THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2015-001508
Case No. 2013-CP-10-06439

Wells Fargo Bank, N.A., Successor by Merger to Wachovia Bank, National Association,.....Respondent,

v.

Robert L. Freeman, ...Appellant.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

1. DID THE LOWER COURT ERR IN DETERMINING THAT THE STATUTE OF LIMITATIONS APPLICABLE TO SEALED INSTRUMENTS APPLIES TO A GUARANTY AGREEMENT BETWEEN SOPHISTICATED PARTIES THAT STATES IMMEDIATELY ABOVE THE SIGNATURE LINE "GUARANTOR . . . HAS CAUSED THE UNCONDITIONAL GUARANTY TO BE EXECUTED UNDER SEAL" AND INCLUDES THE NOTATION "(SEAL)" DIRECTLY BESIDE THE GUARANTOR'S SIGNATURE?

2. ALTERNATIVELY, EVEN IF THE GUARANTY AGREEMENTS WERE NOT EXECUTED UNDER SEAL, SHOULD THE LOWER COURT BE AFFIRMED BECAUSE THE TWENTY-YEAR STATUTE OF LIMITATIONS STILL APPLIES TO THESE GUARANTY AGREEMENTS THAT WERE BARGAINED FOR, EXECUTED AND DELIVERED AS PART OF A MORTGAGE LOAN TRANSACTION?

3. EVEN IF THE APPLICABLE STATUTE OF LIMITATIONS IS THREE YEARS INSTEAD OF TWENTY YEARS, SHOULD THE LOWER COURT BE AFFIRMED BECAUSE THE RESPONDENT FILED ITS COMPLAINT WITHIN THREE YEARS OF THE MATURITY OF THE LOANS ON JUNE 15, 2011?

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5. EVEN IF THE APPLICABLE STATUTE OF LIMITATIONS IS THREE YEARS AND BEGAN TO RUN FROM THE DATE AN INTEREST PAYMENT WAS MISSED, DID THE STATUTE ONLY BEGIN TO RUN AS TO EACH MISSED INSTALLMENT SEPARATELY, NOT THE ENTIRE LOAN BALANCE?

STATEMENT OF FACTS

The parties submitted the statute of limitations issue to the Circuit Judge on cross-motions for summary judgment, and the relevant facts pertaining to that issue are not in dispute. During 2006 and 2007, Wells Fargo made a total of thirteen (13) loans to the six (6) separate, but related, entities in which the Appellant was principal member (each hereinafter referred to individually as a "Loan" and all of them, collectively, as the "Loans"). (Compl., R. pp. 13-26 at ¶¶ 4, 6, 14, 22, 24, 32, 34, 36, 38, 50, 52, 61, 63; Am.

Answer, R. pp. 308-17 at ¶¶ 5, 7, 15, 23, 25, 33, 35, 37, 39, 51, 53, 62 and 64; Aff. of Robert L. Freeman, R. p. 393 at ¶ 3; Aff. of Steven A. Jasinski, R. p. 401 at ¶ 3.) The aggregate original principal amount of the Loans was approximately $9,800,000.00. *Id.* All the Loans were secured by mortgages on real estate, and each Loan was further secured by a personal guaranty agreement that was signed by the Appellant and delivered to Wells Fargo (collectively, the "Freeman Guaranties"). (Compl., R. pp. 14-27 at ¶¶ 8-9, 16-17, 26-27, 41-42, 55-56, 66-67; Am. Answer, R. pp. 296-304 at ¶¶ 9-10, 17-18, 27-28, 42-43, 56-57 and 67-68; Aff. of Robert L. Freeman, R. pp. 393-95 at ¶¶ 3, 5, 7 and 10; Aff. of Steven A. Jasinski, R. pp. 401-02 at ¶ 3-4.)

A summary of the Loans is as follows:

Borrowing Entity	**Original Principal Amount**	**Hereinafter Described As**
Seafree LLC	$1,089,500.00	Seafree Note 1
Seafree LLC	$ 124,000.00	Seafree Note 2
Seafree Edisto, Inc.	$ 500,000.00	Seafree Edisto Note
Yerby Road, LLC	$ 950,000.00	Yerby Road Note 1
Yerby Road, LLC	$ 700,000.00	Yerby Road Note 2
Jadiekate, LLC	$1,205,000.00	Jadiekate Note 1
Jadiekate, LLC	$1,520,000.00	Jadiekate Note 2
Jadiekate, LLC	$ 790,000.00	Jadiekate Note 3
Jadiekate, LLC	$ 495,000.00	Jadiekate Note 4
708 Ocean, LLC	$ 239,700.00	708 Ocean Note 1
708 Ocean, LLC	$ 400,000.00	708 Ocean Note 2
1F3S, LLC	$1,500,000.00	1F3S Note 1

1F3S, LLC	$ 320,000.00	1F3S Note 2

On April 8, 2010, the Loans were last modified pursuant to documents titled "Modifications of Promissory Note and Security Documents" (collectively, the "Loan Modifications"). Under the Loan Modifications, the maturity date for all Loans was extended to June 15, 2011. (Compl., R. pp. 13-26 at ¶¶ 5, 7, 15, 23, 25, 33, 35, 37, 39-40, 51, 53-54, 62, 64-65; Am. Answer, R. pp. 308-17 at ¶¶ 6, 8, 16, 24, 26, 34, 36, 38, 40-41, 52, 54-55, 63, 65-66; Affidavit of Steven A. Jasinski, R. pp. 402 at ¶ 5.) The Loan Modifications also provided that monthly interest payments only were due on the Loans until June 15, 2011, at which time the principal and any remaining accrued interest were due and payable in full. Copies of all the notes, guaranties and all modifications thereto, including the Loan Modifications, were attached to the Complaint and are not in dispute. (Compl., R. pp. 13-27 at ¶¶ 4-7, 9, 14-15, 17, 22-25, 27, 32-40, 42, 50-54, 56, 61-65, 67; Am. Answer, R. pp. 308-17 at ¶¶ 5-10, 15-18, 23-28, 33-43, 51-57, 62-68; Aff. of Robert L. Freeman, R. pp. 394-95 at ¶ 9,10; Aff. of Steven A. Jasinski, R. p. 402 at ¶ 4-5.)

