Sims

Ms. Sims executed a note and mortgage in the amount of \$9,262.46 to American General on May 26, 1995, at an interest rate of 25%. *Sims Trial ROA 0157.* With her new real-estate-secured 25% loan, she paid off her then-existing unsecured 17.99% loan. *Id.* The amount borrowed included involuntary unemployment insurance (\$652.46) and credit life insurance (\$1,553.00) for total insurance premiums of \$2,205.46 or 23.8% of the amount borrowed. *Id.* She executed an attorney-insurance preference form which is not dated and which does not indicate her insurance agent preference. *Sims Trial ROA 0169, Ridenhour Depo. ROA 1071-1072.* She applied for the loan several weeks before the closing. *Sims Trial ROA 0160-016, ROA 0150.* Ms. Sims testified that American General did not ascertain her preference at the time of application and that she signed the attorney preference form at the closing after 5:00 p.m. on a Friday afternoon. *Sims Trial ROA 0169-0170.* Ms. Sims testified that she had never visited the American General loan office prior

to the closing on Friday evening, May 25, 1995. *ROA 0161- 0162*. Section 37-10-102(a) required the lender to ascertain the attorney preference at the time of the application, as confirmed by the Supreme Court decision in this case.

After reviewing multiple memoranda and depositions as well as a two-day trial in 2007, *ROA 0093-0640*, this court views the Sims situation in much of the same light as did Judge Williams in January 2003:

"With regard to the loan transaction with Sims, AGF admitted at the [12/16/2002] hearing that the undated Preference Form in the Sims loan file was signed at the loan closing. Thus, the only evidence before the Court indicates that the preference form was presented to Sims at the time of the loan closing. There is no evidence before the Court that AGF attempted to ascertain Sims's preferences at the time of application or at any other time prior to the closing."

Order, 01/10/2003 ROA 0038.

#16
P-B

In the months following the above Order of Judge Williams, American General produced arguments about "habit" and American General's employee Carolyn Gibson's procedures so that Judge Williams ultimately vacated his grant of Partial Summary judgment. *Order 8/20/2003 (Sims)*, *ROA 0043-0045*. Four years later, the Sims matter was tried to a jury. Eleven jurors found that the disclosure was "made by American General to Ms. Sims on May 26, 1995 the day of the closing" while one juror found that the disclosure was "before May 26, 1995." *ROA 0640*. American General made no attempt to prove at trial that the Sims' preference disclosure was made at the time of credit application. The Sims' trial verdict was vacated by the South Carolina Supreme Court:

". . . the trial court impermissibly entangled the concepts of timeliness and substantial compliance. It was error to instruct the jury on substantial compliance with respect to the timing element of the attorney preference disclosure. As a matter of law, providing the attorney preference disclosure after the completion of the credit application violated section 37-10-102. This prejudicial error is clear in the inconsistent jury verdict forms. Accordingly, we reverse due to the trial court's error of law in permitting the timing element in section 37-10-102 to be satisfied by substantial compliance.

King 386 S.C.at 92, 687 S.E.2d at 326.

All the evidence related to Ms. Sims' specific transaction as well as any inference

that can be reasonably drawn from that evidence can only lead to a conclusion that the attorney preference form was presented to and signed by Sims after credit application. In fact, Plaintiffs have pointed out that counsel for American General has conceded that Ms. Sims signed its form at closing. *ROA 0831-0923*. The Supreme Court ruled that such a scenario was unlawful under the Code.

#17
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It is undisputed that the Sims application is dated April 19, 1995. *ROA 0565*. Carolyn Gibson admits Ms. Sims initially applied for the loan by phone. *ROA 0278-0279*. At trial Ms. Gibson testified she had no recollection of Ms. Sims or the Sims transaction, *ROA 0277*. In her deposition, she testified that her "procedure" would have been to require the customer to come in and sign the attorney preference form at the same time she signed the RESPA documents. *ROA 1338*. The RESPA documents include Good Faith Estimate (*ROA 570*) and Servicing Transfer Disclosure (*ROA 571*) and are required by law to be signed within three days of the time of the application. *ROA 1325-1326*. Gibson then testified that if the customer did not come in within three days she would void the application and have the customer make a new application. *ROA 284*. There is no evidence of any credit application other than the April 19, 1995 copy contained in Ms. Sims' file. *ROA 1342-1343*.

