

RECORD ON APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case No: 2014-000091

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SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr. Circuit Court Judge

John R. Rakowsky, *Respondent*
Adrian Falgione, *Respondent*

v.

James Spencer, *Pro Se, Appellant*

RECORD ON APPEAL

VOLUME II

David W. Overstreet, Esquire
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
(843) 727-0307
Attorney for Respondent John Rakowsky

Benjamin C. Bruner, Esquire
Bruner, Powell, Wall & Mullins, LLC
1735 St. Julian Place, Suite 200
Columbia, SC 29260-1110
(803) 753-0060
Attorney for Respondent Adrian Falgione

James B. Spencer, *Pro Se*
Box 183
7001 Saint Andrews Road
Columbia, SC 29212
Appellant

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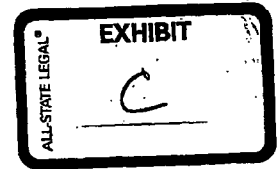
On May 26, 2016, the Court Ordered the Respondents to provide documents missing from the proposed Joint Appendix. Respondent specifically listing item 22 of John Rakowsky's Designation of Matters. Furthermore, Respondent failed to provide the missing documents listed in item 16 of the Appellant's Designation of Matter which were documents that Judge Addy incorporated in reaching his terminal decision to dismiss this case. Documents received by Judge Addy giving him including instructions, most of the documents on the case which were provided to Judge Griffith and an overview of the case as detailed in the June 5, transcript (i.e. page 5, lines 2-17 and page 7, lines 5-12)."

These records were not provided to the Appellant at any time before after or
during the hearing, nor were they in the SC State Judicial records retention system.

530-531

Huggins, Mona Denise

From: Brian Headley [bjheadley@yahoo.com]
Sent: Tuesday, May 07, 2013 12:05 PM
To: Huggins, Mona Denise
Subject: James Spencer v. Rakowsky, et al.
Importance: High



Dear Ms. Huggins:

To follow up on my voicemail from just a little while ago, I was contacted this morning about potentially representing the Plaintiff in this case. However, I have not yet had a sufficient opportunity to determine whether this is a case that I will take, though I would very much like the chance to further investigate to see if I can help. I understand that a hearing is set for this afternoon at 2:00 p.m. before Judge Griffith. Unfortunately, I will not be able to make it to the hearing to appear in person, but I could be available to appear by phone if the Court would so allow. At this point, I would ask that the Court postpone the hearing – which I understand was set for hearing only within the last week – to allow some additional time to explore representation and/or formally respond to the pending motion(s). I have also attempted to contact defense counsel to request that the hearing be postponed, but I have not yet heard back from them.

I appreciate your consideration and assistance. Should you need anything further, please do not hesitate to contact me.

Very truly yours,

Brian

Brian J. Headley, Esquire
 The Headley Law Firm
 145 Historic Drive
 Mount Pleasant, SC 29464
 (843) 375-6181
 (843) 375-6185 (fax)

BEATRICE C. GREGG
 CLERK OF COURT
 LEXINGTON, SC

2013 MAY -8 A 8:50

FILED

State of South Carolina) In the Court of Common Pleas
County of Lexington) Eleventh Judicial Circuit
2012-CP-32-3428

James Spencer, individually,)
on behalf of the Estate)
of Doris Holt and on behalf)
of Southern Holdings, Inc.,)
and Irene Santacroce,)

Plaintiffs,

VS.

Transcript of Record

John R. Rakowsky, Adrian L.
Falgione, and The Law
Offices of Adrian Falgione,
LLC,

Defendants.

June 5, 2013
Laurens, South Carolina

B E F O R E:

The Honorable Frank R. Addy, Jr., Judge

A P P E A R A N C E S:

James Spencer
Plaintiff, Pro Se

Amanda K. Dudgeon, Esquire
Attorney for Defendant Rakowsky

Benjamin C. Bruner, Esquire
Attorney for Defendants Falgione and Law Offices
of Adrian Falgione, LLC

Maryann S. Nevers, CVR-M-CM
Circuit Court Reporter

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TRANSCRIPT OF RECORD

(Whereupon, the proceeding was commenced at 9:40 a.m.)

THE COURT: All right. If we may, let's go ahead and go on the record. I think that we're assembled in a Lexington County case, Case No. 12-CP-32-3428. Is it *James Spencer v. John R. Rakowsky, Adrian Falgione, et al.*? Is that correct?

MS. DUDGEON: Yes, Your Honor.

THE COURT: All right.

MR. BRUNER: Yes, Your Honor.

THE COURT: Let me get the names of everybody and who they are representing, if I could, please.

MS. DUDGEON: Thank you, Your Honor. Mandi Dudgeon here for the defendant, John Rakowsky.

MR. BRUNER: Your Honor, I'm Ben Bruner, and I represent Mr. Falgione and his law firm.

THE COURT: All right. And, yes, sir?

MR. SPENCER: James Spencer, pro se.

THE COURT: All right. Thank you, Mr. Spencer. And this is a ---

MR. SPENCER: He's ---

THE COURT: --- friend of yours or ---

MR. SPENCER: No. He's helping me because of -- I've got a ---

THE COURT: Okay. Very good.

1 MR. SPENCER: --- problem.

2 THE COURT: One housekeeping matter that I do need to
3 take care of before we proceed: I only received Judge
4 Griffith's letter last week. And I received a copy of the
5 -- most of the materials which had been provided to him.
6 And the letter that I'm talking about is dated May the
7 30th, in which Judge Griffith informed Ms. Dudgeon --
8 Dudgeon, Mr. Bruner, and Mr. Spencer that he was recusing
9 himself from further action on the case.

10 The letter also indicated that I would be able to hear
11 these motions -- or the pending motions today. And in that
12 material that I reviewed yesterday, it included the order
13 of Judge Toal -- Justice Toal, rather -- dated January 17th
14 of this year, which appointed Judge Griffith as chief judge
15 for administrative purposes to hear this particular matter.
16 Apparently, Judge McMahon and Keesley had conflicts on
17 hearing the case.

18 I contacted court administration because I was a
19 little concerned about the -- what was in the body of the
20 order. It basically indicated that Judge Griffith had been
21 appointed. Judge Griffith had been under the impression,
22 based on a conversation I had with him last night, that
23 because he was chief judge for administrative purposes, he
24 could appoint this matter or assign this matter to me or
25 some other judge.

1 In conversing with court administration last night,
2 what they basically said was that -- that that's an
3 incorrect reading of the Chief Justice's order, but that
4 what they could do is get a -- do another order, in light
5 of Judge Griffith's conflict; appoint somebody else as
6 chief admin judge to hear this matter: either appoint me
7 or appoint somebody else who could then assign it to me.

8 The gentleman, Motte Talley, who I spoke with late
9 yesterday evening, told me that he's on vacation for the
10 next two days so -- or next three days -- today, tomorrow,
11 and Friday. So he was not going to be able to do an order
12 last night in advance of this hearing. Usually, the way
13 that we handle these things is that they're done *nunc pro*
14 *tunc* when they eventually get around to it.

15 Is everybody okay proceeding today? is what I'm
16 basically asking, with the anticipation that court
17 administration will be issuing this order, probably
18 sometime early next week, giving me authority to hear this
19 matter. And -- and so basically what I'm asking is: Is it
20 -- the -- what I'm saying is the order is en route; it's
21 just not here yet. Everybody okay to go forward today?
22 Mr. Spencer, you're all right with that?

23 MR. SPENCER: Yes, sir.

24 THE COURT: All right. Y'all are okay?

25 MS. DUDGEON: Yes, Your Honor.

1 THE COURT: All right.

2 MR. BRUNER: Yes ---

3 THE COURT: Very good.

4 MR. BRUNER: --- Your Honor.

5 THE COURT: If you could, bring me up to speed a
6 little bit on what we are dealing with. Judge Griffith's
7 clerk did prepare a brief overview. I know that this is a
8 -- there's an underlying medical malpractice action which
9 apparently had been settled ---

10 (Off the record briefly.)

11 THE COURT: --- legal malpractice. Okay. I'm sorry.
12 Sorry.

13 MS. DUDGEON: Your Honor ---

14 THE COURT: Correct.

15 MS. DUDGEON: --- I'd be happy to give you a quick
16 overview.

17 THE COURT: Please.

18 MS. DUDGEON: Again, Mandi Dudgeon for John Rakowsky.
19 This -- we're here on a legal malpractice action. The
20 underlying action was a 1983 action arising out of a 2000
21 traffic stop and a lawsuit against Horry County and various
22 other entities. That lawsuit, which I will call the
23 "underlying lawsuit," was filed in 2006. So we are here on
24 a legal malpractice action filed in 2011.

25 We have about, I believe eight ---

1 (Whereupon, Ms. Dudgeon and Mr. Bruner conferred.)

2 MS. DUDGEON: I'm sorry. 2000 -- no. This -- this
3 legal malpractice action was filed in 2011. We have about
4 eight motions before the Court today. I have a list from
5 the last time we were in front of Judge Griffith, if that
6 would -- if you don't already have a list, I have one.

7 THE COURT: I don't have that list, I believe.

8 MS. DUDGEON: I didn't bring extra copies, but I'm
9 happy to let Mr. Spencer look at the list ---

10 THE COURT: Sure.

11 MS. DUDGEON: --- first.

12 THE COURT: My clerk has one. I don't have a hard
13 copy. So if you could hand one up to me, that'd be
14 helpful.

15 MS. DUDGEON: It -- it does not include two most
16 recently filed motions, but we'll get there when we get
17 there; at least includes the first seven.

18 May I approach?

19 THE COURT: Please. Thanks.

20 MS. DUDGEON: And I also have the materials related to
21 those motions in the event you don't have the file. And
22 Mr. Bruner just advised me that I had the wrong date. The
23 underlying suit was filed in 2002, not 2006.

24 THE COURT: Okay. All right. And apparently,
25 according to the motions, we're dealing with Defendant

1 Rakowsky's and Falgione's -- if I am mispronouncing these,
2 I ---

3 MR. BRUNER: No, you're ---

4 THE COURT: --- apologize ---

5 MR. BRUNER: --- not ---

6 THE COURT: --- so ---

7 MR. BRUNER: --- Your Honor.

8 MS. DUDGEON: You -- you have it right.

9 THE COURT: --- if -- if I'm slaughtering these names
10 ---

11 MS. DUDGEON: That's okay.

12 THE COURT: --- I'm sorry. But those, it would
13 appear, need to be taken up first. Is that y'all's
14 understanding or ---

15 MS. DUDGEON: It is. But, Your Honor, one -- one
16 matter: Mr. Spencer filed a motion to disqualify me right
17 before our hearing was scheduled for last March. And he
18 has been making some allegations that I am unethically
19 involved in this case. So I would like that motion to be
20 heard first.

21 THE COURT: That's probably prudent.

22 Mr. Spencer, the motion to disqualify Ms. Dudgeon,
23 I'll be inclined to hear that first, if -- if that's okay
24 with you, sir.

25 MR. SPENCER: That's -- certainly.

1 THE COURT: What are the grounds for the motion to
2 disqualify her from further representation in this case?

3 MR. SPENCER: It turns out that in 2007 her firm
4 represented Mr. Rakowsky when the -- and, apparently,
5 myself in involvement in a lawsuit that he was sued for in
6 the mishandling of that case in 2002. I had -- they
7 settled the case; I knew nothing about it. And I only
8 found out about it about a year ago.

9 THE COURT: All right. Say that again. Let me make
10 sure I understand the factual background. Her firm
11 represented you?

12 MR. SPENCER: I did not know about it. Apparently,
13 Mr. Rakowsky got the paperwork. And then he engaged Ms.
14 Dudgeon's firm to represent him on a suit from LawMax Legal
15 Finance.

16 I -- apparently, after the fact I received from
17 LawMax, which was about a -- a year or so ago, information
18 that showed that I was named -- also named a party to that
19 suit. I had no idea I was named a party to the suit. I
20 had no idea that there was a -- a -- a suit going on and
21 that Mrs. -- Ms. Dudgeon represented Mr. Rakowsky.

22 Certainly, she would be a material witness in any case
23 involving malpractice. I would want to know what -- what
24 happened in that case, where the paperwork was from that
25 case. And that -- that's why I move to disqualify her:

1 because I plan to call her as a witness.

2 THE COURT: All right. Let me just understand,
3 though: She represented Dr. Rakowsky against you?

4 MR. SPENCER: Not Dr. Rakowsky; John Rakowsky. She --
5 no, not against me. She -- she represented John Rakowsky
6 and, apparently, me against LawMax, who is suing John
7 Rakowsky for his inappropriate actions in the 2002 lawsuit
8 that is the -- that is the subject of the malpractice. And
9 that suit was commenced in 2007 and was finalized in 2008.

10 THE COURT: Can you speak to what he's describing?

11 MS. DUDGEON: Yes, Your Honor, I will.

12 THE COURT: Try -- try and fill me in a little bit.
13 I'm -- I'm having a -- a hard time understanding exactly
14 the players and -- and ---

15 MS. DUDGEON: Sure.

16 THE COURT: --- what your firm's involvement was.

17 MS. DUDGEON: Before I get fired up about the
18 accusations, I'll just go to the facts of what ---

19 THE COURT: Yeah.

20 MS. DUDGEON: --- the underlying ---

21 THE COURT: Just give ---

22 MS. DUDGEON: --- matter ---

23 THE COURT: --- me some background ---

24 MS. DUDGEON: --- was.

25 THE COURT: --- please.

1 MS. DUDGEON: Again, we're here on a legal malpractice
2 case. Underlying case, my client, John Rakowsky, and Mr.
3 Falgione, represented Mr. Spencer ---

4 THE COURT: Right.

5 MS. DUDGEON: --- other parties. Mr. Spencer obtained
6 legal funding -- I don't know if you're familiar with the
7 companies that provide legal funding sometimes for
8 plaintiffs in cases. One of those companies was LawMax.

9 THE COURT: Okay.

10 MS. DUDGEON: In 2007 LawMax, once they heard of the
11 underlying settlement, filed a notice of demand for
12 arbitration, saying we want our portion of that settlement
13 because we provided funding to this underlying case. That
14 notice of arbitration named both Mr. Spencer, because he
15 was the person who -- you know, the recipient, the
16 plaintiff; and Mr. Rakowsky. Mr. Rakowsky was named in the
17 normal course of he is the attorney who was representing
18 Mr. Spencer in the underlying case.

19 My firm was retained to represent Mr. Rakowsky and Mr.
20 Rakowsky only. We absolutely never represented Mr.
21 Spencer. The case was never settled because we just told
22 them: "You need to come to South Carolina to sue us; we're
23 not going to New York." And they kind of gave up.

24 So if anything, it was a benefit to Mr. Spencer. We
25 have never represented him. And it did not involve any

1 claims of legal malpractice. There's absolutely no way to
2 make me a witness in this case.

3 And I have the materials that actually show this
4 information, if you'd like to see them.

5 THE COURT: Please, if you don't mind ---

6 MR. SPENCER: I object ---

7 THE COURT: --- showing ---

8 MR. SPENCER: --- to this, Your Honor. I have not
9 received these materials.

10 THE COURT: Okay.

11 MS. DUDGEON: Mr. Spencer received them back in June
12 of 2012.

13 THE COURT: All right. Why don't you take a look at
14 what she's handed you, and maybe you can -- maybe that'll
15 refresh your memory as to whether you got them or not.

16 And just so that the record's clear: This is a
17 Richland case. It's captioned *James Spencer, individually*
18 *and on behalf of the Estate of Doris Holt, etc.,*
19 *Plaintiffs, v. --* same defendants pretty much that we have
20 here. And it's Case 11-CP-40-5384.

21 MS. DUDGEON: And, Your Honor, this is actually the
22 same case. It was just -- the venue was transferred to
23 Lexington.

24 THE COURT: Oh, okay.

25 MS. DUDGEON: And what you have in front of you is our

1 memo, which you can -- you don't really need to look at,
2 but Tab A would be the demand for arbitration, showing who
3 it was sent to, including Mr. Spencer. Tab B is my firm's
4 -- my letter to the American Arbitration, indicating who we
5 represent and copying Mr. Spencer. Tab C is correspondence
6 from the American Arbitration to me, as well as to Mr.
7 Spencer's e-mail address.

8 And -- and -- and the point of this is just to show we
9 didn't represent him; it wasn't settled; and there's no
10 reason that I would be a witness in this case.

11 I also have included affidavits -- my own affidavit,
12 as well as Mr. Rakowsky's affidavit in these materials.
13 And I sent Mr. Spencer a letter two weeks ago, asking him
14 to review the documents previously sent; sending him
15 another copy; and asking him to withdraw this motion
16 because it has no basis.

17 THE COURT: All right. Mr. Spencer, have you had a
18 chance to review the materials that she's handed me?

19 MR. SPENCER: Yes, sir, I have.

20 THE COURT: All right. I'm having difficulty seeing
21 how she would have a conflict in this particular matter.
22 Do you want to elaborate on that or explain again what your
23 theory is? Because it looks like she's represented the
24 same individual throughout the course of -- of this action.
25 And the materials that she's given to me don't seem to

1 conflict her out in this particular case.

2 MR. SPENCER: Your Honor, I tried to -- Judge Barber
3 opened up discovery. And in another case, I sent a
4 subpoena to LawMax, requesting information on Mr. -- on
5 this case, because I had no knowledge of it. The
6 representative for LawMax told me the case had been
7 settled; that they had been paid; but that -- that -- that
8 -- I -- so I asked for the information because I was a
9 party to the suit.

10 In the meantime they called Ms. Dudgeon's firm, who
11 was not involved in this lawsuit. And next thing I know,
12 I'm shut off from receiving any material.

13 So despite having discovery being allowed in this
14 case, any questions I've asked to be provided regarding
15 this case, I've received no answers. And so what I -- what
16 I was hoping was that since Judge Barber allowed discovery,
17 that we be allowed discovery to find out what the depth of
18 her true involvement was.

19 MS. DUDGEON: Your Honor, unfortunately, that's just
20 simply not true. Mr. Spencer did attempt to subpoena this
21 company, I believe. And I do not believe there was a
22 response to the subpoena, not an authenticated one.

23 But they did provide him with documents, which they e-
24 mailed to both me and to him at the same time. And those
25 documents, the majority of which are attached to this -- to

1 this memorandum -- there are some others, but what you have
2 before you clearly repudiates what he is saying. And I've
3 not seen anything from him to show otherwise.

4 MR. SPENCER: Ms. Dudgeon is throwing sand up in the
5 air, Your Honor. She's -- documents -- and she's producing
6 documents from the arbitration association. I subpoenaed
7 directly to LawMax. And LawMax's attorneys got involved
8 and had contacted Mrs. Dudgeon.

9 And they are the ones that refused to supply the
10 information of what happened to the suit. Everything had
11 been destroyed by the arbitration board.

12 MS. DUDGEON: Your Honor, truthfully, I'm -- I'm --
13 I'm not sure what -- what Mr. Spencer's referring to. But
14 my affidavit is included. It -- it states that I did not
15 represent him and that no settlement money was ever paid in
16 this case.

17 THE COURT: All right. Mr. Spencer, it doesn't appear
18 that she or her firm ever represented you. If you were
19 correct that -- that they did, perhaps you would have
20 grounds to allege that she and her firm have a conflict in
21 proceeding in representing Mr. Rakowsky.

22 I'm looking at the attachments to the materials that
23 have been handed up. And I'll make this a Court's exhibit
24 just so that the record's clear. But it looks like you
25 were copied on most of these materials.

1 I -- I have trouble seeing how this is anything but a
2 nonissue.

3 MR. SPENCER: If you'd give me a second, Your Honor.

4 THE COURT: Sure. I -- I -- I just don't see how this
5 really relates to anything that we need to address. It
6 looks like a matter that's totally collateral. And more
7 importantly, there's no conflict in representation and that
8 she simply didn't represent you. Do you have anything
9 indicating an agreement between you and her firm or ---

10 MR. SPENCER: No. There was no agreement.

11 MS. DUDGEON: Your Honor, if, at some point, Mr.
12 Spencer comes up with valid evidence, although I know it
13 doesn't exist, then he can make this motion if he has that
14 information. It's -- it -- it -- this was used as a tactic
15 to avoid a -- a -- a hearing date back in March of 2012.

16 THE COURT: All right. At -- at -- at this point I
17 really don't see where your motion is proper unless you can
18 show me something definitive that ---

19 MR. SPENCER: I'm looking for ---

20 THE COURT: --- she ---

21 MR. SPENCER: --- it, Your Honor.

22 THE COURT: Okay. Very good. I'll give you a moment,
23 then.

24 (Off the record from 9:59 a.m. until 10:05 a.m.)

25 MR. SPENCER: Your Honor, can we approach the bench?

1 THE COURT: Sure. Come on up. Did you find
2 something?

3 All right. I've been handed a letter that's dated
4 June 21st, 2008. It does not appear to be copied -- well,
5 it does -- it was apparently copied to Ms. -- or it was
6 sent to Ms. Dudgeon and Daniel Zolberg of LawMax in New
7 York.

8 It reads: "Dear Parties: The association has been
9 notified that New Amsterdam Capital Partners, LLC, has
10 reached a settlement agreement with Carlock, Copeland, et
11 al., for James Spencer and John Rakowsky, Esquire. As of
12 the date -- this date, there is no outstanding balance.
13 Therefore, the entire case file will be destroyed per
14 request. Cordially yours, James F. M-e-d-e-i-r-o-s, Case
15 Manager"; copied to Walter G. Gans, G-a-n-s, Esquire.

16 Are you -- have you seen that or do you recall that?
17 Do -- or do you need to look at that?

18 MS. DUDGEON: Your Honor, that document is not in my
19 file. Mr. Spencer has not produced it to me. I was hoping
20 he would not attempt to present it to the Court as an
21 authentic document. But since he has, if I could just
22 first confirm it's the letter I think it is. May I look at
23 ---

24 THE COURT: Sure.

25 MS. DUDGEON: --- it, Your Honor?

1 THE COURT: Come on up. It's ---

2 MS. DUDGEON: Thank you.

3 Okay. Your Honor, bear with me while I explain the --
4 a little bit of a chain of events.

5 THE COURT: Please.

6 MS. DUDGEON: Mr. Spencer had -- has already
7 referenced attempting to get documents from the arbitration
8 association. I mentioned that they did provide him with
9 documents, which they sent to all of us. They did so.

10 And included in those documents was Mr. Spencer's
11 letter to the association, saying: "As we discussed,
12 please confirm X, Y, Z," things that weren't true.

13 And so I called the association to say, "What is this
14 all about? And have you ever seen a June 21, 2008,
15 letter?"

16 They confirmed it was not part of their file; that
17 they have no one by the name of Catherine Paulston in their
18 company to be able to certify a document. They actually
19 pointed out to me, rather than me to them, that the
20 numbering on the June 21st, 2008, appeared to be
21 questionable. And the document Your Honor has appears to
22 be a complete original, not even a -- not even a e-mailed
23 copy or a copy that would've been faxed to Mr. Spencer.

24 I -- I did not think he would attempt to present this.
25 And it has not been produced to me. Therefore, I -- I

1 don't have an affidavit, for instance, from AAA. But, Your
2 Honor, my affidavit, Mr. Rakowsky's affidavit verifying
3 those settlement funds were paid; I also have an e-mail
4 from the AAA, specifically stating: "This document does
5 not exist in our file."

6 MR. SPENCER: Your Honor, if you can see the
7 certificate of service, it was served upon Ms. Dudgeon and
8 her firm. She did already file paperwork in the Court on
9 this. She contacted them; they sent me a -- I contacted
10 them.

11 I want a reclarification of this. They sent us the
12 files and said they don't have any other files. And so
13 that's when I went ahead and tried to get confirmation from
14 LawMax.

15 THE COURT: All right. Well -- well, Mr. Spencer,
16 more to the point, you say you've never retained them to
17 represent you.

18 MR. SPENCER: That's correct.

19 THE COURT: They say they've never represented you.

20 MR. SPENCER: Yes.

21 THE COURT: They've never undertaken to represent you.

22 MR. SPENCER: That's correct. But that -- that letter
23 says that ---

24 THE COURT: I don't know what this letter says. I
25 don't know what it relates to. I don't know -- and it

1 sounds like its genuineness is somewhat suspect. Is that
2 what you're saying?

3 MS. DUDGEON: Yes, Your Honor. And again, this is
4 just an e-mail from the AAA after my conversation with
5 them, regarding the existence of this letter since I didn't
6 have it in my file.

7 MR. SPENCER: Excuse me? I don't have a -- a copy of
8 this. I haven't seen this.

9 MS. DUDGEON: I just handed it to your ---

10 (Whereupon, Mr. Spencer and his assistant conferred.)

11 MS. DUDGEON: --- assistant.

12 Your Honor, again, I was hoping Mr. Spencer would not
13 attempt to do this. But it -- and we -- we've already had
14 issues of allegedly fraudulent documents in this case. And
15 this is one where he's accusing me of ethical violations.
16 I don't think the letter itself even changes my opposition
17 whatsoever.

18 I have affidavits indicating there's no settlement.
19 There was no settlement. Even if there was, it would've
20 benefitted Mr. Spencer. I did not represent him.

21 MR. SPENCER: Your Honor, I object to this document.
22 It was not provided to me in a timely fashion. I have no
23 way of knowing that this had happened so I could go back
24 and talk to these people and get clarification.

25 THE COURT: All right. If you want to talk to them,

1 if you want to get clarification at a later point in time,
2 that's perfectly fine. There are serious concerns about
3 the genuineness of the June 21st letter.

4 My clerk is making a copy of it. It'll be marked as
5 Court's 2. I'll also mark the e-mail dated May 6, 2013,
6 from Melanie Rutherford to counsel; that'll be Court's 3.

7 Everyone seems to agree that at no point in time did
8 the firm or Ms. Dudgeon represent the plaintiff in this
9 particular case. So for those reasons, I'm going to deny
10 your -- your motion. I -- it appears that everyone agrees
11 that she's never represented -- or her firm has never
12 represented y'all.

13 That's where we are. If that changes, I suppose you
14 can renew your motion at that particular point in time.

15 But I have some concerns about the authenticity of the
16 June 21st, '08, letter, especially in light of the e-mail
17 from ADR. So I'll hand this -- this copy of the motion and
18 the attachments back to Mr. Spencer. So if you want to
19 come up and -- or, Mr. Byers, if you want to hand that to
20 him.

21 THE BAILIFF: (Complied.)

22 MR. SPENCER: Will you note my objection to the
23 introduction of that ---

24 THE COURT: Certainly. Your -- your -- your objection
25 is -- is certainly ---

1 MR. SPENCER: All right.

2 THE COURT: --- noted. Her e-mail, of course, is in
3 reply to the materials that you have provided. And as she
4 said, she was not -- she didn't think that you were going
5 to go down that road necessarily.

6 So while we have a few moments, I'll take a brief
7 break. Then we'll boot up with the motions that -- I think
8 that the next motion -- it'd be proper to go ahead and
9 address the motion to dismiss at this point in time. But
10 we're going to go ahead and get these marked so that I
11 don't forget to do so and take a brief break, and then we
12 proceed.

13 MS. DUDGEON: Thank you, Your Honor.

14 (Off the record from 10:12 a.m. until 10:25 a.m.)

15 (Whereupon, Court's Exhibits 1, 2, and 3 were marked
16 for identification while off the record.)

17 THE COURT: All right. Let's go ahead and address and
18 -- oh, I'm sorry, Mr. Spencer. You wanted to say something
19 else, sir?

20 MR. SPENCER: Yes, Your Honor. Can I have the Court
21 also put these in the record? This is the response from
22 American Arbitration Association. I didn't find it till
23 just a second ago, which shows about nine letters going to
24 Ms. Amanda ---

25 THE COURT: Sure. Hand them up. I'll -- let her see

1 them, if you don't mind, before y'all pass them up, just so
2 that we can get on the same sheet of music.

3 MS. DUDGEON: And, Your Honor, I'm not sure if I have
4 all these, but I can get a copy from the Court's record if
5 I need it.

6 THE COURT: All right. Thank you.

7 All right. I've been shown a letter from Mr. Spencer
8 to Heather Pina, P-i-n-a, of the American Arbitration
9 Association, dated June 22nd, 2012. The response indicates
10 -- the response from the American Arbitration Association
11 indicates that there were a few letters that were stored in
12 electronic format, but that otherwise, the file had been
13 already destroyed.

14 I don't know that it changes a great deal. Have you
15 had a chance to review these or ---

16 MS. DUDGEON: I mean, I don't know, Your Honor. I --
17 it -- it -- I can take a look at them in detail and see if
18 I have them. I -- I don't know what Mr. Spencer's trying
19 to do.

20 I didn't represent him; no settlement money was paid.
21 It -- it -- if anything, that matter was to his benefit in
22 representing Mr. Rakowsky. And the -- the LawMax went away
23 because we said, "Come to South Carolina if you want to sue
24 us. We're not coming to New York."

25 And I'm starting to get a little fired up because Mr.

1 Spencer is trying to find any way he can to prolong things
2 and to avoid my client getting his motion to dismiss heard.
3 And it's just getting old.

4 THE COURT: All right. I -- I ---

5 MR. SPENCER: Your -- if -- if I was going to prolong
6 things, Your Honor, I would've objected to the hearing
7 going on today.

8 THE COURT: I -- I ---

9 MR. SPENCER: She ---

10 THE COURT: --- understand.

11 MS. DUDGEON: And I ---

12 MR. SPENCER: And ---

13 MS. DUDGEON: --- apologize ---

14 MR. SPENCER: --- those ---

15 MS. DUDGEON: --- Your Honor, for getting ---

16 MR. SPENCER: --- those are ---

17 MS. DUDGEON: --- fired up.

18 MR. SPENCER: --- those information -- that
19 information right there shows that she was being copied;
20 Rakowsky was getting copied. I was not getting copied, and
21 I was named a party in the suit.

22 And every one of those correspondence shows that. I
23 had no way of knowing this was going on. Somehow, they
24 stopped the communication -- or -- or -- and said, "Look,
25 just communicate with these people."

1 And when I tried to go direct to the law firm that
2 handled it for them, I received a letter back, saying that
3 they had contacted her, Ms. Dudgeon, and she said do not
4 provide me with any information.

5 MS. DUDGEON: I would love to see that letter. I was
6 on maternity leave for the majority of this time. I would
7 ---

8 MR. SPENCER: All right. I can bring that letter.
9 It's in the -- I can produce that letter later. It's in
10 another file.

11 THE COURT: All right. Again, I don't know what the
12 genesis for all this underlying stuff with the American
13 Arbitration Association really is. One letter in here,
14 September 19th, 2007, indicates that -- that you were
15 copied when there was an objection to basically, as she
16 says: "Look, come to South Carolina and sue us if you want
17 to; we're not coming to New York."

18 Everybody's agreeing that they've never undertaken
19 representation of you, Mr. Spencer. It appears to be a
20 nonissue to me. I'll be more than happy to have these
21 documents made a Court's exhibit if you desire or make
22 copies of them and have those ---

23 MR. SPENCER: Yes, sir.

24 THE COURT: --- made as a Court's exhibit. We'll make
25 those Court's D or 4, whichever we're using.

1 All right. Let's move forward on -- I think it'd be
2 best to go ahead and address the motions to dismiss that
3 have been filed by the two defendants. You have the floor.

4 MS. DUDGEON: Thank you, Your Honor. I apologize for
5 losing my cool, but it's been a -- it's been a long time of
6 a lot of accusations.

7 THE COURT: I understand.

8 MS. DUDGEON: I'm going to hand up our memorandum.
9 It's for a motion to dismiss which was filed and served in
10 January of last year. I'm handing a copy to Mr. Spencer
11 and for the Court.

12 THE COURT: Thank you.

13 (Whereupon, Ms. Dudgeon and Mr. Bruner conferred.)

14 MS. DUDGEON: Your Honor, to keep things efficient,
15 I'm going to hand up Mr. Bruner's documents as well.

16 THE COURT: Thank you.

17 MS. DUDGEON: Sure. Again, we are here on defendant's
18 motion to dismiss. My motion is based on three grounds. I
19 believe Defendant Falgione has an additional ground.

20 The three grounds are violation of Section 15-36-100,
21 which is the expert-affidavit statute. The second ground
22 is statute of limitations. And the third ground is failure
23 to commence within the 120-day rule. I'll address the
24 expert-affidavit issue first.

25 This suit was filed in August of 2011. It was filed

1 without any supporting expert affidavit. The complaint
2 itself references the statute. Therefore, the plaintiff
3 was well aware of the requirement of an expert affidavit.

4 The complaint, if you'd like to review it, Your Honor,
5 is Tab A in the documents that I've handed up. The --
6 Paragraph 7 of the complaint addresses 15-36-100. So the
7 plaintiff was aware -- not that that matters, but they're
8 aware of the -- the requirement. No expert affidavit was
9 filed.

10 I learned of this lawsuit through those e-mails you
11 get, the court system where you can see when lawsuits are
12 filed. And so I saw that my client was named in a lawsuit.

13 He had not been served yet, but we chose to go ahead
14 and file a motion to dismiss in November of 2011. So
15 August -- three months after the complaint was filed, we
16 file a motion to dismiss, which is what's before you today.
17 Approximately 18 months ago that was filed.

18 Mr. Spencer did not produce an expert at any point
19 during the next several months. I believe he has found an
20 affidavit at some point recently. I have not been served
21 with that. I haven't been served with really anything by
22 Mr. Spencer in the last several months. But that's
23 essentially a nonissue.

24 No affidavit was filed. There's no supporting legal
25 opinion from an expert. This is not a common-knowledge

1 case. The 45-day exception does not apply. So it's --
2 it's a fairly straightforward argument applying that
3 statute.

4 Our second argument is on the grounds of failure to
5 file within the three-year statute of limitations. Mr.
6 Spencer's own complaint supports this argument.

7 Again, I know it's hard to get the background on this
8 case. But the allegations against my client involve --
9 again, a lawsuit is filed in 2002; underlying suit is filed
10 in 2002 -- federal court in Florence -- proceed. In May of
11 2007 they are up for trial. The parties reach a
12 settlement.

13 The allegations against my client in this case involve
14 that they were -- the -- the plaintiffs were wrongfully
15 coerced into this settlement in May of 2007. Almost
16 immediately after the settlement conference, the plaintiffs
17 began filing motions with the court to set aside that
18 settlement. They filed an appeal, all in 2007, all well
19 before -- you know, four years before this action was
20 filed.

21 And again, if you turn to plaintiffs' own complaint,
22 starting with Paragraph -- just so we -- we can be clear --
23 for instance, Paragraph 23 addresses kind of the
24 allegations of -- we wouldn't -- you know, we were coerced
25 into this settlement. Paragraph 26 and 29 address Mr.

1 Spencer's meetings with the defendant, telling them: "I --
2 I don't want a settlement" -- he claims. All of these
3 allegations occur in May of 2007.

4 And if that is not enough, the court issued a July 27
5 order, denying the motions to set aside this settlement and
6 clearly putting the plaintiffs on notice. And now, I know
7 that Your Honor's probably aware: A -- a legal malpractice
8 under the discovery rule does not depend upon when an
9 appeal ends or when a judgment ends, but when plaintiff --
10 yeah -- knew or should've known.

11 And so that's -- that's our fairly straightforward
12 argument in that case. Again, 2007 they're on notice; 2011
13 they file suit.

14 The final ground is failure to properly effect service
15 and commence the action under Rule 3 and 5. This suit was
16 filed on August 15th, 2011. My client was served on
17 December 16th, 2011. The 120 days expired on December
18 13th.

19 So we have three fairly clear grounds for dismissal.
20 And I will let Mr. Bruner continue.

21 THE COURT: All right. Mr. Bruner, let me hear from
22 you. You raise the identical three grounds. And you have
23 an additional ground?

24 MR. BRUNER: Yes, Your Honor. And -- and I did e-mail
25 a copy of my memorandum in support last week. I don't know

1 if you've had a chance to read it.

2 THE COURT: I -- I actually did a few moments ago, so

3 ---

4 MR. BRUNER: Okay.

5 THE COURT: --- go ahead.

6 MR. BRUNER: I -- I want to -- I want to fill in some
7 gaps on the -- on the first three grounds. And then, I'll
8 -- the fourth one's going to be rather brief.

9 I -- I'd like to point out, with -- well, as to the
10 statute of limitations: If you read the complaint, Mr.
11 Spencer was there in court on -- in May -- I believe it was
12 May 9th, 2007 -- and saw his case settled. And if that's
13 not notice of a claim after you've told your attorneys you
14 don't want to settle, I don't know what is.

15 And -- and really, Paragraph 38 of the complaint --
16 it's on page 7 of 16 -- I'm sorry -- page 8 of 16,
17 Paragraph 44. This is -- this is the allegation that
18 caught my eye: "Santacroce and Spencer informed Rakowsky
19 and Falgione that when the judge polled them, each
20 plaintiff would state their opposition to the settlement;
21 and then Green, as CEO of Southern, would state he could
22 not agree to a proposed settlement on behalf of Southern
23 without the authority of the board of directors."

24 And when you -- when you read through the complaint,
25 the -- these are allegations of what's happening the day of

1 trial -- at the federal courthouse in Florence the day of
2 trial. I think it's evident that they allege they were
3 there and they saw the case settled. So I'm -- I'm not
4 sure how they can say the -- the discovery rule as applied
5 has a statute run after August 15th, 2008, nearly a year
6 later.

7 Your Honor, with respect to timeliness of service,
8 they have 120 days under the rule. The plaintiffs filed a
9 motion for default against all the defendants. And their
10 basis for that was that they alleged they served all of the
11 defendants, my clients included, with the summons and
12 complaint on September 15th, 2011.

13 Judge Barber denied that. That's one of the few
14 orders in the record. And I have a copy of Judge Barber's
15 order if you'd like it. But -- but Judge Barber denied
16 that.

17 And in holding it, he -- on page 2 of that order, he
18 denies the default and says the record shows that Rakowsky
19 and -- and Falgione -- and I'm summarizing -- filed motions
20 to dismiss. Now, this is word for word, quote: These
21 motions preclude an entry of default under Rule 12, South
22 Carolina Rules of Civil Procedure.

23 And the important part about that, the key part about
24 that, is that Judge Barber, in order to find that -- that
25 those motions were timely filed and that they preclude a

1 motion for default, has to have found that the plaintiffs
2 failed to prove they served my clients and Mr. Rakowsky on
3 September 15th, 2011. That finding has to be premised on
4 -- on the fact that there was no service of process on
5 September 15th.

6 So, you know, I'd -- I'd like to just add that
7 argument, Your Honor: that to the extent the plaintiffs
8 now argue that they have evidence they served the
9 defendants on September 15th, I think the Court's already
10 held that that's not the case. That order hadn't been --
11 hadn't been challenged; there was no motion to reconsider.
12 And I'm not aware of any appeal on that. And that's all
13 I'd like to add on the third ground.

14 The fourth ground, Your Honor, is based on the manner
15 in which my client was served. And this is the reason
16 you'll -- you may note in the record that I filed a motion
17 to dismiss November 4th, 2011, and then later filed an
18 amended motion to dismiss. I later amended my motion after
19 the -- the complaint was served on my clients by someone
20 walking into his office and dropping them with a temporary
21 employee.

22 Your Honor, he -- Your -- Your Honor, proper service
23 requires that -- that you serve an authorized agent for
24 service of process. We have affidavits -- I have an
25 affidavit of Mr. Falgione and of Julie Owen, who is the

1 temporary employee who was served. I -- I -- I forget the
2 name of the gentleman who dropped the summons and complaint
3 off, Your Honor.

4 But -- but Ms. Owen was neither the office manager;
5 she was not -- she's not the statutory agent for --
6 registered agent for service of process. And, Your Honor,
7 she had no authority to accept service of process.

8 The Makawi case -- the recent Makawi case that I cite,
9 I think, sets a pretty good rule in favor of our argument.
10 I have seen no evidence from the plaintiffs that Ms. Owen
11 had authority. And I think they have to show it.