Appellant stopped making interest payments on the Loans in the Fall of 2010. Specifically, the Appellant failed to make the interest payments due on Yerby Road Note 1 and Yerby Road Note 2 starting with the September 5, 2010 payment, and also failed to make the interest payments due on Seafree Note 1 commencing with the September 15, 2010 payment. (Aff. of Steven A. Jasinski, R. p. 402 at ¶ 6; Aff. of Robert L. Freeman, R. pp. 395-96 at ¶¶ 13, 19.) The Appellant failed to make the interest payments on the remaining Loans starting with the October 2010 payments, except for 708 Ocean Note 2 for which the September and October interest payments were made, but none thereafter.

(Aff. of Steven A. Jasinski, R. p. 402 at ¶ 7-8; Aff. of Robert L. Freeman, R. pp. 395-399 at ¶¶ 15, 17, 21-24, 26, 28-29, 32.)

On November 22, 2010, Wells Fargo's counsel sent the obligors for each Loan a notice of default and reservation of rights letter. (Aff. of Paul VanWagenen dated January 6, 2015, Ex. A, R. pp. 595, 597-614; Aff. of Steven Jasinski, R. p. 402 at ¶ 9; Aff. of Robert L. Freeman, R. p. 399 at ¶ 31.) On December 7, 2010, Wells Fargo's counsel sent letters to the obligors for each Loan notifying them that Wells Fargo would impose the default rate of interest on the Loans. (Aff. of Paul VanWagenen, Ex. B, R. pp. 595, 615-631.) Finally, on May 19, 2011, Wells Fargo's counsel sent letters to the obligors for each Loan, including the Appellant, providing in part:

> Lender has elected to accelerate the balance of the Loans and hereby demands payment in full of the Loans. Please be further advised that, effective as of such defaults, interest will accrue on the outstanding amounts under the Notes at the Default Rate (as defined in the Loan Documents). If the outstanding balance of the Loans is not delivered in full to Lender by June 17, 2011, Lender intends to pursue available remedies, including foreclosure of the collateral property and suits against each of the guarantors.

(Aff. of Paul VanWagenen, Ex. C, R. pp. 595, 632-648; Aff. of Steven A. Jasinski, R. p. 403 at ¶ 11.) Neither of the prior two letters from Wells Fargo's counsel contain any reference to acceleration of the Loans.

From 2010 through 2013, Wells Fargo and Appellant worked together in a cooperative effort to reduce the outstanding balance of the subject Loans. (Am. Answer, R. pp. 309-18 at ¶¶ 11, 19, 29, 44, 58, 69; Aff. of Steven A. Jasinski, R. p. 403 at ¶ 13.) Certain of the collateral properties were earmarked for private sale efforts, while others were agreed to be the proper subjects of a foreclosure action. (Email from Trenholm Walker to Paul VanWagenen dated March 12, 2012, attached as Ex. A to Supplemental

Affidavit of Paul VanWagenen dated April 22, 2015; R. pp. 649, 651-655.) As a result, certain of the collateral properties were voluntarily sold by the Appellant, with Wells Fargo's consent, through private "short sales" that occurred in 2012 and 2013. (Compl., R. pp. 17-27 at ¶¶ 19, 44 and 69; Am. Answer, R. pp. 311-18 at ¶¶ 20, 45 and 70; Aff. of Steven A. Jasinski, R. p. 403 at ¶ 13.)

In connection with each private short sale, Appellant executed and delivered to Wells Fargo a letter required by Wells Fargo regarding its lien release, which provides in part as follows:

> Please be advised that [Wells Fargo] is willing to release the Property from the lien of the Mortgage in exchange for 100% of the net proceeds of the sale or [the contract price], whichever amount is greater, provided the Borrower and Guarantor expressly agree this is a partial payment on the Loan and that neither this payment nor any other partial payment that has been or may be received shall constitute an agreement to waive demand for full payment of all amounts due under the Loan Documents.

(Supp. Aff. of Paul VanWagenen, R. pp. 649, 656-75 at ¶ 3 (emphasis added); Aff. of Steven A. Jasinski, R. p. 403 at ¶ 14.) Wells Fargo would not have released its lien without such express agreement from Appellant that the sale proceeds would constitute a partial payment on the Loan. (Aff. of Steven A. Jasinski, ¶ 14; R. p. 403.)

Thus, Appellant, as guarantor, made or caused to be made partial payments on 1F3S Note 1, 1F3S Note 2, Jadiekate Note 1, Jadiekate Note 2, Jadiekate Note 3, Jadiekate Note 4, and the Seafree Edisto Note. (Aff. of Steven A. Jasinski, R. pp. 403 at ¶ 15, 575.) The proceeds from each of the short sales were insufficient to pay the applicable Loan secured, resulting in a deficiency balance. (Compl, R. pp. 17-27 at. ¶¶ 20, 45-48, 70-71; Aff. of Robert L. Freeman, R. pp. 396-99 at ¶¶ 16, 18, 25, 27 and 30; Aff. of Steven A. Jasinski, R. pp. 404 at ¶ 18, 580.)

In March 2012, Wells Fargo commenced actions to foreclose its mortgages on the remaining collateral properties. (Compl., R. pp. 15-25 at ¶¶ 11, 29 and 58; Am. Answer, R. pp. 309-16 at ¶¶ 12, 30 and 59; Aff. of Steven A. Jasinski, R. pp. 403-04 at ¶ 13, 16.) All foreclosures resulted in deficiency judgments against the borrowers, which remain unsatisfied. (Compl., R. pp. 15-25 at ¶¶ 12, 30 and 59; Aff. of Steven A. Jasinski, R. pp. 404 at ¶ 18-19.)

The outstanding deficiency amounts on the Loans were as follows:

Seafree Note 1 and Seafree Note 2	$ 967,168.14 as of December 5, 2012
Seafree Edisto Note	$ 198,976.62 as of September 17, 2013
Yerby Road Note 1 and Yerby Road Note 2	$1,064,040.28 as of June 6, 2013
Jadiekate Note 1	$ 347,692.07 as of September 17, 2013
Jadiekate Note 2	$ 425,706.30 as of September 17, 2013
Jadiekate Note 3	$ 395,744.75 as of September 17, 2013
Jadiekate Note 4	$ 255,001.01 as of September 17, 2013
708 Ocean Note 1 and 708 Ocean Note 2	$ 469,044.84 as of October 31, 2012
1F3S Note 1	$ 101,199.95 as of September 17, 2013
1F3S Note 2	$ 113,525.81 as of September 17, 2013

This action was filed against the guarantors on October 30, 2013. In October 2014, the parties mediated the case, which resulted in settlements with two of the three guarantors, who have since been dismissed as parties. In November 2014, Appellant amended his answer to assert the statute of limitations as a defense. Wells Fargo and the Appellant filed cross-motions for summary judgment regarding whether the Bank's claims were time-barred due to its extensive negotiations with Appellant prior to filing its

lawsuit. On June 2, 2015, the Circuit Judge ruled that the Bank's claims were not time-barred because the sealed guaranty agreements were subject to the twenty-year statute of limitations found in S.C. Code Ann. §15-3-520(2).