The undated attorney preference form of Sims was not signed at the time of application as required by the statute and the Supreme Court. In fact, Sims' RESPA documents are all signed by Sims and Gibson on the date of closing, May 26, 1995, *ROA 570- 571*. Therefore, if Carolyn Gibson followed her normal routine (i.e. habit) of having the attorney preference signed at the same time as RESPA documents, the undated attorney preference form was signed at closing. *ROA 288*. This is consistent with statements by counsel for American General. (*ROA 0831 and 0923*). Plaintiffs' counsel have pointed out and it is undisputed that Mrs. Sims's loan was closed by a non-attorney employee of American General, Ms. Gibson.

If American General presented an attorney preference form dated April 19, 1995 and signed at the time of credit application, Plaintiff would have no claim. As with most of American General's attorney preference forms, the Sims' form is undated and the form

itself contains no place for a date to determine compliance.

American General has suggested that Ms. Sims's preference was ascertained at some time prior to closing. However, there is no evidence to support a claim that the preference was ascertained at the time of application as required by law. Viewing the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party, this court concludes that there is no genuine issue of material fact and that Sims, the moving party, is entitled to a judgment as a matter of law.

D. Discussion of American General's Responses

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This court has carefully read and examined each of the Affidavits submitted by American General. This court is mindful of its obligation to determine if the proffered Affidavits raise issues of material fact that would preclude this court from granting plaintiff's Motion for Summary Judgment. The submitted Affidavits implicate the defense asserted by American General that it is entitled to the protections afforded to creditors in the Consumer Credit Code. Specifically, American General asserts that it may avoid all liability in this case under the terms of S.C. Code Ann. Section 37-10-105(B) which states:

No creditor may be held liable in an action brought under this section for a violation of this chapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

S.C. Code Section 37-10-105(B).

In this case, Plaintiffs assert that American General failed to timely ascertain from its consumer debtor borrowers their individual preference as to the identity of the legal counsel "... that is employed to represent the borrower in all matters of the transaction relating to the closing of the transaction." *SC Code Ann. Section 37-10-102 (a)*. As a result, this court must be guided by the interpretation of the law established by the Supreme Court in this case. *King*, 386 S.C. at 82. This court must then determine if the proffered affidavits establish "by a preponderance of evidence" that, even if Plaintiffs have

established a violation of law for Ms. King and Ms. Sims, (1) American General did not intend to violate the provisions of the Code and, even more important, (2) American General established "procedures reasonably adapted to avoid the error," and (3) American General maintained those procedures. *S.C. Code § 37-10-105(B)*.

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In determining whether American General complied with the provisions of the preference statute, the Supreme Court expressly adopted the Class Certification Order of Judge Hughston and the Administrative Interpretation 10.102(8)-8302 (October 11, 1983) (the "A.I.") *SI App 5*, issued by the South Carolina Department of Consumer Affairs. The A.I. and the compliance form were issued in response to requests from the lending community seeking guidance on compliance.² In the *King* decision, the Supreme Court adopted both the reasoning and legal construction of the preference statute stated in the 1983 A.I. *King*, 386 S.C. at 89-90. The A.I. provides a clear compliance roadmap of how a creditor can comply with §37-10-102(a) and provides a creditor and the Court with a creditor compliance preference form for creditors to use to ensure compliance with the Code. Strongly rejecting Defendant's "substantial compliance" argument, the Court held that the attorney/insurance preference must be ascertained contemporaneously with the credit application. *King*, 386 S.C. at 89. The Court ruled, if a lender does not timely ascertain the preferences of a consumer borrower at the time of credit application, any later American General disclosure and ascertainment of a debtors preferences is untimely as a matter of law. *King*, 386 S.C. 91. The Court noted that to do otherwise would undermine the legislative purpose of the preference statute "to protect borrowers". *King*, 386 S.C. 89-90.