12 Interestingly, Your Honor, last night when I was --
13 when I was Shepardizing the Makawi case, I came across an
14 opinion in -- from the federal court. And it was from a
15 federal magistrate. And that's the only case I could find
16 that cited *Makawi*. And that was the case of *Lail v. United*
17 *States*.

18 And the reason that's interesting is because that is
19 the federal lawsuit that the plaintiffs current -- and
20 others currently have pending in, I believe, the Columbia
21 division of the federal court for the District of South
22 Carolina right now against Horry County and others, based
23 on allegations that -- that those entities made
24 misrepresentations, committed fraud, and misled the Court
25 in the underlying case -- in the same underlying case as

1 this one.

2 So we've got the underlying suit. We've got a federal
3 suit in Columbia that's -- that's arisen out of the
4 underlying suit. We've got this legal malpractice suit.

5 I believe there's also a federal suit that was filed
6 for -- in the District of D.C. And there is also currently
7 pending a federal suit in Nevada. There's another state
8 suit that's pending in Richland County over the settlement
9 money.

10 They're a whole bunch of lawsuits. I -- I just want
11 to paint the big picture for Your Honor. But the bottom
12 line is I think the magistrate in that federal case -- and
13 -- and if you bear with me, I have a copy of it, Your
14 Honor.

15 MR. SPENCER: Your Honor ---

16 MR. BRUNER: I can hand it up to ---

17 MR. SPENCER: --- Mr. Bruner is ---

18 MR. BRUNER: --- the Court.

19 MR. SPENCER: --- getting way off topic here.

20 THE COURT: Well, I'll let -- I'll let him talk and
21 I'll let you talk, okay?

22 MR. BRUNER: May I approach, Your Honor?

23 THE COURT: Sure.

24 MR. SPENCER: Your Honor, I object. This -- I -- this
25 is first time I've seen it.

1 MR. BRUNER: Your Honor, I'm -- I'm handing this case
2 of *Lail v. U.S.* It's -- it's a federal suit, not reported
3 in the Federal Supplement. But I -- I offer it to Your
4 Honor simply for the discussion on page 6 in the right-hand
5 column. The magistrate was Judge Rogers.

6 And the magistrate held: "In *Graham Law Firm v.*
7 *Makawi*, the Court upheld the trial court's ruling that
8 plaintiff's attempt to serve the defendant by certified
9 mail was insufficient because the return receipt was signed
10 by an unauthorized person -- namely, an employee of the
11 individual defendant's business -- because the plaintiff
12 had failed to present evidence that the employee had either
13 actual or apparent authority to accept service. Here the
14 plaintiffs -- here plaintiffs failed" -- let me start that
15 sentence over. "Here plaintiffs failed to present
16 sufficient evidence that Richardson or Hazel had apparent
17 authority to accept service." And then, the magistrate
18 goes on to quote Wright and Miller, Federal Practice and
19 Procedure Manual, in further support.

20 Your Honor, I think the same -- same reasoning applies
21 here. In the event the failure to file an expert affidavit
22 as required by law is -- and -- and the failure to timely
23 commence this action under the statute of limitations and
24 the failure to timely commence the suit under Rule 3 of the
25 South Carolina civil rules is insufficient. They also

1 failed to properly serve Mr. Falgione's law firm.

2 And I'd be happy to answer any questions you have.

3 THE COURT: All right. Well, apparently, this order
4 is public record. So I'll overrule Mr. Spencer's
5 objections to this authority that's been handed up. I'm
6 trying to find a citation to refer to it. But it's -- oh,
7 here we are. 2012 WL -- Westlaw -- 3779386 is the only
8 citation that apparently is available. It's Civil Action
9 No. 3:11-cv-0977-TLW-TER, dated August 10th, 2012. That's
10 what's been presented to me.

11 All right. Thank ---

12 MR. BRUNER: And I understand it's not controlling,
13 Your Honor, but I ---

14 THE COURT: Certainly.

15 MR. BRUNER: --- I just offer it for the application
16 of *Makawi*.

17 THE COURT: I understand. All right.

18 Mr. Spencer, you want to address the defendants'
19 grounds? In turn, the -- the first is the expert
20 affidavit. It's alleged that you have not been able to
21 locate an expert to attest to the malpractice of the
22 defendants in this case.

23 MR. SPENCER: Yes, sir. First of all, if -- we filed
24 the complaint with the understanding that if a defendant in
25 a complaint admits that there was malpractice that occurred

1 in the case, then there's no need to file an affidavit from
2 an expert. We, however, have supplemented and filed an
3 affidavit from an expert as to the malpractice.

4 Judge Barber, on June -- on -- excuse me -- May 7th,
5 2011, in his hearing had allowed us the opportunity to
6 produce a expert, if necessary, once Mr. Rakowsky -- and
7 they referred to this other suit that Mr. Rakowsky brought
8 that is tying up uncontested-litigation funds that we were
9 going to use to obtain an expert. Mr. Rakowsky has sat on
10 those funds, even though he's admitted they're uncontested,
11 since 2008.

12 Judge Barber, on -- on May 7th, asked them to be
13 turned over to the Court by June 1st, 2011. And they were
14 not turned over by the Court -- turned over to the Court
15 for distribution to us. However, we did secure an expert
16 after that point in time.

17 But as I was saying before, if you admit to the
18 malpractice -- can I present this?

19 THE COURT: Well, is that the expert affidavit?

20 MR. SPENCER: Huh?

21 THE COURT: Is that the expert affidavit?

22 MR. SPENCER: No, that's not the expert affidavit.
23 This is the affidavit where Rakowsky and Falgione are
24 admitting malpractice.

25 THE COURT: Okay. All right. Show it, if you would,

1 to counsel before you hand it up. And ---

2 (Whereupon, Mr. Spencer and his assistant conferred.)

3 THE COURT: --- since you have an expert affidavit, if
4 you'll locate that too.

5 MR. SPENCER: Okay.

6 (Whereupon, Court's Exhibit 4 was marked for
7 identification.)

8 (Off the record briefly.)

9 MS. DUDGEON: Your Honor, are -- is -- if you -- what
10 are we looking for? Because I may be able to assist.

11 THE COURT: All right. It -- I -- I -- I was allowing
12 him some -- a chance to flip through his voluminous
13 paperwork and see if he could locate the expert affidavit.
14 He's handed up a letter dated May 17th, 2007, from your
15 client to Mr. Bruce Benson, explaining what happened in
16 front of Judge Harwell.

17 And the portion that has been highlighted by the
18 plaintiff states: "So we need to drop the claims against
19 Dave Smith and Ancil Garvin as part of the settlement."
20 And then, the last sentence of the letter says: "Now that
21 this case is behind us, we can go after Goldberg for not
22 filing the evidence in a timely manner, which caused these
23 problems in the first place, along with Goldberg's flawed
24 initial pleadings."

25 MS. DUDGEON: Okay. I ---

1 THE COURT: Do you have the affidavit that he ---

2 MS. DUDGEON: I ---

3 THE COURT: --- references?

4 MS. DUDGEON: --- I do.

5 THE COURT: All right. Why don't you go ahead and
6 hand that up and let me look at it.

7 MS. DUDGEON: And, Your Honor, this is an affidavit
8 filed in April of this year. I -- I -- I don't think it's
9 -- a discussion of it is relevant to this motion. But I
10 want the Court to at least see it ---

11 THE COURT: Thank you.

12 MS. DUDGEON: --- rather than . . .

13 (Whereupon, Mr. Spencer and his assistant conferred.)

14 (Whereupon, Ms. Dudgeon and Mr. Bruner conferred.)

15 MS. DUDGEON: And, Your Honor, I don't want to get
16 into a back-and-forth, but I would like time to address my
17 objections to the affidavit and to that letter you've
18 reviewed.

19 THE COURT: Okay. The affidavit is signed by Aimee,
20 A-i-m-e-e -- I'm not even going to try and pronounce this
21 last name -- Z-m-r-o-c-z-e-k. It's notarized February the
22 8th of 2013. And it is about -- it's 12 pages in length.
23 Apparently, he has filed an affidavit. Do you want to
24 address that?

25 MS. DUDGEON: Yes, Your Honor. First of all, the

1 sufficiency of the affidavit or the qualifications of this
2 expert are a whole nother issue, which I don't think is
3 before the Court. But it -- it contains mostly a
4 recitation of the rules of professional conduct and some
5 allegations that are simply just not true.

6 But it doesn't change the fact that the plaintiffs did
7 not have supporting expert opinion in August of 2011 when
8 they filed this suit. Again, this affidavit is in 2013.
9 And it is untimely and, really, is not for the -- for the
10 Court's consideration.

11 As to the letter that's been presented, I -- I can't
12 confirm if it's a letter. I -- there's a similar letter
13 that I've seen at some point. I cannot confirm right now
14 if that's accurate. It looks like a different letterhead;
15 I'm not sure.

16 But it doesn't contain an admission. It's not
17 attached to the complaint. And it's not alleged in the
18 complaint that my clients admitted to -- my client admitted
19 to anything or that Mr. Falgione did.

20 And I believe it's outside the scope of Rule 12. I --
21 I know that's a diatribe of objections. But I did want to
22 note them for the record.

23 MR. BRUNER: Your Honor, we -- we join in those
24 objections. I also want to note that the plaintiffs never
25 filed a motion to file this expert affidavit out of time.

1 And -- and I don't think it satisfied the -- satisfies the
2 requirements under 15-36-100.

3 MR. SPENCER: Your Honor?

4 THE COURT: Sure.

5 MR. BRUNER: And, Your Honor, I have a copy of the
6 statute in the binder under ---

7 THE COURT: Oh.

8 MR. BRUNER: --- Tab 4.

9 THE COURT: I've got it right here too. All right.

10 And while I'm looking at the statute, I understand
11 your position that normally, an expert affidavit would need
12 to be filed contemporaneously with the -- the pleadings;
13 or, at the very least, sometime close to when they're
14 filed. But it was represented that apparently Judge Barber
15 held this question in abeyance pending the money being paid
16 out.

17 MS. DUDGEON: And, Your Honor, I ---

18 THE COURT: How does that affect this?

19 MS. DUDGEON: I -- I disagree with that
20 representation. There is -- there is no order stating that
21 our motion to dismiss, based on failure to file an expert
22 affidavit, was denied; or an order instructing Mr. Rakowsky
23 to release certain funds. What I believe -- and I will
24 tread carefully here, because I don't have the transcript
25 memorized. But what occurred -- and Mr. Bruner can correct

1 me where I'm wrong -- we had a May 2012 status conference
2 in front of Judge Barber for two cases: the legal
3 malpractice case, as well as a separate interpleader case.

4 Understandably, when my client has settlement funds in
5 trust and a lawsuit is filed over those funds by multiple
6 parties seeking an interest in those funds, he hired Desa
7 Ballard, who filed an interpleader action with the Court,
8 saying: "We need the Court's ruling on where this money
9 goes. We want to pay it into the Court. Let's deal with
10 it that way."

11 So that's a separate action. There -- again, there
12 has been no order that Mr. Rakowsky release any funds.
13 He's been instructed by counsel to have an order from the
14 interpleader action instructing him to do so.

15 Mr. Spencer claims he didn't have the money to get an
16 expert, which, frankly, I don't think is what the statute
17 addresses. But he's -- has multiple suits going where he
18 has other attorneys. He has a suit pending months before
19 this one was filed in federal court where he has two
20 attorneys involved.

21 He is involved in a lawsuit against my client in
22 Nevada. So the -- the -- the allegation that he does not
23 have funds ---

24 MR. SPENCER: Your Honor ---

25 MS. DUDGEON: --- is ---

1 MR. SPENCER: --- I challenge ---

2 MS. DUDGEON: --- questionable.

3 MR. SPENCER: --- Ms. Dudgeon to ---

4 THE COURT: One second. Let her finish talking, if
5 you would, please. Go ahead.

6 MS. DUDGEON: I -- I -- I'm finished, Your Honor.

7 THE COURT: Oh, okay. Mr. Spencer?

8 MR. SPENCER: Ms. Dudgeon has a way of twisting the
9 truth; it's unbelievable. She cannot tie me to any lawsuit
10 in Nevada, and she knows full well she can't. She cannot
11 -- the lawyers that are handling the lawsuit are handling
12 it purely on a contingency basis here because they believe
13 in what they're doing.

14 And so she's trying to mispresent the -- the simple
15 facts. And we happen to have the transcript that you don't
16 have that shows that he said that money should be produced
17 by June 1st. We'll move on. And we'll -- we're prepared
18 to present the transcript. Mr. Bruner ---

19 THE COURT: All right.

20 MR. SPENCER: --- if you want to go up ---

21 THE COURT: Well, we're -- we're -- we're dealing with
22 a very limited type of an issue here. If you're looking at
23 the law, it says: "If an affidavit is not filed within the
24 period specified in this subsection, or as extended by the
25 trial court, and the defendant against him an affidavit

1 should have been filed alleges by motion to dismiss filed
2 contemporaneously with its initial responsive pleadings,
3 that the plaintiff has failed to file the requisite
4 affidavit, the complaint is subject to dismissal for
5 failure to state a claim."

6 That's what the law says.

7 MR. SPENCER: Right.

8 THE COURT: And, I mean, I -- I ---

9 MR. SPENCER: Judge Barber ---

10 THE COURT: --- I -- I -- I didn't write that. I just
11 ---

12 MR. SPENCER: Oh, I understand ---

13 THE COURT: --- read it.

14 MR. SPENCER: --- that, sir. But Judge Barber, in his
15 hearing, was quite clear that we didn't have the money to
16 get it. They're to release that uncontested money, and
17 then we can get our expert.

18 THE COURT: Okay. Can you point to a part in the
19 transcript -- you say you have the transcript. Can you
20 show me what you are referring to, please ---

21 MR. SPENCER: Yes. Just ---

22 THE COURT: --- which -- which page and which line?

23 MR. SPENCER: All right.

24 (Whereupon, Mr. Spencer and his assistant conferred.)

25 MR. BRUNER: Your Honor, the -- I've got copies of the

1 transcript. I have a clean copy for Your Honor.

2 THE COURT: Thanks. Hand it up, please.

3 MR. BRUNER: This is from a -- from the May 7th, 2012,
4 status conference.

5 MS. DUDGEON: And, Your Honor, if I may, I have the
6 order that followed that status conference.

7 MR. BRUNER: Your Honor, the plaintiffs have made ---

8 MS. DUDGEON: I'll wait.

9 MR. BRUNER: --- numerous representations and filed
10 affidavits about their beliefs of what rulings were made at
11 the status conference. The bottom line is this: Judge
12 Barber discussed paying out the interpleader money. That
13 was discussed because the interpleader case was one of the
14 two cases that the status conference was held for.

15 And my recollection -- and when I go back and read
16 through the transcript, what I see, is there was a
17 discussion about paying out what they are representing is
18 an uncontested portion of the funds. It's 9800-some-odd
19 dollars. That is not part of this legal malpractice suit.
20 That's entirely within the interpleader suit.

21 And on top of that, I'm not so sure that they are
22 uncontested. I don't see any ruling by Judge Barber that
23 that money is to be paid. And there is no order, to my
24 knowledge, in the record in this case or in the
25 interpleader case, directing the money to be paid.

1 I -- I want to also focus on this: Mr. Falgione never
2 held any of this money. They money's currently being held
3 in Desa Ballard's trust account, is my understanding, based
4 on that status conference, more than anything else.

5 So -- so to the extent there's some equitable argument
6 that -- that the contemporaneous-filing requirement doesn't
7 apply because the lawyers are holding money that would
8 allow them to hire an expert, I don't think that should
9 apply to Mr. Falgione.

10 THE COURT: All right.

11 MR. BRUNER: And my -- the best reading I can find on
12 -- on the enforceability of orders in this state leads me
13 to believe that -- that an order is final when it's written
14 and signed by the judge and submitted for filing, period.
15 And if you look at the orders that were filed in this case
16 after that -- that May 7th status conference, they are a
17 June -- an order signed June 14th by Judge Barber, denying
18 the plaintiffs' motion for entry of default against the
19 defendants.

20 There's an order signed June 14th, continuing the
21 motions to dismiss and Mr. Spencer's motion to disqualify,
22 denying Ms. Santacroce's motion to disqualify, filed, I
23 believe, June 28th. There's a July 30th, 2012, order that
24 granted me protection for a personal vacation.

25 Now -- now, after the status conference, there were --

1 there -- the file -- I'm not sure how much of it you have,
2 Your Honor, but there are numerous correspondence from Mr.
3 Spencer directly to Judge Barber about his understandings
4 of the rulings. And -- and on July 31st, Judge Barber --
5 I'm looking for a copy of it, Your Honor, to hand up to the
6 Court.

7 On July 31st of last year, what appears to me to be in
8 response to all the plaintiffs' arguments about the rulings
9 he made, Judge Barber issued a letter. I'm going to hand a
10 copy of it up.

11 MR. SPENCER: Your Honor, I object to this letter.

12 THE COURT: On what grounds?

13 MR. SPENCER: Grounds it's not applicable. If you
14 take a look at the -- with the cases this is regarding,
15 it's not this case. It's regarding a different case. This
16 is a typographical error that should be thrown out and not
17 even considered in this case.

18 MR. BRUNER: Your Honor, I -- I think Mr. Spencer's
19 right: That's nothing more than a typographical error
20 committed by either Ms. -- Judge -- Judge Barber's law
21 clerk or his administrative assistant.

22 MR. SPENCER: Your -- your assumption of a
23 typographical error and the applicability of this motion
24 doesn't make this any more legitimate document.

25 THE COURT: All right. It -- it simply -- it's --

1 it's one sentence. Certainly, we can agree on one
2 sentence: "I have signed the orders I intend to sign, and
3 they will stand," period, end of story. That seems to be
4 -- it's on Judge Barber's letterhead. It's got his
5 signature.

6 MR. SPENCER: But it's not regarding this case.

7 THE COURT: I -- I understand. It -- it is
8 apparently, however, addressed to you, Mr. Spencer. Are
9 you involved in the other case?

10 MR. SPENCER: No, I'm not involved -- involved in the
11 other cases. That's ---

12 THE COURT: It would stand ---

13 MR. SPENCER: --- why I'm ---

14 THE COURT: --- to -- it ---

15 MR. SPENCER: --- saying ---

16 THE COURT: --- would ---

17 MR. SPENCER: --- this is -- Judge Barber -- the
18 characterization they've made of these other orders being
19 issued? They were issued on a -- not on the -- on this
20 hearing on May 7th. They -- they well know it. Those
21 orders were issued on a April hearing.

22 THE COURT: All right. We need to move this along.
23 Have you located in the transcript that part where you say
24 Judge Barber gives you additional time to locate an expert?

25 MR. SPENCER: Yeah.

1 (Whereupon, Mr. Spencer and his assistant conferred.)

2 (Off the record briefly.)

3 THE COURT: Would it be around pages 48 on through ---

4 MR. SPENCER: That's what I'm looking for. Page 50, I
5 believe.

6 MS. DUDGEON: And, Your Honor, again, as Mr. Bruner
7 has mentioned, this status conference we discussed the
8 timing of the lawsuits and when the interpleader would be
9 held. It didn't happen.

10 Desa Ballard's office followed up with judge; "What do
11 you want us to do?"

12 The response was the letter, saying: "The orders that
13 I have filed stand."

14 And I have a letter from Desa's office if you need it,
15 but I -- I don't want to muddy already clear waters.

16 THE COURT: All right.

17 MR. BRUNER: And, Your Honor, the -- I mean, I -- I
18 just want to, for the record, point out: The primary
19 thrust of this discussion is trying to figure out a
20 scheduling order going forward.

21 THE COURT: Just curious: Why isn't Judge Barber
22 hearing this? How'd this get over to Judge Griffith and
23 then myself?

24 MR. BRUNER: Well, it's been a long, winding road,
25 Your Honor. We -- it -- time -- the lawsuit was getting

1 older. And I was faced -- you know, my -- I believe my
2 client had a substantial right to be tried in his resident
3 county. And our motion to dismiss hadn't been heard.

4 So I could either risk popping up on the trial roster
5 without any discovery and my motion to dismiss till --
6 still pending, or go ahead and try to move to Lexington
7 County. And -- and we made the call to go ahead and
8 transfer venue.

9 THE COURT: I hear you.

10 MR. BRUNER: So it ---

11 THE COURT: All right.

12 MR. BRUNER: --- fell in your able lap, Your Honor.

13 THE COURT: I've reviewed the portion of the
14 transcript. The transcript speaks for itself; the order
15 speaks for itself. Let's move along.

16 How do you -- how do you get -- Mr. Spencer, how does
17 the statute of limitations not apply in this case?

18 MR. SPENCER: Statute of limitations doesn't apply in
19 this case because if you read the letter -- and that letter
20 is on the -- it's on the court record in federal district
21 court -- it's from the court record, and they well know it
22 -- Mr. Rakowsky -- if -- if a attorney admits to
23 malpractice going on in a case, which what -- he did in
24 this case -- he's claiming that other lawyers were involved
25 in the malpractice -- and that he would cure this

1 malpractice, because he and Falgione were going to end up
2 suing the other lawyers. Okay? And we did not -- and they
3 cannot point to one document where I questioned this until
4 the following August, when Judge Harwell admitted on the
5 record that he never ordered the defendants -- or the
6 unrepresented defendants dismissed from the case, which is
7 completely contrary.

8 He also said that he never reviewed all the evidence,
9 the way Rakowsky and Falgione said. And that -- that's
10 when I knew that there was a reason why Rakowsky and
11 Falgione had not taken action -- remedial action to correct
12 the case by suing the attorneys that they said they were
13 going to sue, who they said were responsible for the
14 rulings of the judge. The judge never made those rulings.

15 And so they misled us. And under the ---

16 THE COURT: Let -- let's focus -- let's focus in on
17 this: The question is: When did you have notice or when
18 should you have known that, assuming what you're saying is
19 true -- malpractice took place; and clearly, you were at
20 the hearing with Judge Harwell ---

21 MR. SPENCER: Yes.

22 THE COURT: --- clearly, this is something that
23 apparently, for lack of a better word, Judge Harwell shoved
24 down everybody's throat and you were not happy with that;
25 and apparently, Judge Harwell did not ask the various

1 individuals who were in attendance -- did not ask them
2 individually if they agreed to the settlement; and it's
3 been represented that you wrote Judge Harwell, or you and
4 other plaintiffs wrote Judge Harwell after the fact, taking
5 issue with the settlement. Is that an accurate statement
6 of -- of what's ---

7 MR. SPENCER: No, sir.

8 THE COURT: --- transpired?

9 Okay. Where am I wrong?

10 MR. SPENCER: Okay. I did not write the judge and
11 take issue with -- with the settlement at that -- at that
12 point in time. It -- according to John Rakowsky and
13 Falgione, what they were doing was looking for a way around
14 the judge's rulings on the evidence. And so what -- what
15 the -- what they wrote the Court about was that the -- the
16 transcript they got back was completely different than what
17 Rakowsky and Falgione had put in that letter, claiming that
18 all the evidence was dismissed.

19 Judge Harwell refused to comment on it, saying no;
20 that -- that's moot. And so Rakowsky said that that's
21 right, but that the judge had, in fact, been sanctioned
22 before for holding a hearing -- an evidentiary hearing in
23 chambers. And he showed me that ---

24 MS. DUDGEON: Your Honor, we're -- we're ---

25 THE COURT: We're ---

1 MS. DUDGEON: --- getting ---

2 THE COURT: --- we're -- we're -- we're getting a
3 little far afield. The -- the ---

4 MR. SPENCER: Okay.

5 THE COURT: --- the question is very ---

6 MR. SPENCER: I did ---

7 THE COURT: --- simple.

8 MR. SPENCER: --- not -- I did not know until -- that
9 the judge confirmed that there was not an evidentiary
10 hearing. It had to have been a settlement hearing.

11 THE COURT: But you were present when the settlement
12 took place; it's the settlement that you have issue with;
13 it's the fact that the case was settled that you have an
14 issue with, correct?

15 MR. SPENCER: Well, my understanding was the case
16 would not be settled until we -- we signed the settlement
17 documents and accepted the settlement funds. Neither --
18 neither occurred. That was my understanding.

19 But if I was asked in court, I would tell them that I
20 was not in agreement with the settlement. So Rakowsky --
21 Rakowsky had told us to keep us our mouths shut unless we
22 were polled.

23 MS. DUDGEON: Your Honor, my client had filed a motion
24 to be relieved within two months, in July of 2007. Mr.
25 Spencer was writing the Court, saying, "Counsel Rakowsky

1 has failed to protect the interests of his clients," on
2 July 30th, 2007, just two months after this settlement
3 hearing. It's a three-year statute of limitations for a
4 reason. It gives them time to look into the claim they
5 have notice of.

6 MR. SPENCER: The ---

7 THE COURT: All right.

8 MR. BRUNER: I think Your Honor ---

9 THE COURT: When -- when was the suit filed?

10 MR. SPENCER: The -- the suit was filed on ---

11 MR. BRUNER: August ---

12 MR. SPENCER: --- the third ---

13 MR. BRUNER: --- 15th ---

14 MR. SPENCER: --- third anniversary of Judge Harwell
15 admitting that -- that he didn't hold ---

16 THE COURT: But the ---

17 MR. SPENCER: --- an evidentiary ---

18 THE COURT: --- I -- I need a date. I don't need ---

19 MS. DUDGEON: August ---

20 MR. SPENCER: Oh, okay. It was, I think, August --
21 August 11th, 2008.

22 MS. DUDGEON: August 15th ---

23 MR. SPENCER: August 15th.

24 MS. DUDGEON: --- 2011.

25 MR. SPENCER: Yeah.

1 MR. BRUNER: The immediate suit was filed August 15th,
2 2011.

3 MR. SPENCER: Oh. 2011. Right.

4 MR. BRUNER: Your Honor, the -- I -- I think we go to
5 the complaint. This is a 12(b)(6) motion. And the
6 allegations in the complaint are that the defendants failed
7 to properly represent the plaintiffs; failed to adequately
8 prepare the case, which necessarily occurred before May
9 9th, 2007; failed to adequately advise the clients of the
10 status of the representation, which necessarily happened in
11 2007 or prior; failed to adequately communicate with the
12 clients regarding the representation; failure to perform
13 the contract of employment of legal services; failed to
14 provide competent legal representation of the plaintiffs;
15 failed to act diligently in the interests of the
16 plaintiffs; failed to communicate with the plaintiffs
17 properly and timely in order for them to make informed
18 decisions about the case.

19 And that -- all -- all these allegations are the
20 representation during and leading up to the settlement.
21 And I think Your Honor is correct. The primary thrust is:
22 "Hey, our -- our lawyers settled our case out from under
23 us."

24 They allege in their complaint that they told their
25 attorneys, "Well, I'm -- I'm not going to agree to any

1 settlement. And if -- and if the judge polls me, I'm going
2 to tell him I don't agree."

3 And -- and, Your Honor -- and -- and then they start
4 inundating the Court. I -- I want to point out that Mr.
5 Spencer says he didn't write a letter. And -- and I
6 haven't found a letter yet. We haven't gotten into
7 discovery. But I haven't found a letter from Mr. Spencer
8 directly to Judge Harwell.

9 THE COURT: All right. Well, I'm reviewing Judge
10 Harwell's order that apparently has not been reported in
11 F. Supp. 2d, but it is dated, I guess, July 3rd, 2007.

12 MR. BRUNER: Yes, Your Honor.

13 THE COURT: Addressing the 60(b) motion, and the
14 second paragraph of that captioned section, saying "Other
15 Grounds for Relief Under Rule 60(b)," second paragraph
16 says: "Further, with regard to any claim by the plaintiffs
17 of either improper inducement, bad advice, or inadequate
18 representation or preparation against plaintiffs and
19 attorneys, such is not a valid basis for repudiating a
20 settlement, citing Petty. In the event there was any
21 breach of the standard of care by -- owed by plaintiffs'
22 attorneys to the plaintiffs as a result of the alleged
23 coercion, improper inducement, fraud, or inadequate
24 representation, plaintiffs have an available remedy for
25 damages against their own attorneys."

1 So Judge Harwell is denying the 60(b) on that ground.
2 And again, that order is -- I want to double-check the
3 date.

4 MR. BRUNER: And that's the July 3rd, 2007, order,
5 Your Honor?

6 THE COURT: According to the Westlaw, it's -- yes --
7 July 3rd, 2007.

8 MR. BRUNER: It's ---

9 THE COURT: And it is ---

10 MR. BRUNER: --- 2000 WL 1960590?

11 THE COURT: --- 1960590. Correct.

12 MR. BRUNER: Your Honor, if you look at Footnote 3 in
13 that same order ---

14 (Whereupon, Ms. Dudgeon and Mr. Bruner conferred.)

15 MR. BRUNER: It -- I -- I think -- I think that order,
16 if -- if nothing else, puts them on notice of any claim;
17 that the latest possible date that they could -- the -- the
18 statute would begin to run is on that date. And I -- I
19 think this is -- if -- if the Court needs to, I think this
20 is a public record.

21 THE COURT: Right.

22 MR. SPENCER: Your Honor?

23 THE COURT: Yes, sir.

24 MR. SPENCER: The letter that John Rakowsky issued to
25 us claims that our attorneys did, in fact, commit

1 malpractice. But he was pointing to the other attorneys.
2 Okay? The other attorneys that had been on the case,
3 that's who he's referring to.

4 And he was going to remedy that problem by suing those
5 attorneys. Okay? That is what we were -- that was what
6 myself and -- my mother and I were led to believe. It
7 never occurred. Then we learned why, when it came out in
8 August.

9 But he had three years to sue them. He was never
10 intending to sue them. All's he was doing was setting
11 aside the money that he was supposed to -- that he was
12 holding onto was supposed to be used for that lawsuit.

13 MR. BRUNER: And I ---

14 MR. SPENCER: So yes. They're talking about lawyers
15 -- our former lawyers.

16 THE COURT: All right.

17 MR. BRUNER: I don't see that argument in the
18 complaint, Your Honor. It's -- it's news to me -- this --
19 this theory of recovery is news to me.

20 THE COURT: All right.

21 MR. SPENCER: It's in his letter.

22 THE COURT: All right. Moving on to the third point,
23 improper service: What do you say to that, Mr. Spencer?

24 MR. SPENCER: The -- the -- the -- they were served --
25 well, the -- the judge -- you know, they're -- they're

1 sitting here, saying -- Mr. Bruner is making a statement
2 that Judge Barber found that they were not served. That's
3 not true. Judge Barber stated that he didn't find the
4 dates -- the -- the documents that were filed didn't
5 contain the full information. And so therefore, we
6 resubmitted the documents.

7 And he found that -- that he -- he said, "Well, it's
8 too late. Even though you've resubmitted the documents, I
9 still can't go for the -- them not responding on a timely
10 basis, because the original documents you submitted didn't
11 carry the exact place that they -- or the name of the place
12 that they were served." But he did not find that they were
13 not served properly.

14 MR. BRUNER: I have a copy of the order, if Your Honor
15 ---

16 THE COURT: Please.

17 MR. BRUNER: --- would like it.

18 MS. DUDGEON: And, Your Honor, we've also attached
19 affidavits regarding the time that our clients were served.

20 THE COURT: Thank you.

21 MR. BRUNER: Your Honor, we -- the -- the rule that --
22 my -- my argument is not that there was a clear ruling that
23 -- that -- basically, my argument was that in order for
24 that holding to be so, there has to be no service on
25 September 15th. They had their opportunity. They put up

1 defective affidavits. And Judge Barber made his ruling. I
2 think they're stuck with it.

3 MR. SPENCER: This ruling was on the -- was on the
4 subject of default.

5 THE COURT: All right. I understand. Can you -- can
6 you present any evidence that the person that you served,
7 when you served the defendants, have authority to accept
8 service?

9 MR. SPENCER: The person that served -- the -- the --
10 the individuals that were served -- accept service was
11 Rakowsky and Falgione themselves. They were served a
12 second time ---

13 THE COURT: Do you have an affidavit to that effect?

14 MR. SPENCER: Yes. Somewhere.

15 THE COURT: Is that correct? Were ---

16 MS. DUDGEON: No, Your ---

17 THE COURT: --- they ---

18 MS. DUDGEON: --- Honor.

19 THE COURT: --- individually served?

20 MS. DUDGEON: No, Your Honor. The first time -- he
21 was individually served on December 16th, yes, but not
22 before that time. And it . . .

23 THE COURT: Okay. Well, what was he served with on
24 December 16th, then, the complaint or ---

25 MS. DUDGEON: The -- yes. The -- December 16th.

1 Nothing on September. We -- he -- no one even contacted
2 him on September -- and there's an affidavit of where he
3 was at that time ---

4 THE COURT: Okay.

5 MS. DUDGEON: --- in the.---

6 MR. SPENCER: Where he ---

7 MS. DUDGEON: --- in the file.

8 MR. SPENCER: --- where he ---

9 (Whereupon, Mr. Spencer and his assistant conferred.)

10 MS. DUDGEON: I apologize, Your Honor. It's actually
11 Stephanie Weissenstein's affidavit about where John was on
12 the day that plaintiffs claim that they served him. My
13 client, Mr. Rakowsky's affidavits, show that he was not
14 served on the 15th of September, but was served on the 16th
15 of December. Who's on first?

16 THE COURT: Which is outside the limit?

17 MS. DUDGEON: Yes, Your Honor.

18 MR. BRUNER: And likewise, Your Honor, Exhibit A to my
19 amended motion includes an affidavit from Mr. Falgione,
20 stating that he was served on December 15th, 2011, beyond
21 the 120 days. Paragraph 6 says: "To the best of my
22 knowledge, December 15th, 2011, was the first time the
23 plaintiff attempted to serve me or my firm with the summons
24 and complaint."

25 (Whereupon, Ms. Dudgeon and Mr. Bruner conferred.)

1 THE COURT: And just so that the record is clear, the
2 order that was handed up involves -- it's Judge Barber's
3 order, dated June 14th, 2012, Case No. 11-CP-40-5384; order
4 speaks for itself. All right.

5 MS. DUDGEON: Your Honor, what's being handed up is
6 the same affidavit that Judge Barber already addressed in
7 his order. And it's also signed by the wife of one of the
8 plaintiffs in the underlying case. And it's not notarized.
9 But again, that's addressed in the order, I believe.

10 THE COURT: All right. I'm being shown a document.
11 It purports to be affidavit of Tammy -- Tammy Lail,
12 L-a-i-l, two-page document, dated September 15th, 2011. It
13 is not notarized. And I presume it's the wife of one of
14 the parties in interest in this matter ---

15 MR. SPENCER: Which ---

16 THE COURT: --- therein. It -- is this person the
17 spouse of somebody involved in this suit?

18 MR. SPENCER: Not in this suit or ---

19 THE COURT: I mean, the -- the whole underlying thing.

20 MR. SPENCER: The -- the whole underlying ---

21 THE COURT: Yes, sir.

22 MR. SPENCER: Yes.

23 THE COURT: Okay. Do you have anything further, Mr.
24 Spencer?

25 MR. SPENCER: No, sir.

1 THE COURT: All right. Here's what I'm going to do:
2 We've been at this for two hours. The remaining motions,
3 as I see it, relate primarily to discovery issues, timing
4 issues, motions to quash. That's what we've got left.

5 I will be taking the matter under advisement. Upon
6 receipt by the powers that be of authority to rule, I will
7 issue a ruling on this issue.

8 Depending upon what I do after reviewing this, we may
9 reconvene to address any other discovery issues, where the
10 -- the remaining motions: namely, Motions 4 through 7 --
11 defendant -- the defendant's motion to compel discovery
12 responses, plaintiffs' motion to compel and stay hearing,
13 defendant's motion -- and the two defendants' motions to
14 quash.

15 So if I do not grant the defendants' motions to
16 dismiss, we will reconvene and address those, since those
17 relate to the actual merits and I would need to wade in a
18 little bit deeper on this case factually in order to be
19 able to rule intelligently as to those motions.

20 MR. SPENCER: Your Honor, there's ---

21 THE COURT: Yes, sir.

22 MR. SPENCER: --- two other motions that have
23 presented before the Court.

24 THE COURT: Right. That's what I was just talking
25 about.

1 MR. SPENCER: Okay.

2 THE COURT: That -- I was going to hold those in
3 abeyance, based upon -- because if the case is dismissed,
4 it ---

5 MR. SPENCER: Well, it had to do with the parties to
6 ---

7 THE COURT: Oh.

8 MR. SPENCER: --- the case.

9 THE COURT: To amend the complaint? We'll -- we'll
10 cross that bridge if we come to it. If -- if the matter is
11 not resolved through this hearing, I'm going to need to get
12 a -- a lot more up to speed on the other motions.

13 My understanding, in all candor, concerning the
14 hearing today was that I was dealing solely with the
15 motions to dismiss and that we weren't going to be taking
16 up these other matters. So I have not had a chance to --
17 to review those as -- as thoroughly as I would to get as
18 involved in the file as I would need to be to address
19 discovery disputes.

20 MR. SPENCER: And, Your Honor, I'd like to also make a
21 motion ---

22 THE COURT: Sure.

23 MR. SPENCER: --- under 59(b) that -- that this --
24 because of the fact that they merged these two hearings,
25 they tied these orders together of both these cases under

1 Judge Barber. This case was transferred out. It's become
2 so convoluted, including the submission of ex parte
3 information in the other case. I'd like to move for a
4 mistrial on this.

5 THE COURT: All right. I appreciate your position. I
6 don't necessarily disagree with your -- what you're saying,
7 as far as the case becoming somewhat convoluted.
8 Obviously, there's a lot of paper in front of you. There's
9 a lot of paper in front of the defendants.

10 I'm not inclined to grant a motion for a mistrial,
11 though. I don't really see any grounds for that. But I
12 appreciate your concerns.

13 Very good. We'll be at ease on this. Thank you.

14 MS. DUDGEON: Thank you, Judge.

15 MR. BRUNER: Thank you, Your Honor.

16 MR. SPENCER: Thank you, Your Honor.

17 MR. BRUNER: Would you ---

18 THE COURT: Thank you.

19 MR. BRUNER: --- like proposed orders from the
20 parties?

21 THE COURT: Not until I get authority from my boss,
22 saying everything is good; go ahead and issue an order.

23 MR. BRUNER: Okay.

24 THE COURT: Thank you.

25 MR. BRUNER: Thank you for your time this morning,

1 Your Honor.

2 THE COURT: No. Not a problem.

3 MR. SPENCER: Thank you, Your Honor.

4 THE COURT: Thank you, Mr. Spencer. Good to meet you,
5 sir.

6 (Whereupon, the proceeding was concluded at 11:34 a.m.)

7 (Whereupon, Court's Exhibit 5 was marked for
8 identification while off the record.)

9 --- END OF TRANSCRIPT OF RECORD ---

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CERTIFICATE

I, THE UNDERSIGNED MARYANN S. NEVERS, CERTIFIED
VERBATIM REPORTER - MASTER, CERTIFICATE OF MERIT,
OFFICIAL COURT REPORTER FOR THE EIGHTH JUDICIAL
CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY
CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND
COMPLETE TRANSCRIPT OF RECORD IN THE HEARING OF THE
CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT
COURT FOR LEXINGTON COUNTY, SOUTH CAROLINA, ON THE 5TH
DAY OF JUNE, 2013.

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



MARYANN S. NEVERS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

SEPTEMBER 1, 2014

STATE OF SOUTH CAROLINA)

County of Richland)

COURT OF Common Pleas
2008-CP-40-6656

John R. Rakowsky,)

Plaintiff)

vs.)

TRANSCRIPT OF RECORD

Adrian L. Falgione,)

and The Law Offices of)

Adrian Falgione, LLC,)

James Spencer, Estate)

of Doris Holt, Rodney)

Lail, Irene Santacroce,)

Marguerite Stephens,)

Ricky Stephens.)

Defendants)

STATE OF SOUTH CAROLINA)

County of Richland)

COURT OF Common Pleas
2011-CP-40-5384

James Spencer,)

Individually, on behalf)

of the Estate of Doris)

Holt and on behalf of)

Southern Holdings, and)

Irene Santacroce,)

Plaintiffs)

vs.)