STANDARD OF REVIEW

Appellant has the burden of proof on his statute of limitations defense. *Cole v. S. C. Elec. & Gas, Inc.*, 355 S.C. 183, 195, 584 S.E.2d 405, 412 (Ct. App. 2003,) *aff'd as modified*, 362 S.C. 445, 608 S.E.2d 859 (2005) (citing *Lorick & Lowrance, Inc. v.. Julius H. Walker & Co.*, 153 S.C. 309, 318, 150 S.E. 789, 792 (1929) ("When a defendant interposes an affirmative defense, he becomes as to that matter the actor in the suit, and the burden of proof rests upon him to establish his affirmative defense by the preponderance of the evidence."). Moreover, Rule 56, SCRCP, requires the entry of summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002).

Although the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, "this initial responsibility may be discharged by 'showing' – that is, pointing out to the trial court – that there is an absence of evidence to support the nonmoving party's case." *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Once the moving party makes this demonstration, the opposing party "must, under Rule 56(e), do more than simply show some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a *genuine issue for trial*." *Id.* (emphasis in original); *Midland Mutual Life Ins. Co. v. Harrell*, 331 S.C. 394, 397, 503 S.E.2d 189, 190 (Ct. App. 1998). The nonmoving party must specifically set forth such facts "as would be admissible in

evidence" to show that a true jury issue exists. Rule 56, SCRCP. The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003); *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001).

An appellate court reviews a grant of summary judgment under the same standard applied by the lower court pursuant to Rule 56, SCRCP." *Lanham v. Blue Cross and Blue Shield of South Carolina, Inc.*, 349 S.C. 356, 361 (2002). However, the factual findings made by a lower court generally will not be disturbed on appeal unless there is no evidence to support them. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976) ("In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings.").

In addition, the Court of Appeals may affirm the lower court's ruling on any ground(s) appearing in the Record on Appeal. Rule 220(c), SCRAP. The Circuit Judge found that the twenty-year statute of limitations applied because the Freeman Guaranties were executed under seal, and that decision was determinative of the cross summary judgment motions. It was not necessary, therefore, for Judge Nicholson to address several other arguments offered by the parties (Order, R. p. 11, n.2.) Nevertheless, all of Respondent's arguments below are available and appropriate for this Court to rely upon as grounds to affirm the lower court: "A respondent may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled upon by the lower court." *Sims v. Amisub of South Carolina, Inc.*, 408 S.C. 202, 214-15, 758 S.E.2d 187, 194 (Ct. App. 2014).

ARGUMENTS

I. THE CIRCUIT JUDGE CORRECTLY RULED THE APPLICABLE STATUTE OF LIMITATIONS TO BE TWENTY (20) YEARS BECAUSE THE FREEMAN GUARANTIES WERE EXECUTED UNDER SEAL AS A MATTER OF LAW.

The Circuit Judge found that the statute of limitations applicable to "an action upon a sealed instrument" is twenty (20) years. S.C. Code Ann. § 15-3-520(2). The Appellant has admitted that his guaranty agreements were executed and delivered to Wells Fargo. (Compl., R. pp. 14-27 at ¶¶ 9, 17, 27, 42, 56, 67; Am. Answer, R. pp. 309-17 at ¶¶ 10, 18, 28, 43, 57 and 68; Aff. of Robert L. Freeman, R. pp. 394-95 at ¶¶ 5, 7 and 10; Aff. of Steven A. Jasinski, R. pp. 401-02 at ¶ 3-4.) The provisions of the Freeman Guaranties are not in dispute, and there are multiple grounds on which the Court should affirm the Circuit Judge's ruling.

A. The Circuit Judge Correctly Applied Section 19-1-160.

In determining whether an instrument is a "sealed instrument" for purposes of Section 15-3-520(2), the Court is restricted to the language used in the instrument itself:

> Whenever it shall appear *from the attestation clause or from any other part of any instrument in writing* that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto.

S.C. Code Ann. § 19-1-160 (emphasis added). "The clear language of section 19-1-160 imposes a statutory rule of evidence and requires that the determination of whether a non-sealed instrument should be considered a sealed instrument be gleaned from the instrument." *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 173, 609 S.E.2d 548, 550-51 (Ct. App. 2005).

The Circuit Judge correctly found that the Freeman Guaranties executed by the Appellant contain sufficient indicia of the parties' intent that the guaranties are "sealed instruments". (Order, R. p. 5.) First, the Circuit Judge found that the following attestation clause, which appears in each of the Freeman Guaranties directly above the Appellant's signature line, clearly indicates the parties' intent to seal:

> **IN WITNESS WHEREOF**, Guarantor, on the day and year first written above,
>
> has caused this Unconditional Guaranty to be executed under seal."

(Compl. Ex. E, H, M, W, CC, II, at 6, R. pp. 61, 96, 125, 181, 232, 276) (underlined emphasis added). The Circuit Judge further found this attestation clause to be conspicuous and set apart from the rest of the text by the bold and capitalized font of the words at the beginning of the one-sentence clause. (Order, R. p. 6.).

The attestation clause alone is a sufficient basis on which to affirm the Circuit Judge's ruling that the Freeman Guaranties are sealed instruments. However, as the Circuit Judge found, there is additional evidence of the parties' intent to seal as well. Specifically, each of the Freeman Guaranties contains the conspicuous notation "(SEAL)" next to Appellant's signature, in all capital letters. (Order, R. p. 6.). In light of these indicia of the parties' intent to seal, the Circuit Judge correctly found the Freeman Guaranties to be sealed instruments.