First, this court notes that American General chose to use an undated preference form that it drafted to use as its official preference compliance form. This court has not identified any evidentiary basis in the record or in the proffered Affidavits that meets the Code-established standard of "preponderance of evidence" as to why an American General

² This is the second time the Supreme Court affirmed the Department of Consumer Affairs' interpretation of §37-10-102(a). See also *Davis v. NationsCredit Financial Services Corp.*, 326 S.C. 83, 484 S.E.2d 471 (1997)

undated compliance form meets the required statutory standard for timely Code compliance.

Given the "bright line" compliance timing standard established and required by the Supreme Court in this case and in the 1983 A.I., this court has reviewed the written compliance procedures proffered by American General through its 30(b)(6) witness, Mr. Ridenhour. *ROA 1076, 1078*. The official American General compliance procedures require:

"The customer must check the appropriate box, enter the appropriate names of attorneys or agents, and sign the form prior to completion of the rest of the Application for loan."

ROA 1076.

The court has also located a second American General preference compliance procedure in the record dated "3/20/96." *ROA 1078*. That loan closing and preparation of documents form references "FIRST PAGE MORTGAGE LOAN APPLICATION" and states that:

- #20
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- a. This form then becomes the first page of the Application for Loan.
 - b. The customer must check the appropriate box, enter the appropriate names of attorneys or agents, and sign the form **prior to completion** of the rest of the Application for Loan.

ROA 1078 (emphasis added).

American General established a very clear written compliance process to provide its consumer borrowers with a timely written disclosure and the opportunity to express their Code established rights to name both the attorney and insurance agent to provide the required legal services and insurance associated with a real estate secured loan from American General. This court must determine whether the written requirements were, in fact, followed – maintained – on a consistent and uniform basis.

This court notes that American General required, in both of the above referenced compliance procedures, that the customer "must check the appropriate box, enter the appropriate names of attorneys or agents, and sign the form prior to completion of the rest of the Application for Loan." In light of the compliance standard established by American

General, this court again reviewed the proffered American General employee Affidavits to determine if those affidavits establish by a preponderance of evidence that American General maintained and regularly followed the required steps it established for Code compliance. This court has determined that the proffered Affidavits do not establish the application any consistent compliance procedures by American General to "avoid the error" of untimely preference disclosure and the related ascertainment from the "customers" of their attorney and insurance agent preferences. Several affidavits reference that the employee "believes" that a preference was given but do not state exact time that the lost or misplaced preference form might have been provided to the consumer. Notably, there is no reference to the American General requirement that the consumer "sign the form prior to the completion of the rest of the Application for Loan." Indeed, the Affidavits generally reference various times after initial credit application before the consumer was even afforded the opportunity to review the undated preference form created by American General. This court is not persuaded that the essentially "upon information and belief" declarations of American General employees regarding various loan circumstances meet the preponderance of evidence standard required to have the protection of the statutory safe harbor. This court notes that the decision by American General to use an undated preference "compliance" form fails to demonstrate or establish a consistently applied "compliance standard" by American General.

Several of the employee affidavits attempt to suggest to this court that a consumer was provided with a preference form, if at all, sometime during the process of American General making real estate secured loans and that such conduct was consistent with American General training. Most affidavits reflect that the employee did not remember the specifics of a particular loan transaction and simply state they "believed" certain actions were taken. Some affidavits confirm that a preference form was finally provided and signed at some time after the credit application. None of the Affidavits address any detailed and ongoing document retention policies of American General so that Defendant could, in fact, demonstrate Code compliance if there were a later dispute or missing documents. Those Affidavits are consistent with the position that American General

21
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presented to the Supreme Court, namely, that the lender had no legal duty or obligation to "ascertain the borrower's preference before the day of closing, much less a certain number of days in advance." *Resp.Br. at 20*. American General attempts to ignore that the Supreme Court completely rejected American General's compliance position by stating:

"The timing feature of section 37-10-102 imposes a bright-line approach which is manifestly at odds with the notion of "substantial compliance." To permit a construction of section 37-10-102 as sanctioning the lender's furnishing the borrower with *the attorney preference disclosure after the application was completed* would undermine the legislative purpose "to protect borrowers." *Davis*, 326 S.C. at 86, 484 S.E.2d at 472; *see also McClanahan v. Richland County Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute;"). **And the suggestion that the attorney preference disclosure may be made at closing borders on frivolity."**

#22 *King*, 386 S.C. at 91.

pnB The preference statute, as construed by the Supreme Court, requires a bright line sequence of consumer protection disclosures that begins on the date of application. A bright-line approach requires dated documents to establish by a "preponderance of evidence" standard for of Code compliance, as demonstrated by the dated compliance form created by the Department of Consumer Affairs. The official American General compliance procedures are clear and unambiguous. *ROA 1076, 1078*. In order to establish that it maintained "procedures reasonably adapted to avoid the error", this court has also reviewed the affidavits submitted by American General to determine if American General actually maintained and followed procedures to ensure that the standards established by its own operating procedures were regularly applied and followed. Such evidence is required in order for American General to provide this court with a preponderance of evidence that it consistently followed its own operating procedures to "avoid the error" of not timely ascertaining the preferences of consumers who obtained a real estate secured loan .

Therefore, to defeat the pending summary judgment motion American General must point to some evidence that the undated attorney preference form, *Trial Ex. 4, ROA 0568*, complies with all required disclosures and was presented "prior to or contemporaneously with the application form" as stated in the 1983 A.I. endorsed by the Supreme Court. American General has failed to provide this court with that evidence to avoid summary judgment and establish a "safe harbor" defense. This court has also carefully considered the Affidavits of attorneys who closed loans for American General. This court concludes that the Affidavits by American General fail to establish by a preponderance of evidence that American General created, established and consistently followed and applied its own stated preference compliance procedures.

Based on this court's review of the entire record in this matter, the decision by American General to use an undated preference "compliance" form, the compliance claim by American General to the Supreme Court that it had no legal duty or obligation to "ascertain the borrower's preference before the day of closing, much less a certain number of days in advance," *Resp.Br. at 20*, confirms that American General did not apply the correct Code compliance timing standard in the consumer loans now before this court. Further, this court will not ignore the rulings of the Supreme Court or the "wait to closing" compliance arguments made by American General to the Supreme Court. This court is unable and unwilling to assist American General in avoiding the liability it created by its own decisions and actions.

#23
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V. CONCLUSION

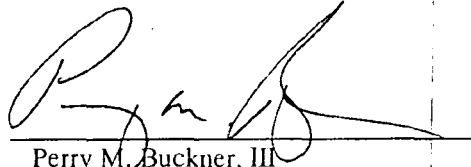
Judicial economy dictates that, insofar as practical, all substantive matters are addressed in a single comprehensive order. While the foregoing discussion indicates this court's intention to enter summary judgment for Plaintiffs against Defendant, entry of judgment will be deferred until all issues have been addressed. At that time, a single comprehensive Final Order will be filed.

Plaintiffs' have requested that if the motion for summary judgment is granted, this court also make a rulings on (i) the amount of the penalty, (ii) prejudgment interest, (iii)

appropriate notice to the Class, (iv) class administration, and (v) attorneys' fees and costs.

Argument on these issues will be heard at a date to be scheduled by this court and addressed in this court's final order.

IT IS SO ORDERED!


Perry M. Buckner, III
Judge, Fourteenth Judicial Circuit

July 29, 2011

Walterboro, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	Case No. 96-CP-38-595
LOIS KING and DELORIS SIMS, on behalf	)	
of themselves and all others	)	
similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
AMERICAN GENERAL FINANCE, INC.,	)	
	)	
Defendant.	)	

Before this Court are two motions of Defendant American General Finance, Inc.:

- Defendant's Renewed Motion to Decertify the Class, or Require Separate Trials, or Require Subclasses, filed on March 16, 2011, and
- Defendant's Renewed Motion for Leave to Amend Answer and Counterclaim, also filed on March 16, 2011.