TRANSCRIPT OF RECORD FOR
BOTH CASES HEARD JOINTLY

John R. Rakowsky,)

Adrian L. Falgione,)

and The Law Offices of)

Adrian Falgione, LLC)

Defendants.)

May 7, 2012
Columbia, South Carolina

BEFORE:

The Honorable James Barber, III, Judge

APPEARANCES:

Stephanie Weissenstein, Esq.

Amanda Dudgeon, Esq.

Adrian Falgione, Esq.

Benjamin Bruner, Esq.

James Spencer, Appearing Pro Se

KAREN AMBROZIAK
Official Court Reporter

CONTENTS:

WITNESSES:

(There were no witnesses called.)

EXHIBITS:

(There were no exhibits introduced.)

CERTIFICATE OF REPORTER

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1 THE COURT: All right. I need people to tell me
2 who is here and who is not here. We're here today to
3 try to figure out where we are in these cases, where
4 we need to go and how we're ultimately going to
5 resolve them. We've had some issues with --- here is
6 Mr. Spencer --- Mr. Spencer's health and they're
7 ongoing I assume. Come on up here, Mr. Spencer.

8 (Complies.)

9 MR. SPENCER: Yes, sir.

10 THE COURT: Is Ms. Santacroce coming?

11 MR. SPENCER: Yes, sir, she is on her way up.

12 THE COURT: Is this Ms. Santacroce?

13 MR. SPENCER: Yeah.

14 THE COURT: Let her sit at the table. She is one
15 of the parties in this action, actions.

16 Now, as most things have gone in this case, when
17 we were having all the discussion several weeks ago
18 about hearings and where we're going to go and how
19 we're going to do things, we being my office, my law
20 clerk, pulled all the files, two files and got them
21 all organized so that we would start from there. Of
22 course, we took them back to the clerk's office and
23 our clerk can't find where they are, but that's --- so
24 you're going to have to fill me in a little bit.

25 We have two actions here. We have an

1 interpleader action on some money that's been paid.
2 What's the money in the trust account that's presently
3 being held? Anybody have an idea of the value?
4 What's the amount of money in that? Are you all
5 holding that?

6 MS. WEISSENSTEIN: Stephanie Weissenstein, and we
7 have the money in our trust account. It's about
8 \$63,000.

9 THE COURT: \$63,000. All right. There is an
10 interpleader action to pay that \$63,000 into the
11 court, the clerk's office is that --- that's one
12 action. That's the oldest action, right.

13 MS. WEISSENSTEIN: Yes, sir.

14 THE COURT: Anybody disagree with that? All
15 right. Now, I have heard --- we weren't able to come
16 up with this information when we were reviewing and
17 organizing the file. It's been repeated to me that
18 there's 10, 12, 13, \$9,000 that nobody can contest
19 that somebody wants to be able to disperse that. Does
20 anybody know anything about this?

21 MS. WEISSENSTEIN: Your Honor, there was a
22 comment made in one hearing that referred to about
23 \$9,500 as being undisputed in the sense that those
24 funds belong to or were generated for a cost of
25 litigation, and since then there's been by the pro se

1 defendants the claim that it's on the court record
2 that these are undisputed funds and that they're being
3 improperly withheld. What our position has always
4 been, Your Honor, is it's an interpleader action and
5 we want to pay all the money to the court.

6 THE COURT: So there is no segregated \$9,500 in
7 some account somewhere that's separate and ---

8 MS. WEISSENSTEIN: It's all in one lump sum in
9 our trust account.

10 THE COURT: The only money that is being held is
11 the \$63,000 that's in a trust account with your law
12 firm?

13 MS. WEISSENSTEIN: Yes, sir; yes, sir.

14 THE COURT: All right. The interpleader was
15 filed on behalf of ---

16 MS. WEISSENSTEIN: Mr. Rakowsky.

17 THE COURT: Mr. Rakowsky. All right, and this
18 being the defendants, Mr. Spencer and Ms. Santacroce.
19 Anybody else?

20 MS. WEISSENSTEIN: There was actually a plethora
21 of parties, Your Honor, but most of them are in
22 default, so the only remaining parties are
23 Mr. Falgione and the pro se defendants and we also
24 believe that Mr. Rakowsky will, once the money is
25 interpled, can take on the posture of also being a

1 claimant, so there are multiple claimants.

2 THE COURT: Do y'all have any counter claims in
3 the interpleader action?

4 MR. SPENCER: Well, let me straighten something
5 out. First of all, Your Honor ---

6 THE COURT: Identify yourself.

7 MR. SPENCER: I'm Jim Spencer. I'm a defendant
8 in the interpleader. The amount in question is
9 \$9,855.85, by their own accounting records that were
10 submitted to your court on September 15th. I have a
11 copy of this right here.

12 THE COURT: All right. But that money is not a
13 segregated amount of money that ---

14 MR. SPENCER: That money --- they have combined
15 that money and have said that that money is not
16 disputed.

17 THE COURT: All right. Well, we're not getting
18 into the merits.

19 MR. SPENCER: It's supposed to be segregated.

20 THE COURT: I'm just trying to find out where the
21 cash is.

22 MR. SPENCER: It's supposed to be segregated and
23 they didn't segregate it.

24 THE COURT: So it's in one account?

25 MR. SPENCER: I don't know that.

1 THE COURT: All right. Well, they have
2 represented that, and you don't have any information
3 to the contrary. All right. Now, are there any
4 counterclaims on the interpleaders?

5 MR. SPENCER: Yes.

6 MS. WEISSENSTEIN: Sir, the counterclaims are all
7 dismissed.

8 UNIDENTIFIED SPEAKER: They didn't dismiss us.

9 MR. SPENCER: They have been dismissed.

10 THE COURT: Don't talk to them. They don't talk
11 to you. Everything comes through me.

12 All right. Are there orders on the
13 counterclaims?

14 MS. WEISSENSTEIN: Yes, there was an order on the
15 counterclaims, sir.

16 THE COURT: What was the counterclaim?

17 MR. SPENCER: Your Honor, we've asked for a
18 counterclaim to get the ---

19 THE COURT: What was the cause of action on the
20 counterclaim?

21 MR. SPENCER: A dispute in the amount of money in
22 question.

23 THE COURT: Well, I understand that at some point
24 in time if they are successful, there's going to be
25 some issues as to who gets the money. You're making a

1 claim for some of the money. I don't know whether Ms.
2 Santacroce is making a claim for the money. Ail
3 apparently Ms. Weissenstein says that somebody else
4 might --- I don't know if Mr. Falgione --- I don't
5 know who is going to make any claims or what claims
6 are pending, but is that what --- is that what y'all
7 are looking for?

8 MR. SPENCER: No, sir. Mr. Rakowsky, on
9 September 15th, acknowledged that he had no problem
10 with that litigation money being paid out, that
11 \$9,855.85, which is separate from the \$50,000 that was
12 put in.

13 THE COURT: All right. Well, I don't care what
14 he said at that point in time. I'm still trying to
15 understand in my mind what we ---

16 MR. SPENCER: There are no other claims on that
17 \$9,855 but our claim.

18 THE COURT: All right. Well, here is the deal.
19 Y'all oppose the money being paid into the court?

20 MR. SPENCER: We oppose the \$9,855.85 being paid
21 into the court.

22 THE COURT: Because you say you want it paid
23 directly to you?

24 MR. SPENCER: That's correct.

25 THE COURT: Do you oppose the 9,000 some odd

1 dollars -- who has the claim on that?

2 MR. SPENCER: The only people who have a claim on
3 that are the defendants.

4 THE COURT: Give me the names.

5 MR. SPENCER: The three defense (sic) are Irene
6 Santacroce, Rodney Lail, and myself.

7 THE COURT: All right. Do you dispute that that
8 there is a \$9,000 ---

9 MS. WEISSENSTEIN: Your Honor, the other possible
10 claimants have all defaulted, so we have disputed
11 paying anything to anyone without a court order.

12 THE COURT: I understand that, but if you can all
13 agree that 9,000 some odd dollars should go to these
14 defendants for some reason, we'll sign a consent order
15 and put the \$54,000, pay it into trust and we'll argue
16 about who gets that.

17 MS. WEISSENSTEIN: Your Honor, a consent order
18 that firmly releases my client from any kind of
19 liability as to the payment of that 9,500 whatever
20 dollars will be okay, but without an order, we're just
21 not going to pay these people any money.

22 THE COURT: Well, I know, but the best you're
23 going to get ---

24 MS. WEISSENSTEIN: I'm sorry.

25 THE COURT: The best you're going to get on the

1 interpleader action is permission for the court to
2 hold the money as opposed to you. There will not be
3 any action on the interpleader action as to who is
4 entitled to what. Just to pay the money into the
5 court. Do you understand that?

6 MS. WEISSENSTEIN: I do, sir.

7 THE COURT: And then there's going to be --- I
8 guess, I don't have the pleading. Somebody is making
9 a claim for that money.

10 MS. WEISSENSTEIN: Yes, sir.

11 THE COURT: Be it Mr. Spencer, Mr. Rakowsky,
12 somebody is making a claim for the money. They say,
13 being the defendants in the interpleader action, say
14 there's \$9,500 for lack of a different --- that is not
15 disputed and it should go to them. There is a dispute
16 as to the other \$54,000. Who gets that? Well, you
17 know, if, in fact, they should get it, we might as
18 well give it to them. If you can't, here is what's
19 going to happen. I'm going to order the money be paid
20 at some point in time into the court. There's no
21 reason for them to hold when the court can hold it.
22 And then we're going to have to set up some process
23 for determining who gets \$64,000.

24 MR. SPENCER: Your Honor, it's my understanding
25 that according to the law that if the money is not in

1 dispute, it is not to be put into the interpleader.
2 This money is not in dispute. It's supposed to be
3 paid to us.

4 THE COURT: They're claiming it is in dispute.

5 MR. SPENCER: No, they just said it wasn't in
6 dispute.

7 THE COURT: I didn't hear them say that. They
8 said we'll pay anything if we're relieved of any
9 liability. Well, are you agreeable to relieving them
10 of any liability with respect to ---

11 MR. SPENCER: Well, I'm not sure what she is
12 talking about with any liability.

13 THE COURT: I would assume that however --- I
14 don't know how.

15 MR. SPENCER: What liability is she looking for
16 release from?

17 THE COURT: I don't know.

18 MR. SPENCER: We're just asking that \$9,500 be
19 paid that we agreed to.

20 THE COURT: Well, here's what you need to do.
21 You all need to agree to just pay the money into the
22 court. You all need to agree that let's have a
23 hearing as quickly as we can to decide who gets it.
24 If there is some of that money, that \$64,000 that is
25 not --- that y'all acknowledge. You say it's for the

1 advancement of some court costs or ---

2 MR. SPENCER: Litigation funds.

3 THE COURT: All right. If that's, in fact, the
4 case, then pay it to them. These folks need money at
5 least based on my outside observation. If it's
6 theirs, give it to them. Who is entitled to the other
7 \$50,000? \$55,000? Do you have an opinion as to that?

8 MS. WEISSENSTEIN: Yes, sir, we do.

9 THE COURT: All right. What is your opinion as
10 to who is entitled to that?

11 MS. WEISSENSTEIN: Our opinion is that \$55,000 was
12 settlement proceeds.

13 THE COURT: All right. And who gets ---

14 MS. WEISSENSTEIN: And then the attorneys
15 representing the parties would be entitled to their
16 fee, but in addition to that, Your Honor, there are
17 other considerations that would be presented to the
18 court at a hearing to ascertain those amounts of
19 money.

20 THE COURT: Look ---

21 MS. WEISSENSTEIN: But, again, in terms of the
22 interpleader action ---

23 THE COURT: This is a status conference. We're
24 not holding anybody responsible. Basically your client
25 believes they are entitled to a contingent fee on the

1 \$50,000; is that right?

2 MS. WEISSENSTEIN: Yes.

3 THE COURT: Is there other money that they say
4 they're entitled to in addition to the fee?

5 MS. WEISSENSTEIN: The fees and costs that were
6 not paid in relation to the representation of
7 Mr. Spencer.

8 THE COURT: All right. So everything you're
9 claiming is litigation fees or costs?

10 MS. WEISSENSTEIN: I think so, Your Honor.

11 MR. FAGIONE: If I may, Your Honor, I'm Adrian
12 Falgione. I'm one of the defendants in this
13 interpleader action. I think there were multiple
14 plaintiffs in that action, more than just the three
15 people that are before you today, and I think they are
16 entitled to that.

17 THE COURT: I don't care what they are entitled
18 to. I want to know what you claim you're entitled to.

19 MR. FAGIONE: Our fees and costs, Your Honor.

20 THE COURT: Anything else?

21 MR. FAGIONE: I didn't have anything else in that
22 particular action, Your Honor.

23 THE COURT: All right. And then you claim all
24 the other plaintiffs are due the rest of it.

25 MR. FAGIONE: The plaintiffs and there were some

1 expert witnesses, I believe, Your Honor, but I have
2 not kept up with the status of all those.

3 THE COURT: Expert witnesses on behalf of who?

4 MR. FAGIONE: On behalf of the plaintiffs.

5 THE COURT: Who paid them?

6 MR. FAGIONE: I don't know if they all have been
7 paid or not, Your Honor. I've lost touch with what's
8 gone on. This case, it's five years ago, six years
9 old.

10 THE COURT: I ran for judgeship one time.
11 Somebody on the committee wrote a letter to somebody
12 who had filed a complaint against another judge and
13 said, "Would you're like to file a complaint against
14 Judge Barber?"

15 Now, we're not going out and looking for people
16 to come in here and claim these funds if they're not
17 interested in protecting their own whatever.

18 MS. WEISSENSTEIN: Your Honor, the --- everyone
19 that we can think of who could have possibly been the
20 contacted was identified and the Summons and Complaint
21 was advertised in the newspaper.

22 THE COURT: When was this case settled?

23 MS. WEISSENSTEIN: I'm sorry?

24 THE COURT: When was the case settled?

25 MS. WEISSENSTEIN: The underlying action?

1 THE COURT: The \$50,000 settlement, when was that
2 settled?

3 MS. WEISSENSTEIN: I believe sir, that it was in
4 2005.

5 THE COURT: They ain't appeared, they have no
6 claims. I can tell you that.

7 All right. So the parameters are --- do you
8 understand that, Mr. Spencer? There's \$63,000. They
9 claim that they are entitled to some attorney fees and
10 costs and that the plaintiffs are entitled to the
11 other money. I'm not saying that's a valid claim.
12 I'm not saying that's what will happen. That's what
13 they claim.

14 MR. SPENCER: I'm not objecting to anything to do
15 with that \$55,000. The only thing we're asking for is
16 the litigation expenses back, and we'll litigate over
17 the other fees. That's all we're asking for. The
18 money that we paid for litigation expenses that wasn't
19 used, back.

20 THE COURT: All right. Well, I'm trying to
21 understand in my mind, and I want you to understand in
22 your mind what it is they're claiming.

23 MR. SPENCER: I understand what they were
24 claiming.

25 THE COURT: All right. Now we have a second

1 lawsuit. The second lawsuit is you have filed a
2 negligence action and some other cause of action in
3 which you're seeking, Mr. Spencer, and I guess,
4 Ms. Santacroce damages from Mr. Falgione and Mr.
5 Rakowsky, right?

6 MR. SPENCER: Yes, sir.

7 THE COURT: And that's the newest suit?

8 MR. SPENCER: Yes, sir.

9 THE COURT: All right. Now, when is it that
10 y'all believe we'll be able to deal with the \$63,000?
11 Is there any discovery that has to be done in that
12 case?

13 MR. SPENCER: Yes, Your Honor.

14 THE COURT: All right. Who needs to do
15 discovery?

16 MR. SPENCER: We have been trying to do
17 discovery. We have a motion to compel. Irene has ---

18 THE COURT: I read ---

19 MS. SANTACROCE: I'm Irene Santacroce. I have a
20 motion to compel to get some answers.

21 THE COURT: All right. I read the
22 interrogatories, and I read the discovery responses,
23 and I I'm going to tell you Ms. Santacroce, in looking
24 that the responses and the questions, you're not going
25 to prevail. There may be some things that you'll get,

1 but some of your questions are just kind of left
2 field. You know, under the rules, you're entitled to
3 any discovery that is relevant or that may lead to
4 something that is relevant. You're not entitled to
5 just ask questions and expect people to just answer
6 those questions. If it's not relevant or something
7 that's likely to lead to something that's relevant,
8 then that's not going to fly. Now, I'll be
9 happy --- whatever your entitled to get, I'll be happy
10 to see to it that you get.

11 MS. SANTACROCE: Okay.

12 THE COURT: But I went through all your
13 discovery, all your interrogatories and ---

14 MS. SANTACROCE: Well, all the answers were the
15 same.

16 THE COURT: Well, you're questions were --- I
17 just didn't see any kind of relevancy to most of your
18 questions.

19 MS. SANTACROCE: Okay.

20 THE COURT: But, I mean, --- do you all want to
21 do any depositions?

22 MR. SPENCER: Yes, sir.

23 THE COURT: All right. Who do you want to
24 depose?

25 MR. SPENCER: I want to depose Mr. Rakowsky.

1 THE COURT: This is on the interpleader action.

2 MR. SPENCER: Yes, sir.

3 THE COURT: All right. You want to depose Mr.
4 Rakowsky. Anybody else?

5 MR. SPENCER: No, I can't think of anybody else.

6 THE COURT: Ms. Santacrocce, do you want to take
7 any depositions?

8 MS. SANTACROCE: No.

9 THE COURT: You will have an opportunity to
10 question the witnesses at the same time that the
11 deposition is being taken.

12 MS. SANTACROCE: Yes, sir.

13 THE COURT: You can take one. One of you will be
14 the lead litigant and the other one can ask whatever
15 you want to ask.

16 All right. Are there any motions outstanding in
17 that first case?

18 MS. WEISSENSTEIN: Not by us, Your Honor.

19 THE COURT: All right. Mr. Spencer, any motions
20 outstanding in the ---

21 MR. SPENCER: In the interpleader, yes, sir.

22 THE COURT: What is the motion?

23 MR. SPENCER: There is a motion for sanctions.

24 THE COURT: All right. For what?

25 MR. SPENCER: For interpleading funds that are

1 not supposed to be interpleaded and for ---

2 THE COURT: Well, and that won't be dealt with
3 prior to trial.

4 MR. SPENCER: Okay.

5 THE COURT: Because that won't be --- what you
6 will probably have to do is seek some sort of
7 frivolous action if, in fact, they're not there.

8 MR. SPENCER: That's part of our counterclaim.

9 THE COURT: All right. Well, that will have to
10 be decided in the whole picture.

11 MR. SPENCER: We have a motion to amend our
12 answer for a counterclaim and for a jury trial.

13 THE COURT: Well, I don't think it's for a jury
14 trial.

15 MR. SPENCER: All right. Our counterclaim ---

16 THE COURT: It's an equitable action.

17 And you have a proposed counterclaim?

18 MR. SPENCER: Yes, sir.

19 THE COURT: On the amended complaint?

20 MR. SPENCER: We have had an amended complaint
21 and counterclaim since August of 2011.

22 THE COURT: Have you seen the amended complaint?

23 MS. WEISSENSTEIN: Your Honor, I couldn't
24 understand what he just said.

25 THE COURT: He said that since August of 2011, he

1 had filed a motion to amend the answer and the
2 counterclaim and when he did that, he submitted a
3 proposed answer and counterclaim, which is what you're
4 required to do. Are you going to fighting him on the
5 amendment? You're going to lose. Do you want to
6 fight him?

7 MS. WEISSENSTEIN: Your Honor, I believe that an
8 order of August 3rd, 2011 addressed that motion.

9 THE COURT: Let me see it.

10 MS. WEISSENSTEIN: I'm sorry?

11 THE COURT: Let me see it.

12 MS. WEISSENSTEIN: I don't have that with me
13 today, Your Honor.

14 THE COURT: Why wasn't it filed?

15 MS. WEISSENSTEIN: Because, Your Honor, I
16 believed that we were here to schedule the outstanding
17 motions and not litigate the issues.

18 THE COURT: We're here to determine the status of
19 the thing. I'm not litigating it, but you know as
20 well as I do, the rules liberally allows for amended
21 pleas, so you're probably going lose that.

22 What I'm trying to figure out is the if he
23 amends, when can they do the depositions and let's go
24 ahead and schedule the hearing on the merits of the
25 interpleader action.

1 MS. WEISSENSTEIN: Your Honor, if the --- this
2 action has been pending since 2008. He could have
3 moved for the depositions a long time ago, and we
4 would object to any further discovery at this point.
5 It's an interpleader action.

6 THE COURT: I don't care. We're going to give
7 him an opportunity to do it. We are going to give
8 everybody an opportunity to do what they need to do
9 before we go to a hearing, but we're going to schedule
10 a hearing. If they don't do it before we go to the
11 hearing, then they're going to give up their right to
12 do it. I want to get the issues framed so that
13 everybody knows what it is we're talking about when we
14 go to a hearing.

15 What you need to do is consent to his amending
16 the answer and the counterclaim, let's get on with
17 that. Find out when it is he can take these
18 depositions, let's get on with that and schedule a
19 hearing.

20 MS. WEISSENSTEIN: All right. Your Honor. We'll
21 consent to him filing his amended.

22 THE COURT: All right, they're consenting to
23 allow you to amend your answer and counterclaim, so
24 get them filed and get them served.

25 MR. SPENCER: Yes, sir.

1 THE COURT: I am going to give you fifteen days
2 to do that.

3 MR. SPENCER: Yes, sir.

4 THE COURT: If you don't, you blow this.

5 MR. SPENCER: I understand.

6 THE COURT: Then you answer the amended answer
7 and counterclaim.

8 MS. WEISSENSTEIN: We will, sir.

9 THE COURT: I'll give you ten days to do that.

10 MS. WEISSENSTEIN: All right.

11 THE COURT: From service. And when do you want
12 to --- when can you take depositions, Mr. Spencer?

13 MR. SPENCER: Well, I can --- I'll have to get
14 the ---

15 THE COURT: Can you do it within 30 days of their
16 filing an answer?

17 MR. SPENCER: Within thirty days of their filing
18 an answer.

19 THE COURT; Within thirty days of your filing an
20 answer, I mean, a reply to their counterclaim, he
21 needs to take Mr. Rakowsky's and you need to make him
22 available and Mr. Falgione. Do you have any discovery
23 you want to take?

24 MS. WEISSENSTEIN: Not really, Your Honor, but I
25 mean, are they going to be required to notice my

1 client's deposition?

2 THE COURT: Notice in what way? Yeah, I'll get
3 them to --- send a notice when you want to take them.

4 MR. SPENCER: Yes, sir.

5 THE COURT: We can do it the hard way, or we can
6 see if we can ---

7 MS. WEISSENSTEIN: And that's what I'm asking.
8 I'll be happy to cooperate and coordinate for dates
9 and times.

10 THE COURT: Do you all have e-mail, I mean, email
11 addresses?

12 MR. SPENCER: Yes, sir.

13 THE COURT: All right. Then you and
14 Ms. Santacroce figure out some times that you --- now
15 have don't just figure out one day, because this lady
16 has a busy schedule and these lawyers have busy
17 schedules, so you're going to have to give them
18 several days.

19 MR. SPENCER: We will.

20 THE COURT: And y'all get together and get those
21 depositions scheduled.

22 MR. SPENCER: Yes, sir.

23 THE COURT: All right. Then when do you all want
24 to have a hearing? So we're --- it's probably going
25 get it to June, July --- when do you want to have a

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1 hearing?

2 MS. WEISSENSTEIN: In July, Your Honor, we are
3 pretty much open any day but the 16th.

4 THE COURT: Well, it probably won't be in July.
5 It will be later than that. How about after
6 August 15th?

7 MR. SPENCER: Yes, sir.

8 MR. FALGIONE: Your Honor, with great
9 trepidation, I would like to inform the court that I
10 intend to ask for a week, and it's the week following
11 the 15th.

12 THE COURT: Get your client to write a letter of
13 protection for you. I never take vacations away from
14 people. I mean, I'm not saying it's going to be the
15 week of the 5th. It may be September 15th before we
16 get around to setting it. I've got to find an nonjury
17 term. How much time are we going to take on this
18 thing, a day?

19 MS. WEISSENSTEIN: I imagine so, Your Honor.

20 THE COURT: Do you think we can do it in a day,
21 Mr. Spencer?

22 MR. SPENCER: I would believe so, sir.

23 THE COURT: We will schedule a hearing for one
24 day after September --- I mean, August 15th. Now,
25 don't call me on the 16th saying I haven't got notice

1 yet, because I'm got to --- I mean, I've got get
2 judges. I've got get courtrooms. I've got get y'all.
3 I'll try to give y'all as much notice as I possibly
4 can.

5 All right. Does that take care of --- now, we'll
6 look at your counterclaims and see what the deal is on
7 whether they're legal or equitable. I'm not sure that
8 you're going to be able to file a legal counterclaim
9 on the interpleader action.

10 MR. SPENCER: Yes, sir.

11 THE COURT: I'm not sure what it is that you're
12 going to want to do specifically. You've already got
13 your damages lawsuit pending now. If you're
14 seeking --- bringing a counterclaim seeking damages
15 that you're already seeking in your ongoing
16 litigation, you know, they're going to get kicked.
17 You're only entitled to one kick of the mule. That
18 may be the lawsuit y'all have got pending now.

19 MR. SPENCER: Yes, sir, I understand.

20 THE COURT: But take a look at it. You
21 understand what the parameters are. All right.
22 Lawsuit number two.

23 MR. SPENCER: Your Honor, the \$9,855.85, are they
24 willing to release that to us?

25 THE COURT: Apparently not.

1 MS. SANTACROCE: I don't --- excuse me, Your
2 Honor, but I don't understand if Mr. Rakowsky and Mr.
3 Falgione ---

4 THE COURT: I don't know if you've introduced
5 yourself fully.

6 MS. SANTACROCE: Yes, sir. I'm Irene Santacroce.

7 THE COURT: I'm sorry. All right. Go ahead.

8 MS. SANTACROCE: I don't understand why, if
9 Mr. Rakowsky and Mr. Falgione --- I know Mr. Rakowsky
10 has, even in this, he has no problems with releasing
11 the \$9,800 worth.

12 THE COURT: Who doesn't?

13 MS. SANTACROCE: Mr. Rakowsky. Is that not true?

14 MR. RAKOWSKY: Your Honor, after I talked to my
15 counsel, she said there were some issues that were
16 going to have to be addressed so that the money, I
17 mean, I defer to her. Outside of this, I'm the
18 client. If she feels that there's still any potential
19 issues about repayment and for that reason I'm going
20 to defer to her. If she says that that are ---

21 THE COURT: All right. Tell me how the \$63,000
22 comes into play? Where is that money?

23 MR. RAKOWSKY: There was a \$55,000 paid as a
24 result of a federal court settlement and then there
25 was some money that was paid into an account prior to

1 the case being resolved, but was to be used for
2 resolution of the case, but there was money borrowed
3 and ---

4 THE COURT: Whoa, whoa. There was some other
5 money paid into what again?

6 MR. RAKOWSKY: Into my trust account by the two
7 lenders who Mr. Spencer and the parties had contacted
8 requesting money to be paid. It was litigation
9 expense money and these lenders ---

10 THE COURT: All right. So \$55,000 is the
11 settlement and in your trust account were some monies
12 that had been advanced by these clients ---

13 MR. RAKOWSKY: No, not these clients, but through
14 these companies on behalf of their clients.

15 THE COURT: Well, I assume they were on the line
16 to get this money advanced, either signed some note or
17 did something to generate those funds.

18 MR. RAKOWSKY: Yes.

19 THE COURT: So whether they took it out of their
20 pocket or they went to the bank and borrowed, it is
21 money that would be theirs.

22 MR. RAKOWSKY: Theirs is the issue, the word
23 theirs. I don't have a strong opinion who is defined
24 to be theirs because each loan was different. There
25 were different parties involved at the time the loans

1 came in. Quite frankly, I think it's an issue that
2 probably the court should hear. That's my opinion.
3 That's what Ms. Weissenstein has advised me of. At
4 this point I'm not trying to give an opinion either
5 way because I'm not sure that I know who the present
6 potential claimants are on that \$9,500.

7 Certainly Mr. Spencer is, but from what
8 Ms. Weissenstein tells me, there could be other
9 claims. For that reason, I think they're misstating
10 where I stand, but I'm not going to get into an
11 argument about it.

12 THE COURT: But you acknowledge that you have no
13 claim to that money, right?

14 MR. RAKOWSKY: Not to the \$9,500, no.

15 THE COURT: And Mr. Falgione has no claim to that
16 money. Is that correct, Mr. Falgione, the \$9,500?

17 MR. FALGIONE: That's correct, Your Honor.

18 THE COURT: The only people that would have claim
19 to that would be the plaintiff --- or the defendants
20 in the interpleading action.

21 MR. RAKOWSKY: Or any of the lenders.

22 MS. WEISSENSTEIN: Your Honor, Mr. Spencer has
23 made representations and allegations against
24 Mr. Rakowsky regarding the lenders and the failure to
25 properly contract with or repay or name as parties or

1 et cetera the lenders that for this \$9,800 so they
2 have created much of our concern with these
3 allegations that he's made via e-mail and in
4 pleadings.

5 THE COURT: All right.

6 MS. WEISSENSTEIN: So we would prefer for the
7 safety of ---

8 THE COURT: Mr. Spencer, I want you to sit down.
9 You stay seated. You don't have to address the court
10 standing up.

11 MR. SPENCER: Okay.

12 MS. WEISSENSTEIN: For the purpose of the
13 interpleader action, Your Honor, for the protection of
14 my client, if we were to issue a check to Mr. Spencer,
15 what's to say that Ms. Santacroce or some other person
16 with whom they are in concert with would not then sue
17 my client for conversion or for some other action and
18 so I would just, for the safety of my client and for
19 full representation, the entire \$63,000 needs to be
20 paid ---

21 THE COURT: Look, I'm not asking you to write a
22 check to anybody. What you would do is we're going to
23 pay this money into the court.

24 MS. WEISSENSTEIN: Yes, sir.

25 THE COURT: What you would do is consent to those

1 funds being paid upon court approval.

2 MS. WEISSENSTEIN: Yes, sir.

3 THE COURT: If it's these three --- I don't know
4 how many defendants in the interpleader.

5 MS. WEISSENSTEIN: Currently, Your Honor, we
6 have ---

7 THE COURT: How many were named?

8 MS. WEISSENSTEIN: Mr. Falgione, Mr. Lail, Mr.
9 Spencer, Ms. Santacroce and Horry County.

10 THE COURT: Horry County, Mr. Lail, Mr. Falgione,
11 Ms. Santacroce, and Mr. Spencer. All right.

12 MS. SANTACROCE: Also, Ricky Stephens and
13 Marguerite Stephens, as well.

14 THE COURT: Are they in default?

15 MS. SANTACROCE: Well, they haven't shown up.

16 THE COURT: All right. So they're in default.

17 MR. SPENCER: Your Honor, if I may speak.

18 THE COURT: Hold on a second. Judge Benjamin, do
19 you need to see me?

20 JUDGE BENJAMIN: When you get a second.

21 THE COURT: That may be tomorrow. You can come
22 up here.

23 JUDGE BENJAMIN: Okay.

24 (WHEREUPON, there was a bench conference.)

25 THE COURT: All right. Now, tell the me about

1 who --- so the only --- did Horry County file ---

2 MR. LINDEMANN: Your Honor, I'm Andrew Lindemann
3 for Horry County. We have no claim to any of the
4 \$63,000 ---

5 THE COURT: So you don't have a claim.

6 MR. LINDEMANN: No, sir.

7 THE COURT: So y'all are three of the defendants,
8 right? And who else did you say?

9 MS. WEISSENSTEIN: Your Honor, beside Horry
10 County, there was Marguerite Stephens and Ricky
11 Stephens; they never made an appearance.

12 THE COURT: All right. So. They were are in
13 default.

14 MS. WEISSENSTEIN: Well, they filed an answer
15 signed by Mr. Spencer, but they never actually ---

16 THE COURT: Well, he can't represent them, so
17 they are in default. Where are these people,
18 Mr. Spencer?

19 MR. SPENCER: Your Honor, first of all, I did not
20 --- they filed their own answer and they asked that
21 their rights today, money be turned over. We all
22 signed the same motion October 2008. The money be
23 turned over. They are in default. They have no claims
24 on the money.

25 THE COURT: They're out of the case.

1 MR. SPENCER: They're out of the case. The
2 lending companies are out of the case.

3 THE COURT: Mr. Spencer, I'm trying --- if
4 they're in default, they're out of the case.

5 MR. SPENCER: Everybody is in default, the only
6 claims are right here.

7 THE COURT: All right.

8 MR. SPENCER: And Ms. Weissenstein knows that.
9 She is trying to keep this money out of our hands so
10 we cannot ---

11 THE COURT: Whoa.

12 MR. SPENCER: Okay.

13 THE COURT: Don't talk about her.

14 MR. SPENCER: Okay.

15 THE COURT: Y'all have a problem with let's sign
16 a consent order ordering all the money be paid into
17 the court and then let's have an immediate hearing on
18 the \$9,500 to determine who gets that money. We know
19 Horry county is not making a claim. Y'all can sign a
20 waiver of any claim.

21 UNIDENTIFIED MAN: Your Honor, we paid 30,000 of
22 the 55 settlement. That's why we're in the case.

23 THE COURT: Y'all can waive any claim to that ---
24 who was --- Mr. Rakowsky, he was one of the defendants
25 in the case, interpleading action; is that right?

1 MS. WEISSENSTEIN: He is a claimant, yes.
2 Mr. Falgione is a defendant in the interpleader case,
3 so they're claiming to the \$55,000.

4 THE COURT: I'm not talking about the \$55,000.
5 I'm talking about the \$9,500.

6 MS. WEISSENSTEIN: Neither Mr. Falgione nor
7 Mr. Rakowsky have a claim to that.

8 THE COURT: All right. So. They can waive any
9 claim to that.

10 MS. WEISSENSTEIN: Yes.

11 THE COURT: And then they can get up and tell me
12 why it is they're entitled to the money and if that's
13 the only evidence in front of me and there will be a
14 record, then I'll sign an order giving them the money.
15 I assume these folks want to use some of this money to
16 prosecute this action. Maybe not. Maybe they want to
17 go have a party. Let's not waste time. Let's get to
18 the bottom of this.

19 MS. WEISSENSTEIN: Yes, sir, absolutely.

20 THE COURT: The bottom of this is you've got
21 \$55,000 of which these two gentleman may have some
22 claim to.

23 MS. WEISSENSTEIN: Yes, sir.

24 THE COURT: And that's all they claim. Nobody
25 else is making a claim to the \$55,000 but these folks.

1 MS. WEISSENSTEIN: Yes, sir.

2 THE COURT: If they don't prevail, they get it
3 all. If they prevail, they get whatever they don't
4 get. I mean, whatever is left, but that's easy.
5 Let's go ahead with that. Do you have a problem with
6 that, have an immediate hearing on the \$9,500?

7 MR. SPENCER: No, sir. That's all we've asked
8 for since day one in 2008.

9 THE COURT: All right. Well, let's do that. Do
10 you need to do any discovery as to the \$9,500?

11 MR. SPENCER: I'm taking their record of
12 \$9,855.85.

13 THE COURT: I don't know why you wanted to do
14 discovery on the other claim. You know what it is.

15 MR. SPENCER: Yes, sir.

16 THE COURT: That is, they think they're entitled
17 to, I guess, a 33 percent interest in the settlement
18 and some costs that they've advanced on your behalf.

19 MR. SPENCER: I know what they are claiming.

20 THE COURT: You can spend the money on the
21 depositions if you want, but I don't know that you
22 need to, but if you want.

23 All right. Well, I'm going to --- can we have a
24 hearing on \$9,500 quickly?

25 MR. SPENCER: It's, you know, it's --- all we're

1 going to present.

2 THE COURT: Well, you're going to have to present
3 your case as to why you're entitled to or why
4 Ms. Santacroce is entitled to it. Let me hear it. If
5 somebody has filed an answer on their behalf ---

6 MR. SPENCER: Nobody filed --- they filed their
7 own answers.

8 THE COURT: Somebody filed an answer on their own
9 behalf. They were going to have to be noticed to come
10 to the hearing. If they don't show up --- they were
11 talking about Ricky, whoever Ricky is and somebody
12 else.

13 All right.

14 MS. WEISSENSTEIN: Your Honor, if I might
15 interject real quickly, if they're going to file an
16 amended answer and counterclaims, that could affect or
17 attach somehow to the 95 plus, so we don't know what
18 their claims are going to be at this point, Your
19 Honor, so I would be hesitant to have a hearing
20 addressing money if that could be part an element of
21 their ---

22 THE COURT: My guess is they're not going
23 to --- other than their counterclaim might say we're
24 entitled to the \$9,500. He says he is prepared the
25 counterclaim and sent it to y'all.

1 MR. SPENCER: Yes, sir, and that counterclaim has
2 no claim on that. All we've asked for from day one is
3 the \$9,855.85 that we put in. That's all we asked
4 for.

5 THE COURT: What does the counterclaim ask for?

6 MR. SPENCER: The counterclaim goes into the ---

7 THE COURT: The division of the \$55,000?

8 MR. SPENCER: Yes, sir. It goes into that and it
9 goes into other areas that we're making claims on and
10 part of the counterclaim that they have, and she knows
11 quite well, I would assume that they know quite well.

12 THE COURT: I don't know.

13 MR. SPENCER: That there is no claim on the
14 \$9,855.

15 THE COURT: Ms. Santacroce is not available to go
16 to a hearing until after June 1, so I'm going to
17 schedule a hearing on this --- are you all agreeable
18 to everybody consent to the money being paid into the
19 court?

20 MR. SPENCER: As far as ---

21 THE COURT: Taking it from their trust account
22 paying it to the court, have the court hold it.

23 MR. SPENCER: I don't have a problem with that.

24 THE COURT: Ms. Santacroce, do you have any
25 problem with it?

1 MS. SANTACROCE: No.

2 MR. LAIL: No, sir.

3 THE COURT: All right. Prepare an order and in
4 that order say that no funds will be held until it is
5 determined by the court who is to receive what and
6 that the court will immediately schedule, as soon as
7 it can after June 1, a hearing to determine whether
8 these three defendants or any of the named defendants
9 are entitled to any --- or any of the parties are
10 entitled to the \$9,500, whatever that amount is, and I
11 will schedule that sometime after June 1st, and if
12 y'all don't want any of that, do a waiver, Horry
13 County, if Mr. Rakowsky and Mr. Falgione are not
14 making any claim to that, let them do a waiver without
15 denying anybody else's interest in the money. You
16 know, they can protect themselves in that regard.
17 Then we'll have a hearing. Do you think we can do it
18 in an hour?

19 MR. SPENCER: I would assume less than that.

20 THE COURT: All right. We'll have a hearing,
21 I'll hear it. Then we'll come up here and decide
22 whether they're entitled to \$9,500.

23 Now, you need to let us know. If the court is
24 going to issue a separate check to each party, then we
25 will need to know each amount.

1 MR. SPENCER: In our proposal, from day one, to
2 put that into one trust account and everybody has
3 agreed to that. That motion has been before the court
4 since ---

5 THE COURT: Well, I'm not sure what one trust
6 account.

7 MR. SPENCER: We've all named a trust account, a
8 lawyer to be paid into.

9 THE COURT: And who is that?

10 MS. SANTACROCE: It's James T. Young.

11 THE COURT: Where is he?

12 MS. SANTACROCE: He's with Singleton Burroughs &
13 Young out of Conway, South Carolina.

14 THE COURT: Can you get something from him saying
15 that he is agreeable to accept those funds if the
16 court orders it and hold those funds in trust on
17 behalf of whoever ---

18 MS. SANTACROCE: Yes.

19 THE COURT: All right. Get something and bring
20 that to the hearing ---

21 MS. SANTACROCE: Okay.

22 THE COURT: --- saying that if the court
23 authorized the payments to y'all for your claims for
24 the \$9,500, that you're authorizing it be paid to him
25 and he will hold it in trust for your use and benefit.