In so doing, the Circuit Judge applied well-settled South Carolina law. In *South Carolina Dep't of Soc. Servs. v. Winyah Nursing Homes, Inc.*, 282 S.C. 556, 320 S.E.2d 464 (Ct. App. 1984), the Court of Appeals held that the agreements in that case were sealed documents, so that an action upon the contracts would fall within the twenty-year statute of limitations provided by Section 15-3-520(b). *Winyah Nursing Homes*, 282 S.C.

at 561, 320 S.E.2d at 467. In determining that the agreements were executed under seal, the Court in *Winyah Nursing Homes* focused on the fact that the contracts contained attestation clauses stating that "the parties hereto have set their hands and seals" and also contained the notation "L.S."[1] following the signatures of the parties. *Id.* As the Court of Appeals concluded, "[c]learly, the two contracts are sealed instruments." *Id.*

Similarly, in *Wallingford v. Western Union Tel. Co.*, 60 S.C. 201, 38 S.E. 443 (1901), the Supreme Court held that a deposition transcript was properly sealed where the notary's certificate included the language "Witness my hand and official seal" and the notary public attached the word "Seal" to the jurat of each deposition. *See also Cook v. Cooper*, 59 S.C. 560, 38 S.E. 218 (1901) (holding that a deed was properly executed under seal where it contained the notation "seal" after the grantor's signature).

In *Transouth Financial Corp. v. Cochran*, 324 S.C. 290, 478 S.E.2d 63 (1996), a creditor brought an action to recover on a guaranty after the entry of a confession of judgment by the borrower. *Id.* 324 S.C. at 292–93, 478 S.E.2d at 64. The guarantor argued that his obligation on the guaranty ended when the confession of judgment against the borrower expired ten years after its entry. *Id.* at 293, 478 S.E.2d at 65. The Court of Appeals held that the guarantor was not relieved of his liability because the guaranty was an independent contractual obligation surviving the expiration of the confession of judgment. In rejecting the guarantor's statute of limitations argument, the Court noted, referencing the guarantor's liability under the guaranty, that "pursuant to [Section 15-3-520(2)], an action upon a sealed instrument may be brought within the prescribed twenty

[1] L.S. is an abbreviation for locus sigilli, meaning "the place of the seal; the place occupied by the seal of written instruments", and it serves the same purpose as a seal. *Carolina Marina Handling, Inc. v. Lasch*, 363 S.C. 169 at 174, 609 S.E.2d 548 at 551 (2005) (citing Black's Law Dictionary, 948 (6th ed. 1990) and 68 Am.Jur. *Seals* §6 (2004)). Both Black's Law Dictionary and the cited American Jurisprudence's *Seals* article acknowledge that "(SEAL)" may be used in place of "L.S" with the same effect.

year period." *Id.* at 294 n.2, 478 S.E.2d at 65 n.2 (emphasis added). Notably, the guaranty agreement at issue in *Transouth* contains the identical "(SEAL)" notation adjacent to the guarantor's signature, as in the Freeman Guaranties. (Supreme Court Record on Appeal at 9, *Transouth Fin. Corp. v. Cochran*, Case No. 90-CP-23-2643.)[2]

In *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 609 S.E.2d 548 (Ct. App. 2005), the Court of Appeals considered whether a lease agreement was executed under seal so as to fall within the twenty-year statute of limitations. Because the *only* reference to "seal" was in the "hands and seals" attestation clause, the Court of Appeals found that the lease agreement was not executed under seal. *Id.* at 363 S.C. 174-75; 609 S.E.2d 551-52. Importantly, the Court of Appeals emphasized that the holding was limited to documents where the parties relied upon a "boilerplate attestation clause, by itself". *Id.* (emphasis in original).

The Freeman Guaranties are very different from the lease agreement in *Lasch*. First, the Freeman Guaranties do not contain the "hands and seals" type of attestation clause found by the Court of Appeals to be "boilerplate" in the *Lasch* case. To the contrary, the Freeman Guaranties expressly, unambiguously and conspicuously state that the Appellant "has caused this Unconditional Guaranty to be executed under seal." (Compl. Ex. E, H, M, W, CC, II, at 6, R. pp. 61, 96, 125, 181, 232, 276 (emphasis added).) Second, each of the Freeman Guaranties contains the notation "(SEAL)", which conspicuously appears, in all capital letters, next to the Appellant's signature on each of the guaranties. (Compl. Ex. E, H, M, W, CC, II, at 6, R. pp. 61, 96, 125, 181, 232, 276.)

[2] The guaranty in *Transouth* also contains the "hands and seals" type of attestation found to be sufficient in *Winyah Nursing Homes*.

Appellant's arguments regarding the type, font and placement of the seal language are simply not supported by the law of this State. Recently, both the Court of Appeals and the Supreme Court upheld the validity of a jury trial waiver provision in a guaranty that, similar to the attestation clause, was not in color, contained no italics, was not in a font larger than the remainder of the document, and contained language in bold font only at the beginning of the clause. *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 325-6, 755 S.E.2d 437, 439 (2014) (*affirming in relevant part Wachovia Bank, N.A. v. Blackburn*, 394 S.C. 579, 585, 716 S.E.2d 454, 458 (Ct. App. 2011)). Furthermore, like the attestation clauses here, the jury trial waivers upheld in *Blackburn* were contained in separate, stand-alone paragraphs located above the signature lines. *Id.* In light of these decisions, the Circuit Judge correctly found the language in the Freeman Guaranties was conspicuous, as a matter of law.

Appellant relies heavily upon the unpublished federal district court decision in *Midwest Dredge & Excavating, Inc. v. Bay Pointe Homeowner's Assoc.*, C/A 2:06-2021-DCN, 2007 U.S. Dist. LEXIS 99536, 2007 WL 7141921 (unpublished) (D.S.C. May 15, 2007). Appellant's reliance on that decision is misplaced. A careful reading of the *Midwest Dredge* decision shows that the federal judge ignored applicable South Carolina law, which specifically holds that the existence of more than one reference to "seal" is sufficient proof that the document constitutes an agreement under seal. *Lasch.* at 363 S.C. 174-75; 609 S.E.2d 551-52; *Winyah Nursing Homes*, 282 S.C. at 561, 320 S.E.2d at 467.

Even if this Court were to consider the *Midwest Dredge* seal analysis, the document in that case was materially different from the Freeman Guaranties, rendering

the unpublished federal court decision inapplicable. The document in *Midwest Dredge* included multiple parentheticals in the signature area, which led the federal judge to conclude that the "(SEAL)" parenthetical on that document was intended to serve as a placeholder, rather than as an operative contract term. By contrast, there are no such "stray parentheticals" in the Freeman Guaranties.

The *Midwest Dredge* judge also relied heavily upon the relatively short-term, anticipated six-month duration of the contractual relationship in that case. Here, by contrast, Wells Fargo and Appellant entered into a mortgage loan relationship that envisioned installment payments over a period of many years. The statute of limitations for an action on an agreement secured by a mortgage on real estate is twenty years, pursuant to S.C. Code Ann. 15-3-520. As the Circuit Judge correctly pointed out, Appellant's future, contingent obligations could reasonably be expected to last as long as the underlying loan documents. (Order, R. p. 9.)