In response, Plaintiffs filed their:

- Motion to Quash, dated April 4, 2011.

On June 9, 2011, argument was heard at the Colleton County Courthouse with T. Thomas Cottingham, III representing Defendant and C. Bradley Hutto for Plaintiffs. Also present were James Y. Becker, Phoebe N. Coddington, Mary M. Caskey and Stacie C. Knight for the Defendant as well as Defendant's Associate General Counsel, James McMurray. Other counsel present for the Plaintiffs were Steven W. Hamm, Charles L. Dibble, Daniel W. Williams and T. Alexander Beard.

Procedural Background

This case is on remand from the Supreme Court of South Carolina pursuant to its Opinion, refiled on December 21, 2009. On remand, this case, which had been designated as exceptional and complex, was assigned to the Honorable Diane S. Goodstein, resident Circuit Judge, First Judicial Circuit. In August 2010, the parties entered into an agreement fixing a schedule and establishing a deadline for the filing and

service of motions and supporting memoranda. Mr. Becker signed this document on behalf of the Defendant on August 30, 2010, and Mr. Dibble signed on behalf of the Plaintiffs on August 31, 2010. The agreement between counsel was signed by Judge Goodstein on September 17, 2010 (the "September Order").

Pursuant to the agreed schedule in the September Order, Defendant filed three motions, two of which are pertinent here – a Motion for Leave to Amend Answer and Counterclaim and a Motion to Decertify the Class¹, or Require Separate Trials, or Require Subclasses. At a hearing before Judge Goodstein on November 22, 2010, the parties were afforded an opportunity to argue all pending motions. On December 12, 2010, Judge Goodstein issued an Order "(1) Granting in part and denying in part Defendant's Amended Motion for Leave to Amend Answer; ... and (3) Denying Defendant's Motion to Decertify the Class, etc." (the "December Order").

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On February 16, 2011, Judge Goodstein *sua sponte* recused herself from this case. Judge Goodstein's Order of recusal states: "All rulings issued prior to [February 16] remain in effect." On February 25, 2011, Chief Justice Jean Hofer Toal of the Supreme Court of South Carolina ordered that the undersigned "be vested with exclusive jurisdiction to hear and dispose of [this] case." As required by Rule 63, SCRPC, this Court hereby certifies that it is familiar with the voluminous record in this case. This Court has further determined that the proceedings may be completed without prejudice to the parties.

The Pending Motions

In support of the two renewed motions and in reply to Plaintiffs' Motion to Quash, Defendant filed its Memorandum in Opposition to Plaintiffs' Motion to Quash, dated April 18, 2011, and also a Supplemental Memorandum of Law Regarding All Pending Motions for the June 9, 2011 Hearing, dated June 8, 2011.

1. Defendant filed an Amended Motion for Leave to Amend on October 28, 2010.

This Court has carefully considered the arguments of counsel and submitted documents in support of the renewed motions. However, the September and December Orders along with the Judge Goodstein's Order of recusal dictate the disposition of Defendant's two motions.

First, counsel for the parties reached an agreement on August 31, 2010 to set a deadline – an ending date – for the filing of motions in this almost 15-year-old case. As noted above, this agreement when approved by the Court became the September Order. The renewed motions were filed more than five months after the agreed deadline.

#3
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In addition, as characterized by Defendant itself, the motions are “renewed” motions, raising matters that have already been argued at the November hearing and addressed in the December Order. Judge Goodstein has already ruled on these matters and, as noted in her recusal Order, all prior rulings remain in effect.