1 MS. SANTACROCE: That's correct.

2 THE COURT: And you all need to figure out what
3 you need to do with him in order to be able to
4 authorize the expenditure of that money or authorize
5 the payment to you.

6 MS. SANTACROCE: Right. Yes, sir.

7 THE COURT: All right. So we'll get rid of that
8 and then we'll have a hearing sometime after
9 August 15th to decide what happens to the \$55,000,
10 \$54,000.

11 MS. WEISSENSTEIN: Yes, sir.

12 THE COURT: All right.

13 Lawsuit number two, when was that filed,
14 Mr. Spencer?

15 MR. SPENCER: That was filed in August of 2011.

16 THE COURT: All right.

17 Now, we know in that suit we have a motion to
18 exclude.

19 MS. DUDGEON: Yes, Your Honor, Mandy Dudgeon, for
20 Mr. Rakowsky. There is motion to disqualify.

21 THE COURT: That's the first thing we need to
22 hear. We're going to hear it. Now, Mr. Spencer the
23 doctors have asked --- they tell me that he can start
24 and will be able to hold hearings, but not more than
25 one a day.

1 MS. DUDGEON: We'll be prepared immediately after
2 June 1st to handle that.

3 THE COURT: We're not going to have this hearing
4 on the same day we would have your hearing.

5 MS. DUDGEON: I understand.

6 THE COURT: We'll have to figure all that out.
7 I'd like to give Mr. Spencer is couple of days between
8 hearings to catch his breath and recoup, so that will
9 have to be the first hearing.

10 Then there was another motion that we heard that
11 was ---

12 MS. DUDGEON: There's two motion to dismiss, one
13 on behalf of each of the defendants and that's all
14 that I know that is pending, Your Honor.

15 MR. BRUNER: Yes, that's correct, Your Honor.
16 Ben Bruner here for Mr. Falgione and his firm. We have
17 a motion to dismiss that we filed last November, the
18 day after Ms. Dudgeon's firm. We amended our motion
19 later, I believe, if it matters, both our amended
20 motion and our original motion are appearing as two
21 separate items on the docket, but the amended one is
22 the only one we need heard. We simply request that
23 it's heard as soon as possible ---

24 THE COURT: All right.

25 MR. BRUNER: --- so we can pursue discovery

1 before this cases pops up on the trial roster.

2 THE COURT: Let's assume that the case is not
3 dismissed. What discovery has to be done?

4 MS. DUDGEON: Your Honor, probably ---

5 THE COURT: Who would you want to depose?

6 MS. DUDGEON: Well, at least all the actual
7 plaintiffs ---

8 THE COURT: I mean, I don't know who the
9 plaintiffs are. Mr. Spencer would be one ---

10 MS. DUDGEON: I would say there would be at least
11 five depositions. It also depends if they have an
12 expert, but at least five depositions.

13 THE COURT: All right. Mr. Spencer, who are you
14 all going to want to depose in that lawsuit --- or
15 Ms. Santacroce?

16 MR. SPENCER: There will be about six
17 depositions.

18 THE COURT: All right. Tell me who you're
19 thinking about at this time, Rakowsky and Falgione?

20 MR. SPENCER: At this time it would be Rakowsky
21 and Falgione would be two of the people. And, there
22 will be ---

23 THE COURT: All right. How about let's --- do you
24 think it's possibility to combine the discovery in
25 these two cases so they don't have to take their

1 depositions twice?

2 MS. DUDGEON: No, Your Honor, because I would
3 anticipate our motions would be heard in June and that
4 would be about the same time they were going to be
5 deposing people, so no, I would not want to combine
6 the discovery.

7 THE COURT: All right. Do you all anticipate
8 securing counsel if you get this money?

9 MR. SPENCER: Yes, sir.

10 THE COURT: So all of this may be for naught
11 because your lawyer may step in here and say I need
12 something different; is that correct?

13 MR. SPENCER: I can't speak for somebody I don't
14 know, sir. However, I would like to bring up ---

15 THE COURT: All right. Go ahead.

16 MR. SPENCER: No one has addressed the entry of
17 default that we filed.

18 THE COURT: I don't know about entry of default.

19 MR. BRUNER: Your Honor, I believe that's the
20 motion for entry of default that Mr. Spencer filed as
21 against my clients and Ms. Dudgeon's client prepared
22 an answer to the complaint timely. That was attached
23 to an unnotarized affidavit. I believe we discussed
24 that at the status conference.

25 THE COURT: Somebody --- Ms. Santacroce, I

1 believe, somebody filed a motion of default where I
2 said the service was not sufficient service because it
3 doesn't meet the rule as to specificity as to this.
4 SAPBLTS about is that correct.

5 THE COURT: I already addressed that issue.

6 MS. DUDGEON: Your Honor addressed in the status
7 conference ---

8 MS. SANTACROCE: Yes, I know, but what I'm saying
9 is that we sent a supplement when I got the ---

10 THE COURT: A supplement --- what?

11 MS. SANTACROCE: --- the process server to redo
12 what they should have done.

13 MR. BRUNER: Your Honor, my understanding is that
14 it was Mr. Lail's wife that's reported to have served
15 my client at the September 15th hearing at the
16 interpleader case. Your Honor did address that. We
17 had a court reporter there at the last hearing. I
18 don't think that that's before the court right now.
19 If it is ---

20 THE COURT: I've already determined that based on
21 what is filed --- you know, one of the things with a
22 lawsuit, you don't get to go back and redo things
23 because they didn't get done right the first time.

24 MS. SANTACROCE: Well, in all the cases I've been
25 in, Your Honor, and that's been quite a few since

1 2008, the other side is always sending supplement
2 this, supplement that, so my experience as a pro se
3 litigant, I thought it was okay, so I straightened it
4 out and I resubmitted it.

5 THE COURT: I already ruled. I determined there
6 is no default because there is no appropriate
7 affidavit showing anybody was served. I mean, it
8 wasn't even something you'd have a hearing on.

9 MR. BRUNER: I believe that ---

10 THE COURT: If it's an entry of default, you
11 would normally file, send me an affidavit of service,
12 an affidavit of nonmilitary service, a copy of
13 the --- I don't know, whatever else you may have.

14 MS. SANTACROCE: Yeah, and you did say that on
15 the phone.

16 THE COURT: I would review the facts and either
17 sign the default or deny the default. In this
18 instance you sent it, I pulled the file and I reviewed
19 it, the affidavit that you --- whoever filed your
20 affidavit of service was clearly deficient under the
21 rule, so I denied the entry of default and that's
22 where it is. We don't go back and redo it again, but
23 we're not trying this case on the default. We're
24 trying this case on the merits of the case. If you
25 all are entitled to money against them, you're going

1 to get it based on the merits of your claim.

2 MS. SANTACROCE: Yes, sir.

3 THE COURT: If they have something about you,
4 they're going to get it on the merits of the claim.
5 That's not going to be done on some technicality that
6 kicks you out of court or kicks them out of the court.
7 That's the purpose of litigation. You give everybody
8 the opportunity to offer whatever they want to offer
9 and somebody is going to make a decision as to who is
10 entitled to recover. In this case you get to a jury
11 and the jury is going to make a decision. Were you
12 wronged and if so what damages are you entitled to.

13 MS. SANTACROCE: Yes, sir.

14 MR. Bruner: Your Honor, at the risk of beating a
15 dead horse, I would like to point out for the record
16 that the motion for default was filed three months
17 after we filed our notice of appearance and our motion
18 to dismiss.

19 THE COURT: I'm well aware of that.

20 MR. BRUNER: I'd just like to get that on the
21 record, Your Honor.

22 THE COURT: That's an issue --- do you all want
23 me to do an order saying that I had Ms. Santacroce
24 send a proposed entry of default, the court reviewed
25 the file, determined that the affidavit of service was

1 deficient, that it failed the specificity of the rule
2 stating who was served, what time they were served,
3 where they were served and all that, that it was
4 deficient, but it was served after the fact that y'all
5 had already served an answer, if I remember correctly
6 and the court has determined that there is no default
7 based on there is no sufficient affidavit.

8 MR. BRUNER: Your Honor, if we need an order ---

9 THE COURT: All right. Do me that order. All
10 right. Now, we need to find out whether you're in the
11 case or not in the case.

12 MS. DUDGEON: Yes, Your Honor.

13 THE COURT: And then we need to hear the motions
14 to dismiss.

15 MS. DUDGEON: Yes, Your Honor.

16 THE COURT: Then, we need to figure out a
17 scheduling order as to discovery. Mr. Spencer, I
18 would like you and Ms. Santacroce to determine --- are
19 you going to have any experts in this case? I need we
20 need to find out whether you have a lawyer or not.

21 MR. SPENCER: Yes, Your Honor.

22 MS. DUDGEON: Your Honor, perhaps we could have
23 one hearing a week in the month of June.

24 THE COURT: I don't think I can have ---

25 MS. DUDGEON: Well, I was going to beg you to

1 make yourself available.

2 THE COURT: Let me tell you, there is very little
3 benefit to being the administrative Judge, but one of
4 them is you don't do nonjury. I'm going to do the
5 interpleader action because I think they need to get
6 their monies and get on with this litigation so they
7 can hire their lawyer. We can bring this thing to a
8 conclusion this year, both cases, all right? We've
9 got a term of nonjury, I think the 4th of this month,
10 of June.

11 MS. DUDGEON: We could fit two motions in one
12 week.

13 THE COURT: We may try to do that and then the
14 following week hear this interpleader action and then
15 if the motions to dismiss are denied, and he's
16 granted, they're granted the funds, they can go get
17 their lawyer and then we will have a status conference
18 with their lawyer to determine ---

19 MS. DUDGEON: A scheduling order.

20 THE COURT: --- a scheduling order.

21 MR. SPENCER: Your Honor, we're trying to get the
22 funds to obtain a lawyer, which they're --- one of the
23 objections they raise is that we don't have an expert
24 witness which requires fund from the lawyer, so they
25 were trying to schedule it before we get the funds for

1 the lawyer. That's what they're trying to do, sir.

2 MS. DUDGEON: My case is separate from the
3 interpleader. I'm just trying to get a motion that
4 was filed in November.

5 THE COURT: Well, what is --- do they say this is
6 a negligent malpractice case?

7 MR. BRUNER: Yes, Your Honor.

8 THE COURT: You all are alleging that they need
9 an expert in order to go forward with ---

10 MS. DUDGEON: There are actually three separate
11 grounds for a motion to dismiss. One being expert
12 affidavits and two being ---

13 THE COURT: I don't know, is this a common
14 knowledge case?

15 MS. DUDGEON: Two being --- absolutely not.

16 MR. BRUNER: The plaintiffs allege in the
17 complaint that they were required to file an extra
18 affidavit. They actually used the safe harbor
19 provision in the frivolous claims proceedings act. We
20 have alleged they failed to include the affidavit as
21 required. We've alleged that they failed to initiate
22 the case timely enough, and we've initiated an
23 insufficiency and untimely service of process.

24 Your Honor, several of those grounds I don't know
25 if they can be cured, but to the extent Mr. Spencer is

1 worried that his case will get kicked before the
2 merits of the interpleader action is determined. We
3 all know that just because there is a hearing on a
4 Tuesday doesn't mean the judge rules on Tuesday. In a
5 case like this it's certain possible that the judge
6 may take ---

7 THE COURT: All right. So y'all have moved to
8 dismiss on ---

9 MS. DUDGEON: Expert affidavits, statute of
10 limitations, and service.

11 MR. SPENCER: Your Honor, we ---

12 THE COURT: Why don't you just have --- why don't
13 you stay the expert affidavit until he gets his
14 lawyer.

15 MS. DUDGEON: May I respectfully ask why, Your
16 Honor?

17 THE COURT: Probably because if something had
18 agreed to give them their \$8,500 or \$9,500, there
19 would have been a lawyer and the lawyer would have
20 been able to look at the case and say yeah or nay.
21 The lawyer is not going to cure the statute of
22 limitations problem. I don't care how good the lawyer
23 is, if the time has run, the time has run.

24 MS. DUDGEON: Then, Your Honor, what else the
25 purpose of the statute? I mean....

1 THE COURT: I don't know what the purpose of the
2 statute is. I wasn't up there when they passed the
3 statute, but ---

4 MS. DUDGEON: To avoid (unintelligible).

5 MR. BRUNER: Your Honor, the reason why ---

6 THE COURT: Then I'll just hold off on scheduling
7 your motions for a while.

8 MR. BRUNER: I don't know that it's something to
9 cure, is the point.

10 THE COURT: I don't know whether it is or not,
11 but at least they have a lawyer that might say
12 Mr. Spencer, unfortunately, you don't have an expert
13 and didn't have one when you needed one and I can't
14 help you.

15 MS. DUDGEON: Your Honor.

16 MR. BRUNER: I'm just saying that, respectfully,
17 Your Honor, that they have had plenty of time to go
18 talk to lawyers and we all know there are two law
19 school putting out lawyers in this state, now.

20 THE COURT: Mr. Bruner, they haven't had a dime
21 because we've been sitting up here arguing about
22 \$9,500, apparently. It should have been resolved a
23 year ago.

24 MS. DUDGEON: Your Honor, are you proposing that
25 we have a motion to dismiss on all grounds except the

1 expert ---

2 THE COURT: We'll hear from them, but it may be a
3 month or two after they have the interpleader, the
4 \$9,500 case.

5 MS. DUDGEON: Your Honor I'll take what I can
6 get. I'll argue whatever motion I'm allowed to argue
7 as soon as I can.

8 THE COURT: And I hope to be there.

9 MS. DUDGEON: It's a good point, but I hope to
10 be.

11 THE COURT: How about that, Mr. Spencer?

12 MR. SPENCER: Sir?

13 THE COURT: Schedule the hearing on the motion to
14 dismiss on the grounds that one, you didn't file
15 within the statute of limitations and two, deficient
16 service, the issue of whether you had an expert,
17 needed an expert or met the expert requirement, we
18 will defer until you can get an attorney.

19 MR. SPENCER: Your Honor, I'd like to have an
20 attorney on those issues and it --- the second part is
21 that I've been waiting for their --- the ruling on the
22 entry for default.

23 THE COURT: I told you that on the phone.

24 MR. SPENCER: You said that the affidavit was
25 incorrect. We remedied the affidavit being incorrect,

1 and now you say that you're going to rule against it.
2 Now, at that point in time we would amend that
3 complaint and amend it to where we don't need an
4 expert if we cannot afford an expert. Now they're
5 arguing service on a timeliness basis when just a few
6 minutes ago they were just saying that it doesn't
7 matter if they miss a few days. Now they're arguing
8 back that we missed a few days. I don't understand
9 the dichotomy of two different standards.

10 THE COURT: I don't know what you mean, it
11 doesn't matter if you miss a few days.

12 MR. SPENCER: They were talking about the twenty-
13 one days that they failed to respond on a timely
14 basis, doesn't matter. They're going to have a
15 hearing.

16 THE COURT: Did you all read your affidavit of
17 service, Mr. Spencer?

18 MR. SPENCER: Yes, I will reread the affidavit of
19 service. The affidavit of service was ---

20 THE COURT: Did you compare it with the rule?

21 MR. SPENCER: No, sir. We understood that the
22 affidavit of service was supposed to be sufficient
23 that they used that affidavit of service in federal
24 court and it was acceptable.

25 THE COURT: Well, I don't know what federal court

1 does.

2 Proof of service shall state the date and time of
3 service, the name and address of such person served.
4 None of which that affidavit stated. It had the
5 person. That's all it had.

6 MR. SPENCER: Yes, sir, and they responded. They
7 responded accordingly in their response. They
8 responded two weeks late so they had to have been
9 served. They responded, so they were served.

10 THE COURT: Well ---

11 MR. SPENCER: They didn't respond without being
12 served.

13 THE COURT: Well, if they responded, they had to
14 served, there's no doubt about it, but the question is
15 when were they served?

16 MR. SPENCER: They were served on the 15th. They
17 responded 20, 30 days later.

18 THE COURT: I don't know when they were served.
19 Your affidavit was not sufficient. They appeared.
20 We're not going to argue that. I've already ruled.

21 MR. SPENCER: Okay.

22 THE COURT: You all understand this, we're not
23 ending this case on either side based on some silly
24 technicality.

25 MR. SPENCER: Okay.

1 THE COURT: If you're entitled to recover funds,
2 you're going to recover them because your claim says,
3 I've been wronged and this is how you rectify that.

4 MR. SPENCER: Yes, sir.

5 THE COURT: You can't go back and undo what's
6 been done. The only way we do it our system is
7 somebody pays money.

8 MR. SPENCER: Yes, sir.

9 THE COURT: All right. Same way with them.

10 MR. SPENCER: Right.

11 THE COURT: At least anything that I'm involved
12 in. All right. Let me look at it. I'll figure it
13 out.

14 MS. DUDGEON: Your Honor, I'm sorry.

15 THE COURT: What I'm going to schedule is what
16 I'm going to schedule.

17 MS. DUDGEON: Okay. But our goal, so I
18 understand ---

19 THE COURT: We had a term of court, I think on
20 the 18th of June, nonjury that would have been perfect
21 for this, but Judge Benjamin decided she was going on
22 vacation. They moved her and those rosters may have
23 gone out. I don't know. The next term would be the end
24 of June. I just am going to have to see what the
25 schedule is, but I do know I'm going to hold this

1 hearing on the \$9,500 early on, and if you all are
2 agreeable to hold it sooner than that, I'm not going
3 to be here the 28th or the 14th. I'll just have to
4 figure it out, but we all know we're going to try to
5 get those cases resolved this year.

6 MR. SPENCER: Yes, sir.

7 THE COURT: We need to put an end to them.

8 MR. SPENCER: Agreed.

9 THE COURT: We're going to --- Mr. Spencer, Ms.
10 Santacroce, you'll need to start figuring in your
11 minds whether you're represented or not represented,
12 who it is you want to depose so that we can come up
13 with a schedule at some point in time to move this
14 case along. I would like to try to maybe try this
15 case --- when was it filed?

16 MS. DUDGEON: It was filed in August. We
17 answered in November because we saw that it had been
18 filed.

19 THE COURT: All right. So August, it would be
20 coming up on 12 months. I'd like to see about trying
21 to get it tried by October. That would give y'all six
22 months or so to do whatever discovery you need to do
23 and put it all out there.

24 MS. DUDGEON: Your Honor, can we continue with
25 discovery during this time?

1 THE COURT: Sure.

2 MS. DUDGEON: Or is it also ---.

3 THE COURT: Sure.

4 MS. DUDGEON: Okay. I just wanted to confirm.

5 MR. BRUNER: Well, specifically, Your Honor, I
6 know Mr. Spencer's health is an issue.

7 THE COURT: Well, he's not required to do
8 anything until June 1st.

9 MR. BRUNER: Okay.

10 THE COURT: Other than come to a status
11 conference. I asked the doctors if he can come to a
12 status conferences and he said yes.

13 MR. BRUNER: Okay.

14 THE COURT: If you schedule depositions, my
15 suggestion is, unless he consents to it, don't
16 schedule more than one deposition a day, and I would
17 spread them out to some extent. I know that costs you
18 more money because you have to drive --- are you in
19 Charleston?

20 MS. DUDGEON: Yes, Your Honor.

21 THE COURT: Then drive up from Charleston. I've
22 talked to his doctor in Charleston, his doctor here,
23 and they both are on the same page. I told them I
24 would do what I could to help them, but apparently a
25 big stressor in his life is this litigation, so there

1 is some benefit to moving on that and getting him
2 beyond that stressor.

3 MS. DUDGEON: Your Honor, do you think there is
4 any problem to at least getting a motion to
5 disqualify, since that is first in my case on the
6 list?

7 THE COURT: I'll get to that in a second.

8 MS. DUDGEON: I did present a proposed order, but
9 I don't know if you've had a chance to review it. It's
10 just ---

11 THE COURT: I didn't see it.

12 MS. DUDGEON: It was just from the status
13 conference where you continued Mr. Spencer's
14 outstanding motions and you granted --- I mean, you
15 denied the motion to disqualify from Ms. Santacroce.
16 You had asked that I prepare an order that walked
17 through kind of the time line of events.

18 THE COURT: When did you send this?

19 MS. DUDGEON: Very late.

20 THE COURT: Very late?

21 MS. DUDGEON: Friday morning.

22 THE COURT: Well, see, I was out of town.

23 MS. DUDGEON: I know and I apologize for that,
24 but if you can review it, I can make any changes.
25 It's lengthy because you asked us to go through the

1 time line of what got us to that point.

2 THE COURT: All right.

3 MS. DUDGEON: We can file it by e-mail ---

4 MR. SPENCER: Your Honor, this order is
5 premature.

6 THE COURT: I haven't seen it. I'll look at it.

7 MR. SPENCER: I know nothing about what her
8 claims are on this.

9 THE COURT: My recollection is that I told
10 somebody to prepare an order. Did you prepare an
11 order setting forth the time frame that you didn't
12 have any --- you didn't have any hearings before
13 June 1st, all that stuff.

14 MR. SPENCER: Your Honor, this goes way beyond
15 that.

16 THE COURT: I'll have to look about it.

17 MS. DUDGEON: We didn't know about June 1 at the
18 time of preparing this order so that ---

19 MS. SANTACROCE: No, but you did tell me, Judge
20 Barber, when we were speaking on the phone, that you
21 were going to dismiss me out for the reasons of not
22 showing up.

23 MS. DUDGEON: Just ---

24 MS. SANTACROCE: But you said before you were
25 going to do anything, you were going to wait to see

1 what condition, what was going on with Mr. Spencer
2 first.

3 THE COURT: Well, you know, it doesn't matter.

4 MS. DUDGEON: It was just motions to disqualify
5 and you said it could actually be changed later.

6 THE COURT: If Mr. Spencer gets them
7 disqualified, they're disqualified regardless of
8 whether you do or don't. I assume you all have the
9 same reason, right?

10 MR. SPENCER: Yes, sir.

11 THE COURT: All right.

12 MR. SPENCER: Your Honor, in the future, could
13 you have opposing counsel submit these proposed orders
14 to us in a timely basis so we have them and can ---

15 THE COURT: I don't know what that means, a
16 timely basis.

17 MR. SPENCER: Well, I mean ---

18 THE COURT: Here is what I require, and I can
19 tell you that it's not been done on either side. I
20 know that Ms. Santacroce sends me all of the kinds of
21 stuff and talks to my law clerk and nobody else is
22 copied.

23 MS. SANTACROCE: Yeah, ever since you told me
24 that on the phone, yes, sir, I did.

25 THE COURT: Well, here is --- we're not

1 having --- we're not being pen pals anymore.

2 MS. SANTACROCE: Nope, nope.

3 THE COURT: Anything your send to me, all these
4 defendants have to be copied, all these lawyers have
5 to be copied and I'm not reading anything else from
6 now on if everybody doesn't get a copy of whatever is
7 sent. If I ask somebody to send an order to me, I
8 want the other parties to be copied before it's sent
9 to me. I don't want it to go contemporaneously with
10 me because I sit there and I read it and I think
11 that's sounds pretty good, so I wait five days to see
12 if somebody doesn't want me to sign it, and the other
13 side takes eight days to notify me.

14 MS. DUDGEON: Yes, Your Honor.

15 THE COURT: So send it to the other side and then
16 wait five days and send it to me so that both sides
17 have the right to read it and then make an issue of it
18 if you want to make an issue of it.

19 Ms. Santacroce, if you want to go back and look
20 at --- I reviewed your discovery and your request and
21 frankly, I mean, it just --- some of it just didn't
22 maker any sense to me.

23 MS. SANTACROCE: I will recheck it, Your Honor.
24 I'll recheck it.

25 THE COURT: You know, I'm happy to give you a

1 hearing, get on the telephone, and resolve all
2 discovery disputes. Now, if you have a discovery
3 dispute with them, Mr. Spencer doesn't need to be on
4 the telephone for your discovery dispute.

5 MS. SANTACROCE: That's correct.

6 THE COURT: And if he has one, you don't need to
7 be on the phone, but you know, let's make it
8 meritorious on what we're trying to do. If you have a
9 discovery dispute, then send an e-mail saying I'm
10 having a discovery dispute. Send a copy to whatever
11 lawyer it is and ask me to get it resolved. I will,
12 within 48 hours, I will be on the telephone and we'll
13 resolve it.

14 MS. SANTACROCE: Yes, sir, thank you.

15 THE COURT: You don't have to send a motion in
16 forma pauperis because we're not doing in forma
17 pauperis.

18 All right, here, this must be what you sent.

19 THE COURT: If the Stephens, if they're not in
20 this case, Mr. Spencer if you're would get in touch
21 with them and have them file something with the court
22 saying that they're no longer interested in pursuing
23 any claim.

24 MR. SPENCER: Yes, sir.

25 THE COURT: And have that notarized and send it

1 to me and then that takes them out of the being
2 noticed, even if they're in default.

3 MR. SPENCER: Yes, sir.

4 THE COURT: That makes it easy, the least number
5 of people we have involved in the case, the less
6 difficulty there's going to be.

7 MR. SPENCER: Yes, sir.

8 THE COURT: All right. Anything else y'all want
9 to tell me?

10 MS. DUDGEON: No, Your Honor.

11 THE COURT: Anything else y'all want to tell me?

12 MR. SPENCER: I was just curious about you had
13 mentioned something about something that Irene had
14 submitted in formal pauperis and you weren't going to
15 allow that.

16 THE COURT: Yeah, she wanted to file a motion to
17 compel in forma pauperis.

18 MR. SPENCER: And you wouldn't allow in forma
19 pauperis?

20 THE COURT: No, we're not going to do that. I
21 mean, I told her how to handle this stuff.

22 MR. SPENCE: Okay.

23 THE COURT: That's what they're entitled to again
24 because of a technicality, but you know, every time
25 you file a motion, I'm not going to have to go back

1 and review an in forma pauperis application. It's
2 just not going to happen. Apparently in another three
3 weeks y'all have lawyers, or a lawyer.

4 MR. SPENCER: Hopefully, yes, sir.

5 THE COURT: All right. Anything else?

6 MR. SPENCER: No, sir.

7 MS. SANTACROCE: No, sir.

8 THE COURT: And I emphasize to you, anything you
9 --- any contact you have with me, the other side has
10 to be involved. Don't call Rick. The only thing that
11 we can talk to you about without that is scheduling.
12 If we have something scheduled, then the you can let
13 me know you're going to be there or not going to be
14 there, whatever the situation is. If you feel like
15 it's necessary that you be there, then I'll consider
16 whether we change the hearing on your motion to
17 dismiss --- I mean, motion to have them disqualified.

18 I mean, if he prevails, you prevail. If you want
19 to come up and argue the motion, you're welcome to be
20 here. If you don't want to, you don't have to. You
21 won't be able to participate in that motion. He can
22 say whatever he wants to say and if Mr. Spencer
23 prevails, then he'll be out of the case, period. All
24 right.

25 MS. SANTACROCE: Yes, sir.

1 THE COURT: All right. Are y'all submitting
2 affidavits in support of your motions to disqualify
3 then?

4 MR. SPENCER: Yes, sir.

5 THE COURT: Have you done that yet?

6 MR. SPENCER: We have, yes.

7 THE COURT: You have submitted all the
8 affidavits?

9 MR. SPENCER: No, we've got more affidavits that
10 we need to submit.

11 THE COURT: All right. Well, you need to get
12 them in. We're going to hear that motion in June.

13 I can tell you the court just went through this
14 on another case. We're not taking affidavits the day
15 of the hearing.

16 MR. SPENCER: I haven't received anything from
17 the other side.

18 THE COURT: You have the burden.

19 MR. SPENCER: Correct.

20 THE COURT: And they can't respond to
21 something --- have they submitted any affidavits to
22 you?

23 MS. DUDGEON: No, I don't believe any affidavits,
24 just some documents.

25 MR. SPENCER: We haven't.

1 THE COURT: If you have any affidavits, I want
2 them submitted five days before the hearing.

3 MR. SPENCER: Yes, sir.

4 THE COURT: All right.

5 MS. DUDGEON: Okay.

6 THE COURT: Okay. Anything else?

7 MS. DUDGEON: I don't think so.

8 THE COURT: Let's do our best to get this thing
9 resolved.

10 MS. DUDGEON: Your Honor, would you take a review
11 of that order? I apologize, I did not circulate it to
12 Mr. Spencer beforehand. I apologize. If he has any
13 changes to it, I'll be happy to consider them to
14 incorporate them and submit to you again, or we can
15 just put a time limit on his response. Whatever you
16 would like to do.

17 THE COURT: You can review the order, get in
18 touch with her if you have any problems, questions or
19 concerns, get in touch with her, let her know. If you
20 all can't resolve those, then whatever they are, send
21 them to me.

22 MR. SPENCER: Yes, sir.

23 THE COURT: Copying her.

24 MR. SPENCER: All right.

25 THE COURT: All right.

1 MS. DUDGEON: Thank you.

2 THE COURT: All right. Anybody that I've asked
3 to do an order, do it and get it to me within seven
4 days. Again submit it to Mr. Spencer, Mr. Lail, and
5 Ms. Santacroce.

6 MS. DUDGEON: Yes, sir.

7 THE COURT: All right. Have a nice day. Thank
8 you for coming.

9 MS. SANTACROCE: Thank you, Judge.

10 THE COURT: Stay in touch.

11 MS. SANTACROCE: Your Honor.

12 THE COURT: Are there good days and bad days that
13 you can or can't be up here when I'm scheduling this
14 hearing on the \$9,500? I assume you would like to be
15 here for that day.

16 MS. SANTACROCE: I would like to, yes.

17 THE COURT: Are there certain days that are
18 easier to get here than not?

19 MS. SANTACROCE: No sir. I don't have any money
20 to drive up all the time either.

21 THE COURT: Well, we'll not --- we will attempt
22 to minimize that. Actually, in some things I don't
23 have a problem with your being on the telephone. The
24 problem is we don't have a speakerphone here in the
25 courtroom.

1 MS. SANTACROCE: I'll get you a speaker phone if
2 that helps.

3 THE COURT: For the courthouse? Richland County
4 would appreciate that.

5 MS. SANTACROCE: Okay. We'll get one. Can you
6 get one for them?

7 And, Judge Barber, while everybody is here, I
8 also have medical issues that prevents me sometimes
9 from driving long distances. Now, I can send you a
10 copy and I can send everybody a copy of ---

11 THE COURT: Well, I'm the one that needs --- I'm
12 not continuing anything without some medical
13 verification.

14 MS. SANTACROCE: No. I mean, I've got it. I'm
15 just saying.

16 THE COURT: So you need to send it to me.

17 MS. SANTACROCE: Okay. I'm worried about ex
18 parte, now. You know, so I'm trying to follow your
19 rules.

20 THE COURT: Scheduling is something I can talk to
21 individuals about.

22 MS. SANTACROCE: Okay.

23 THE COURT: I can't talk about the merits of the
24 case, or anything about the case, but with scheduling,
25 you're sick, she has another hearing somewhere else.

1 Mr. Bruner, his Monday is laid out.

2 MS. SANTACROCE: Yeah, I know.

3 THE COURT: But I can schedule it, but I mean,
4 the thing is, if you know you have some medical
5 problem that is going to confine you for a certain
6 period of time, don't wait for the day of the hearing.

7 MS. SANTACROCE: Well, see sometimes it happens
8 like at five, six o'clock and, you know.

9 THE COURT: This lady is driving up from
10 Charleston and somebody is paying her a lot of money
11 to do that.

12 MS. SANTACROCE: Well, I'll make every effort,
13 Judge Barber.

14 THE COURT: All right. Thank you all.
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CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Karen Ambroziak, Official Court Reporter for the 5th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing, prepared by Vicki Everhart, Transcriptionist, is a true, accurate complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned cases, relative to appeal, in the Common Pleas Court for Richland County, South Carolina, on the 7th day of May, 2012.

Signed

October 17, 2012

Karen Ambroziak

Karen Ambroziak, Court Reporter

My Commission Expires: 04/01/14

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF SOUTH CAROLINA
3 FLORENCE DIVISION

4 SOUTHERN HOLDINGS, INC., ET AL.,)

5 PLAINTIFFS,)

6 VS.)

7 HORRY COUNTY, SOUTH CAROLINA,)
8 ET AL.,)

9 DEFENDANTS.)

CIVIL ACTION
NO. 4:02-1859

-----X

10 UNITED STATES COURTHOUSE
11 FLORENCE, SOUTH CAROLINA
12 MAY 8, 2007.

13 TRANSCRIPT OF HEARING PROCEEDINGS

14 BEFORE THE HON. R. BRYAN HARWELL, DISTRICT JUDGE

16 APPEARANCES:

17 ADRIAN L. FALGIONE, ESQ.
18 JOHN R. RAKOWSKY, ESQ.
19 LEXINGTON, SOUTH CAROLINA
FOR THE PLAINTIFFS.

20 ANDREW F. LINDEMANN, ESQ.
21 COLUMBIA, SOUTH CAROLINA
22 JAMES M. SALEEBY, JR., ESQ.
23 FLORENCE, SOUTH CAROLINA
24 SANDRA SENN, ESQ.
ROBIN L. JACKSON, ESQ.
25 CHARLESTON, SOUTH CAROLINA
FOR THE DEFENDANTS HORRY COUNTY, ET AL.

EDWARD GLENN ELLIOTT, ESQ.
FLORENCE, SOUTH CAROLINA
FOR THE DEFENDANTS HARTNESS.

1 STENOGRAPHIC REPORTING AND COMPUTER-AIDED TRANSCRIPTION
2 VINCE ROLLAND P O BOX 2317 FLORENCE SC 29503 843-615-1654
EMAIL: VINCE_ROLLAND@SCD.USCOURTS.GOV

3 (THEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD:)

4 THE COURT: ALL RIGHT. LET'S TAKE UP ANY MATTERS,
5 WHAT I CALL HOUSEKEEPING MATTERS. PARTICULARLY, LET'S
6 TALK ABOUT, HAS THERE BEEN ANY RESOLUTION REGARDING MR.
7 HERROLD AND HIS DEPOSITION?

8 MR. RAKOWSKY: WE TOOK A SUPPLEMENTAL DEPOSITION
9 MONDAY.

10 THE COURT: EXCUSE ME?

11 MR. RAKOWSKY: WE TOOK HIS SUPPLEMENTAL DEPOSITION
12 OFFER THE TELEPHONE MONDAY.

13 THE COURT: IS THAT CORRECT?

14 MR. SALEEBY: YES, SIR.

15 THE COURT: SO THAT'S BEEN TAKEN CARE OF. ANY
16 OTHER MATTERS?

17 MR. FALGIONE: EXCUSE ME, YOUR HONOR. REGARDING
18 MR. HERROLD AND THAT VIDEOTAPE DEPOSITION, I BELIEVE MS.
19 SENN IS IN AGREEMENT THOSE PORTIONS REGARDING THE 706
20 WITNESS FOR THE COURT WILL BE DELETED.

21 MS. SENN: YES, YOUR HONOR. THEY FILED LIKE FIVE
22 PAGES OF DOCUMENTS THIS MORNING, I DON'T KNOW IF YOU SAW
23 IT, PERTAINING TO THAT, AND I'M NOT SURE WHAT THE PURPOSE
24 WAS. IT GOT FILED THIS MORNING. I GUESS TRYING TO SAY
25 THAT WE KNEW OR SHOULD HAVE KNOWN. I DIDN'T KNOW AND

1 APPARENTLY THEY DIDN'T EITHER, BECAUSE DURING THE
2 DISCOVERY DEPOSITION, I CONTINUED TO MAKE THOSE
3 ASSERTIONS DURING THE DISCOVERY DEPOSITION. I WAS NEVER
4 CORRECTED BY THE PLAINTIFF'S COUNSEL EARLIER. I WANT TO
5 APOLOGIZE AGAIN FOR MY ASSUMPTION, AND WE'LL BE HAPPY TO
6 STRIKE THAT.

7 MR. FALGIONE: YOUR HONOR, WE'RE NOT ALLEGING MS.
8 SENN DID THAT INTENTIONALLY.

9 THE COURT: I THINK IT WAS APPROPRIATE FOR ME TO
10 SUA SPONTE BRING IT UP.

11 MR. FALGIONE: WE APPRECIATE THAT.

12 THE COURT: YOU, I GUESS, HAVE EDITED OUT THOSE
13 PORTIONS OF HIS DEPOSITION?

14 MS. SENN: YES, SIR. I HAD ASKED AND I'M SURE IT
15 IS, I'D HAVE TO CHECK, I ASKED TO GET A REPORTER THAT
16 WOULD HAVE THE STAMP DOWN AT THE BOTTOM SO WE COULD FAST
17 FORWARD. THAT REPORTING SERVICE SAID THEY HAD IT. WE'LL
18 JUST HAVE TO GET TOGETHER AND FAST FORWARD THROUGH THOSE
19 SECTIONS.

20 THE COURT: ALL RIGHT. VERY GOOD.

21 DID Y'ALL GET TOGETHER AND TAKE AL CANNON, WAS IT?

22 MR. RAKOWSKY: WE TOOK THAT YESTERDAY MORNING,
23 YOUR HONOR.

24 THE COURT: SO THAT'S RESOLVED. GOOD.

25 WE TALKED ABOUT THIS BRIEFLY. OPENING STATEMENTS

1 TOMORROW, HOW MUCH TIME ARE YOU GOING TO NEED, MR.

2 RAKOWSKY.

3 MR. RAKOWSKY: I DON'T SEE MUCH MORE THAN A HALF

4 HOUR, 35 MINUTES, MAYBE.

5 THE COURT: CAN THE THREE OF Y'ALL COVER WHAT YOU

6 NEED TO IN 45 MINUTES COLLECTIVELY?

7 MS. SENN: YOU MEAN 15 MINUTES APIECE OR 45

8 MINUTES?

9 THE COURT: 45 MINUTES. YOU'RE GOING TO COVER THE

10 SAME GROUND.

11 MR. SALEEBY: PROBABLY, YOUR HONOR, IF YOU'LL GIVE

12 US A LITTLE LATITUDE.

13 THE COURT: MR. RAKOWSKY, IF YOU NEED UP TO 45

14 MINUTES, YOU'VE GOT IT. YOU PROBABLY WON'T NEED IT.

15 MR. RAKOWSKY: I'M NOT GOING TO TRY TO, YOUR

16 HONOR.

17 THE COURT: CERTAINLY IF Y'ALL NEED 45, 50

18 MINUTES, THAT'S FINE. I'LL GIVE YOU A LITTLE EXTRA TIME

19 IF YOU NEED IT. I GENERALLY GIVE JURIES SOME BRIEF

20 OPENING INSTRUCTIONS, AS WELL.

21 ALL RIGHT. LET'S TALK ABOUT ANY EXHIBITS. HAVE

22 Y'ALL GOT TOGETHER AND MARKED YOUR EXHIBITS? AND WORKED

23 OUT AS MUCH AS YOU CAN WORK OUT. LET'S GO THROUGH, I

24 GUESS LET'S START WITH PLAINTIFF'S EXHIBITS AND SEE WHAT

25 THERE IS NO OBJECTION TO.

1 I'M GOING TO ASK YOU, MR. RAKOWSKY, I'VE GOT YOUR
2 LIST OF EXHIBITS HERE, WHICH WAS FILED, CAN YOU TELL ME
3 WHICH EXHIBITS THAT THERE ARE NO OBJECTIONS TO? BY ANY
4 OF THE DEFENDANTS?

5 MR. RAKOWSKY: YOUR HONOR, I COULD. I DON'T HAVE
6 THAT COPY IN FRONT OF ME RIGHT YET. WE HAD SOME
7 SUPPLEMENTALS THAT CAME IN AND I HAVEN'T BEEN ABLE TO
8 ADJUST. THERE'S A GOOD BIT THERE'S AN OBJECTION TO.