B. The Argument that Appellant did not Understand the Impact of What He was Signing was not Preserved for Appeal.

Appellant never pled his ignorance of the importance of executing a sealed instrument, never submitted an affidavit supporting such a defense, and never argued ignorance as a defense to Wells Fargo's summary judgment motion before the Circuit Judge. Accordingly, the issue was not preserved for appeal, and Appellant cannot now be heard to argue that he was unaware of what he was signing.

Even if Appellant had raised the issue below, the argument is legally insufficient because under well-settled South Carolina law, a person is deemed to know and understand the legal documents they sign. Our courts consistently require "that one entering into a written contract should read it and avail himself of every reasonable

opportunity to understand its content and meaning." *O'Connor v. Brotherhood of Railroad Trainmen*, 21 S.C. 442, 449, 60 S.E.2d 884, 886 (1950). In *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014), the Supreme Court recently reiterated this principle of law, stating that "[a] person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it." Instead, "when a person signs a document, he is responsible for exercising reasonable care to protect himself by reading the document and making sure of its contents." *Id.*, 407 S.C. at 325-6, 755 S.E.2d at 439 (2014) (*citing Regions Bank v. Schmauch*, 354 S.C. 648, 663-64, 582 S.E.2d 432, 440 (Ct. App. 2003). Appellant is a business person who personally guaranteed thirteen (13) commercial loan transactions having an original principal balance of approximately $9,800,00.00 and was represented by legal counsel. (Supp. Aff. of Paul VanWagenen Exh. C, R. pp. 649, 676-683; Aff. of Steven A. Jasinski dated April 22, 2015, R. p. 402 at ¶4.) Appellant cannot avoid the effects of his Guaranties being sealed instruments simply because he claims he was unaware of the legal consequence what he was signing.

C. Appellant's So-Called "Public Policy" Arguments are Contrary to Established South Carolina Law, and, Moreover, the Public Policy Actually Supports Affirming the Circuit Judge.

The General Assembly alone may determine the appropriate length of time for a statute of limitation. *Hite v. Town of W. Columbia*, 220 S.C. 59, 65, 66 S.E.2d 427, 429-30 (1951) (quoting 34 Am.Jur., sec. 22, page 30) ("The legislature is the primary judge as to whether the time allowed by a statute of limitations is reasonable. Although the determination of the legislature is reviewable by the courts, the courts will not inquire into the wisdom of the legislative decision in establishing the period of legal bar, unless

the time allowed is manifestly so insufficient that the statute becomes a denial of justice."). Our General Assembly has determined that an action on a sealed instrument should be twenty years. S.C. Code Ann. § 15-3-520(2). Perhaps in recognition of the delicate balance between competing public policy considerations and the respective roles of the judiciary and the legislature, the Supreme Court has long recognized the mandate that any doubt as to which of two statutes of limitation applies "must be resolved in favor of the longest period." *Scovill v. Johnson*, 190 S.C. 457, 3 S.E.2d 543 (1939).

Appellant spends much of his brief arguing that affirming the lower court in this case will create a blanket twenty-year statute of limitations on all bank contracts. The case currently before the Court of Appeals involves a commercial guarantor who understood the nature of his commercial real estate mortgage transaction and executed multiple guaranty agreements, each of which expressly and unambiguously stated that he was causing the instrument to be executed under seal. While it is true that statutes of limitation serve important public policy considerations, all of the public policy considerations in this case weigh in favor of the longer statute of limitations.

Contrary to scenario painted by Appellant, where one of the parties is trying to prosecute a "stale claim" after "sleeping on his rights", the case before this Court presents quite the opposite situation: in response to Appellant's specific request Wells Fargo worked with the Appellant to reduce the amount of his guaranty liability through the cooperative liquidation of the real estate collateral, over the course of several years. (Supp. Aff. of Paul VanWagenen Exh. C, R. pp. 649, 676-683; Aff. of Steven A. Jasinski dated April 22, 2015, R. p. 403 at ¶ 13.) To reverse the lower court in this case will not promote a positive public policy outcome, but rather the opposite: it would induce

lenders to commence litigation as soon as possible in order to avoid risking a statute of limitations defense, rather than work with obligors to achieve a mutually-agreeable resolution outside of litigation.

D. No Contract Construction is Necessary where the Language of the Agreement is Not Ambiguous

Appellant's argument that the Court must construe the Freeman Guaranties against Wells Fargo is likewise without merit because the language contained in the Guaranties is clear and unambiguous: "[Appellant] has caused this Unconditional Guaranty to be executed under seal." Contract construction is necessary only when there is ambiguity in the contract.

In his brief, Appellant quotes from the decision of the Court of Appeals in *Southern Atlantic Financial Services, Inc. v. Middleton*, 349 S.C. 77, 562 S.E.2d 482 (Ct. App. 2002). However, the relevant portion of the decision precedes the quoted portion, which Appellant failed to include: "In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties. The parties' intention must, in the first instance, be derived from the language of the contract. If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect." *S. Atl. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 80, 562 S.E.2d 482, 484 (Ct. App. 2002) *aff'd as modified by* 356 S.C. 444, 590 S.E.2d 27 (2003) (internal citations omitted).

Here, the language employed in the Freeman Guaranties speaks for itself with respect to the parties' intention to seal. In light of the express and unambiguous attestation clause directly above Appellant's signature and the notation "(SEAL)" just next to Appellant's signature, the parties' intent is clear, and no further construction

necessary. Because the Freeman Guaranties were executed under seal, as defined by Section 19-1-160, they are subject to a twenty-year statute of limitations under established South Carolina law. The Circuit Judge's ruling should be upheld.

II. ALTERNATIVELY, THE TWENTY-YEAR STATUTE OF LIMITATIONS APPLIES BECAUSE THE UNDERLYING OBLIGATIONS GUARANTEED BY APPELLANT WERE SECURED BY MORTGAGES ON REAL ESTATE.

Even if the Court were to determine that the Circuit Judge erred in finding that the Freeman Guaranties were executed under seal, the Circuit Judge's finding that a twenty-year statute of limitations applies should still be affirmed because the guaranteed obligations were secured by mortgages on real estate. Section 15-3-520(1) provides for a twenty-year statute of limitations on any "bond or other contract in writing secured by a mortgage of real property". S.C. Code Ann. § 15-3-520(1). Therefore, any action on the Freeman Guaranties was subject to a twenty-year statute of limitations.