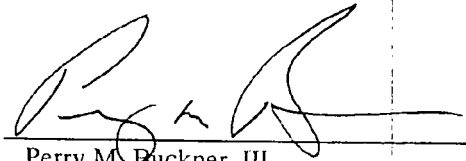
As for the renewed motion to amend, Rule 15(a), SCRCP, speaks of leave to amend being “freely given” and our case law allows amendment under various circumstances at almost any stage of the proceedings. However, this case presents an additional factor: the parties reached an agreement on August 31, 2010 to set a deadline of September 27, 2010 for filing and serving all motions. In light of the agreement of the parties and taking into account Judge Goodstein's recusal Order, this is an instance where leave to amend would be inappropriate.

Conclusion

For the reasons stated above,

1. Defendant's Renewed Motion to Decertify the Class, or Require Separate Trials, or Require Subclasses is DENIED.
2. Defendant's Renewed Motion for Leave to Amend Answer and Counterclaim is DENIED.
3. Plaintiffs' Motion to Quash is GRANTED.

IT IS SO ORDERED!


Perry M. Buckner, III
Judge, Fourteenth Judicial Circuit

July 29, 2011

Walterboro, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS

LOIS KING and DELORIS SIMS, on
behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

AMERICAN GENERAL FINANCE, INC.,

Defendant.

Case No. 96-CP-38-595

2010 DEC 17 A 11

ORDER

- (1) GRANTING IN PART AND DENYING IN PART DEFENDANT'S AMENDED
MOTION FOR LEAVE TO AMEND ANSWER;
(2) DENYING DEFENDANT'S MOTION TO REQUIRE PLAINTIFFS TO GIVE
NOTICE TO THE CLASS; AND
(3) DENYING DEFENDANT'S MOTION TO DECERTIFY THE CLASS, ETC.**

This matter is before the Court on the following motions of Defendant American General Finance, Inc. ("American General"): (1) Amended Motion for Leave to Amend Answer and Counterclaim dated October 26, 2010 ("Motion to Amend"); (2) Motion to Require Plaintiffs to Give Notice to the Class dated September 27, 2010 ("Motion to Require Notice"); and (3) Motion to Decertify, or Require Separate Trials, or Require Subclasses dated September 27, 2010 ("Motion to Decertify"). A hearing on these motions was held before me on November 22, 2010.

For the reasons stated at the hearing, American General's Motion to Amend is granted, in part, as to the request to plead the following affirmative defenses as set forth in American General's proposed Third Amended Answer to Amended Complaint, attached as Exhibit 1 to the Motion to Amend:

1. Third Defense—Equitable Estoppel;

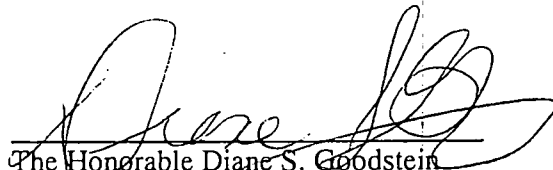
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2. Fourth Defense—Estoppel by Silence;
3. Fifth Defense—Waiver;
4. Sixth Defense—Consent;
5. Seventh Defense—Good Faith Error, S.C. Code Ann. § 37-10-105(B);
6. Eighth Defense—Lack of Prejudice;
7. Ninth Defense—Unconstitutionality of Attorney Preference Statute, S.C. Code § 37-10-102(a);
8. Tenth Defense—Unconstitutionality of Penalty under S.C. Code § 37-10-105;
9. Eleventh Defense—Violation of Due Process Rights, U.S. Const. amend XIV, § 1, S.C. Const. art. I, § 3, as to Prospective Class Members; and
10. Twelfth Defense—Statute of Limitations as to Prospective Class Members.

American General's Motion to Amend is denied, in part, without prejudice, regarding the defenses of Set-Off, Recoupment and Repayment, and Breach of Contract, and the proposed counterclaim for Breach of Contract. American General shall serve its proposed Third Amended Answer to Amended Complaint, as modified to comply with this order, on or before December 3, 2010.

American General's Motion to Require Notice and American General's Motion to Decertify are each denied for the reasons stated at the November 22, 2010, hearing.

AND IT IS SO ORDERED.


The Honorable Diane S. Goodstein
First Judicial Circuit

12-12, 2010