9 MR. SALEEBY: YOUR HONOR, I THINK I HAVE THE LIST
10 OF THE INITIAL OBJECTIONS THAT WE TALKED ABOUT AT THE
11 EXHIBIT MEETING. I COULD PROBABLY GO THROUGH THAT, AND I
12 THINK MS. SENN HAS FILED SOME SUPPLEMENTAL OBJECTIONS
13 SINCE THEN, IN ADDITION TO WHAT MR. ELLIOTT HAS FILED.

14 THE COURT: ALL RIGHT. HAVE YOU GOT YOUR LIST?

15 MR. RAKOWSKY: I DO, YOUR HONOR.

16 THE COURT: LET'S GO THROUGH. I'LL BE GLAD TO
17 HEAR FROM YOU, MR. SALEEBY, IF YOU CAN SET FORTH WHAT
18 EXHIBITS THE DEFENDANTS DO NOT HAVE AN OBJECTION TO.

19 MR. SALEEBY: IF YOU LET ME BEGIN WITH MS. SENN'S
20 SUPPLEMENT.

21 THE COURT: I'M SORRY, I HAVING TROUBLE HEARING
22 YOU.

23 MR. SALEEBY: I'LL BEGIN AND LET MS. SENN
24 SUPPLEMENT AND MR. ELLIOTT.

25 THE COURT: ALL RIGHT.

1 MR. SALEEBY: NUMBER 26 WE OBJECTED TO, AND THEN
2 30 THROUGH 33. 36 THROUGH 43. 49. 52. 58 THROUGH 61.
3 97 THROUGH 99. 111. 113. 115 THROUGH 118. 136 THROUGH
4 147. 151 AND 152. 156. 158 THROUGH 164.

5 MR. RAKOWSKY: THAT'S MY UNDERSTANDING, YOUR
6 HONOR. I FOUND MY LIST.

7 THE COURT: ALL RIGHT. LET ME ASK MS. SENN, ARE
8 THERE ANY ADDITIONAL ONES MR. SALEEBY DID NOT MENTION?

9 MS. SENN: YES, SIR, YOUR HONOR. IN FACT THE VAST
10 MAJORITY OF THESE DOCUMENTS, I'M NOT GOING TO HAVE ANY
11 OBJECTION TO THEM COMING IN ONCE THE FOUNDATION IS LAID,
12 BUT THERE ARE A LOT OF DOCUMENTS THAT I SIMPLY CAN'T TELL
13 WHAT THEY ARE. THEY ARE IN SPANISH, OR THEY ARE PEOPLE,
14 IT DOESN'T SAY WHO IT'S TO, WHO IT'S FROM, SO MY
15 OBJECTION IS, ONCE MR. SPENCER TAKES THE STAND AND HE
16 TELLS US WHAT THESE THINGS ARE AND SOMEBODY ATTESTS TO
17 THEM, I'M OKAY WITH THEM. HE'S JUST GOING TO HAVE TO LAY
18 THE FOUNDATION FOR SOME OF THESE THINGS.

19 THE COURT: CAN YOU GO AHEAD AND TELL ME WHAT
20 THOSE ARE?

21 MS. SENN: PRETTY MUCH THE ENTIRE FIRST PAGE. DO
22 YOU HAVE THE SAME LIST WE'RE WORKING FROM?

23 THE COURT: I MAY NOT.

24 MR. RAKOWSKY: MAY I PASS UP A COPY?

25 THE COURT: IF IT'S NOT ALREADY FILED.

1 MR. RAKOWSKY: IT'S THE SAME THING, JUST NOT
2 MARKED. IT'S A LIST OF 1 THROUGH 166. THAT IS WHAT WE
3 FILED.

4 THE COURT: ALL RIGHT. I'VE GOT THAT.

5 MS. SENN: IT'S PROBABLY GOING TO BE EASIER FOR ME
6 TO GO THROUGH THE ONES I DON'T OBJECT TO, AND AGAIN, ONCE
7 THE WITNESS TAKES THE STAND, WE'RE NOT GOING TO BE
8 ARGUING OVER THEM. I WAS CONCERNED TO SAY IT'S ALL RIGHT
9 TO LET THESE IN WITHOUT SOMEBODY SAYING SOMETHING ABOUT
10 THEM.

11 I DON'T HAVE ANY OBJECTION TO PLAINTIFF'S 23,
12 ANCIL GARVIN'S RESIGNATION. I DON'T HAVE ANY OBJECTION
13 TO THE SECRETARY OF STATE'S APPLICATION, NUMBER 28, OR
14 NUMBER 29, THE ANNUAL LISTINGS OF SHAREHOLDERS. I
15 BELIEVE IT'S JUST A LISTING OF THE OFFICERS. LET ME LOOK
16 REAL QUICK.

17 NO OBJECTION TO HIS COLLEGE TRANSCRIPTS, I BELIEVE
18 AT 54 AND 55. NO OBJECTION TO 83, 84, 85. 101. 102.
19 103, IF I DIDN'T SAY THAT, THROUGH 106. 107. 108. 110.
20 112. 128. 129. 130. 131. 132. 134. 135. 149.
21 150. I TAKE BACK 150. THEY ARE JUST GOING TO HAVE TO
22 SHOW WHERE THOSE CAME FROM. ONCE THEY DO THAT, I'M GOOD.
23 IF YOUR HONOR CAN MOVE ON TO MR. ELLIOTT, I'LL SCAN THESE
24 REAL QUICK.

25 THE COURT: ALL RIGHT. THANK YOU. HOW ABOUT YOU,

1 MR. ELLIOTT?

2 MR. ELLIOTT: DID YOU WANT WHAT I OBJECTED TO OR
3 HAVE NOT OBJECTED TO?

4 THE COURT: FIRST OF ALL, LET ME ASK, WITH REGARD
5 TO THOSE THAT MS. SENN HAS INDICATED SHE HAS NO OBJECTION
6 TO, THOSE THAT SHE JUST WENT THROUGH, LET ME ASK IF ANY
7 OF YOU HAVE ANY OBJECTION TO THOSE GOING AHEAD AND BEING
8 ADMITTED?

9 MR. SALEEBY: NONE HERE, YOUR HONOR.

10 MR. ELLIOTT: NO, SIR.

11 THE COURT: SO THOSE THAT MS. SENN HAS INDICATED
12 SHE HAS NO OBJECTION, THOSE CAN BE ADMITTED WITHOUT
13 OBJECTION. SO THOSE WILL GO AHEAD AND BE ADMITTED NOW
14 WITHOUT OBJECTION.

15 GO AHEAD, MR. ELLIOTT, AND TELL ME WHICH ONES YOU
16 DO HAVE AN OBJECTION TO, HOW ABOUT THAT?

17 MR. ELLIOTT: THAT WILL BE EASIER, JUDGE. 78.
18 79. 80 AND 81 ARE E-MAILS, COPIES OF E-MAILS THAT I'M
19 NOT SURE A FOUNDATION HAS BEEN LAID FOR THEM. 148, AND
20 THEN I GENERICALLY LISTED ALL OF THE NUMBERS RELATED TO
21 THE PLAINTIFFS MEDICAL BILLS, YOUR HONOR, FOR THIS
22 REASON.

23 AS YOU KNOW, WE WERE GOING TO TRY THIS CASE IN
24 JULY OF 2005, AND THEN OF COURSE, DID NOT. AT THAT TIME,
25 WE HAD VIRTUALLY MINIMAL OR NO MEDICAL BILLS FROM MOST OF

1 THE PLAINTIFFS, MAYBE 15, 18,000 FOR HOLT, SPENCER,
2 SOMETHING ALONG THE LINES THAT I CAN RECALL OR REMEMBER
3 OF MAYBE \$1200 FOR MS. SANTACROCE, AND VIRTUALLY NOTHING
4 IN TERMS OF ANYTHING ELSE IN TERMS OF MEDICAL BILLS OR
5 RECORDS PROVIDED. THERE WAS NOTHING SET FORTH IN THE
6 ANSWERS TO INTERROGATORIES, NO SUPPLEMENTAL DISCOVERY
7 OTHER THAN STACKS OF DOCUMENTS GIVEN TO US AS EXHIBITS
8 RIGHT BEFORE TRIAL. IN CHAMBERS FRIDAY, YOU MAY REMEMBER
9 THE COMMENT FROM MR. RAKOWSKY THAT ONE OF HIS PLAINTIFFS
10 NOW HAS IN EXCESS OF \$200,000 OF MEDICAL BILLS, WHICH
11 WE'VE NEVER SEEN, LITERALLY, UNLESS THEY ARE IN THE STACK
12 OF EXHIBITS HANDED TO US LAST WEEK WHEN WE MET FOR THAT.
13 I'M GOING TO HAVE TO PUT AN OBJECTION ON THE RECORD TO
14 ANYTHING THAT WE HAVEN'T SEEN POST JULY OF 2005. THERE
15 WERE NO SUPPLEMENTAL DISCOVERY SERVED, WE HAVEN'T HAD AN
16 OPPORTUNITY TO DEPOSE ANYBODY OR GO BACK. I JUST HAVE A
17 LOT OF PROBLEMS WITH THE \$200,000 IN ACTUAL MEDICAL
18 BILLS.

19 MR. SALEEBY: YOUR HONOR, WE JOIN IN THAT REGARD.
20 WE'VE GONE BACK AND LOOKED AT WHAT WAS GIVEN TO US IN
21 JULY OF 2005, BEFORE TRIAL, AND COMPARED THAT TO WHAT WE
22 WERE GIVEN, I THINK LAST WEDNESDAY WAS THE EXHIBITS
23 MEETING. APPARENTLY THERE WAS SOME ONGOING TREATMENT
24 WITH MR. HOLT AND OTHERS, AND WE HAVE TWO SITUATIONS, WE
25 HAVE A SITUATION WHERE SOME MEDICAL BILLS ARE COMPLETELY

1 NEW FOR A PLAINTIFF, I BELIEVE, AND SOME OF IT IS ONGOING
2 CARE, WHICH IS MUCH MORE SIGNIFICANT FINANCIALLY, WHICH
3 WAS JUST PROVIDED WEDNESDAY, WHICH WE REALLY CAN'T
4 RESPOND TO.

5 THE COURT: HOW ABOUT IT, MR. RAKOWSKY?

6 MR. FALGIONE: YOUR HONOR, IT'S MY UNDERSTANDING
7 IN LOOKING AT THE MEDICAL RECORDS AND MEDICAL BILLS FILED
8 IN THIS MATTER, BEFORE I GOT INTO IT IN 2004, THEY ALL
9 INDICATED ONGOING TREATMENT. I THINK MR. ELLIOTT'S
10 PRESCRIPTION BILLS INDICATED \$18,000 PER YEAR. SO IT
11 WOULD BE MY POSITION AND MY ASSERTION, YOUR HONOR, THAT
12 THEY WERE NOTIFIED OF ONGOING CONTINUING CARE. THEY
13 CHOSE NOT TO TAKE THE DEPOSITIONS OF THOSE TREATING
14 PHYSICIANS, I THINK DR. BARBIAN SPECIFICALLY, AND THAT
15 THEY WERE PUT ON NOTICE THAT IT WAS ACCRUING AT THE RATE
16 OF \$18,000, APPROXIMATELY, IN MEDICAL BILLS, NOT MEDICAL
17 BILLS, BUT PRESCRIPTION BILLS.

18 THE OTHER SIDE OF THAT, YOUR HONOR, I CERTAINLY
19 UNDERSTAND DEFENSE COUNSEL'S ARGUMENT. WE PUT THOSE
20 BILLS TOGETHER AND WE GAVE THEM TO THEM THE VERY SAME
21 TIME WE RECEIVED THEM. SO THAT'S, IT IS ONGOING
22 TREATMENT, IT'S ONGOING TREATMENT FOR THE SAME INJURY,
23 THE SAME AILMENTS AND SAME PROBLEMS THAT AROSE OUT OF
24 THIS INCIDENT, AND I RESPECTFULLY SUBMIT THEY WERE PUT ON
25 NOTICE OF IT AND COULD EXPECT THE BILL WOULD BE HIGHER

1 SOME TWO YEARS LATER.

2 MR. SALEEBY: YOUR HONOR, HAD THE PLAINTIFFS
3 TIMELY SUPPLEMENTED, AT LEAST WE WOULD HAVE BEEN GIVEN
4 THE OPTION TO DEPOSE THESE PHYSICIANS, BUT WE WEREN'T
5 GIVEN THAT OPTION, AND THE MEDICAL PICTURE IS VERY
6 DIFFERENT TODAY THAN IT WAS IN 2005.

7 MR. ELLIOTT: WITH ALL DUE RESPECT TO MR.
8 FALGIONE, IF YOU LOOK AT THE DISCOVERY RESPONSES AND WHAT
9 WE WERE GIVEN, AND IT'S IN EVERY DEPOSITION, WE RESERVE
10 THE RIGHT TO COME BACK, WE DEPOSED ALL THESE PLAINTIFFS,
11 WE HAVE NO MEDICAL ON ANYBODY. WE LATER, THROUGH OUR OWN
12 SUBPOENAS GOT SOME THINGS FROM A COUPLE OF PSYCHIATRISTS
13 WE WERE USING AND DID GET SOME STUFF TO DR. BARBIAN. I
14 OBJECTED TO DR. BARBIAN THROUGH JULY OF 2005. THAT'S
15 FINE. THE MEDICAL BILLS OR DOCUMENTS THAT MR. FALGIONE
16 REFERS TO THAT SHOULD HAVE PLACED US ON NOTICE OF \$18,000
17 IN BILLS WERE TRIAL EXHIBITS GIVEN TO US A FEW DAYS
18 BEFORE TRIAL LAST TIME. WE NEVER GOT TO THEM, AND WE
19 KNEW THE THING WAS GOING TO BLOW UP EARLY, AS WAS
20 TELEGRAPHED IN E-MAILS AND OTHER THINGS. WE NEVER GOT
21 AROUND TO HAVING THIS CONVERSATION THEN, OR WE WOULD HAVE
22 BEEN OBJECTING TO WHAT WE WERE GIVEN THEN. I CAN'T BE ON
23 NOTICE OF THINGS I NEVER RECEIVED AND NEVER SAW.

24 THERE IS ABSOLUTELY NO MEDICAL BILL WHATSOEVER IN
25 EVIDENCE PRIOR TO THAT TIME, WITH THE EXCEPTION OF A FEW,

1 DR. BARBIAN, THAT WE GOT OURSELVES AND A FEW PRESCRIPTION
2 PRINTOUTS FROM THE PHARMACY THAT NEEDED TO BE RELATED UP.

3 THE COURT: WHAT MEDICAL RECORDS, IF ANY, HAVE
4 BEEN PRODUCED, MR. FALGIONE, PRIOR TO LAST WEEK?

5 MR. FALGIONE: YOUR HONOR, I'D HAVE TO DEFER TO
6 MR. ELLIOTT, BECAUSE I WASN'T INVOLVED IN THIS CASE. I
7 DON'T KNOW WHAT THOSE RECORDS ARE. AS YOU MAY REMEMBER,
8 WE DIDN'T RECEIVE AND STILL HAVE NOT RECEIVED MANY
9 MEDICAL RECORDS FROM OUT OF STATE COUNSEL. SO WE WERE AT
10 A DISADVANTAGE HERE TRYING TO PULL THIS TOGETHER AT THE
11 LAST MINUTE. PERSONALLY, I CANNOT SPEAK WHAT WAS
12 PRESENTED TO MR. ELLIOTT. I HAVE NO REASON TO DOUBT MR.
13 ELLIOTT'S ASSERTION WHAT RECORDS WERE PRODUCED TO HIM.

14 MR. ELLIOTT: YOUR HONOR, I DID MISSPEAK A MOMENT
15 AGO. WE DID DEPOSE DR. HWANG ON THE INJURIES. WE HAVE
16 THOSE BILLS, THE WRIST INJURY.

17 THE COURT: WHICH RECORDS WOULD THOSE BE, PLEASE,
18 SIR? WHICH EXHIBITS ARE WE TALKING ABOUT RELATED TO DR.
19 HWANG THAT YOU SAY YOU DO HAVE?

20 MR. RAKOWSKY: IT'S GOING TO BE A PORTION OF
21 EXHIBIT 140, YOUR HONOR.

22 MR. ELLIOTT: WHAT I DON'T KNOW, JUDGE, IS IF
23 THERE'S ANYTHING PAST JULY OF 2005, I NEVER RECEIVED
24 UNTIL IT WAS HANDED TO ME LAST WEEK, I GUESS. SO UP
25 THROUGH HIS, UP THROUGH THE DATE OF HIS DEPOSITION, OF

1 DR. HWANG, WE'VE NEVER SUPPLEMENTED WITH ANYTHING, WITH
2 REGARD TO DR. HWANG. WHAT WE GOT IN HIS DEPOSITION IS
3 WHAT WAS PRODUCED TO US OR WHAT WE OBTAINED PRIOR TO THE
4 DEPOSITION.

5 DR. BARBIAN, THEY DID PRODUCE AND/OR WE OBTAINED,
6 I DON'T REMEMBER IF IT'S BOTH, THROUGH, AGAIN, JULY OF
7 2005. I CAN'T SAY WE DIDN'T HAVE THAT. WE DID HAVE SOME
8 VARIOUS OR WERE GIVEN AT SOME POINT IN TIME SOME VARIOUS
9 PRESCRIPTION BILLS, I THINK FROM MS. SANTACROCE, IF I'M
10 NOT MISTAKEN. BUT IN TERMS OF WHAT WAS ACTUALLY GIVEN TO
11 US OR WHAT WE WERE ON NOTICE OF IN OUR HANDS, THAT WAS
12 IT.

13 MR. RAKOWSKY: YOUR HONOR, IF I COULD CLARIFY A
14 LITTLE BIT FROM WHAT I KNOW PERSONALLY. WHEN I CAME INTO
15 THIS THING IN 05 WHEN WE WERE READY TO GO IN 05, I KNOW
16 OF SOME OF THE PHARMACY BILLS FOR MS. STEPHENS AND MS.
17 SANTACROCE HAD BEEN PROVIDED. THEY WERE PHARMACY, AND
18 THEN I THINK THAT BY 05, SOME OF THE TREATMENT NOTES FOR
19 MS. SANTACROCE WERE PROVIDED FROM TEANNE OEHLER,
20 SPECIFICALLY THERE WAS A LETTER ADVISING SOME TREATMENT
21 AND A COUPLE OTHER RECORDS. BUT THAT'S ALL THAT WAS
22 PROVIDED ON MS. SANTACROCE.

23 MS. STEPHENS APPARENTLY, AND I DON'T KNOW THE
24 ANSWER TO THIS, BUT MR. GOLDBERG APPARENTLY GOT SOME
25 MEDICAL RECORDS ON HER, BUT DIDN'T PROVIDE THEM AND I

1 TRIED TO SUPPLEMENT THOSE, BUT THAT'S ALL I CAN TELL YOU.
2 I'M JUST TRYING TO BRING IT BACK WHERE IT SHOULD BE, BUT
3 I DON'T THINK THERE WAS ANY CLAIM BY THE DEFENDANTS THAT
4 THEY DIDN'T KNOW THESE PEOPLE WERE RECEIVING TREATMENT
5 FROM THESE DOCTORS. I JUST THINK THERE MIGHT HAVE BEEN A
6 LIMITED AMOUNT OF RECORDS BEING PROVIDED AT THE END OF
7 THE DISCOVERY PERIOD, AND THEN IN 05 WE PRESENTED MORE
8 INFORMATION ON THE EVE OF TRIAL, AT THE EXCHANGE OF
9 EXHIBITS IN 05.

10 ON MR. HOLT, NOW, HIS RECORDS, THE RECORDS THAT WE
11 PROVIDED ON MR. HOLT ARE FROM DR. BARBIAN --

12 THE COURT: EXCUSE ME, WHAT'S HIS NAME?

13 MR. RAKOWSKY: BARBIAN. B-A-R-B-I-A-N. THOSE
14 NOTES I THINK WERE RECEIVED BY MR. ELLIOTT AND MR.
15 SALEEBY BACK IN 04, I'M SORRY, 05, PRIOR TO THE EXHIBITS
16 BEING PRESENTED. THEN WE SUPPLEMENTED. DR. BARBIAN IS
17 AN ONGOING PSYCHOLOGIST WHO IS TREATING MR. SPENCER FOR
18 THE LAST SEVERAL YEARS, AND SO, WE DID PROVIDE MORE
19 CURRENT NOTES THAT WERE RECEIVED SUBSEQUENT TO, I MEAN
20 AFTER 05. I DO ADMIT, WE HAVE PROVIDED SOME RECORDS THAT
21 WERE CREATED AFTER 05, BUT THEY KNEW HE WAS BEING TREATED
22 BY BARBIAN. I DON'T THINK THEY EVER TOOK HIS DEPOSITION,
23 AS FAR AS I KNOW. I DON'T KNOW IF THAT HAPPENED OR NOT.
24 I KNOW RECORDS WERE PROVIDED. HE WAS A NAMED WITNESS IN
25 THE RESPONSE TO INTERROGATORIES, AND SO WAS DR. HWANG.

1 SO IT WAS MY THEORY THAT SINCE THEY KNEW WHO THESE
2 TREATING PHYSICIANS WERE, THEY KNEW THERE WAS ONGOING
3 TREATMENT, AND THAT THERE HAD BEEN A PARTIAL RECORD
4 DISCLOSURE, THAT I JUST CONTINUED, I SUPPLEMENTED
5 WHATEVER ELSE WAS THERE, AND THEN AS FAR AS PHARMACY
6 GOES, I KNOW FOR A FACT THERE WERE PHARMACY BILLS
7 PROVIDED IN 05 PRIOR TO TRIAL BECAUSE I PROVIDED THEM,
8 AND THEN I SUPPLEMENTED THEM AGAIN, BECAUSE ONCE AGAIN,
9 THE TESTIMONY FROM DR. -- MR. SPENCER, DR. HWANG AND DR.
10 BARBIAN ARE GOING TO BE THAT THIS MAN IS HAVING ONGOING
11 TREATMENT FROM THE POINT OF INJURY FOR THESE SPECIFIC
12 ILLNESSES.

13 SO THERE ARE SUPPLEMENTS TO THE NOTES THAT WERE
14 PROVIDED ORIGINALLY, AND I SUPPLEMENTED BECAUSE I FELT A
15 NEED TO GIVE THEM AS MUCH AS I HAD, BUT THEY DIDN'T HAVE
16 EVERYTHING THAT THEY HAVE NOW IN 05, AND THEY DIDN'T HAVE
17 WHAT THEY HAD IN 05 IN 04, AND THAT'S ONLY BECAUSE OF THE
18 FACT THAT I TRIED TO, IN GOOD FAITH, PROVIDE AS MUCH OF
19 THE RECORD AS POSSIBLE, ONCE IT WAS PROVIDED TO ME. BUT
20 THEY WERE AWARE OF THE FACT, BECAUSE THEY TOOK HWANG'S
21 DEPOSITION AND THEY DID, THEY WERE NOTICED EARLY ON ABOUT
22 BARBIAN, AND -- THAT THOSE TWO WERE THE PRIMARY TREATING
23 PHYSICIANS, AND OF COURSE, THOSE ARE THE ONES WE'RE
24 FOCUSING IN ON IN THIS TRIAL.

25 THE COURT: DR. BARBIAN AND DR. HWANG.

1 MR. RAKOWSKY: YES, YOUR HONOR. OF COURSE, PART
2 OF THAT AMOUNT IS ONGOING MEDS, PHARMACY BILLS. WE DID
3 PROVIDE AS MUCH OF THE BLOCK OF PHARMACY BILLS AVAILABLE
4 IN 05, AND THEN I DID PROVIDE WHAT WAS MADE AVAILABLE TO
5 ME AS QUICK AS --

6 THE COURT: WHAT IS THE \$200,000?

7 MR. ELLIOTT: I DON'T KNOW WHERE THEY COME FROM.
8 AT THE TIME AT THE END OF DISCOVERY --

9 THE COURT: ARE WE TALKING ABOUT MR. HOLT?

10 MR. ELLIOTT: LET'S TALK ABOUT MR. HOLT FIRST. AT
11 THE TIME OF THE END OF DISCOVERY PRIOR TO TRIAL LAST
12 TIME, WE HAD NO DEFINITE NUMBER FROM ANYONE ON HIS
13 MEDICAL BILLS. WE HAD RECEIVED THROUGH SUBPOENA AND/OR
14 DISCLOSURE, I THINK IT WAS BOTH, WE CHECKED BEHIND EACH
15 OTHER, DR. BARBIAN'S NOTES AND BILLS THROUGH JULY OF
16 2005. THAT IS NOT, UP TO THAT POINT, I DON'T HAVE ANY
17 OBJECTION TO HIM. DR. HWANG UNLESS HE'S BEEN BACK SINCE
18 2005 WHEN WE DEPOSED HIM SINCE THE SURGERY, UNLESS HE'S
19 BEEN BACK TO HWANG.

20 MR. RAKOWSKY: HE'S HAD NO MORE SURGERY BUT
21 FOLLOWUP.

22 THE COURT: WITH DR. BARBIAN?

23 MR. RAKOWSKY: AND DR. HWANG.

24 THE COURT: OKAY.

25 MR. ELLIOTT: SINCE HIS DEPOSITION, DR. HWANG'S

1 DEPOSITION IN 2004 OR 05 WHEN WE TOOK IT, WE RECEIVED
2 NOTHING ON HIM. THE SUPPLEMENTATION THAT MR. RAKOWSKY IS
3 DISCUSSING WAS THE EXHIBIT MEETING LAST WEEK. THERE WAS
4 NO SUPPLEMENTATION IN THE MEANTIME, IN BETWEEN 2005 AND
5 LAST WEEK. SO WE COULDN'T HAVE HAD NOTICE OF ANYTHING IN
6 REGARD TO THAT. SO THAT IS WHY I'M DRAWING THE LINE IN
7 THE SAND IN JULY OF 2005, THAT IS WHAT WE KNEW OR COULD
8 HAVE BEEN GIVEN ABOUT BARBIAN OR HWANG. AND IT WAS IN
9 JULY OF 2005, I THINK LITERALLY A FEW DAYS BEFORE TRIAL,
10 THAT MR. RAKOWSKY HAD SENT TO US THIS STACK OF THINGS,
11 WHICH IS NOT ALL MEDICAL BILLS, BUT THAT'S WHEN WE FIRST,
12 I THINK, ACTUALLY RECEIVED ANY BILLS AT ALL ON MS.
13 SANTACROCE OR MS. STEPHENS. AGAIN, THAT'S WHEN WE
14 RECEIVED THIS. WE NEVER HAD A CHANCE TO DO ANY DISCOVERY
15 ABOUT IT. I WOULD HAVE BEEN OBJECTING TO THESE THEN
16 BECAUSE IT'S NOT TIMELY PRODUCTION. JUST BECAUSE THEY
17 WERE GIVEN TO US IN 2005 DOESN'T MEAN WE HAD A CHANCE TO
18 DO ANYTHING ABOUT THEM OR OBJECT TO THEM. IN FACT, IF
19 YOUR HONOR WOULD REMEMBER WHEN THIS CASE WAS APPEALED, WE
20 STOOD IN YOUR OFFICE AND TALKED ABOUT THE CASE REMAINING
21 STATUS QUO UNTIL THE APPEAL WAS DONE. YOUR HONOR ISSUED
22 AN ORDER STAYING THE CASE. WE WERE STUCK ON GO, WHERE WE
23 WERE IN TIME AND AS FAR AS I'M CONCERNED, WHERE WE ARE
24 NOW, EXCEPT FOR BEING HANDED A BIG STACK OF DOCUMENTS.

25 THE COURT: THOSE RECORDS YOU HAVE THERE, YOU'VE

1 HAD THOSE SINCE WHEN.

2 MR. ELLIOTT: JULY 14, 2005 IS THE DATE ON THE
3 LETTER.

4 THE COURT: I CAN'T REMEMBER WHEN THE STAY WAS
5 LIFTED.

6 MR. ELLIOTT: I'VE NEVER SEEN AN ORDER LIFTING THE
7 STAY. I'M NOT GOING TO ARGUE THAT. THE ONLY DISCOVERY
8 ANYBODY HAS ASKED ME ABOUT, WHEN WE CAME BACK TO YOU IN
9 MARCH OR FEBRUARY WHEN WE WERE TALKING ABOUT NEEDING MORE
10 DISCOVERY AND DOING THINGS. IF WE HAD BEEN GIVEN BILLS
11 AND RECORDS THEN, WE COULD HAVE HAD AN OPPORTUNITY TO DO
12 SOMETHING ABOUT IT. WE'VE HAD ABOUT SIX MONTHS SINCE THE
13 APPEAL WAS OVER TO GET BACK INTO THE CASE AND WORK BEFORE
14 TODAY. BUT WE WERE NEVER GIVEN ANYTHING UNTIL LAST WEEK.
15 I CAN'T RESPOND TO IT. I CAN'T DEAL WITH IT. MY CARRIER
16 CERTAINLY CAN'T DEAL WITH IT.

17 THE COURT: GO AHEAD.

18 MR. SALEEBY: I TAKE THE SAME POSITION AS MR.
19 ELLIOTT. I KNOW MR. RAKOWSKY AND MR. FALGIONE HAVE DONE
20 EVERYTHING IN THEIR CIRCUMSTANCES THAT THEY CAN DO TO
21 SUPPLEMENT. I DON'T FAULT THEM. THE FACT REMAINS, WE'RE
22 JUST PREJUDICED. THE MEDICAL PICTURE HAS CHANGED
23 DRAMATICALLY. I DIDN'T GO BACK AND DO AN ACCOUNTING OF
24 THE MEDICAL BILLS IN 2005, BUT THE MEDICAL PICTURE WAS
25 VERY VERY SMALL IN COMPARISON TO WHAT EXISTS TODAY, AND

1 WE'RE NOT IN A POSITION TO ADEQUATELY RESPOND.

2 MS. SENN: YOUR HONOR, CAN I JUST DITTO THIS
3 RATHER THAN ARGUE. I DON'T KNOW IF WE CAN HAVE AN
4 AGREEMENT THAT THE OBJECTION OF ONE IS THE OBJECTION OF
5 ALL.

6 THE COURT: AND MOST OF THESE RECORDS DEAL WITH
7 MR. HOLT AND HIS TREATMENT OF DR. BARBIAN AND DR. HWANG,
8 IS THAT CORRECT?

9 MR. ELLIOTT: I'M ASSUMING SO.

10 MR. SALEEBY: I WOULD SAY IN VOLUME, YES, SIR, BUT
11 THERE ARE ALSO NEW MEDICALS AS TO MS. STEPHENS, RICKY
12 STEPHENS, IRENE SANTACROCE.

13 MR. RAKOWSKY: THERE'S NOTHING ON RICKY STEPHENS.

14 THE COURT: NOTHING ON RICKY STEPHENS.

15 MR. RAKOWSKY: NOT OF ANY CONSEQUENCE SINCE 04.

16 MR. SALEEBY: EXHIBIT 160 IS RICKY STEPHENS MEDS.

17 MR. RAKOWSKY: THAT IS NOT VOLUMINOUS.

18 MR. SALEEBY: I'M SAYING THAT'S SOMETHING NEW,
19 YOUR HONOR. THE MEDS THAT ARE LISTED IN THE NEW EXHIBIT
20 LIST OF PLAINTIFFS YOUR HONOR IS 137 FOR IRENE
21 SANTACROCE, 138 IS ALSO IRENE SANTACROCE. 139 IS FOR
22 MARGUERITE STEPHENS. 140 WHICH IS THE LARGEST IN VOLUME,
23 IS FOR MR. HOLT. AND 143 ARE MEDICALS FOR MARGUERITE
24 STEPHENS. 144, MEDS FOR IRENE SANTACROCE. 145, MEDS FOR
25 RODNEY LAIL, WHICH IS NEW TO US AS WELL. 146, MEDS FOR

1 DORIS HOLT. 160, MEDS FOR RICKY STEPHENS. 163, MEDS
2 AGAIN FOR DORIS HOLT, AND 164, MEDS FOR IRENE SANTACROCE.

3 THE COURT: 160 IS FOR WHO?

4 MR. SALEEBY: 160 IS FOR RICKY STEPHENS.

5 THE COURT: 163 IS FOR DORIS HOLT.

6 MR. SALEEBY: THAT'S RIGHT, YOUR HONOR.

7 THE COURT: 164 IS FOR WHO?

8 MR. SALEEBY: IRENE SANTACROCE.

9 MR. RAKOWSKY: YOUR HONOR, 160 THAT YOU JUST
10 MENTIONED IS JUST A SUMMARY OF MEDICAL EXPENSES THAT WERE
11 INCURRED BY DR. PARKER AND IT WAS DATED 1-2000 TO 2005.
12 THAT WAS PROVIDED PRIOR TO THE LAST CASE. IT'S JUST A
13 STATEMENT OF MEDICAL BILLS.

14 MR. SALEEBY: YOUR HONOR, IT MAY OR MAY NOT HAVE
15 BEEN PROVIDED IN 2005. I THINK GLENN HAS THE EXHIBITS
16 PRODUCED IN JULY. JUST BECAUSE THE DATE IS THAT DATE,
17 I'M NOT SURE IT WAS PROVIDED AT THAT TIME.

18 THE COURT: WHAT IS EXHIBIT 138?

19 MR. SALEEBY: 138, IT'S ENTITLED PARTIAL
20 ESTIMATION OF EXPENSES/DAMAGES OF IRENE SANTACROCE. WHEN
21 I LOOKED AT THE EXHIBIT, MY NOTE SAYS WAL-MART PHARMACY
22 ON IT. SO I'M ASSUMING THOSE ARE PHARMACY BILLS FROM
23 WAL-MART.

24 MR. RAKOWSKY: YOUR HONOR, WHAT IT IS, IS A NEW
25 SUMMARY OF PHARMACY BILLS THAT WERE; WE HAVE PROVIDED

1 SOME PHARMACY BILLS ON HER IN THE PAST, AND THIS JUST
2 KIND OF BRINGS US CURRENT FROM 01. IT'S 01 TO 07. MS.
3 SANTACROCE, THERE HAD BEEN SOME DOCUMENTS PROVIDED BY HER
4 AND I SUPPLEMENTED IT, SINCE SHE HAD ONGOING, AND
5 VIRTUALLY IN 04 THEY GOT SOME, AND THEN IN 05 THEY GOT
6 SOME ON HER, AND I JUST TRIED TO BRING IT TO WHERE IT
7 SHOULD BE TODAY. THAT'S WHAT WE DID. SOME OF THIS STUFF
8 IS REITERATION OF, LIKE 136 ARE THE OLD PHARMACY RECORDS,
9 AND SO I KEPT THEM SEPARATE BECAUSE I DIDN'T WANT TO
10 MISLEAD ANYBODY BY WHAT WE DID AND WHAT -- WHAT WE HAD
11 BEFORE AND WHAT WE HAD NOW. THAT IS WHY THERE'S SO MANY
12 DIFFERENT LISTINGS.

13 MR. ELLIOTT: YOUR HONOR, I'M NOT GOING TO STAND
14 HERE AND DIRECTLY DISPUTE MR. RAKOWSKY, BECAUSE I'M OLD
15 AND DUMB. SO I MAY HAVE MISSED SOMETHING. BUT WITH
16 REGARD TO EVERYONE EXCEPT MR. SPENCER, I DON'T RECALL
17 ACTUALLY BEING GIVEN ANY DOCUMENTATION ABOUT BILLS UNTIL
18 RIGHT BEFORE THE LAST TRIAL, WHICH WOULD HAVE BEEN,
19 AGAIN, WHEN WE WOULD HAVE BEEN AT THIS STAGE THEN TO
20 OBJECT TO THEM, BECAUSE THEY WERE LATE THEN. NOW, IF
21 THERE'S SOMETHING I MISSED, I'LL GLADLY OWN UP TO IT.
22 I'VE GONE BACK AND LOOKED AT MY DISCOVERY RESPONSES, AND
23 AS EVERY PLAINTIFF DID IN THEIR DEPOSITION, THEY TALKED
24 GENERALLY ABOUT PROBLEMS, MY HEART, MY THIS, MY STRESS,
25 MY THAT. BUT NOBODY PRODUCED ANY BILLS, UNTIL THIS STACK

1 THE WEEK BEFORE TRIAL LAST TIME, WHEN WE WERE GOING TO
2 HAVE OUR EXHIBIT MEETINGS, WHICH WE NEVER GOT TO DO.
3 THEN A FEW DAYS LATER, AS I RECALL, OR SOMETIME LATER,
4 MR. RAKOWSKY SENT THIS STACK. THESE ARE NOT ALL MEDICAL
5 BILLS, BUT OTHER THINGS AS WELL. AGAIN, THIS IS ALL JULY
6 2005. I DON'T CARE WHEN THEY ARE DATED, WE DIDN'T GET
7 THEM. I'M SURE IT'S NOT THEIR FAULT.

8 MR. RAKOWSKY: I'M NOT GOING TO DISAGREE. I DON'T
9 KNOW WHAT HAPPENED TO 04. I CAN'T SAY. I DO KNOW THAT
10 IN AN EFFORT TO TRY TO BRING IT TOGETHER IN PREPARATION
11 FOR 05, I TOOK THE RESPONSIBILITY TO TRY TO GET AS MANY
12 OF THE RECORDS TO THEM AS I COULD PRIOR TO OUR LAST
13 EXHIBIT MEETING, AND I KNOW THAT I PROVIDED A SUBSTANTIAL
14 AMOUNT OF MEDICAL RECORDS IN 05 THAT PROBABLY HADN'T BEEN
15 PROVIDED IN 04 FOR TWO REASONS. ONE, SOME OF THEM DIDN'T
16 EXIST, AND THE OTHER, I THINK MR. GOLDBERG WAS LACKING IN
17 GIVING THEM TO THEM, AND I JUST FELT COMPELLED TO TRY TO
18 DO WHAT I COULD IN GOOD FAITH TO BRING IT CURRENT. THEN
19 I BELIEVE THAT BECAUSE THEY WERE AWARE OF THE ONGOING
20 TREATMENT, THAT, THAT I HAD A RIGHT TO SUPPLEMENT WHAT I
21 HAD GIVEN THEM A YEAR AGO. THAT'S WHERE WE ARE.

22 I'M NOT TRYING TO HIDE ANYTHING, AND I'M CERTAINLY
23 NOT TRYING TO SQUEEZE ANYTHING THROUGH. THESE DOCTORS,
24 IT WAS MY INTENTION TO HAVE THEM TESTIFY ABOUT THE
25 ONGOING TREATMENT, AND HAVE THEM REFER TO RECORDS ABOUT

1 THE ONGOING TREATMENT AND THE AMOUNTS THAT THE BILLS
2 MIGHT HAVE BEEN DURING THE COURSE OF THEIR TREATMENT.
3 THAT IS THE WAY I WANTED TO APPROACH IT.

4 FOR THE OTHER PLAINTIFFS, I KNOW YOU'RE TIRED OF
5 HEARING ABOUT THIS, BUT I JUST HAD TWO LAWYERS IN FRONT
6 OF ME THAT JUST OBVIOUSLY DIDN'T DO WHAT THEY NEEDED TO
7 DO, AND I JUST THOUGHT MR. FALGIONE AND I HAD A
8 RESPONSIBILITY TO TRY TO CURE AS MUCH OF THAT AS WE
9 COULD. I KNOW YOU'RE TIRED OF HEARING ABOUT THAT.

10 THE COURT: NO, I'M NOT. NO, I'M NOT. YOU KNOW,
11 THE LAWYERS DO HAVE A DUTY TO SUPPLEMENT. MR. ELLIOTT,
12 THOSE RECORDS YOU INDICATED, THOSE TWO STACKS OF RECORDS
13 THERE THAT YOU GOT, WHICH YOU RECEIVED IN 2005, DO THOSE,
14 I ASSUME OVERLAP WITH THE ADDITIONAL RECORDS THAT MR.
15 RAKOWSKY GAVE Y'ALL LAST WEEK? OR ARE THERE ADDITIONAL
16 RECORDS THAT YOU GOT LAST WEEK IN ADDITION TO THOSE?