In *Scovill v. Johnson*, 190 S.C. 457; 3 S.E.2d 543 (1939), the Supreme Court specifically rejected an argument that endorsers were not subject to the same twenty-year statute of limitations as borrowers and mortgagors. The court reasoned that, "the credit extended on the note in question was not extended on the promise to pay made by the maker, or on the endorsement made by the endorsers, or on the two obligations combined. It was extended on such obligations plus the security of the real estate mortgage." *Id.* at 3 S.E.2d at 546 (emphasis added). As such, the Court stated that the obligation of a guarantor was "inseparably intertwined" with that of the borrowers under the note and mortgage. *Id.*

Here, the Freeman Guaranties were executed concurrently with, and as a requirement of, Wells Fargo's mortgage loans to the Appellant's entities. (Aff. of Steven

A. Jasinski, R. p. 401 at ¶ 3.) As in *Scovill*, Wells Fargo extended credit not simply on the promises contained in the borrower's note and Appellant's guaranties, but also in exchange for the applicable mortgage. Moreover, each of the Freeman Guaranties "irrevocably and unconditionally" guaranteed not simply payment of the debt, but also "performance of all liabilities and obligations" of the borrower under the applicable Loan Documents, which included, by definition, the subject mortgages. Accordingly, the Appellant's liability under his personal guaranty of obligations that were secured by real estate mortgages is subject to the same twenty-year statute of limitations, and the Circuit Judge's ruling should be affirmed.

III. EVEN IF THE APPLICABLE STATUTE OF LIMITATIONS IS THREE YEARS, THE LOWER COURT SHOULD STILL BE AFFIRMED BECAUSE THE ACTION WAS FILED LESS THAN THREE YEARS AFTER MATURITY OF THE LOANS ON JUNE 15, 2011.

Even if the Court were to determine that the applicable statute of limitations is three years instead of twenty years, the Circuit Judge's ruling on the statute of limitations defense should still be affirmed because the action was filed within three years after the loans matured. In *CoastalStates Bank v. Hanover Homes of South Carolina, LLC*, 408 S.C. 510, 759 S.E.2d 152 (Ct. App. 2014), this Court recently analyzed a statute of limitations defense asserted by a guarantor and concluded that the applicable 3-year statute of limitations began to run from maturity of the loan.[3]

In addressing when the applicable statute of limitations began to run, the Court stated that: "The statute of limitations on an action on an absolute guaranty, which is conditioned only on the debtor's default, begins to run when the obligation matures and

[3] In the *CoastalStates* case, the underlying mortgage had been previously released through a short sale, and it does not appear from the decision that the longer twenty-year statute of limitations was ever raised by the parties or considered by the Court.

the debtor defaults." *Id.* (emphasis added, internal marks omitted) (quoting 38 Am.Jur.2d *Guaranty* § 96, at 1040 (2010). This holding is consistent with the Supreme Court's long-standing definition of a guaranty of payment as "an absolute or unconditional promise to pay a particular debt if it is not paid by the debtor at maturity." *Citizens & S. Nat'l Bank of S.C. v. Lanford*, 313 S.C. 540, 543, 443 S.E.2d 549, 550 (1994) (emphasis added).

The *CoastalStates* decision holding that the statute of limitations begins to run at maturity is also consistent with the Supreme Court's prior decision in *Town of Cheraw v. Turnage*, 184 S.C. 76, 191 S.E. 831 (1937), where the Court determined that the statute of limitations on an installment payment debt did not begin to run until the last payment matured. In addressing the right of a municipality to collect certain installment payments, the Court in *Turnage* held that "unless and until the municipality exercises its right to declare the whole balance of the assessment to be due and payable because of default in the payment of an installment, the installment arrangement continues in effect, and . . . the [applicable] limitation period does not then begin to run ***until the last installment matures***." *Id.* at 191 S.E. at 837. (emphasis added)

The rule that the statute of limitations on an installment payment debt does not begin to run until maturity makes the most logical sense, and is consistent with the rule applied by courts in other states. In *Glass v. Grant*, 46 Ga.App. 327, 167 S.E. 727 (Ct. App. 1933), a borrower argued that the statute of limitations barred collection of all installments but the last installment due. The Georgia Court rejected the argument and held that "an entire contract for a stated sum" payable in installments did not trigger the statute of limitations "until after the date the last installment becomes due." *Id.* As the

Court explained, a "contrary rule ... would necessitate or require a multiplicity of suits, and in many cases a multiplicity of foreclosure of liens, ... [and would therefore] be against the general policy to avoid litigation and a multiplicity of actions." *Id.* Instead, "the promisee is entitled to wait, if he chooses, until the defendant has defaulted as to [the] contract in its entirety plus the period of limitations given to him." *Id.*

The holding and logic of *Glass* was later reaffirmed by Georgia Supreme Court, which held that the general rule that a statute of limitations begins running from the date on which suit first could have been filed is inapplicable to a suit on an installment note when the bank does not elect to accelerate maturity of the debt. *Wall v. Cit. & Southern Bank of Houston County*, 247 Ga. 216, 274 S.E.2d 486 (1981).

This rule has also been followed in North Carolina. In *Vreede v. Koch*, 94 N.C.App. 524, 380 S.E.2d 615 (Ct.App. 1989), the North Carolina Court of Appeals held that where there is a provision in the note requiring all unpaid amounts to be paid upon maturity, the statute of limitations does not begin to run as to a guarantor until the maturity occurs. The Court in *Vreede* reasoned that the "right to receive in advance partial payments or performances" was provided for the lender's benefit. *Id.* at 94 N.C.App. at 529 and 380 S.E.2d at 618. If the lender chooses to continue performance, then such continuance should be allowed without prejudice. *Id.* "To compel the injured party, in order to protect his rights, to bring actions from time to time is undesirable." *Id.* Therefore, "a plaintiff may recover damages, based on the entire performance due from the defendant, at any time before the Statute has run *from the time when the last part of the performance was due*." *Id.* (emphasis added).

Similarly, the Colorado Court of Appeals has held that where promissory notes provide for a "final payment of the unpaid principal balance plus accrued interest on the notes' maturity dates", the statute of limitations does not begin to run upon a missed payment. *Castle Rock Bank v. Team Transit, LLC*, 292 P.3d 1077 (Ct.App. 2012). Instead, the Court in *Castle Rock Bank* held that the lender had three options: "(1) accelerate the notes and demand payment, (2) sue on each missed installment, or (3) sue for the final payment of the unpaid principal balance plus accrued interest on each note, in which case the statute of limitations began running from the dates the unpaid principal balance became due, which occurred on the notes' maturity dates ...." *Id.* Because the lender brought the action within the applicable limitations period from the maturity date, the entire debt was collectible.