17 MR. ELLIOTT: YES, SIR. YES, SIR. EVERYTHING
18 FROM 2005 UNTIL TODAY OR LAST WEEK IS WHAT WE GOT LAST
19 WEEK.

20 THE COURT: ALL RIGHT. HOW ARE YOU PREJUDICED
21 WITH REGARD TO THOSE RECORDS THAT YOU'VE GOT THERE, THAT
22 YOU RECEIVED IN 2005?

23 MR. ELLIOTT: YOUR HONOR, AGAIN, WE RECEIVED THOSE
24 AFTER DISCOVERY HAD CLOSED IN THIS CASE ORIGINALLY. WE
25 WOULD HAVE BEEN HAVING THIS ARGUMENT ABOUT OBJECTIONS AND

1 TIMELY PRODUCTION OF MEDICAL BILLS AND RECORDS IN THAT
2 CASE AT THIS STAGE LAST TIME, BECAUSE THEY WEREN'T
3 PRODUCED DURING DISCOVERY. THE ONLY REASON WE DIDN'T
4 HAVE THAT CONVERSATION IS BECAUSE OF THE APPEAL. WHEN
5 THE CASE WENT UP ON APPEAL YOU LOST JURISDICTION, WE WERE
6 STATUS QUO, AS I UNDERSTOOD, AND YOU ISSUED AN ORDER
7 STAYING THE CASE. WHEN WE CAME BACK, THERE WAS A
8 CONVERSATION ABOUT WANTING MORE DISCOVERY AND OTHER
9 THINGS, BUT NOBODY MENTIONED ANY OF THIS. NOW, IF I'M ON
10 NOTICE OF WHAT'S IN MY FILE IN 2005, I HAVE TO LIVE WITH
11 THAT. YOU KNOW, WE CAN ARGUE AND SQUAWK ABOUT THAT, BUT
12 I CAN'T RESPOND TO THINGS I WAS NEVER GIVEN UNTIL LAST
13 WEEK.

14 THE COURT: I UNDERSTAND THAT. WHAT I'M GETTING
15 AT IS, I'M NOT SURE I SEE --

16 MR. ELLIOTT: I'VE HAD NO DISCOVERY, JUDGE. I'VE
17 NEVER HAD ANY CHANCE TO DO ANYTHING. I'M NOT GOING TO
18 SCREAM AND HOLLER AS MUCH ABOUT THIS AS I AM ABOUT THE
19 NEW STUFF, BUT I DON'T KNOW WHAT THE MEDICAL RECORDS
20 TOTAL OR ANYTHING LIKE THAT, AND YOU KNOW, WE MAY HAVE
21 DONE SOME DIFFERENT DISCOVERY, SENT OUT SOME
22 INTERROGATORIES OR SUBPOENAS OR DONE DIFFERENT THINGS HAD
23 WE BEEN GIVEN THIS STUFF TIMELY. I KNOW IT'S NOT THEIR
24 FAULT, THESE GENTLEMEN'S FAULT. BUT WE WEREN'T GIVEN
25 EVERYTHING, AND IN EVERY DEPOSITION WE PUT ON THE RECORD

1 WE'RE GOING TO HAVE TO COME BACK, WE DON'T HAVE ANYTHING
2 FOR YOU. TELL ME WHAT'S WRONG WITH YOU, AND THEY WOULD
3 JUST GENERALIZE. SOME OF THEM DIDN'T REMEMBER DOCTORS'
4 NAMES. SOME OF THEM DID, BUT SOME OF THEM COULDN'T
5 REMEMBER THE NAMES OF DOCTORS THEY WERE TREATING WITH.

6 THE COURT: I APPRECIATE WHAT YOU'RE SAYING. I'M
7 TALKING ABOUT TWO SEPARATE GROUPS HERE. I'M TALKING
8 ABOUT THOSE DOCUMENTS RECEIVED IN 2005, AND A SEPARATE
9 SET OF DOCUMENTS THAT WERE RECEIVED LAST WEEK.

10 MR. ELLIOTT: YES, SIR.

11 THE COURT: WITH REGARD TO THE DOCUMENTS THAT WERE
12 RECEIVED IN 2005, YOUR CONCERN IS THAT YOU DIDN'T GET TO
13 DO ANY OR, OR THE CONCERN OF THE OTHER COUNSEL IS THAT
14 YOU HAVEN'T HAD AN OPPORTUNITY TO DO ANY DISCOVERY WITH
15 REGARD TO THOSE RECORDS THAT YOU GOT IN 2005, WHICH YOU
16 WOULD HAVE ARGUED THEN, HAD IT NOT BEEN APPEALED, THAT
17 THEY WERE UNTIMELY, IS THAT RIGHT?

18 MR. ELLIOTT: ABSOLUTELY, YOUR HONOR. WITH YOUR
19 ORDER STAYING THE CASE, I'M NOT SURE WHEN DISCOVERY
20 ENDED, BUT --

21 THE COURT: ALL RIGHT. BUT SINCE THEN, SINCE
22 THEN, NO ONE HAS ASKED ME TO ENGAGE IN ANY DISCOVERY OR
23 OPEN DISCOVERY WITH REGARD TO THOSE.

24 MR. ELLIOTT: WHY WOULD I WANT TO DO THAT? THAT
25 IS NOT MY DUTY. IT'S NOT MY DUTY. IF THEY ARE GOING TO

1 SUPPLEMENT OR GIVE ME THINGS THAT ARE NEW THAT I NEED TO
2 DEAL WITH IN THIS TRIAL, THEN THAT'S -- AND I'M NOT
3 TALKING ABOUT THIS, I'M TALKING ABOUT THIS.

4 THE COURT: I'M TALKING ABOUT THAT, TOO.

5 MR. ELLIOTT: THAT'S MY POINT. THEY WERE LATE
6 THEN. WE'VE HAD, IN THEORY, NO DISCOVERY BETWEEN THEN
7 AND NOW EXCEPT THE SPECIAL THINGS YOU'VE ORDERED BECAUSE
8 OF TAPES, OR YOU KNOW, LATE THINGS, AND I SAY LATE, I
9 APOLOGIZE FOR THE WORD, MAYBE MS. SENN HAS BROUGHT UP,
10 NEW THINGS IN THE CASE. THESE AREN'T NEW THINGS. JUST
11 BECAUSE I'VE BEEN GIVEN A STACK OF BILLS, I DON'T KNOW
12 HOW I'M SUPPOSED TO GLEAN FROM THAT THAT TREATMENT IS
13 AUTOMATICALLY ONGOING, EITHER. SO AGAIN, I UNDERSTAND
14 THE POINT THAT THE COURT -- THE COURT'S DISTINCTION AND
15 I SEE THE BABY ABOUT GETTING TO BE SPLIT, BUT THAT'S MY
16 CONCERN. THESE ARE ALL NEW TO US. IF THEY CAN BE LINKED
17 UP AND THEY ARE GOING TO BRING DOCTORS TO TALK ABOUT
18 WHERE THEY WERE IN 2005 IN TREATMENT UP UNTIL THAT POINT,
19 YOU KNOW, THAT TO ME IS A DIFFERENT BALL OF WAX. I'VE
20 STILL GOT OBJECTIONS, BUT IT'S A WHOLE LOT EASIER TO
21 SQUAWK. YEAH. I GUESS THAT'S KIND OF LIKE SAYING JUDGE,
22 THEY NEVER GAVE ME MEDICAL BILLS. WHY DIDN'T YOU FILE A
23 MOTION TO COMPEL? IT'S NOT MY JOB. THEY HAVE GOT THE
24 BURDEN. THEY ARE SUPPOSED TO BRING IT TO ME BECAUSE I'VE
25 ASKED FOR IT IN DISCOVERY AND THE COURT'S MANDATORY

1 DISCLOSURE. ABSENT THEM BRINGING IT TO ME, WHY SHOULD IT
2 COME IN? I UNDERSTAND THESE GENTLEMEN HAVE MADE A
3 VALIANT EFFORT GETTING READY AND JUMPING INTO THIS CASE,
4 AND IT'S NOT THEIR FAULT, I'LL SAY THAT.

5 THE COURT: OBVIOUSLY, I DON'T HAVE IN FRONT OF ME
6 A LIST OF THE MEDICAL BILLS OR MEDICAL RECORDS THAT YOU
7 HAD, OR THAT THEY GAVE YOU IN 2005 VERSUS WHAT THEY
8 HANDED OVER TO YOU LAST WEEK.

9 MR. ELLIOTT: BECAUSE NONE HAS NEVER BEEN
10 PRODUCED, WHICH WE ASKED FOR. MY INTERROGATORY
11 SPECIFICALLY ASKED EACH PLAINTIFF TO NAME A SPECIFIC
12 ELEMENT OF DAMAGE AND SPECIFIC DOLLAR AMOUNT TO GO WITH
13 IT, AND SPECIFIC DOCUMENTS AND DOCTOR TO PROVE EACH ONE.
14 I GET ONE LITTLE PARAGRAPH ABOUT THEY CLAIM THEY GOT
15 MENTAL HEALTH PROBLEMS AND STRESS AND HEART RELATED.
16 THAT'S ALL I GET, ALL I GOT UNTIL THE WEEK OF TRIAL LAST
17 TIME, UNTIL THE APPEAL. I WOULD HAVE BEEN HAVING THIS
18 SCREAMING ARGUMENT BACK THEN, IF WE HAD GOT THERE.

19 THE COURT: WHAT DOCTORS ARE GOING TO BE HERE TO
20 TESTIFY?

21 MR. FALGIONE: YOUR HONOR, WE ANTICIPATE DR.
22 BARBIAN AND DR. HWANG. DR. TEANNE --

23 MR. RAKOWSKY: MAYBE IT WOULD BE BETTER TO TALK
24 ABOUT EACH PLAINTIFF, YOUR HONOR.

25 THE COURT: YES, SIR.

1 MR. RAKOWSKY: MR. HOLT IS GOING TO HAVE DR.
2 BARBIAN AND DR. HWANG. AND THAT'S IT FOR MR. HOLT.

3 DR. OEHLER, O-E-H-L-E-R, I THINK IS HOW YOU
4 PRONOUNCE HER NAME IS FOR IRENE SANTACROCE. DR. LAMM FOR
5 MARGUERITE STEPHENS.

6 THE COURT: L-A-N-D?

7 MR. RAKOWSKY: I THINK IT'S L-A-M-M. THEN AS FAR
8 AS MR. LAIL, MR. LAIL IS NOT GOING TO HAVE ANYBODY
9 TESTIFY AS FAR AS I RECALL. IS THERE ANYBODY?

10 MR. FALGIONE: NO.

11 MR. RAKOWSKY: HE'S GOING TO TESTIFY ON HIS OWN
12 WHAT HIS MEDICAL BILLS WERE FROM THE PHARMACY, BUT THAT'S
13 THE EXTENT OF HIS TESTIMONY. I DON'T KNOW IF I MISSED
14 SOMEBODY OR NOT. MS. HOLT. SHE HAS SOME TREATMENT, YOUR
15 HONOR. MS. HOLT IS, THERE'S AN INDIAN DOCTOR THAT I
16 CAN'T PRONOUNCE HIS NAME, AND DR. BARBIAN ALSO HAS SOME
17 TREATMENT FOR MS. HOLT. SWANINATHAN OR SOMETHING LIKE
18 THAT.

19 THE COURT: LET'S TAKE A SHORT RECESS. TEN
20 MINUTES.

21 (THEREUPON, THE PROCEEDINGS WERE ADJOURNED.)
22
23
24
25

1 I CERTIFY THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT
2 OF THE RECORD OF PROCEEDINGS AS HEREINABOVE SET OUT.

3

4 S/ VINCE ROLLAND

MAY 21, 2007

5

6 VINCE ROLLAND

DATE

7 OFFICIAL COURT REPORTER

8 UNITED STATES DISTRICT COURT

9 DISTRICT OF SOUTH CAROLINA

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ATTACHMENT 53PAGE 1 OF 1

Vincent Rolland FCRR
Official US Court Reporter
US District Court
P. O. Box 2317
Florence SC 29503
(843) 615-1654

July 20, 2007

To: Irene Santacroce

Re: Southern Holdings, Inc., vs. Horry County
May 8, 2007 Hearing

Dear Ms. Santacroce:

This letter is in response to your inquiry about the time the recess occurred at the above-referenced hearing.

The hearing began at 3:05 p.m., the recess was at 3:53 p.m., and I actually turned my machine off at 5:00 p.m.

The time notations are different from what I stated in our phone conversation, and the reason for that is, the machine wasn't set an hour ahead when daylight savings time began in April. This explains the approximate one hour difference in what I originally told you and what I have now calculated to be the correct times.

If you have any further questions, please let me know.

Sincerely,



Vincent Rolland

JOHN R. RAKOWSKY
ATTORNEY AT LAW
900 12th STREET
POST OFFICE BOX 3593
WEST COLUMBIA, SOUTH CAROLINA 29171

TELEPHONE
(803) 791-8830
FAX
(803) 794-7880

May 17, 2007

Mr. Alex Rozenaft
LawMax
459 Columbus Avenue, Suite 299
New York, NY 10024

Dear Mr. Rozenaft:

On the afternoon of Tuesday, May 8, 2007, Judge Harwell held an evidentiary hearing regarding the evidence both sides proposed to admit at trial. Almost every document of evidence the Plaintiffs submitted was challenged by the Defendants' counsel. Prior to my involvement in this case, former Plaintiffs' counsel Michael Goldberg missed specific filing deadlines set by the Court's scheduling order, causing a serious problem in the admissibility of a very large proportion of Plaintiffs' evidence. Consequently, as just one example, Judge Harwell indicated that the next day, he would rule as inadmissible at least 75% of Plaintiffs' medical expenses. Accordingly, Judge Harwell suggested that the Plaintiffs take the pre-trial settlement that was being offered by the Defendants.

Additionally, it was revealed by Defendants' Counsel Saleeby for the first time that former Plaintiffs' counsel Goldberg had received an offer of Judgment from the Defendants that neither I, nor former local Plaintiffs' counsel James Cooper nor the individual Plaintiffs had ever seen before or knew about. This is critical because if the case was decided in favor of the Plaintiffs below the thirty thousand dollars (\$30,000) threshold amount in the "Offer of Judgment," the Plaintiffs would have been responsible both collectively and individually for all the Defendants costs, including attorney's fees from the first date of the signing of the offer. Adrian and I estimated that that would be a minimum amount of between \$200,000 and \$300,000 and likely much more.

Judge Harwell strongly suggested that Adrian and I get the Plaintiffs to settle for their best interests before he made the ruling against the Plaintiffs' evidence at trial on Wednesday, May 9, 2007, and the Defendants then subsequently drop their settlement offer. Judge Harwell indicated at the evidence hearing on Tuesday, May 8, 2007, that, (1) most of the Plaintiffs' medical damages, (2) most of the Plaintiffs' evidence regarding the civil conspiracy and the questionable action of the defendants, and (3) almost all of the Southern Holdings, Inc. valuation evidence was not going to be allowed to be admitted because it was not timely filed with the Court. Judge Harwell told Adrian and me in chambers that he wanted for everything related to this case to end at one time, so we needed to drop the claims against Dave Smith and Ancil Garvin as part of the settlement.

Without the admission of the critical evidence, the Plaintiffs would have been exposed to a Judgment against them of \$300,000 to 400,000 if we did not settle the case due to the Defendants' "Offer of Judgment" filed on July 21, 2004. Judge Harwell told us in chambers on Wednesday, May 9, 2007, the Plaintiffs acceptance of the Defendants' offer was the best decision for the Plaintiffs to make given that he was going to rule against the admission of the majority of the Plaintiffs' evidence. Now that this case is behind us we can go after Goldberg for not filing the evidence in a timely manner, which caused these problems in the first place, along with Goldberg's flawed initial pleadings.

Sincerely,



John R. Rakowsky

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
Florence Division

SOUTHERN HOLDINGS, INC.,
et al.

Plaintiffs,

v.

HORRY COUNTY, SOUTH
CAROLINA, et al.
Defendants.

Case No.

4:02-CV-01859-RBH

MOTION TO DISMISS RONALD SEROTA AS COUNSEL

AND FOR A GAG ORDER TO BE ISSUED ON RONALD SEROTA

COMES NOW SOUTHERN HOLDINGS, INC., et al. (including all individual Plaintiffs), by and through counsel of record, and submit the following Motion to Dismiss Ron Serota as Counsel and a Gag Order be issued on Ron Serota.

Background and History

After a continuing series of negative incidents caused by Ron Serota, the Plaintiffs were forced to terminate the services of Ronald Serota as of March 6, 2007. These incidents include but are not limited to 1) the failure of Ron Serota to appear at the February 9, 2007, hearing of this Court on the above captioned matter, and the related failure to notify co-counsel and Plaintiffs prior to the hearing of his planned non-appearance, which resulted in Plaintiffs' co-counsel not being fully prepared for all issues

on the agenda for the hearing; 2) Attorney Serota consistently failed to follow directions of Lead Counsel; 3) Attorney Serota independently took actions without consent and consultation with co-counsels and informed co-counsels of such actions after the fact; 4) Attorney Serota took actions and frequently did not inform co-counsels of the actions causing inconsistent legal representation; 5) Attorney Serota undermined the authority of Lead Counsel and Plaintiffs by directly taking actions against the instructions of both Lead Counsel and the Plaintiffs; 6) Attorney Serota threatened a now former local co-counsel with filing a complaint with the South Carolina Bar against the co-counsel in an attempt to coerce the circuitous filing of a premature Motion for Sanctions against opposing counsel that Lead Counsel had rejected; 7) Attorney Serota attempted to circuitously divert case funds from Lead Counsel's trust account into Attorney Serota's trust account; and 8) Attorney Serota in at least one instance after he was terminated on March 6, 2007, circuitously passed privileged client communications to opposing counsel and made unsubstantiated accusations concerning his clients to opposing counsel without consent, knowledge and authority from Lead Counsel or Plaintiffs. This was done in a deliberate and wrongful undermining of Plaintiffs' interests due to Lead Counsel and Plaintiffs' dismissal of Ron Serota.

Prior to his termination, Ron Serota had been warned several times by Lead Counsel and Plaintiffs to stop such actions, and despite Ron Serota's agreeing to stop, such actions and agreeing to work in conjunction with co-counsels and Lead Counsel, Ron Serota continued undeterred in such damaging and wrongful actions, which ultimately culminated in his dismissal.

SUMMARY

Neither Plaintiffs nor the Defendants would appear to be prejudiced by Attorney Serota's dismissal as Plaintiffs continue to be represented by John Rakowsky and Adrian Falgione of Columbia, SC. John Rakowsky has been associated with this case as local Counsel since 2005. Attorney Ron Serota's dismissal will not affect the trial scheduling of this case.

Southern Holdings, Inc., a corporate plaintiff, continues to be represented by an attorney duly admitted to practice law in this district.

POINTS AND AUTHORITIES

South Carolina Rules of Professional Responsibility allow the Plaintiffs to dismiss a Counsel for any cause.

Therefore, based on the facts and circumstances as presented herein, and for good cause shown, this Court should grant an Order that Attorney Ron Serota be dismissed from further representation of the Plaintiffs in this action, and that Ron Serota be issued a Gag Order to prevent him from communicating any manner to any person or entity beside Plaintiffs and their current counsels on any and all matters concerning the Plaintiffs, and that Ron Serota within twenty four hours of the Order discharging Ron Serota that Ron Serota ship to John Rakowsky's office by Fed Ex two day shipment any and all documents, notes in any form and copies of all emails in his possession related to this case, including those accessible through computer, at Ron Serota's expense.

This 24TH day of March, 2007.

By: /s/ John R. Rakowsky

Federal I.D. # 3200
P.O. Box 3593
West Columbia, SC 29171
Phone (803) 791-8830
Fax (803) 794-2788
Attorney for the Plaintiffs

/s/Adrian Falgione
Federal I.D. # 5022
113 E. Main St.
Lexington, SC, 29071
Phone (803) 957-6453
Fax (803) 957 8902
Attorney for the Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Southern Holdings, Inc.; James Spencer;
Rodney Keith Lail; Irene Santacroce; Ricky
Stephens; Marguerite Stephens; and
Doris Holt;

Plaintiffs,

v.

Horry County, South Carolina; Horry County
County Sheriff's Department; Horry County
Police Department; James Albert Allen, Jr.,
Individually and in his official capacity as
an officer with the Horry County Sheriff's
Department; Sidney Rick Thompson,
Individually and in his official capacity as
an officer with the Horry County Sheriff's
Department; Jeffrey S. Caldwell,
Individually and in his official capacity as
an officer with the Horry County Sheriff's
Department; Charles McClendon,
Individually and in his official capacity as
an officer with the Horry County Police
Department; Jay Brantley, Individually and
in his official capacity as an officer with the
Horry County Police Department; Andy
Christensen, Individually and in his official
capacity as an officer with the Horry
County Police Department; Michael Steven
Hartness; Harold Steven Hartness; Ancil B.
Gavin, III; David Smith; and John Does,

Defendants.

Civil Action No.: 4:02-1859-RBH

ORDER

Pending before the court are: 1) Attorney Ron Serota's [Docket Entry #360] motion to be relieved as counsel; and 2) Plaintiffs' [Docket Entry #367] motion to dismiss Ron Serota as counsel and for a gag order.

While the documents filed and responses thereto indicate disputed matters exist between Attorney Serota and the Plaintiffs along with their counsel John Rakowsky as to the basis for the removal of Serota as counsel, all documents filed indicate a request for Attorney Serota to be relieved can be granted without prejudice to Plaintiffs or Defendants as Plaintiffs continue to be represented by Attorneys Rakowsky and Falgione. Further, dismissal of Serota will not affect the scheduling of the trial of this case.

The court should not have to spend its time refereeing matters or disputes between civil litigants and their own chosen lawyers, especially when, as indicated by Plaintiffs' remaining counsel, that relieving the prior counsel would not prejudice anyone. Those matters should be directed to the appropriate state disciplinary authority, if needed.

This is not a complaint involving a criminal defendant and issues of ineffective assistance of counsel, nor is it a complaint against an adversary's lawyer for improper conduct. Plaintiffs' Attorney Rakowsky clearly indicates that Attorney Serota can be relieved without prejudice to the Plaintiffs and the prosecution of their case or the scheduled trial.

However, Attorney Rakowsky wants this court to get involved in a dispute between he, his clients, and his former co-counsel regarding the transfer of all documents of any kind and the issuance of a "gag" order on Attorney Serota. This court generally declines to get involved in such disputes. It should be noted that the Plaintiffs in this case have had several different attorneys and that Attorney Rakowsky has been lead or co-counsel for a substantial period of time (since December of 2002).

The court will get involved only to the limited extent that there is prejudice or an effect on the trial schedule. Therefore, out of an abundance of caution, Attorneys Serota and

Rakowsky are ordered to confer, **today**, to determine if there are any essential or necessary documents in Serota's possession that Rakowsky does not already have that would prejudice Rakowsky's ability to prosecute the claim, and Serota should immediately transfer those documents to Rakowsky. Upon both counsel notifying the court that those essential and necessary documents, if any, have been received, the court will issue an Order relieving Serota as counsel.

With regard to any other documents, notes, etc., that Serota may have and with regard to a "gag" order request, the court declines to get involved with their dispute, but reminds the lawyers of their ethical obligations regarding disclosure of privileged information and that they are subject to each state's disciplinary authority.

Both Rakowsky and Serota shall notify the court, **today**, of the existence of any essential or necessary documents and whether Serota has turned over any essential or necessary documents.

IT IS SO ORDERED.

April 30, 2007
Florence, South Carolina

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION
C/A NO.: 4:02-cv-01859-RBH

Southern Holdings, Inc.; James)
Spencer; Rodney Keith Lail;)
Irene Santacroce; Ricky Stephens;)
Marguerite Stephens; and Doris)
Holt,)

Plaintiffs,)

vs.)

Horry County, South Carolina;)
Horry County Sheriff's Department;)
Horry County Police Department;)
James Albert Allen, Jr., Individu-)
ally and in his official capacity as)
an officer with the Horry County)
Sheriff's Department; Sidney Rick)
Thompson, Individually and in his)
official capacity as an officer with)
the Horry County Sheriff's)
Department; Jeffrey S. Caldwell,)
Individually and in his official)
capacity as an officer with the)
Horry County Sheriff's Department;)
Charles McClendon, Individually)
and in his official capacity as an)
officer with the Horry County)
Police Department; Jay Brantley,)
Individually and in his official)
capacity as an officer with the)
Horry County Police Department;)
Andy Christensen, Individually and)
in his official capacity as an officer)
with the Horry County Police)
Department; Michael Steven)
Hartness; Harold Steve Hartness;)
Ancil B. Garvin, III; David Smith;)
Richard B. Way, and John Does,)

Defendants.)

RESPONSE OF DEFENDANTS
MICHAEL STEVEN HARTNESS AND
HAROLD STEVE HARTNESS TO
MOTIONS OF PLAINTIFFS SOUTHERN
HOLDINGS, INC., RODNEY KEITH
LAIL, IRENE SANTACROCE, RICKY L.
STEPHENS, AND MARGUERITE
STEPHENS TO OVERTURN
SETTLEMENT, REINSTATE LITIGATION,
AND INITIATE INVESTIGATION,
AND

REQUEST FOR SANCTIONS
AGAINST PLAINTIFFS SOUTHERN
HOLDINGS, INC., RODNEY KEITH LAIL,
IRENE SANTACROCE, RICKY L. STEPHENS
AND MARGUERITE STEPHENS

STATEMENT OF PERTINENT FACTS

As the Court is aware, both the factual and procedural histories of this case are long and complicated. However, the facts needing to be considered by this Court which are related to Plaintiffs' Motions to Vacate Settlement and Request for Investigation are simple and straightforward.

Facts Related to Settlement of Case

Mediation of this case took place on October 8, 2004. At mediation the Defendants collectively offered Plaintiffs Fifty Thousand and No/100 (\$50,000.00) Dollars to settle all claims against all Defendants. That settlement offer was comprised of an offer of Twenty Thousand and No/100 (\$20,000.00) Dollars from the Hartness Defendants and an offer of Thirty Thousand and No/100 (\$30,000.00) Dollars from all remaining Defendants. Trial of this case was first scheduled to begin on July 19, 2005. On July 12, 2005, the Hartness Defendants served then Plaintiffs' counsel John Rakowsky, Ron Serota, James Cooper, and Mark Hardee with an Offer of Judgment in the amount of Twenty One Thousand and No/100 (\$21,000.00) Dollars. Copies of the cover letter to counsel, Offer of Judgment, and documents evidencing successful facsimile transmission of the letter and Offer of Judgment to opposing counsel are attached hereto as **Exhibit A**. From that time until a few days before the second trial of this case was scheduled to begin on May 8, 2007, there were virtually no conversations whatsoever between counsel for the Hartness Defendants and counsel for the Plaintiffs regarding settlement of this case. Now and again an off-hand comment may have been made by one attorney or the other that it would be nice to get the

case settled but there were absolutely no monetary discussions during that time period. In the early evening hours of May 8, 2007, after the parties spent the day in Court, counsel for the Hartness Defendants was authorized to offer the Plaintiffs the sum of Twenty Five Thousand and No/100 (\$25,000.00) Dollars to settle all claims against those Defendants. At approximately 9:00 p.m. that evening the undersigned contacted Plaintiffs' counsel Adrian Falgione via cell phone to advise that the Hartness Defendants had increased their settlement offer to Twenty Five Thousand and No/100 (\$25,000.00) Dollars. During that telephone conversation Attorney Falgione advised that in light of the totality of the circumstances surrounding the case he would encourage his clients to accept the settlement offer but that he would have to speak with his clients and that it would be sometime the next morning before he could advise of their decision. When the undersigned arrived at the courthouse on May 9, 2007, he was advised by Attorneys Falgione and Rakowsky that his clients had agreed to accept the offer of Twenty Five Thousand and No/100 (\$25,000.00) Dollars from the Hartness Defendants and that they were waiting to hear back from counsel for the remaining Defendants in response to a settlement demand they had made that morning. In approximately thirty minutes the undersigned learned through general discussions involving all counsel that Plaintiffs had agreed to settle all claims in the case, except those against Defendants Smith and Garvin, for the total sum of Fifty Five Thousand and No/100 (\$55,000.00) Dollars (Twenty Five Thousand and No/100 (\$25,000.00) Dollars from the Hartness Defendants and Thirty Thousand and No/100 (\$30,000.00) Dollars from the remaining

Defendants). Shortly thereafter the terms and conditions of the settlement agreement were placed on the record before this Court. Plaintiffs Irene Santacroce, Marguerite Stephens, Ricky Stephens, and Rodney Lail were present in the courtroom when the terms and conditions of the settlement agreement were placed on the record and they voiced no objection whatsoever. Counsel is uncertain whether or not Dan Green, CEO of Southern Holdings, Inc., was in the courtroom because he has never met that person. A copy of the transcript of the proceedings during which the terms and conditions of this settlement were placed on the record is attached hereto as **Exhibit B**.

Facts Related to Involvement of FBI

Plaintiffs have asked this Court order an investigation into why the FBI was involved in the analysis of videotapes related to this case. No such investigation is necessary or warranted as the explanation of how the FBI became involved in this matter is very simple. Although neither the Hartness Defendants nor the undersigned were directly involved in that process, the undersigned offers the following historical knowledge to the Court for consideration in response to these motions.

At the time Plaintiffs' counsel first advised defense counsel that Plaintiffs intended to present Steve Cain as an expert witness in this matter, Attorney Robert E. Lee was lead counsel for all Defendants other than the Hartness Defendants. Production by Plaintiffs' counsel of the initial report of expert Steve Cain was the first time any of the Defendants were aware that Plaintiffs believed and/or were going to allege that one or more of the videotapes from the patrol

cars involved in the stop and arrest of Plaintiff Holt/Spencer had somehow been altered or erased. Attorney Lee reported this allegation to John Weaver, County Attorney for Horry County. Although the undersigned was not involved in that communication or the related discussions, the undersigned does know that as a result of this allegation of public corruption Attorney Weaver and/or others associated with Horry County and the other Defendants determined that the South Carolina Law Enforcement Division (SLED) should be advised and asked to look into the allegation. As the facts were relayed to the undersigned, when Horry County reported these allegations to SLED it determined that it should look into the matter and it immediately requested that it be provided with the videotapes in question. The next day a SLED agent traveled from Columbia to the offices of Attorney Lee and picked up the videotapes for analysis. Shortly thereafter, SLED determined that it did not have the technical capability to properly analyze the videotapes and as a result it requested that the FBI analyze the videotapes. This Court is aware of the subsequent difficulties encountered by Defendant Horry County Police Department in attempting to have the FBI videotape expert cooperate and testify in this matter. It is therefore clear that the FBI's involvement in this matter was not voluntary nor was there some inappropriate use of federal funds.

LEGAL AUTHORITIES

Enforcement of Settlement

The United States Court of Appeals, Fourth Circuit, has ruled on the enforcement and/or overturning of settlements using the theories and law of

principal and agent/apparent authority and contract. Given the circumstances as alleged by Plaintiffs in their letters/motions, analyzing the underlying circumstances in this case from the perspectives of both apparent authority and simple contract law may be necessary.

In the case of Auvil v. Grafton Homes, Incorporated, 92 F.3d 226 (1996), the United States Court of Appeals, Fourth Circuit, analyzed a case using the law of principal and agent, and apparent authority, to overturn a settlement that had been enforced by the District Court. In that case the Fourth Circuit Court of Appeals stated the relevant principles of agency as follows:

It is generally accepted that when a client retains an attorney to represent him in litigation, absent an express agreement to the contrary, the attorney has implied authority to conduct any litigation and to negotiate its resolution. The substantive decisions of whether to bring suit, to dismiss suit, or to settle are not by implication ones that the attorney is authorized to make. Apparent authority results when a principal's manifestation of an agent's authority to a third-party, regardless of the actual understanding between the principal and agent...When a principal, through his acts or omissions, causes a third-party, in good faith and in the exercise of reasonable prudence, to rely on the agent's authority to act on the principal's behalf, the agent can bind the principal...An agent's authority must be conferred by some manifestation by the principal that the agent is authorized to act on the principal's behalf. Auvil, supra, at 230 (citations omitted).

In the case of Hensley v. Alcon Laboratories, Inc., 277 F.3d 535, the United States Court of Appeals, Fourth Circuit, analyzed a case using standard contract law to overturn a settlement that had been enforced by the District Court. In that case the Fourth Circuit Court of Appeals stated the relevant principles of agency as follows:

Although resolution of a motion to enforce a settlement agreement draws on standard contract principles, it may be accomplished

within the context of the underlying litigation without the need for a new complaint. To this extent, District Courts have inherent authority, deriving from their equity power, to enforce settlement agreements...Because exercise of the authority to enforce settlement agreements depends on the parties' agreement to a complete settlement, the Court can not enforce a settlement until it concludes that a complete agreement has been reached and determines the terms and conditions of the agreement...Next, if an agreement for complete settlement of the underlying litigation, or part of it, has been reached and its terms and conditions can be determined, the Court may enforce the agreement summarily as long as the excuse for nonperformance of the agreement is "comparatively insubstantial." Having second thoughts about the results of a valid settlement agreement does not justify setting aside an otherwise valid agreement, and the fact that the agreement is not in writing does not render it unenforceable. Thus, to exercise its inherent power to enforce a settlement agreement, a District Court (1) must find that the parties reached a complete agreement and (2) must be able to determine its terms and conditions. Hensley, supra, at 540-541 (citations omitted).

Request for Sanctions

By signing and filing their respective motions, Plaintiffs Southern Holdings, Inc., Rodney Keith Lail, Irene Santacroce, Ricky L. Stephens, and Marguerite Stephens subjected themselves to the ethical requirements of this Court, including Rule 11 *FRCP* and Local Rule 7.09 D.S.C.

Pursuant to Rule 11 *FRCP*, when the moving Plaintiffs signed and filed their motions they were representing to the Court and to opposing parties and counsel that the allegations of their motions were

- to the best of their knowledge, information, and belief;
- formed after an inquiry reasonable under the circumstances;
- not presented for improper purpose; and,
- had evidentiary support.

If the Court finds that the moving parties have violated Rule 11 it may impose an

appropriate sanction.

Likewise, pursuant to Local Rule 7.09 D.S.C., this Court may impose sanctions against the moving Plaintiffs if it determines that these motions are frivolous or filed for purposes of delay.

DISCUSSION

Plaintiffs' Motions to Vacate Settlement are not supported either by facts or the governing case law and should be denied

Plaintiffs argue their lawyers acted outside the scope of their authority when they agreed to settle this case. However, throughout the many years of this litigation Plaintiffs' counsel have handled all aspects of this case for their clients with no indication or statement whatsoever from Plaintiffs that counsel did not have the authority to act in their best interests. Therefore, not only did counsel have apparent authority to negotiate and bind their clients with regard to the terms of a settlement agreement but it is the position of the Hartness Defendants that applicable case law supports their contention that they had the right to rely upon this apparent authority when negotiating with Plaintiffs' counsel. **Auvil, supra.**

To the extent that the Court believes it needs to determine some act or manifestation by the moving Plaintiffs to confirm that Plaintiffs' counsel had the authority to negotiate a settlement and bind them to the terms of the settlement, this Court need look no further than its own memory and the transcript of the May 9, 2007, proceedings. The moving Plaintiffs were in the courtroom when Attorney Rakowsky, on behalf of the Plaintiffs, and counsel for each of the Defendants made a detailed statement into the record of the terms and conditions of the

settlement agreement. At no time when the terms and conditions of the settlement were being placed on the record did any of the moving Plaintiffs object or even make any comment. Near the end of the proceedings the Court advised counsel and Plaintiffs who were present that he was going to bring the members of the jury into the courtroom, tell them that the case had been resolved and that they were discharged, the Court asked, "Any objection to that by anybody?" None of the moving Plaintiffs made any comment or response to that question.

Transcript of May 9, 2007 proceeding, p. 5.

It is clear that this Court has the authority to overturn or enforce the settlement stated on the record on May 9, 2007. Hensley, supra. Pursuant to the Hensley case, in order to exercise its inherent power to enforce a settlement agreement, the District Court (1) must find that the parties reached a complete agreement and (2) must be able to determine its terms and conditions. Once again, in order to satisfy those two requirements the Court need look no further than its memory and the transcript of the proceedings of May 9, 2007. As a review of the transcript of the May 9 proceedings demonstrates, the exact terms and conditions of the settlement agreement between the Plaintiffs and the Defendants were carefully and precisely stated into the record by defense counsel. Moreover, the moving Plaintiffs were in the courtroom and they did not make any comment or objection to either the representations made by their counsel or the terms and conditions stated by defense counsel. Not only was the conduct of the moving Plaintiffs during that hearing confirmation to both Court and the other parties that the attorneys had the authority to negotiate and act on

their behalf but their failure to object to the terms and conditions of the settlement placed on the record was reasonably interpreted by both the Court and opposing parties as their consent to those terms and conditions.

No Investigation regarding the involvement of the FBI in this matter is warranted

As previously set forth in this Memorandum, the explanation of how and why the FBI came to analyze videotapes related to this case is simple and straightforward. No investigation in that regard is needed or warranted.

The Court should impose sanctions upon the moving Plaintiffs

At every point in this litigation these Plaintiffs have alleged that there was a vast conspiracy against them involving a District Attorney from North Carolina, an attorney from North Carolina, a private investigator, the Horry County Sheriff's Department, the Horry County Police Department, and possibly even SLED and the FBI. Plaintiffs made very specific allegations regarding Defendant Harold Steve Hartness claiming that he was in Horry County on a certain date using a car trying to run one of the Plaintiffs' vehicles off the road. Even when presented with specific documentary evidence and the testimony of a witness proving that on the date in question Mr. Hartness was in North Carolina with a client, these Plaintiffs ignored the evidence and persisted in their allegations. These Plaintiffs further specifically allege that Plaintiff Michael Hartness was involved in the stop and arrest of Plaintiff Holt/Spencer and even directed law enforcement authorities during that stop and arrest. In spite of the facts that 1) every law enforcement officer involved identified the picture of the person Plaintiffs allege was Michael Hartness as actually being one of the Horry County Law Enforcement Officers,

and 2) credit card records clearly showed that Michael Hartness was in North Carolina on that day, Plaintiffs continued to insist that Michael Hartness was, in fact, at the scene and controlling the officers. The point of reminding the Court of these facts is to demonstrate to the Court that these Plaintiffs not only see conspiracies all around them but they refuse to believe reasonable evidence to the contrary when it is presented to them.

Similarly, when – for whatever reason – these Plaintiffs changed their minds and did not wish to accept the settlement they agreed to in open Court, they reverted to their normal *modus operandi* by alleging that their lawyers and counsel for the Defendants are in some sort of conspiracy against them to force them to take a settlement they do not want. Nothing could be further from the truth. The undersigned is certain that he was not involved in any conspiracy and he knows that Attorneys Rakowsky and Falgione worked very hard for their clients trying to make as much out of this case as possible for their clients. It is not the attorneys' fault that each of the Plaintiffs had severe credibility problems and the possibility of success on those claims – especially the fanciful claims of conspiracy – could not be supported. Moreover, as explained earlier in this Memorandum, the Offers of Judgment served by the Defendants upon the Plaintiffs had been in place for several years and they were not “fabricated” at the last minute.

The undersigned will be interested to hear from the moving Plaintiffs what steps they took to perform “an inquiry reasonable under the circumstances” (as required by Rule 11) before they filed these motions. When these Plaintiffs are

unable to demonstrate an appropriate and reasonable inquiry prior to filing the motions, and when they can present no objective evidence to support their allegations of conspiracy and collusion among counsel of record, this Court should award sanctions to all parties and counsel of record who have had to spend time and effort responding to these allegations.

CONCLUSION

At the time of the proceedings in open Court on May 9, 2007, Attorneys Falgione and Rakowsky possessed – at a minimum – apparent authority to negotiate and settle this case on behalf of all of their clients, including the moving Plaintiffs. Irene Santacroce, Marguerite Stephens, Ricky Stephens, and Rodney Lail all sat in open Court and heard the terms and conditions of the settlement as placed into the record and at no time did any of them object, complain, or give the Court any indication that they were not in full and complete agreement with their attorneys concerning the settlement agreement.

Upon information and belief, the moving Plaintiffs did not perform any inquiry – reasonable or otherwise – before filing the present motions. Further, these Plaintiffs can not have any evidence to support their allegation that their attorneys colluded with defense counsel as such conduct simply did not take place. At best these Plaintiffs' allegations are reckless and at worst they are making some inappropriate attempt to harm the reputation of counsel and/or to attempt to "set up" their attorneys for some later lawsuit alleging malpractice. Either way these Plaintiffs' allegations are unsupported, inappropriate, and these Plaintiffs should be sanctioned for such conduct.

Due to the foregoing, the Hartness Defendants respectfully request this Court issue an Order

- denying these Plaintiffs' Motions to Vacate Settlement, Reinstate Litigation, and for Investigation;
- requiring these Plaintiffs to conform to the terms and conditions of the settlement set forth on the record on May 9, 2007, and to execute all documents related thereto; and,
- finding the moving Plaintiffs in violation of Rule 11 *FRCP* and Local Rule 7.09 D.S.C. and imposing appropriate sanctions against the moving Plaintiffs which, at a minimum, reimburse all counsel and parties and the Court for all attorneys' fees and expenses incurred in having to respond to these unsupported and frivolous motions.

Respectfully submitted,

AIKEN, BRIDGES, NUNN, ELLIOTT &
TYLER, P.A.

By: s/E. Glenn Elliott

E. GLENN ELLIOTT

Federal I.D. #700

Attorneys for Defendants

Michael Steven Hartness and

Harold Steve Hartness

181 E. Evans Street

P. O. Drawer 1931

Florence, SC 29503

(843) 669-8787

Florence, South Carolina
June 12, 2007

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION**

Southern Holdings, Inc., et al.,	)	
	)	
Plaintiffs,	)	Civil Action No. 4:02-1859-RBH
	)	
v.	)	
	)	
Horry County, South Carolina, et al.,	)	
	)	
Defendants.	)	
_____	)	

**MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION TO VACATE SETTLEMENT**

The Plaintiffs Southern Holdings, Inc., Irene Santacroce, Marguerite Stephens, Ricky Stephens, and Rodney Lail have filed letters requesting that the Court vacate or set aside the settlement agreement reached by the parties and placed on the record in open court on May 9, 2007.¹ The letters/motions were not submitted by these Plaintiffs' counsel of record. These Plaintiffs have submitted this request for relief from the settlement *pro se* and without any motion to relieve their current counsel of record.

These Plaintiffs request that the Court vacate or set aside the settlement based upon the "fraud and coercion committed on the Plaintiffs by Defendants' Counsel and Plaintiffs' Counsel

¹ The Plaintiffs Spencer and Holt have not filed any letter or motion.

through threats, untruthful statements with the use of a bogus document called an 'Offer of Settlement.'" (Doc. # 486).² The governmental Defendants take great exception to the frivolous and unsubstantiated claims of fraud and coercion committed by their counsel. The record establishes that a proper settlement was reached between the parties and was communicated to and accepted by the Court and the litigants in open court. The Court is requested to reject these Plaintiffs' attempt to repudiate this settlement.

DISCUSSION

"Compromises of disputed claims are favored by the courts." *Clarion Corp. v. American Home Products Corp.*, 494 F.2d 860, 863 (7th Cir. 1974), *citing Williams v. First National Bank*, 216 U.S. 582 (1910). Likewise, "[a] strong policy of the Fourth Circuit is to foster settlement in order to advantage the parties and to conserve scarce judicial resources." *United States v. Centex-Simpson Construction Co.*, 34 F.Supp.2d 397, 399 (N.D. W.Va. 1999), *citing Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177 (4th Cir. 1993).

"The Fourth Circuit has clearly held that district courts possess the inherent power to enforce settlement agreements and to enter judgments based on such agreements without a plenary hearing." *Young v. Federal Deposit Ins. Corp.*, 103 F.3d 1180, 1194 (4th Cir. 1997), *citing Petty v. Timken Corp.*, 849 F.2d 130 (4th Cir. 1988). The Fourth Circuit has further recognized that "having second thoughts about the results of a settlement agreement does not justify setting aside an otherwise valid agreement." 103 F.3d at 1195.

² Each of the Plaintiffs phrase the basis for their motion slightly differently, but the substance is the same. These Plaintiffs allege that the Offers of Judgment were "bogus" or fabricated and that the advice received from their own counsel was faulty.

The district court in *United States v. Centex-Simpson Construction Co.*, 34 F.Supp.2d 397 (N.D.W.Va. 1999), ruled that "a settlement agreement, voluntarily entered into, cannot be repudiated by either party and will be summarily enforced by the court." 34 F.Supp.2d at 399. The district court explained: "when parties have agreed to a settlement that was reduced to terms of dollars and cents, the district court has the power and authority to enforce payment of that amount and should not set aside the agreement absent substantial unfairness." *Id.* The district court further recognized that "[a] settlement made in open court ... is a valid, enforceable agreement and need not be reduced to writing." *Id.* "Failure to complete formal settlement papers does not indicate that a settlement agreement was not in fact reached." 34 F.Supp.2d at 400.

In the case at bar, the parties entered into a valid, enforceable settlement agreement. The material terms of that agreement were entered by the parties on the record in open court and were accepted by this Court. The terms of the settlement were communicated to the Court in the presence of the Plaintiffs who now attempt to repudiate the settlement. Those parties never voiced any concern or disagreement with the settlement in open court. Moreover, no attempt was made to communicate to the Court any disagreement or reservations with the settlement until almost a full month after the case was settled. The Plaintiffs' claims that they were not provided an opportunity to object to the settlement is unavailing.

Furthermore, these Plaintiffs' claim that the settlement was the result of fraud committed by the Defendants' counsel is frivolous and without any evidentiary basis. Such bald accusations of wrongdoing are indeed deserving of Rule 11 sanctions.³ The record reflects that the governmental Defendants served their Offer of Judgment by mail and by facsimile transmission

³ The governmental Defendants join in and adopt the request by the Hartness Defendants that the Court award sanctions under Rule 11 against the moving Plaintiffs.

on July 21, 2004, on the Plaintiffs' counsel. *See*, Exhibit 1. The Plaintiffs' counsel then responded with an objection to the Offer of Judgment on the very next day, July 22, 2004. *See*, Exhibit 2. While the Plaintiffs complain that the Offer of Judgment was not served on their local counsel, the objection served the next day was signed by both the lead counsel Michael L. Goldberg as well as local counsel, James D. Cooper. Clearly, the Plaintiffs' counsel was well aware of the Offer of Judgment and responded thereto in a timely manner.⁴

At any rate, these documents clearly demonstrate that the Plaintiffs' bald allegations that the Offer of Judgment was fabricated for "purposes of coercion" are frivolous. Clearly, the Defendants' counsel did not prepare the Offer of Judgment at the time of trial in an attempt to coerce or trick the Plaintiffs into a settlement. Consequently, the Court should reject any contention that the settlement was procured through fraud or deceit by the Defendants or their counsel.

These Plaintiffs also maintain that the settlement was procured by misrepresentations by their own counsel regarding anticipated evidentiary rulings by the Court and the potential consequences of the Offer of Judgment. While it is appropriate to allow John Rakowsky and Adrian Falgione to address their own conduct in this case, the governmental Defendants submit that erroneous information (if any) received by the Plaintiffs from their own counsel is not a valid basis for repudiating a settlement. If their counsel breached any standard of care in

⁴ The Plaintiffs' apparent contention that the Offer of Judgment was invalid because it was not served on local counsel lacks merit. While Local Civil Rule 83.1.06 provides that "the service of all pleadings and notices as required shall be sufficient if served upon only the associated local counsel," the rule does not require that local counsel must be served in order for proper service to be effected. The Offer of Judgment was properly served in this case when service was effected on Michael L. Goldberg. At any rate, no prior objection to service was raised, and the objection served by Plaintiffs' counsel demonstrates that local counsel was aware of and rejected the offer.

advising their clients (which is not suggested), the Plaintiffs have an available remedy for damages, and the repudiation of a valid and enforceable settlement in open court is not the appropriate remedy.

The Fourth Circuit, in fact, has espoused that very holding. In *Petty v. Timken Corp.*, 849 F.2d 130 (4th Cir. 1988), the Court addressed a plaintiff's motion to vacate a settlement made in open court based upon allegations of "improper inducement" and inadequate representation by his counsel. The Court explained:

Even were we to assume that the charges of misconduct subsequently brought against [counsel] by [plaintiff] were true, it would not create a material question regarding the validity of that settlement. When a litigant voluntarily accepts an offer of settlement, either directly or indirectly through the duly authorized actions of his attorney, *the integrity of the settlement cannot be attacked on the basis of inadequate representation by the litigant's attorney.* In such cases, any remaining dispute is purely between the party and his attorney. Unless the resulting settlement is substantially unfair, judicial economy commands that a party be held to the terms of a voluntary agreement.

849 F.2d at 133. (Emphasis added).

Nonetheless, the governmental Defendants submit that the concerns allegedly voiced to their clients by Rakowsky and Falgione were legitimate and constitute prudent advice. While these Plaintiffs acting *pro se* challenge whether they could have been held liable for attorney's fees as a component of the awardable "costs" under Rule 68, FRCP, they fail to recognize that this action was brought pursuant to 42 U.S.C. § 1983. As such, attorney's fees are a component of costs. See, *Marek v. Chesny*, 473 U.S. 1 (1985).⁵ The Plaintiffs' counsel were correct to

⁵ See, *Lucas v. Wild Dunes Real Estate, Inc.*, 197 F.R.D. 172 (D.S.C. 2000), in which Judge Norton awarded the defendant attorney's fees as part of its post-offer costs. Citing *Marek*, the Court recognized that the term "costs" under Rule 68 included attorney's fees if recoverable under the relevant substantive statute. In that case, the plaintiff rejected an offer of judgment of \$20,000 and then recovered only \$5,500 in damages. As a result, Judge Norton

anticipate that the governmental Defendants would have certainly attempted to recover any post-offer attorney's fees and litigation costs awardable under Rule 68 and 42 U.S.C. § 1988. The Plaintiffs' counsel were also correct to anticipate that the claimed costs would have been substantial given the amount of costs incurred since July 21, 2004, and the expected costs from a three to four week trial.

Further, the advice allegedly provided by Rakowsky and Falgione regarding evidentiary rulings that could be anticipated was also sound. During the in limine hearing on May 8, 2007, and the subsequent in chambers discussion, the Court voiced considerable concern with the evidence that had not been properly produced during discovery. The Plaintiffs' counsel were also able to gauge the inherent weaknesses in other aspects of the Plaintiffs' case including anticipated rulings on other evidentiary issues. Counsel apparently attempted to provide their clients with the stark realities of their case, and the Plaintiffs wisely acted on that advice. While they may now have second thoughts and are more willing with additional reflection to take their chances, that is not a proper basis for repudiating a settlement to which they implicitly concurred in open court. The Fourth Circuit has soundly rejected any attempt to repudiate a settlement where the litigant has "second thoughts" regarding the settlement. *Petty v. Timken Corp.*, 849 F.2d 130, 133 (4th Cir. 1988). The Court further explained:

A litigant who enters the judicial process through the agency of freely chosen counsel always assumes a certain risk that the result achieved will not be satisfactory. Defeated expectations do not, therefore, entitle the litigant to repudiate commitments made to opposing parties or to the court.

Id.

awarded the defendant its attorney's fees as a component of "costs" because the relevant statute allowed for an award of attorney's fees to a defendant who qualified as a prevailing party.

In sum, these Plaintiffs have not presented this Court with any legitimate basis to repudiate a settlement made in open court in their presence. There is no question that a settlement was reached. The terms of that settlement were spelled out on the record. The Plaintiffs' claims of a fraudulent Offer of Judgment have been easily disproved and shown to be frivolous. The Plaintiffs' claims of any improper conduct by their own counsel or faulty advice simply will not support the repudiation of the settlement under Fourth Circuit precedent. At best, the Plaintiffs have expressed "second thoughts" or reservations regarding the settlement to which they agreed in open court. That is not a sufficient or proper basis for setting aside the settlement.

CONCLUSION

Based the foregoing discussion, the Defendants Horry County, Allen, Thompson, Caldwell, McClendon, Brantley, and Christensen respectfully request that this Court deny the Plaintiffs' motions to vacate or set aside the settlement reached on May 9, 2007. These Defendants further join the request by the Hartness Defendants that the Court award sanctions under Rule 11 against the moving Plaintiffs.

Respectfully submitted,

DAVIDSON, MORRISON AND
LINDEMANN, P.A.

BY: s/ Andrew F. Lindemann

ANDREW F. LINDEMANN #5070

1611 Devonshire Drive

Post Office Box 8568

Columbia, South Carolina 29202

TEL: (803) 806-8222

FAX: (803) 806-8855

E-MAIL: alindemann@dml-law.com

and

BY: s/ James M. Saleeby, Jr.
JAMES M. SALEEBY, JR. #6715
AIKEN, BRIDGES, P.A.
181 East Evans Street, Suite 409
Post Office Drawer 1931
Florence, South Carolina 29503
(843) 669-8787

*Counsel for Defendants Horry County Sheriff's
Department, Allen, Thompson and Caldwell*

BY: s/ Sandra J. Senn
SANDRA J. SENN
3 Wesley Drive
Post Office Box 12279
Charleston, South Carolina 29422-2279
(843) 556-4045

*Counsel for Defendants Horry County,
McClendon, Brantley, and Christensen*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

SOUTHERN HOLDINGS, INC., et al.,	)	Civil Action No.: 4:02-cv-1859-RBH
	)	
Plaintiffs,	)	
	)	
v.	)	ORDER ON MOTIONS
	)	PURSUANT TO F.R.A.P. 4(a)(4)
HORRY COUNTY, et al.,	)	
	)	
Defendants.	)	
_____	)	

Pending before the court are: 1) Letter/motion [Docket Entry # 483] by Dan Green, C.E.O. of Southern Holdings, Inc.; 2) Letter/motion [Docket Entry # 484] by Irene Santacroce; 3) Letter/motion [Docket Entry # 485] by Marguerite Stephens; 4) Letter/motion [Docket Entry # 486] by Ricky Stephens; and 5) Letter/motion [Docket Entry # 487] by Rodney Lail. All of these letters/motions request relief from the Order dismissing this case with prejudice pursuant to a settlement agreement that was stated on the record. *See* [Docket Entry # 475]; Transcript of Trial Proceedings, at 2-6 [Docket Entry # 482]. The above letters/motions were not filed by Plaintiffs' counsel, but were filed *pro se* by the Plaintiffs listed above.¹

On June 7, 2007, the court issued an Order requesting that any parties wishing to file responses to the Plaintiffs' *pro se* letters/motions must do so no later than June 14, 2007. Order [Docket Entry # 488]. On June 14, 2007, the court received responses from all Defendants and the Plaintiffs' attorneys.

As noted below, a Notice of Appeal has been filed in this case. However, pursuant to Federal Rule of Appellate Procedure 4(a)(4), this court has jurisdiction to rule on the pending

¹ It should be noted that Plaintiffs' attorneys, Rakowsky and Falgione, have not been relieved as attorneys for the Plaintiffs, nor have any motions to withdraw as attorney been filed.

letters/motions. Under Local Rule of Civil Procedure 7.08, hearings on motions are not required. Therefore, the court, in its discretion, elects to rule on the pending matters without a hearing.

Procedural and Factual Background

The procedural background of this case is extensive; however, the procedural and factual background relevant to the current matters is fairly limited. The trial of this case was set to begin on May 9, 2007. On May 8, 2007, a larger than normal jury panel was brought in due to the anticipated length of the case, which was expected to last at least three weeks. On May 9, 2007, the jurors who had been selected reported to the courthouse for the beginning of trial.

On May 9, 2007, with the jury waiting to be brought out and just before the trial was to begin, the lawyers advised the court of a settlement, the terms of which were then stated on the record in the presence of all of the Plaintiffs who filed the *pro se* letters/motions.² Transcript of Trial Proceedings, at 2-6 [Docket Entry # 482]. Accordingly, on the record, with the consent of counsel, and in the presence of the parties, the court Ordered that the case be dismissed with prejudice per the settlement agreement. [Docket Entry # 475]; Transcript of Trial Proceedings, at 2-6 [Docket Entry # 482]. None of the parties objected to the settlement agreement or to the dismissal of the case with prejudice. Transcript of Trial Proceedings, at 2-6 [Docket Entry # 482].

Beginning on June 1, 2007, chambers began receiving emails from individual plaintiffs

² According to the Clerk's office, the total cost to the federal government to bring in jurors for the panel and first day of trial was Eleven thousand, nine hundred eighty-four dollars (\$11,984.67) and sixty-seven cents.

with various attachments ranging from affidavits, court transcripts, court docket entries, and letters from Attorney Rakowsky to third persons.³ These emails requested that this court, among other things, vacate the settlement and reinstate the case.

Some of the emails sent to chambers referenced relief under Rule 59(e) of the Federal Rules of Civil Procedure.⁴ One email did not reference a specific procedural rule.⁵ All of the letters appeared to seek relief on the basis that: 1) Both Plaintiffs' counsel and Defendants' counsel engaged in fraud in order to coerce the Plaintiffs into a settlement; 2) Plaintiffs' counsel misrepresented to Plaintiffs either certain evidentiary rulings the court had made or was going to make; 3) Plaintiffs' counsel allegedly gave the Plaintiffs bad legal advice concerning the likelihood of exposure to a Judgment in light of a previous Offer of Judgment; 4) Plaintiffs did not agree to the settlement offer at any time; and 5) the Offer of Judgment was somehow "bogus." Specifically, Dan Green, Ricky Stephens, Marguerite Stephens, Rodney Lail, and Irene Santacroce asked the court to: 1) vacate the settlement; 2) reinstate the case to active status; 3) order an independent Federal investigation into the corruption that has been

³ With regard to Attorney Rakowsky's letters to third parties, while the court does not agree with many of the statements by Attorney Rakowsky concerning statements attributed to the court, this court did express concern about the matter of Plaintiffs' untimely production of evidence as argued by the Defendants in open court on May 8, 2007. The court reserved ruling until the next day at which time the court was advised the parties had reached a settlement.

⁴ Rodney Lail, who sent an email on June 3, 2007, Irene Santacroce, who sent an email on June 4, 2007, Ricky Stephens, who sent an email on June 6, 2007, and Marguerite Stephens, who sent an email on June 6, 2007, all asked the court to vacate the settlement under Rule 59(e) based on alleged fraud and coercion committed against the Plaintiffs by Plaintiffs' attorneys in conjunction with Defendants' counsel.

⁵ On June 1, 2007, Dan Green, C.E.O. of Southern Holdings, Inc., emailed a letter requesting that the court vacate the settlement based on the same factual allegations as the Plaintiffs noted in Footnote #4; however, Dan Green's email did not reference a specific procedural rule. Dan Green, who is not an attorney licensed to practice in this jurisdiction, purports to represent Southern Holdings, Inc.; however, Local Rule of Civil Procedure 83.1.07(3) states that a corporation cannot proceed without counsel and that such counsel must be admitted to practice in this District. Local Civil Rule 83.1.07(3) DSC.

associated with this case; and 4) stay the case until an independent review can be conducted, the Plaintiffs can assess the damage done to their case, and obtain qualified counsel to represent the Plaintiffs.⁶

On June 7, 2007, the court instructed that all of the emails be filed with the Clerk of Court. *See* [Docket Entry ## 483-487]. On the same day, the court Ordered that any party wishing to file a response to the letters/motions must do so no later than June 14, 2007. By June 14, 2007, all parties, including Plaintiffs' counsel Rakowsky and Falgione, responded to the allegations contained in Plaintiffs' *pro se* letters/motions. Additionally, the Hartness Defendants filed a motion for sanctions and other relief against the Plaintiffs. No replies have been filed.

As if the matter were not complicated enough, on June 21, 2007, a Notice of Appeal was filed by Ron Serota, Esq. on behalf of all Plaintiffs. On June 22, 2007, Attorney Serota also filed a motion to vacate the judgment on behalf of Doris Holt, an individual Plaintiff that had not previously filed a *pro se* letter/motion.

It should be noted that Attorney Serota, who is not admitted to the South Carolina Bar and was previously admitted in this case *pro hac vice*, was later removed and relieved as counsel for the Plaintiffs on May 3, 2007, pursuant to motions filed by both the Plaintiffs and Serota himself. Serota has not been readmitted *pro hac vice* and has not obtained sponsorship from any local counsel admitted to practice in this District. Serota has violated various Local Civil Rules of this District by: 1) filing documents without first being admitted *pro hac vice*;

⁶ The Docket Report in this case indicates that the Plaintiffs have had several attorneys terminated or withdrawn from the case.

2) failing to obtain sponsorship by local counsel; and 3) failing to have his Notice of Appeal and motion signed by local counsel. As mentioned earlier, Attorneys Rakowsky and Falgione have not been relieved as counsel for any of the Plaintiffs. Additionally, it appears Serota filed these documents using Attorney Rakowsky's CM/ECF login and password without Rakowsky's permission. Nevertheless, the Notice of Appeal filed by Serota will be transmitted to the Fourth Circuit Court of Appeals where the propriety of the Notice of Appeal will ultimately be determined.⁷ Because of Serota's failure to comply with the Local Civil Rules regarding local counsel, Holt's motion [Docket Entry # 500] to set aside the judgment based on Rule 60(b) is not properly before this court.⁸

Discussion

Plaintiffs' *pro se* letters/motions are untimely under Federal Rule of Civil Procedure 59(e)

To the extent Plaintiffs seek relief from this court's May 9, 2007, Order dismissing this case with prejudice, their motions are untimely. Rule 59(e) clearly states that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."

Fed. R. Civ. P. 59(e). Even if this court considers the date Plaintiffs emailed their letters to chambers as the filing date, their motions are still untimely. The 10 day deadline contained in Rule 59(e) is mandatory and cannot be extended pursuant to Rule 6(b). Fed. R. Civ. P. 6(b).

Therefore, Plaintiffs' letters/motions founded on Rule 59(e) are denied as untimely.

Plaintiffs' *pro se* letters/motions under Federal Rule of Civil Procedure 60(b)(3)

⁷ At first glance, Plaintiffs' Notice of Appeal appears to be untimely; however, that matter would be more properly decided by the Fourth Circuit Court of Appeals.

⁸ The court also notes that Doris Holt's affidavit that was submitted with Attorney Serota's Rule 60(b) motion does not appear to be properly signed or notarized.

To the extent that Plaintiffs allege fraud as a basis for relief, the court liberally construes their letters/motions as motions under Rule 60(b)(3), which provides for relief from judgment or order based on fraud, misrepresentation, or other misconduct of an adverse party. Fed. R. Civ. P. 60(b)(3). The basis of Plaintiffs' allegations against the adverse parties is that they concocted a "bogus" Offer of Judgment and that, in conjunction with various alleged misrepresentations by the attorneys for the Plaintiffs, they coerced the Plaintiffs to settle the case.

Plaintiffs' *pro se* letters/motions fail under Rule 60(b)(3) because they have failed to show by clear and convincing evidence that the adverse parties, the Defendants or Defendants' counsel, were guilty of any fraud. *See Schultz v. Butcher*, 24 F.3d 626, 630 (4th Cir. 1994). This conclusion is evident from the court's review of the submissions of the parties relevant to the Plaintiffs' letters/motions.

To prevail on a Rule 60(b)(3) motion, the moving party must establish: 1) a meritorious defense; 2) misconduct by clear and convincing evidence; and 3) the misconduct prevented the moving party from fully presenting its case. *Schultz*, 24 F.3d at 630 (citing *Square Constr. Co. v. Washington Metro. Area Transit Auth.*, 657 F.2d 68, 71 (4th Cir. 1981)).

Two Offers of Judgment are at issue. The Hartness Defendants' Offer of Judgment, signed by E. Glenn Elliot, Esq., is dated July 12, 2005. As evidenced by the facsimile transmission reports attached with the Hartness Defendants' response, the Hartness Offer of Judgment was successfully faxed to Plaintiffs' Attorneys Rakowsky, Serota, Cooper, and Hardee on July 12, 2005.

The second Offer of Judgment concerns the Horry County Defendants. The Horry

County Offer of Judgment contains a certificate of service indicating that the Offer of Judgment was mailed to Plaintiffs' Attorney Goldberg on July 21, 2004. Horry County also attached a facsimile transmission report that showed that the Horry County Offer of Judgment was successfully faxed to Plaintiffs' Attorney Goldberg on July 21, 2004. In fact, on July 24, 2004, the Horry County Defendants received an Objection from Plaintiffs' Attorney Goldberg and their local counsel at the time, James Cooper, to the Offer of Judgment. So the contention that the Defendants' attorneys "crafted" a fraudulent Offer of Judgment just days before trial, without proper service, in an attempt to coerce the Plaintiffs into a settlement agreement is totally without merit. The Plaintiffs assert no evidence whatsoever, much less clear and convincing evidence, of any fraud or misrepresentation by any of the adverse parties or lawyers in this case. Additionally, the Plaintiffs have not shown that the supposedly "bogus" Offers of Judgment prevented them from moving forward with their case. As noted above, a jury had already been selected and the settlement agreement was announced the morning trial was set to begin. Therefore, their requests for relief based on Rule 60(b)(3), fraud by an "adverse party," is denied. To the extent the Plaintiffs allege fraud committed by their own counsel, that is not a basis for relief under Rule 60(b)(3) as Plaintiffs' own counsel are not "adverse parties."

Other Grounds for Relief under Rule 60(b)

The court has reviewed the various submissions by the parties, and to the extent the Plaintiffs' letters/motions raise issues that could be construed as seeking relief under other subsections of Rule 60(b), the court has reviewed the applicable law regarding relief under subsections of Rule 60(b) that are arguably applicable to these circumstances and concludes

that the Plaintiffs are not entitled to any such relief. In other words, the Plaintiffs have not made a sufficient showing of entitlement such relief.

Further, with regard to any claim by the Plaintiffs of either improper inducement, bad advice, or inadequate representation or preparation against Plaintiffs' own attorneys, such is not a valid basis for repudiating a settlement. *Petty v. Timken Corp.*, 849 F.2d 130, 133 (4th Cir. 1988). In the event there was any breach of the standard of care owed by Plaintiffs' attorneys to the Plaintiffs as a result of alleged coercion, improper inducement, fraud, or inadequate representation, Plaintiffs have an available remedy for damages against their own attorneys. See *Petty*, 849 F.2d at 133.

Vacate or Set Aside Settlement Agreement

It is well settled that merely having second thoughts about entering into a settlement agreement is insufficient to set aside the settlement agreement. *Young v. Federal Deposit Ins. Corp.*, 103 F.3d 1180, 1195 (4th Cir. 1997). The court notes that all of the Plaintiffs who filed these letters/motions, *pro se* requests for relief, were present in the courtroom when the settlement agreement was announced on the record. Although the undersigned did not poll each plaintiff individually, nor each Defendant individually, he is not required to do so. This case did not involve a minor settlement or a wrongful death settlement, which would require court approval and may require the court to query a plaintiff regarding whether they believe the settlement is fair and in their best interests. Regardless, none of the Plaintiffs brought any of the matters they allege in their letters/motions to the court's attention until three weeks

later.⁹ The court regrets that the Plaintiffs may have had a change of heart, but a change of heart is not a sufficient basis to set aside a settlement agreement. *See Petty*, 849 F.2d at 133.

Conclusion

For the reasons stated above, the relief requested in the: 1) Letter/motion [Docket Entry # 483] by Dan Green, C.E.O. of Southern Holdings, Inc.; 2) Letter/motion [Docket Entry # 484] by Irene Santacroce; 3) Letter/motion [Docket Entry # 485] by Marguerite Stephens; 4) Letter/motion [Docket Entry # 486] by Ricky Stephens; and 5) Letter/motion [Docket Entry # 487] by Rodney Lail is **DENIED**.

Because Attorney Serota failed to comply with this District's Local Rules of Civil Procedure regarding the use of local counsel, Holt's [Docket Entry # 500] motion to set aside or vacate the judgment is not even properly before the court.

Finally, because this case is on appeal to the Fourth Circuit, the court feels that it would not be appropriate to rule on the additional relief requested by the Hartness Defendants.

IT IS SO ORDERED.

Florence, SC
July 3, 2007

s/R. Bryan Harwell
R. Bryan Harwell
United States District Judge

⁹ The court cannot disregard the fact that substantial juror costs and court time had been allocated for this case and to simply allow the matter to be reopened when a settlement agreement has been placed on the record in open court with a jury standing by would open the court to easy manipulation of its time and resources.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION
C/A NO.: 4:02-cv-01859-RBH

Southern Holdings, Inc.; James)
Spencer; Rodney Keith Lail;)
Irene Santacroce; Ricky Stephens;)
Marguerite Stephens; and Doris)
Holt,)

Plaintiffs,)

vs.)

Horry County, South Carolina;)
Horry County Sheriff's Department;)
Horry County Police Department;)
James Albert Allen, Jr., Individually)
and in his official capacity as an)
officer with the Horry County)
Sheriff's Department; Sidney Rick)
Thompson, Individually and in his)
Official capacity as an officer with)
The Horry County Sheriff's)
Department; Jeffery S. Caldwell,)
Individually and in his official capacity)
as an official capacity as an officer)
with the Horry County Sheriff's)
Department; Charles McClendon,)
Individually and in his official capacity)
as an officer with the Horry County)
Police Department; Jay Brantley,)
Individually and in his official capacity)
as an officer with the Horry County)
Police Department, Andy)
Christensen, Individually and in his)
Official capacity as an officer with)
The Horry County Police)
Department; Michael Steven)
Hartness; Harold; Steve Hartness;)
Ancil B. Garvin, III; David Smith;)
Richard B. Way; and John Does,)

Defendants.)

MOTION TO BE RELIEVED AS COUNSEL

Adrian L. Falgione, one of the listed attorneys for the Plaintiffs in this action,
hereby moves the Court for an Order, pursuant to Local Rule 83.I.07, relieving him as
counsel of record in this case upon the following grounds;

1. This case was ended by way of settlement agreement of the parties and approval of the Court on May 9, 2007.
2. On June 7, 2007, certain of the Plaintiffs filed with the Court pro se requests to vacate the settlement and expressions of dissatisfaction with counsel.
3. Counsel believes that Plaintiffs' allegations have created a conflict of interest that prohibits any further representation by him of the Plaintiffs.
4. Plaintiff, Southern Holdings, Inc., has been advised via this Court's Order, Entry #510 (f.n.5.) that a corporation cannot proceed without counsel and that counsel must be admitted in this District.
5. Counsel has served all parties with this motion.

This 10TH day of July, 2007.

BY: /s/Adrian Falgione

Adrian L. Falgione, Fed. I.D. #5022
Attorney for Plaintiffs
113 E. Main St.
Lexington, SC 29071
Phone: (803) 957-6453
Fax: (803) 957-8902

CERTIFICATE OF SERVICE

I, Adrian L. Falgione, Attorney for the Plaintiffs, do hereby certify that the foregoing Motion to Be Relieved as Counsel has this day been served upon the following person(s), this 10Th day of July, 2007:

Via Electronic Mailing

Jefferson Boone Aiken, III	jba@aikenbridges.com ,
Benjamin A. Baroody	bb@aikenbridges.com
Andrew F. Lindemann	alindemann@dml-law.com
Stephanie P. McDonald	smcdonald72@comcast.net
John Robert Rakowsky	johnrakowskylawofc@sc.rr.com
James M. Saleeby, Jr.	jms@aikenbridges.com
E. Glenn Elliott	ege@aikenbridges.com
Sandra J. Senn, Esquire	ssenn@btitelecom.net

Via First Class Mail

Mr. Dan Green, CEO
Southern Holdings, Inc.
6170 W. Lake Mead Blvd., Suite 311
Las Vegas, NV 89108

Mr. Rodney Keith Lail
P.O. Box 2753
Myrtle Beach, SC 29578

Ms. Irene Santacroce
205 Deer Trace Circle
Myrtle Beach, SC 29588

Ms. Marguerite Stephens
207 Deer Trace Circle
Myrtle Beach, SC 29588

Mr. Ricky L. Stephens
207 Deer Trace Circle
Myrtle Beach, SC 29588

Dr. Linda Williamson Lawrence
105 Yadkin Street, Suite 203

Albemarle, NC 28001

Ernest H. Morton, Jr., Esquire
P.O. Box 519
Albemarle, NC 28002

Mr. David Smith
1006 N. Holden Road
Greensboro, NC 27410

BY: /s/ Adrian L. Falgione
Adrian L. Falgione
Federal I.D. #5022

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
Florence Division

	)	
SOUTHERN HOLDINGS, INC.,	)	
et al.	)	Case No.
Plaintiffs,	)	4:02-CV-01859-RBH
	)	
v.	)	
	)	
HORRY COUNTY, SOUTH	)	
CAROLINA, et al.	)	
Defendants.	)	
	)	

**CERTAIN PLAINTIFFS' MOTION FOR CLARIFICATION OF
COURT ORDER 510**

Pursuant to Rules 52 and/or 60 of the Federal Rules of Civil Procedure, certain Plaintiffs¹ request clarification of particular statements by the Court in Court Order No. 510 (hereinafter the "Order"). Plaintiffs seek clarification from the Court on issues arising from the Order's references to Attorney Rakowsky's statements in letters he wrote concerning the Court's position as having been wrongfully described in three (3) letters (See attached hereto Plaintiffs' Exhibit "A") from Attorney Rakowsky, dated May 17, 2007 (hereinafter the "Letters"). Plaintiffs seek clarification regarding the Court's basis of the statement, "while the Court does not agree with many of the statements by Attorney Rakowsky, concerning statements attributed to the Court, the Court did express concern about the matter of the untimely production of evidence as argued by the Defendants in open court on May 8, 2007." (Court Order 510, Page 3, footnote 3.)

¹ The Plaintiffs joining this motion are Rodney Lail, Irene Santacroce, Ricky Stephens and Marguerite Stephens.

I. PLAINTIFFS REQUEST CLARIFICATION REGARDING THE SPECIFICS AS TO WHICH, IF ANY, OTHER STATEMENTS LISTED BELOW AND ATTRIBUTED TO THE COURT BY ATTORNEY RAKOWSKY IN THE LETTERS AND AS CONTAINED IN PLAINTIFFS' DOCUMENTS 483 – 487 WERE ACCURATE.

Although a number of the provisions in the Order detail specific items, the Court failed to provide specific information (besides the reference to the Plaintiffs' untimely production of evidence contained in the Letters and the Order) as to the veracity of the other statements which follow herein attributed to either or both Attorney Rakowsky and Attorney Falgione relating to the Court's position.

On the morning of May 9, 2007, the Plaintiffs in attendance in Court had to make decisions based solely on the representations of the Court's rulings on May 8, 2007, and representation of the stated positions of the Court on May 8, 2007, and May 9, 2007, both made to the Plaintiffs by the Officers of the Court Rakowsky and Falgione. Such representations included statements made throughout the Letters. Decisions based on the representations will likely negatively affect the Plaintiffs every day for the rest of their lives. Two Plaintiffs have been diagnosed as permanently disabled and incur maintenance medical bills of more than \$60,000 annually due to the action of the Defendants, with these medical costs growing every year.

The Plaintiffs are sensitive to the costs of assembling the jury, but most of the Plaintiffs are financially ruined, having mortgaged their homes to fund their day in Court. The injured Plaintiffs' only method to pay for their necessary and life sustaining maintenance medicine and medical treatments would have been from Judgments against those responsible for their injuries, the Defendants.²

² It should be noted that while the Plaintiffs personally funded over \$380,000 of expenses in legitimate pursuit of their claims, the Defendants both civilian and non-civilian litigation expenses were all paid by third parties mainly the taxpayers of the State of South Carolina and, through this Court's Order No. 127,

The only representation in the Letters singled out and confirmed by the Court as being accurate in the Order was that the court did express concern about the matter of the untimely production of evidence as argued in open court on May 8, 2007.

However, statements in the Letters which from the perspective of the Plaintiffs were much more ominous and predictive regarding the realized outcome of the case and the predisposed nature of the Court against the Plaintiffs as presented by Attorney Rakowsky and Attorney Falgione are not addressed by the Court. The Plaintiffs' Counsels established this predisposed nature by citing Judge Harwell's statements during the evidentiary hearing in open Court on May 8, 2007. Attorney Rakowsky and Attorney Falgione stated that Judge Harwell indicated he was going to rule against the majority of the Plaintiffs' evidence including (1) most of the Plaintiffs' medical damages, (2) most of the Plaintiffs' evidence regarding civil conspiracy and the questionable actions of the Defendants, including the spoliation of evidence, and (3) almost all of the Southern Holdings, Inc., valuation evidence.

According to Attorney Rakowsky and Attorney Falgione the Court's position was due to the fact that all the evidence listed in points 1, 2, & 3 herein above was untimely filed with the Court. Additionally, Officers of the Court Rakowsky and Falgione stated that during the evidentiary hearing Judge Harwell's statements included: (4) "Accordingly Judge Harwell suggested the Plaintiffs take the pre-trial settlement that was being offered by the Defendants," (5) "Judge Harwell strongly suggested that Adrian and I get the Plaintiffs to settle for their best interests before he made the ruling against the Plaintiffs' evidence at trial on Wednesday, May

the taxpayers of the United States. The Plaintiffs incurred and paid over \$40,000 in forensic expenses while the Defendants' forensic expenses including related testimony were all funded by the United States Government through participation of the FBI and Justice Department which provided lawyers, lab personnel and laboratory facilities. Oversight regulations prevent the FBI and Justice Department from participating in civil cases of this nature; however, through this Court's Order No. 127 these regulations, in this case, were bypassed and the total amount of civilian and non-civilian Defendants' forensic expenses were funded by the United States Government.

9, 2007, and the Defendants subsequently withdraw their offer,” (6) (On May 8, 2007) “Judge Harwell told Adrian and me in Chambers that he wanted for everything related to this case to end at one time, so we needed to drop the claims against Dave Smith and Ancil Garvin as part of the settlement,” and before the hearing on May 9, 2007, as presented by Plaintiffs’ Counsels for the Plaintiffs to consider in making their decision in regard to acceptance of the proposed settlement, (7) “Judge Harwell told us [Attorney Rakowsky and Attorney Falgione] in chambers on Wednesday, May 9, 2007, the Plaintiffs’ acceptance of the Defendants’ offer was the best decision for the Plaintiffs to make given that he [Judge Harwell] was going to rule against the admission of the majority of the Plaintiffs’ evidence.” Additionally, as contained in the Plaintiffs’ letters/Motions (Please see Documents 484 (Page 4, No. 7), 485 (Page 5, No. 7), 486 (Page 3, No. 3), and 487 (Page 2, No. 6)), letters/Motions which resulted in the Order, the Plaintiffs were informed by Officers of the Court Rakowsky and Falgione that (8) the Court had admitted on the record during the evidentiary hearing on May 8, 2007, all of the Defendants’ evidence intact.

The transcript of the evidentiary hearing (Please see attached hereto Plaintiffs Exhibit “B”) does not support the above citations and quotations from Judge Harwell and the Court’s position statements all made by Officers of the Court Attorney Rakowsky and Attorney Falgione. Therefore, the Plaintiffs respectfully request the Court to expand upon its statement in the Order and provide confirmation as to what the Court’s actual position was on May 8, 2007, and May 9, 2007, in regard to the issues above as compared to the transcript of the evidentiary hearing and to what was contained in the Letters and directly presented to the Plaintiffs by Attorney Rakowsky and Attorney Falgione.

After seven years of legal efforts that has left the Plaintiffs financially ruined, the Plaintiffs respectfully request to know what the Court's position is concerning what the Plaintiffs were told by the Officers of the Court Rakowsky and Falgione, regarding the issues contained herein this Motion, from the Officer of the Court who is being both referenced and quoted, Judge Harwell.