Here, it is undisputed that the subject Loans did not mature until June 15, 2011. Moreover, the Notes and the 2010 Modifications all contain virtually identical language to the language referenced in the decisions above, which provide that "all principal and accrued interest shall be due and payable" on the maturity date. Even if the Court were to conclude that the Loans "matured" when Wells Fargo gave notice of acceleration on May 17, 2011, this action was still timely filed and the Circuit Judge's ruling should be affirmed.

IV. EVEN IF THE APPLICABLE STATUTE OF LIMITATIONS IS THREE YEARS, THE ACTION WAS TIMELY FILED BECAUSE APPELLANT EXPRESSLY ACKNOWLEDGED THE GUARANTEED DEBT THROUGH HIS ACTIONS AND RESTARTED ANY STATUTE OF LIMITATIONS.

Finally, the Circuit Judge's ruling on the statute of limitations defense should be affirmed because Appellant has acknowledged the validity of his guaranty obligation repeatedly through both his words and actions during the three-year period prior to the

commencement of this action. Recognizing that a lender should be allowed to rely upon the representations of a debtor and should be encouraged to pursue amicable workout solutions rather than requiring an immediate lawsuit, South Carolina law provides that a signed, written acknowledgement of the debt or a partial payment on the debt serves to recommence the running of the applicable statute of limitations period. S.C. Code Ann. § 15-3-120. Here, the Appellant both acknowledged the debt in writing and made partial payments on the Loans within the relevant three-year period, and, therefore, the trial court's judgment in favor of Wells Fargo should be affirmed.

A. Appellant Acknowledged the Debt in Writing and Restarted the Statute of Limitations.

Section 15-3-120 expressly provides that an "acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to . . . [restart the statute of limitations if it is] contained in some writing signed by the party to be charged thereby." Our Supreme Court has held that when this acknowledgment is made prior to the expiration of the statute of limitations, it need only be a "mere acknowledgment of a subsisting indebtedness" to satisfy the statutory requirements. *Hill v. Hill*, 51 S.C. 134, 28 S.E. 309 (1897) (distinguishing between the lower "mere acknowledgment of a subsisting indebtedness" standard applicable prior to the expiration of the statute of limitations and the higher requirement of an "express promise to pay, or such unqualified and unequivocal admission that the debt is still due, unaccompanied by any expression indicative of an intention not to pay, as would imply a promise to pay" applicable after the statute of limitations has expired); *see also Young v. Monpoey*, 2 Bail. 278, 18 S.C.L. 278 (Ct. App. Law and Eq. 1831) (holding that where statute of limitations has not yet expired, "every slight acknowledgment" will prevent the operation of the statute"). A

statement of the sum certain amount is not necessary, so long as the debt is sufficiently identified. *Suber v. Richards*, 61 S.C. 393, 39 S.E. 540 (1901).

In *Hill*, the debtor sent letters to the creditor referring to "the note you have placed in the hands of a lawyer for collection". *Hill*, 39 S.E. at 311. The debtor's letters offer several means for resolving the outstanding debt, including execution of new notes, sale of land, and sale of the debtor's personal property. *Id.* Because the first letter was written prior to the expiration of the statute of limitations, the Supreme Court held that "a mere acknowledgment of the debt in writing is sufficient" to remove the case from the bar of the statute of limitations. *Id.*

Likewise, here, in December of 2010, Appellant's counsel at that time sent a letter on behalf of Appellant regarding the possibility of repayment of the debt over time (the "Acknowledgment Letter"). (Supplemental Aff. of Paul VanWagenen Ex. C, R. pp. 649, 676-683.) The Acknowledgment Letter opens by stating that its purpose is "to make a workout proposal for the repayment of Robbie Freeman's secured and unsecured deficiency creditors" and lists Wells Fargo as a "Creditor". Attached to the Acknowledgment Letter is a schedule of debts that lists each and every guaranteed obligation involved in this action, identified by collateral property and the outstanding principal balance.

Because Appellant's Acknowledgment Letter identifies the subject Loans and acknowledges Appellant's obligation as a guarantor of those Loans, the letter satisfies the minimal standard set forth in *Hill*. Our Supreme Court has clearly mandated that "every slight acknowledgment" results in the resetting of the statute of limitations in cases like these. *Young*, 2 Bail. 278, 18 S.C.L. 278. Wells Fargo's complaint was timely filed, and

the Circuit Judge's ruling on Appellant's statute of limitations defense should be affirmed.

B. Appellant Acknowledged the Debt Through Partial Payments and Restarted the Statute of Limitations.

Section 15-3-120 further provides that the "payment of any part of principal or interest" also restarts the statute of limitations. Appellant concedes that partial payments were made on the subject Loans by way of short sale proceeds. (Am. Answer, R. pp. 311-18 at ¶¶ 20, 45 and 70; Aff. of Robert L. Freeman, R. pp. 396-99 at ¶¶ 16, 18, 25, 27, 30.)

From 2010 through 2013, Wells Fargo and Appellant worked together in a cooperative effort to reduce the outstanding balance of the subject Loans. (Am. Answer, R. pp. 309-18 at ¶¶ 11, 19, 29, 44, 58, 69; Aff. of Steven A. Jasinski, R. p. 403 at ¶ 13.) Certain of the collateral properties were earmarked for private sale efforts, while others were agreed to be the proper subjects of a foreclosure action. (Supp. Aff. of Paul VanWagenen Ex. A, R. pp. 649, 651-655.) Each time a private sale occurred, Appellant, in his individual capacity as a guarantor, executed and delivered a letter to Wells Fargo, expressly agreeing that - in exchange and as consideration for the Bank's release of the collateral property - the proceeds from the sale would constitute a partial payment on the loan. (Supp. Aff. of Paul VanWagenen, Ex. B, R. pp. 649, 656-675; Aff. of Steven A. Jasinski, R. p. 403 at ¶14.)

Partial payments were made from short sales on each of the following Loans: Seafree LLC, 1F3S, LLC, Jadiekate, LLC, and Seafree Edisto, Inc. Partial payments were made from the application of proceeds from foreclosure sales that occurred in November and December of 2012 and June of 2013 to the Seafree LLC, Yerby Road,

LLC, and 708 Ocean LLC Loans. (Compl., R. pp. 15-27 at ¶¶ 11-12, 19-20, 29-30, 44-48, 58-59 and 69-71; Am Answer, R. pp. 309-18 at ¶¶ 12, 20, 30, 45, 59 and 70; Aff. of Robert L. Freeman, R. pp. 395-99 at ¶¶ 16, 18, 25, 27 and 30; Aff. of Steven A. Jasinski, R. pp. 403-04 at ¶¶ 15-16, 575-76.) The earliest partial payment took place on or about June 24, 2011, in connection with Seafree Note 1, and the attendant mortgage satisfaction was recorded August 29, 2011. (Aff. of Steven A. Jasinski, R. pp. 404 at ¶ 17, 575, 577-79.)

By statute, the "payment of any part of principal or interest is equivalent to a promise in writing" and serves to restart the running of the statute of limitations. S.C. Code Ann. § 15-3-120. Appellant argues that the partial payments did not cure the default, but his argument is misguided. The statute does not require that the partial payments cure any default, as it specifies that payment of "any part of principal or interest" is sufficient to restart the statute of limitations. *Id.* (emphasis added). Because the complaint was filed within three years of even the earliest partial payment, the action was timely filed, and the Circuit Judge's ruling on Appellant's statute of limitations defense should be affirmed.

V. EVEN IF THE APPLICABLE STATUTE OF LIMITATIONS IS THREE YEARS AND BEGAN TO RUN FROM THE DATE AN INTEREST PAYMENT WAS MISSED, THE STATUTE ONLY BEGAN TO RUN AS TO EACH MISSED INSTALLMENT SEPARATELY, NOT THE ENTIRE LOAN BALANCE.

Appellant appears to argue that there is only one statute of limitations and that it began to run from the earliest date an installment interest payment became due. However, that has never been the law in South Carolina. To the contrary, as discussed hereinabove, the Supreme Court has held that for installment payment contracts with a stated maturity date, the statute of limitations does not begin to run until the last

installment matures. *Turnage*, 184 S.C. 76, 191 S.E. 831 (1937); *see also CoastalStates Bank*, 408 S.C. 510, 759 S.E.2d 152 (Ct. App. 2014) (holding that the statute of limitations on a guaranty begins to run from the date of maturity).

Even if this Court were to conclude that the applicable statute of limitations began to run upon a missed installment payment, rather than maturity, the statute began to run only as to the missed installment payment, not the entire loan balance. In *Dixon v. Roessler,* 76 S.C. 415, 57 S.E. 203 (1907), the Supreme Court held that the statute of limitations on sums due under a life annuity ran separately as to each payment installment, holding that the applicable six-year statute of limitations only barred "sums which did not become due within six years before commencing [the] action" and allowing recovery of all monthly installments, with interest, that became due during the relevant six-year look-back. *Id.*, 57 S.E. at 208.

Similarly, in *Gillam v. Gillam,* 29 S.C.Eq. 67, 8 Rich. Eq. 67 (Ct. App. Eq. 1855), the Court applied the same principles to a different limitations period, awarding judgment on installment payments that became due on a life annuity within the four years prior to the commencement of the suit. *Gillam*, 29 S.C. Eq. at 74. It is important to note that neither *Dixon* nor *Gilliam* involved obligations that contained a final maturity date like the Guaranteed Obligations in this case.

South Carolina finds itself aligned with the majority of states on this issue, as the general rule is that the statute of limitations will run only as to the single missed installment for the part then payable, and as to any other installments only from the dates that they respectively become due. *See, e.g., Finova Capital Corp. v. Beach Pharmacy II, Ltd*, 175 N.C. App. 184, 623 S.E.2d 289 (2005) (noting that, in a case where there was

no final date upon which all remaining sums became due, "[t]he general rule regarding the running of the statute of limitations for installment contracts is that the limitations period begins running from the time each individual installment becomes due."); *Carswell v. Oconee Regional Med. Center, Inc.*, 270 Ga.App. 155, 605 S.E.2d 879 (Ct. App. 2004) ("If the contract is found to be strictly divisible, the statute will run separately as to each payment or performance when it becomes due."); M.C.D., Annotation, *When Statute of Limitations begins to run against action to recover upon a contract payable in instalments*, 82 A.L.R. 316 (1933) and Supp. (2015).

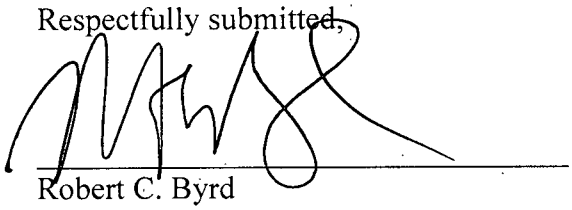
Accordingly, even if this Court were to conclude that the statute of limitations began to run on the date that the first missed installment interest payment, the applicable limitations period would have run separately for each missed installment payment, and not the entire matured or accelerated balance for each Loan. The invoiced September and October 2010 interest installments, which totaled, in the aggregate, $31,615.03, were the only unpaid interest installments due more than 36 months prior to the commencement of this action. (Supp. Aff. of Steven A. Jasinski, R. p. 594 at ¶ 2.)

CONCLUSION

There is no genuine issue of material fact with regard to the statute of limitations issue. The applicable statute is twenty years under either Section 15-3-520(1) or 15-3-520(2). Moreover, even if this Court were to conclude that the applicable statute of limitations is only three years, the action was timely filed because the relevant period did not start to run until maturity, and the period restarted when Appellant acknowledged the debt in December 2011 and again when partial payments were made on the Loans from short sales and/or foreclosure sales. Alternatively, if any applicable statute of limitations had run when the Complaint was filed, which Wells Fargo denies, it ran only on the

missed installment interest payment beyond the three-year period, not on the entire matured loan balance. Accordingly, the Circuit Judge's ruling on Appellant's statute of limitations defense should be affirmed.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2015-001508
Case No. 2013-CP-10-06439

Wells Fargo Bank, N.A., Successor by Merger to Wachovia Bank, National Association,.....Respondent,

v.

Robert L. Freeman, ...Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies on April 27, 2016, that the forgoing Respondent's Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Kimberly S. Nagy, of Parker Poe Adams & Bernstein LLP, hereby certify that I have hereby served a true and accurate copy of the RESPONDENT'S FINAL BRIEF by U.S. Mail postage prepaid on April 27, 2016 to counsel of record as shown below:

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