This motion focuses on several discrete issues where the Plaintiffs believe that the Order, the transcript of the evidentiary hearing, and the representations of the Court's position by Officers of the Court Rakowsky and Falgione made to the Plaintiffs are in conflict, unclear and require clarification.

II. PLAINTIFFS' REQUEST THAT THE COURT CLARIFY THE RECORD REGARDING THE COURT'S POSITION CONCERNING ATTORNEY RAKOWSKY'S STATEMENTS AND ATTORNEY FALGIONE'S STATEMENTS CONCERNING THE POSITION OF THE COURT AS CONTAINED HEREIN DUE TO THE COURT'S UNIQUE POSITION

The Court raised issues related to the Court's position and the presentation of the Courts' position by Attorney Rakowsky in the Order. Since there are no records that can be located that can verify either the written statements made in the Letters or the oral statements made to the Plaintiffs by Officers of the Court Rakowsky and Falgione, the Plaintiffs request the Court present the position of the Court as there appears to be no other source of records besides the transcript of the evidentiary hearing available to the Plaintiffs and the Court only confirmed one item in the Order from the long list of items in the Letters and as contained herein this motion.

III. DISCUSSION

In July of 2000, Plaintiffs submitted a Defendant generated document to two independent and renowned forensic experts for authentication and determination of authorship.

The document was forensically tied to Defendants, including Ancil B. Garvin, by both forensic document examiners. (Please see attached hereto Plaintiffs' Exhibit "C") Two relevant sentences in the document read, (1) "The courts and lawyers will protect us no matter what we do to the 'little people.' It will never get to a jury [the Plaintiffs' case] and if it does the judge will never let the truth be heard." (Exhibit "C", Page 4, Last Bullet Point), and (2) "Let Brian and the shareholders take the high ground. We have the connections, the money, the courts and we will fuck them all [the Plaintiffs]." (Exhibit "C", Page 6, First Bullet Point)

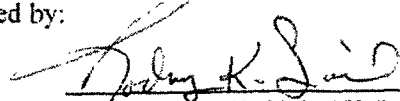
The Plaintiffs do not believe that Your Honor would ever under any circumstances whatsoever act in accordance with the Defendants' directly preceding statements. However, (1) the accuracy of the prediction of the almost decade old Defendants' statement in regard to the disposition of the evidence, and events of May 8, 2007, and May 9, 2007, as stated by Officers of the Court Rakowsky and Falgione concerning this Court's position, (2) the contrary statement by the Court in the Order, and (3) the contrary facts as contained in the certified transcript of the evidentiary hearing, result in this respectful request for clarification of the Court's position on the previously identified issues listed herein.

"Truth needs no disguise", Justice Hugo Black in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 247 (1944). The Plaintiffs merely seek the truth regarding the matters listed herein this Motion as to what the Court's position was on May 8, 2007, and May 9, 2007, in regard to the citations and quotations attributed to Judge Harwell as communicated to the Plaintiffs present at the Court on May 9, 2007, and as contained in the Letters.

IV. CONCLUSION

For the reasons stated, Plaintiffs respectfully request that the Court clarify its Order 510 in the respects described above.

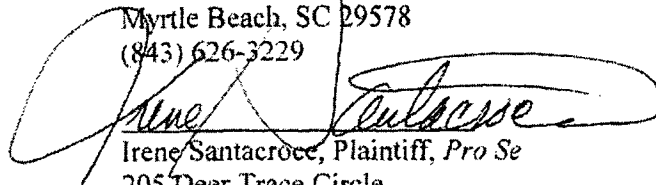
DATED: July 10, 2007, Respectfully submitted by:



Rodney K. Lail, Plaintiff, *Pro Se*
PO Box 2753

Myrtle Beach, SC 29578

(843) 626-3229



Irene Santacrose, Plaintiff, *Pro Se*

205 Deer Trace Circle

Myrtle Beach, SC 29588

(843) 455-0891

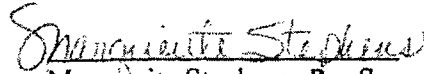


Ricky Stephens, Plaintiff, *Pro Se*

207 Deer Trace Circle

Myrtle Beach, SC 29588

(843) 283-6751



Marguerite Stephens, *Pro Se*

207 Deer Trace Circle

Myrtle Beach, SC 29588

(843) 283-6751

CERTIFICATE OF SERVICE

I, Rodney Lail, hereby certify that I have this day filed with the Clerk of Court a true and correct copy of **CERTAIN PLAINTIFFS' MOTION FOR CLARIFICATION OF COURT ORDER 510**. In addition, I have mailed a true and correct copy of the foregoing Motion to all interested parties designated by the Court to receive paper copies as follows:

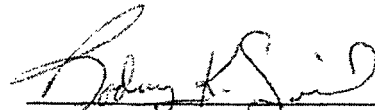
David Smith
1006 N. Holden Rd.
Greensboro, NC 27410
Defendant, In Proper Person

Other Interested Parties:
Linda Williamson Lawrence
105 Yadkin St., Suite 203
Albemarle, NC 28001

Ernest H. Morton, Jr.
117 W. North St.
P.O. Box 519
Albemarle, NC 28002

This 10th day of July, 2007.

by:



Rodney K. Lail, Plaintiff, *Pro Se*
PO Box 2753
Myrtle Beach, SC 29578
(843) 626-3229

JOHN R. RAKOWSKY
ATTORNEY AT LAW
900 12th STREET
POST OFFICE BOX 3593
WEST COLUMBIA, SOUTH CAROLINA 29171

TELEPHONE
(803) 791-8830
FAX
(803) 794-7880

May 17, 2007

Mr. Bruce Benson
6170 W. Lake Mead Blvd.
Suite 311
Las Vegas, Nevada 89108

Dear Mr. Benson:

On the afternoon of Tuesday, May 8, 2007, Judge Harwell held an evidentiary hearing regarding the evidence both sides proposed to admit at trial. Almost every document of evidence the Plaintiffs submitted was challenged by the Defendants' counsel. Prior to my involvement in this case, former Plaintiffs' counsel Michael Goldberg missed specific filing deadlines set by the Court's scheduling order, causing a serious problem in the admissibility of a very large proportion of Plaintiffs' evidence. Consequently, as just one example, Judge Harwell indicated that the next day, he would rule as inadmissible at least 75% of Plaintiffs' medical expenses. Accordingly, Judge Harwell suggested that the Plaintiffs take the pre-trial settlement that was being offered by the Defendants.

Additionally, it was revealed by Defendants' Counsel Saleeby for the first time that former Plaintiffs' counsel Goldberg had received an offer of Judgment from the Defendants that neither I, nor former local Plaintiffs' counsel James Cooper nor the individual Plaintiffs had ever seen before or knew about. This is critical because if the case was decided in favor of the Plaintiffs below the thirty thousand dollars (\$30,000) threshold amount in the "Offer of Judgment," the Plaintiffs would have been responsible both collectively and individually for all the Defendants costs, including attorney's fees from the first date of the signing of the offer. Adrian and I estimated that that would be a minimum amount of between \$200,000 and \$300,000 and likely much more.

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Sincerely,


John R. Rakowsky

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900 12th STREET
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WEST COLUMBIA, SOUTH CAROLINA 29171

May 17, 2007

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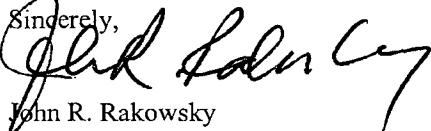
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May 17, 2007

Mr. Alex Rozenaft
LawMax
459 Columbus Avenue, Suite 299
New York, NY 10024

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Sincerely,



John R. Rakowsky

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
Florence Division

SOUTHERN HOLDINGS, INC.,
et al.

Plaintiffs,

v.

HORRY COUNTY, SOUTH
CAROLINA, et al.
Defendants.

Case No.

4:02-CV-01859-RBH

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2008 JAN 30 P 2:31

**CERTAIN PLAINTIFFS' MOTION FOR RECONSIDERATION
OF COURT ORDER 577 IN REGARD TO PLAINTIFFS MOTION FOR
CLARIFICATION [DOCKET ENTRY #519]**

Certain Plaintiffs¹ request reconsideration of Court Order No. 577 in regard to Plaintiffs Motion for clarification of particular statements by the Court in Court Order No. 510. The evidentiary hearing held on the afternoon of May 8, 2007, was an event during which pivotal evidentiary case decisions were made behind closed doors by Judge Harwell. This occurred while the Court Reporter engaged to record the evidentiary hearing inexplicably waited outside the closed doors of Judge Harwell's chambers. According to Officers of the Court Judge Rakowsky and Adrian Falgione, the majority of over two hundred decisions regarding Plaintiffs' evidence and Defendants' evidence were made during an approximately sixty (60) minute long hearing behind closed doors. According to Court Officers John Rakowsky and Adrian Falgione, virtually no evidentiary decisions were made during the first part of the

¹ The Plaintiffs joining this motion are James Spencer and Doris Holt.

evidentiary hearing, which was the only portion of the evidentiary hearing held in open court and is the only portion where there is a record of any part of the evidentiary hearing. This part of the evidentiary hearing lasted for approximately forty-five (45) minutes.

During this sixty-minutes of time in chambers behind closed doors almost "every piece of evidence submitted by the Plaintiffs' was successfully challenged by the Defendants' Counsels," according to Court Officers Judge Rakowsky and Adrian Falgione. That means approximately every eighteen (18) seconds during the closed door hearing (1) a piece of evidence was introduced by Plaintiffs' Counsels, (2) the evidence was then challenged by Defendants' Counsels, (3) the challenge was then responded to by the Plaintiffs' Counsels, and (4) then almost every evidentiary matter in question was decided in the Defendants' favor by Judge Harwell. Significantly, the approximately four hours of compilations of police video and police audio recordings, which Officers of the Court Judge John Rakowsky and Adrian Falgione, Esquire, maintained were reviewed in full and ruled as inadmissible by Judge Harwell at the May 8, 2007, closed door evidence hearing is unaccounted for since the closed door hearing lasted approximately only sixty minutes.

The Court raised the issue concerning the lack of accuracy of Court Officer Judge John Rakowsky's statements in three (3) separate documents Judge Rakowsky wrote describing how Judge Harwell's decisions regarding the evidence on May 8, 2007, ruined the Plaintiffs' case. The three (3) documents from Court Officers Judge Rakowsky and Adrian Falgione also contained instructions from Judge Harwell to the Plaintiffs regarding the terms of the settlement the Plaintiffs were to accept.

Judge Harwell's instructions were that the Plaintiffs were to settle all their claims under the terms offered by the Hartness Defendants and the Horry County Defendants. In that regard,

Judge Harwell instructed the Plaintiffs to drop all claims against Defendants Ancil Garvin and David Smith as part of the settlement. Ancil B. Garvin already had a default Judgment on him in the Plaintiffs favor and David Smith was not present at Court. The three documents written by Court Officer Judge John Rakowsky were dated May 17, 2007 (hereinafter the "Documents").

Plaintiffs seek clarification regarding the Court's basis of the statement, "while the Court does not agree with many of the statements by Attorney Rakowsky, concerning statements attributed to the Court, the Court did express concern about the matter of the untimely production of evidence as argued by the Defendants in open court on May 8, 2007." (Court Order 510, Page 3, footnote 3.) The question of timely production of medical damages was the main topic contained in the forty-five minute transcript of the first part of the evidence hearing on May 8, 2007.

In Order #577, the Court's only statement regarding Plaintiffs' Motion for Clarification Document #519 was, "it is **DENIED** as moot because the clarification sought by the Plaintiffs is irrelevant and unnecessary in the court's earlier disposition of the matter ruled upon."

I. THE CLARIFICATION SOUGHT BY THE PLAINTIFFS IS EXTREMELY RELEVANT AND NECESSARY FOR THE PLAINTIFFS TO DETERMINE THEIR LEGAL OPTIONS AND ACTIONS. THESE OPTIONS AND ACTIONS CAN BE DEFINED BY KNOWING THE TRUTH OF WHAT ACTUALLY HAPPENED BEHIND CHAMBERS CLOSED DOORS ON MAY 8, 2007

Plaintiffs present on the morning of May 9, 2007, were informed by Officers of the Court Judge John Rakowsky and Adrian Falgione that Defendants' Legal Counsels had successfully challenged and objected to almost every piece of Plaintiffs' evidence during the closed door evidentiary hearing on May 8, 2007. Officers of the Court Judge John Rakowsky and Adrian Falgione further advised Plaintiffs present at the Court on May 9, 2007, that Judge Harwell had instructed Rakowsky and Falgione to inform the Plaintiffs that he [Judge Harwell] had decided to rule as inadmissible the vast majority of the Plaintiffs' evidence. Further, Judge Harwell noticed the Plaintiffs through Officers of the Court Judge John Rakowsky and Adrian Falgione that Judge Harwell was admitting all of the Defendants' evidence. These decisions by Judge Harwell virtually destroyed any chances the Plaintiffs had in prevailing in the case.

Additionally, Judge Harwell advised the Plaintiffs were required to drop all claims against Defendants David Smith and Ancil Garvin. Judge Harwell further advised that if the Plaintiffs did not dismiss the claims against Smith and Garvin, that Judge Harwell would disallow the settlement with the Hartness Defendants and the Horry County Defendants and force the case to go to trial. If this occurred, Judge Harwell's decisions to disallow the Plaintiffs' evidence and allow all of the Defendants' evidence opened the door for the Court to

impose judgments of up to \$300,000 against the Plaintiffs. This is the estimated amount of the Hartness Defendants and the Horry County Defendants attorney fees and costs of Court.

On the morning of May 9, 2007, the Plaintiffs in attendance in Court had to make decisions based on Judge Harwell's rulings on May 8, 2007, and Judge Harwell's instructions and "recommendations" to the Plaintiffs on May 8, 2007. Officers of the Court Judge John Rakowsky and Adrian Falgione, Esquire, delivered these rulings, instructions, and recommendations from Judge Harwell to the Plaintiffs as instructed by Judge Harwell. Part of Judge Harwell's rulings and instructions to Plaintiffs from the May 8, 2007, evidentiary hearing were included in the Documents sent out by Officers of the Court Judge John Rakowsky and Adrian Falgione, Esquire on May 17, 2007. (Please see Plaintiffs' Exhibit "A.")

In Court Order #510, the Court not only raised questions as to the accuracy of many of the facts reported to the Plaintiffs by Court Officers Judge John Rakowsky and Adrian Falgione, Esquire, but also singled out and confirmed only one item reported to the Plaintiffs by Court Officers Judge Rakowsky and Adrian Falgione as being accurate. The one item was the Court confirming it did express concern about the matter of the untimely production of the Plaintiffs' cost of medical damages as argued in open court on May 8, 2007. This was the major issue in the forty-five minute part of the evidentiary hearing conducted in open Court in front of and recorded by the court reporter in attendance on May 8, 2007.

Further, through Court Order #577, the Court is telling the Plaintiffs that even though the Court disagrees with Officers of the Court Judge John Rakowsky's and Adrian Falgione Esquire's statements regarding rulings attributed to Judge Harwell on May 8, 2007, that led directly to the disputed events of May 9, 2007, the truth does not matter.

The Federal Rules of Civil Procedure present the legal alternatives for the Plaintiffs at this point depending on the facts of the circumstances. By the Court denying the Plaintiffs from knowing a complete and accurate accounting of the facts and circumstances of what happened on May 8, 2007, behind the closed chambers doors, the Court is effectively preventing the Plaintiffs from pursuing legal due process that is available under the Federal Rules of Civil Procedure.

II. DISCUSSION

In the opinion of the Plaintiffs, there are three possible responses to the Plaintiffs' Request for Clarification of what actually happened on May 8, 2007: (1) the Court states the version of the events as related by Officers of the Court Judge John Rakowsky and Adrian Falgione are in fact correct; (2) the Court provides its unabridged version of the events, which, based on prior statements, disagrees with the version of the events related by Officers of the Court Judge John Rakowsky and Adrian Falgione; or, (3) the Court remains moot and denies the Plaintiffs the right to know the truth so it can proceed.

The Plaintiffs who are signatories to this motion have not accused former Counsel John Rakowsky or Adrian Falgione of committing fraud related to this case. The Plaintiffs are seeking the truth to determine the breakdown of communications or errors that might have occurred that led to the disputed events of May 9, 2007, in order to determine independently what legal options are available to the Plaintiffs.

The epicenters of the controversy of the events of May 9, 2007, are the disputed events of May 8, 2007, which the Court opened the door to in its Order #510 when the Court stated it disagreed with the "many" of the facts as presented by Officers of the Court Judge

John Rakowsky and Adrian Falgione. The statements the Court disagrees with solely led to the events of May 9, 2007.

The known individuals who attended the behind closed door session of the Court on May 8, 2007, were the Defendants' Counsels, the Plaintiffs' Counsels, and Judge Harwell. The Court has pointed out on more than one occasion that fraud or misconduct by the Plaintiffs' Counsels is not by itself reason to vacate the judgment. There has to be fraud or misconduct during the course of the case by an adverse party to vacate the judgment.

Fraud that benefits one party over another party is not committed in a vacuum. Such fraud would involve two or more individuals from each side, to the detriment of the unwitting victims of the fraud. The Plaintiffs believe mistakes were made and inadvertent errors occurred that would explain the events of both May 8th and May 9th of 2007 rather than fraud. However, the Plaintiffs need to have an accurate accounting of the truth in order to determine the origin and circumstance of the errors or misunderstandings.²

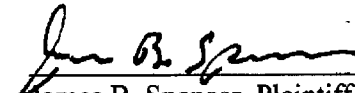
² **Clarification:** The Court in Order #577 and Order #578 correctly pointed out a Plaintiffs' appeal in this case was dismissed. However, Plaintiffs point out this appeal was dismissed because the Plaintiffs prior to a hearing of the facts unilaterally withdrew it. The appeal was in fact untimely filed due to Counsel John Rakowsky and Counsel Adrian Falgione's failure to timely preserve the Plaintiffs right of appeal as opposed to the Court of Appeals findings on the merits of the appeal.

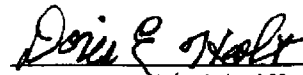
III. CONCLUSION

"Truth needs no disguise", Justice Hugo Black in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 247 (1944). The Plaintiffs merely seek the truth regarding the matters listed in Motion #519 as to what the Court's position was on May 8, 2007, and May 9, 2007, in regard to the citations and quotations attributed to Judge Harwell as communicated to the Plaintiffs present at the Court on May 9, 2007, and as contained in the Letters by Officers of the Court Judge John Rakowsky and Adrian Falgione.

The Plaintiffs believe in no way would the Honorable Judge Harwell be involved in misconduct in this or any other case or even allow an appearance of what could be interpreted as misconduct or bias without recusing himself, as is standard procedure. Therefore, the Plaintiffs respectfully request the Court to reconsider Court Order #577, reverse its position, and provide the Court's version of the truth as requested by Plaintiffs in Document #519.

DATED: January 30, 2008, Respectfully submitted by:


James B. Spencer, Plaintiff, *Pro Se*
Suite 183
7001 Saint Andrews Road
Columbia, SC 29212


Doris E. Holt, Plaintiff, *Pro Se*
Suite 183
7001 Saint Andrews Road
Columbia, SC 29212

CERTIFICATE OF SERVICE

I, James B. Spencer, hereby certify that I have this day filed with the Clerk of Court a true and correct copy of **CERTAIN PLAINTIFFS' MOTION FOR RECONSIDERATION COURT ORDER 577 IN REGARD TO PLAINTIFFS MOTION FOR CLARIFICATION [DOCKET ENTRY #519]**. In addition, I have mailed a true and correct copy of the foregoing Motion to all interested parties designated by the Court to receive paper copies, as follows:

David Smith
1006 N. Holden Rd.
Greensboro, NC 27410
Defendant, In Proper Person

Other Interested Parties:
Linda Williamson Lawrence
105 Yadkin St., Suite 203
Albemarle, NC 28001

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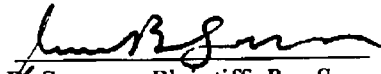
Ricky Stephens
207 Deer Trace Circle
Myrtle Beach, SC 29588

Marguerite Stephens
207 Deer Trace Circle
Myrtle Beach, SC 29588

Rodney Lail
PO Box 2753
Myrtle Beach, SC 29578

Dan Green
Southern Holdings, Inc.
2620 Regatta Drive
Suite 102
Las Vegas, NV 89128

This 30th day of January, 2008.

By: 

James B. Spencer, Plaintiff, *Pro Se*

Suite 183

7001 Saint Andrews Road

Columbia, SC 29212

JOHN R. RAKOWSKY
ATTORNEY AT LAW
900 12th STREET
POST OFFICE BOX 3593
WEST COLUMBIA, SOUTH CAROLINA 29171

Exhibit A

1 of 3

May 17, 2007

Mr. Alex Rozenzaf
LawMax
459 Columbus Avenue, Suite 299
New York, NY 10024

TELEPHONE
(803) 791-8830
FAX
(803) 794-7880

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JOHN R. RAKOWSKY
ATTORNEY AT LAW
900 12th STREET
POST OFFICE BOX 3593
WEST COLUMBIA, SOUTH CAROLINA 29171

Exhibit A
2 of 3

TELEPHONE
(803) 791-8830
FAX
(803) 794-7880

May 17, 2007

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6170 W. Lake Mead Blvd.
Suite 311
Las Vegas, Nevada 89108

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900 12th STREET
POST OFFICE BOX 3593
WEST COLUMBIA, SOUTH CAROLINA 29171

Exhibit A

3 of 3

May 17, 2007

Mr. Bruce Benson
6170 W. Lake Mead Blvd.
Suite 311
Las Vegas, Nevada 89108

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On the afternoon of Tuesday, May 8, 2007, Judge Harwell held an evidentiary hearing regarding the evidence both sides proposed to admit at trial. Almost every document of evidence the Plaintiffs submitted was challenged by the Defendants' counsel. Prior to my involvement in this case, former Plaintiffs' counsel Michael Goldberg missed specific filing deadlines set by the Court's scheduling order, causing a serious problem in the admissibility of a very large proportion of Plaintiffs' evidence. Consequently, as just one example, Judge Harwell indicated that the next day, he would rule as inadmissible at least 75% of Plaintiffs' medical expenses. Accordingly, Judge Harwell suggested that the Plaintiffs take the pre-trial settlement that was being offered by the Defendants.

Additionally, it was revealed by Defendants' Counsel Saleeby for the first time that former Plaintiffs' counsel Goldberg had received an offer of Judgment from the Defendants that neither I, nor former local Plaintiffs' counsel James Cooper nor the individual Plaintiffs had ever seen before or knew about. This is critical because if the case was decided in favor of the Plaintiffs below the thirty thousand dollars (\$30,000) threshold amount in the "Offer of Judgment," the Plaintiffs would have been responsible both collectively and individually for all the Defendants costs, including attorney's fees from the first date of the signing of the offer. Adrian and I estimated that that would be a minimum amount of between \$200,000 and \$300,000 and likely much more.

Judge Harwell strongly suggested that Adrian and I get the Plaintiffs to settle for their best interests before he made the ruling against the Plaintiffs' evidence at trial on Wednesday, May 9, 2007, and the Defendants then subsequently drop their settlement offer. Judge Harwell indicated at the evidence hearing on Tuesday, May 8, 2007, that, (1) most of the Plaintiffs' medical damages, (2) most of the Plaintiffs' evidence regarding the civil conspiracy and the questionable action of the defendants, and (3) almost all of the Southern Holdings, Inc. valuation evidence was not going to be allowed to be admitted because it was not timely filed with the Court. Judge Harwell told Adrian and me in chambers that he wanted for everything related to this case to end at one time, so we needed to drop the claims against Dave Smith and Ancil Garvin as part of the settlement.

Without the admission of the critical evidence, the Plaintiffs would have been exposed to a Judgment against them of \$300,000 to 400,000 if we did not settle the case due to the Defendants' "Offer of Judgment" filed on July 21, 2004. Judge Harwell told us in chambers on Wednesday, May 9, 2007, the Plaintiffs acceptance of the Defendants' offer was the best decision for the Plaintiffs to make given that he was going to rule against the admission of the majority of the Plaintiffs' evidence. Now that this case is behind us we can go after Goldberg for not filing the evidence in a timely manner, which caused these problems in the first place, along with Goldberg's flawed initial pleadings.

Sincerely,


John R. Rakowsky

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

SOUTHERN HOLDINGS, INC., et al.,)

Civil Action No.: 4:02-cv-1859-RBH

Plaintiffs,)

v.)

ORDER

HORRY COUNTY, et al.,)

Defendants.)

Pending before the court are: 1) Hartness Defendants' [Docket Entry #491] motion for sanctions; 2) Counsel for Plaintiffs, Adrian Falgione's [Docket Entry #516] motion to withdraw as attorney; 3) Plaintiffs' *pro se* [Docket Entry #519] motion for clarification or more definite statement; 4) Counsel for Plaintiffs, John Rakowsky's [Docket Entry #525] motion to withdraw as attorney; 5) Plaintiffs' *pro se* [Docket Entry #526] motion for extension of time to file response to court's Order; and 6) Counsel for Plaintiffs, Adrian Falgione's [Docket Entry #565] amended motion to withdraw as attorney.

The record indicates that on June 21, 2007, Plaintiffs filed a Notice of Appeal from this court's May 9, 2007 Order dismissing the case with prejudice pursuant to the settlement agreement. Plaintiffs also appealed from the court's February 12, 2007 Order denying Plaintiffs' motion to reconsider and the court's March 21, 2007 Order denying Plaintiffs' motion to alter or amend. On December 3, 2007, the Fourth Circuit Court of Appeals dismissed Plaintiffs' appeal. The Mandate and Judgment was issued on December 26, 2007.

Accordingly, the pending motions listed above are **DENIED** as moot. Furthermore, with regard to Plaintiffs' *pro se* [Docket Entry #519] motion for clarification, it is **DENIED** as

moot and because the clarification sought by the Plaintiffs is irrelevant and unnecessary to the court's earlier disposition of the matter ruled upon.

IT IS SO ORDERED.

Florence, SC
January 14, 2008

s/R. Bryan Harwell
R. Bryan Harwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
Florence Division

SOUTHERN HOLDINGS, INC.,
et al.

Plaintiffs,

v.

HORRY COUNTY, SOUTH
CAROLINA, et al.

Defendants.

Case No.

4:02-CV-01859-RBH

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**PLAINTIFFS' SECOND MOTION FOR CLARIFICATION OF THE EVENTS AND
DECISIONS OF THE MAY 8, 2007, EVIDENTIARY HEARING AND SECOND REQUEST
FOR THE RECUSAL AND/OR DISQUALIFICATION OF JUDGE R. BRYAN HARWELL**

NOW COME CERTAIN PLAINTIFFS¹, on a *Pro Se* basis, to respectfully move a second time that the Honorable Judge R. Bryan Harwell clarify what happened at the evidentiary hearing held on May 8, 2007, and for Judge R. Bryan Harwell to recuse himself from the above captioned case prior to making any further decisions in this case.

INTRODUCTION

Section 455(a) of Title 28 of the United States Code requires a federal judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." Judge Harwell should disqualify himself from hearing new evidence regarding reopening this closed case for several actions, identified herein, that would bring his impartiality into question.

¹ Doris Holt, Rodney Lail, Irene Santacroce, Ricky Stephens, Marguerite Stephens and James Spencer.

First, Judge Harwell has a documented history of making evidentiary decisions without reviewing the evidence upon which he is making the decisions. In United States v. Under Seal (In re Grand Jury Proceedings #5), 401 F.3d 247 (4th Cir. S.C. 2005), the Fourth Circuit found, "*In re Grand Jury Proceedings*, 33 F.3d at 351, is notably distinguishable because the district court in that case had detailed summaries of the allegedly privileged documents and, after examining these summaries along with the government's evidence, determined in its discretion that actual examination of the documents was not necessary.

"Here the District Court [Judge Harwell] had no such summaries and no basis on which to conclude that these documents are connected to crime or fraud. Indeed, no discussion even took place as to what [**20] information these documents might contain. We thus remand this case back to the district court either to examine the actual documents (or summaries thereof) *in camera* or to otherwise determine whether they satisfy prong two of the crime-fraud exception as it applies to attorney-client privilege."

In the Southern Holdings vs. Horry County case, pivotal Court decisions were made during an unexpectedly unrecorded evidentiary hearing on May 8, 2007. The Court Reporter was kept outside the Judge's Chambers with his camera running, during which Judge Harwell made unrecorded evidentiary decisions against the Plaintiffs' interests behind closed doors. Significantly, based on the time constraints, as established by the Court Reporter Vince Roland, it would have been impossible for the Court to have reviewed the evidence upon which the Court made decisions. This is parallel to the Grand Jury hearing instance previously cited herein.

Judge Harwell has refused to clarify the truth about events and decisions made in this pivotal, undocumented and controversial evidentiary hearing. This unwillingness to divulge the truth regarding these legal proceedings creates a reasonable doubt concerning Judge Harwell's

impartiality in the present case to such an extent that a reasonable person would question the bias of Judge Harwell and would conclude that such bias led to the loss of the integrity of the legal process in this case. These and other actions certainly demonstrate the appearance of a systematic bias by Judge Harwell against the interests of the Plaintiffs, a bias founded on past irregular practices of Judge Harwell regarding his not reviewing evidence upon which Judge Harwell subsequently made rulings.

Second, in May of 2000, while the perpetrators of the events under litigation in this case were planning the events, they generated *planning documents*, ones which were obtained by the Plaintiffs. These documents contained a guarantee that based on local political connections the perpetrators would be protected by the Court's and the lawyers' not allowing evidence to be seen by a jury if the case went to trial. The planning documents were forensically tied to two Defendants in this action, David Smith and Ancil Garvin. The two Defendants were tied to the planning documents by two renowned forensic experts Durward Matheny and Haywood Starling. **(Please see Plaintiffs' Exhibit "A" attached hereto.)** It should be noted that the perpetrators' planning memos that referenced lawyers and Court participation in a cover-up of the evidence were sent independently to these two unrelated forensic document examiners for their expert evaluation *months* before the actual events of August 6, 2000, occurred. It should be further pointed out that these memos were written *seven years prior* to the Court's summary dismissal on May 8, 2007, of the vast majority of the Plaintiffs' evidence in this case. This dismissal of the Plaintiffs' evidence occurred during the key May 8, 2007, evidence hearing that was unrecorded despite the presence of the Court reporter. Mr. Vince Rowland was hired to record the hearing, but was not allowed to record the hearing as he was relegated to a location outside of the Judge's Chambers doors as the hearing progressed inside.

Third, on or about May 22, 2000, notes in a handwritten journal kept by felon Defendant Harold Steve Hartness confirmed that the former long term (20 years) Horry County Clerk of Court, Billie Richardson, would arrange for a Judge at their [the perpetrators'] convenience. The felon's handwritten journal also diagramed how the request for a Judge was to be made by the perpetrators.

STATEMENT OF FACTS

1. **May 18, 2000**, date of planning document (hereinafter "the document") of civilian Defendants Ancil B. Garvin, David N. Smith. "The Courts and the lawyers will protect us no matter what we do to the 'little people' it will never get to a jury and if it does the judge will never let the truth be heard." (*Attached hereto, Exhibit "A", Page 4, last bullet point.*)
2. **June 22, 2000**, self confessed and convicted felon Defendant Harold Hartness makes a notation in a handwritten journal that the perpetrators will be provided a Judge at their convenience in these matters: "**Billie [Billie Richardson the former 20 year Horry County Clerk of Court] will hook us to a judge at our convenience. See Dickie [Richard Way, Billie Richardson's son in law] first, then Billie and then the judge! Dickie was the police commissioner > 1976.**" (*See attached hereto Exhibit "B", from the Harold Hartness journal, page stamped number 12.*)

It should be noted (1) that Harold Hartness's felony conviction involved activities with a criminal organization that bribed public officials, (2) that Harold Hartness also kept a journal of his activities in those criminal matters, and (3) that there was an overlapping of time periods between criminal activities in that case and the occurrence of events in this case. (*See Case 1:07-cr-00104-TSE and related case documents*

involving Harold Steve Hartness, filed in Federal District Court, the Western District of North Carolina.)

3. **May 29, 2002**, this case, civil action 02-1859, is filed in South Carolina Federal District Court, Florence Division. Judge Houck is the presiding judge.
4. **July 12, 2004**, case is reassigned from Judge Houck to Judge R. Bryan Harwell, who had recently been named as a Federal District Judge.
5. **May 8, 2007**, Judge Harwell, behind chambers doors, conducts an unrecorded evidentiary hearing lasting approximately sixty minutes, while the Court Reporter assigned to record the evidentiary hearing, Vince Rolland, waited outside Judge Harwell's chambers doors with his court recorder camera running.
6. **May 8, 2007**, Judge Harwell in the evidentiary hearing, without any records of the proceedings being taken, rules against virtually all the Plaintiffs' evidence painstakingly collected over seven years with the help of renowned experts.
7. **May 8, 2007**, Judge Harwell in the same unrecorded evidentiary hearing, without any records of the proceedings being taken, rules to admit **all** the Defendants' evidence intact, including totally blacked out (redacted) "*trust me*" memos, which purportedly legitimized the Defendants' non-production of evidence legally sought by the Plaintiffs since August 2000. The contents of the blacked out memos written by the Defendants' law firm employees were purportedly too secret to be revealed to the Court or to the Plaintiffs; however, the Defendants' Counsels assured the Court and the Plaintiffs that you could trust the Defendants' Counsels not to submit anything that was not legitimate. (See attached **Plaintiffs' Exhibit "C"**). Plaintiffs believe that a reasonable person would conclude that Judge Harwell's admitting the content of these documents,

totally obliterated by the Defendants, as containing legitimate evidence demonstrates a definite bias in favor of the Defendants and to the detriment of the Plaintiffs.

9. **May 17, 2007**, the Honorable Judge John Rakowsky, and his associate Adrian Falgione, Esquire, sent out three letters to various interested parties describing the events that occurred and the decisions the Court made during the non-recorded evidentiary hearing upon which they had reported to the Plaintiffs.
10. **July 3, 2007**, Judge Harwell issues Court Order No. 510. Judge Harwell states in Court Order No. 510, that "With regard to Attorney Rakowsky's letters to third parties (**See Plaintiffs' Exhibit "E" attached hereto**), while the court does not agree with many of the statements by Attorney Rakowsky concerning statements attributed to the court, this court did express concern about the matter of Plaintiffs' untimely production of evidence as argued by the Defendants in open court on May 8, 2007."

Judge Harwell's open disagreement with Officers of the Court Judge John Rakowsky, Esquire and Adrian Falgione, Esquire regarding the proceedings of the unrecorded evidentiary hearing on May 8, 2007, *raises serious issues about the character of matters that utterly defined the decisions of the Plaintiffs on May 9, 2007*. The Plaintiffs who were present at Court on May 9, 2007, relied on the statements of fact provided by Officers of the Court Judge John Rakowsky and his associate Adrian Falgione, Esquire as to what happened regarding the summary elimination of the majority of the Plaintiffs' evidence and the summary admission of all the Defendants' evidence by Judge Harwell during the unrecorded evidentiary hearing on May 8, 2007, when the Plaintiffs made their decisions on May 9, 2007, regarding the disposition of the case.

11. **July 12, 2007**, Plaintiffs file Court Document No. 519. The Plaintiffs in Court Document No. 519 asked for clarification from Judge Harwell of what the truth was concerning what occurred and the decisions that were made during the proceedings of the unrecorded evidentiary hearing held on May 8, 2007.

In addition to learning of Judge Harwell's significant contradicting statement written into Court Order No. 510 concerning Judge Rakowsky's presentation of events during the unexpectedly unrecorded key evidentiary hearing, the Plaintiffs also learned that the hearing lasted only approximately 60 minutes. During that 60 minute time period, the Plaintiffs' evidentiary exhibits, which included over four hours of police videotapes and police recordings, were reviewed by the Court for the first time, in addition to over 200 Plaintiffs' documentary evidentiary exhibits. Disregarding the discrepancy of viewing 4 hours of videotapes in 60 minutes, it would mean each one of the Plaintiffs' 200 evidentiary exhibits was presented, argued, and decided upon approximately *every eighteen seconds*. On the face of this alone, Plaintiffs believe that the average individual would conclude this would not be possible.

12. **July 20, 2007**, Court Reporter Vince Roland provides written confirmation of the circumstances of his not recording the evidentiary hearing on May 9, 2007 (**See Plaintiffs Exhibit "D" attached hereto**).
13. **January 14, 2008**, Judge Harwell issues Court Order No. 577, denying the Plaintiffs' Motion No. 519. In denying the Plaintiffs' motion Judge Harwell denied the Plaintiffs the right to know what the Court considers the truth to be concerning what occurred during the proceedings of the unrecorded evidentiary hearing held on May 8, 2007. The version of the proceedings of the unrecorded evidentiary hearing which was reported to

the Plaintiffs by Court Officers Judge John Rakowsky and Adrian Falgione (a version openly disagreed upon by Judge Harwell in Order No. 510) was the version of proceedings that led to decisions taken by the Plaintiffs present on May 9, 2007, regarding the disposition of this case. This refusal by Judge Harwell in Court Order No. 577 to reveal the proceedings and decisions of the unrecorded evidentiary hearing effectively denies the Plaintiffs the right to know what happened during the pivotal evidentiary hearing. This leaves the Plaintiffs in a state of legal limbo as to how to proceed at this point in pursuit of their legal due process and keeps hidden what should be made public, which gives the distinct impression of a bias by Judge Harwell in favor of the Defendants.

14. **January 30, 2008** , The Plaintiffs filed Document No. 582, a request in District Court for reconsideration of Court Order No. 577, in order to find out what happened during the unrecorded and in dispute evidentiary hearing that was the pivotal moment in the case. The Court's (1) disagreeing with Officers of the Court Judge John Rakowsky's and Adrian Falgione's version of what happened during the evidentiary hearing, and yet (2) refusal to reveal what should be non-confidential hearing results, rightly or wrongly creates a cloud of suspicion of impropriety. The Court has not responded to date to this motion for reconsideration, Document No. 582.

ARGUMENT

Though "judges are presumed to be impartial," *Tripp v. Executive Office of the President*, 104 F. Supp. 2d 30, 34 (D.D.C., 2000), 28 U.S.C. 455(a) requires a federal judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." The standard for disqualification under this statute is an objective standard, *Liteky v. United States*, 510 U.S. 540,

548 (1994), and the purpose of the statute is "to promote public confidence in the integrity of the judicial process." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988). No actual bias need be demonstrated by the moving party, for §455(a) "focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice. [and] a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street." *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980). In stark terms "what matters is not the reality of bias or prejudice but its appearance." *Liteky* at 458.

The apparent integrity of the judicial process and maintenance of the perception that courts are impartial venues are the chief goals of the statute, and judges must disqualify themselves even when "false and erroneous . . . allegations" are the bases of a motion for recusal if the court's impartiality may reasonably be questioned because of such allegations. *Church of Scientology v. Cooper* 495 F Supp 455, 461 (C.D. Cal. 1980). Section 455 was intended to overrule the "duty to sit" concept, and once a movant demonstrates facts that reasonably call into question a judge's impartiality the judge must disqualify himself. *Smith v. Pepsico, Inc.*, 434 F Supp 524 (S.D. Fla. 1977); *United States v. Corr.* 434 F. Supp. 408 (S.D.N.Y. 1977).

CONCLUSION

Judge Harwell's prior action in **United States v. Under Seal (In re Grand Jury Proceedings #5), 401 F.3d 247 (4th Cir. S.C. 2005)** of not reviewing evidence and making decisions related to the contents of the non-reviewed evidence mirrors this case in (1) Judge Harwell's conducting an unexpectedly unrecorded evidentiary hearing where the majority of the Plaintiffs' evidence was summarily ruled as inadmissible and where 100% of the Defendants

evidence was summarily ruled admissible, (2) the fact that the proceedings of this unrecorded evidentiary hearing presented by Judge Rakowsky and Adrian Falgione, Esquire were disputed by Judge Harwell in Court Order 510, yet Judge Harwell refuses to comment further on what aspects of the version of events during the unrecorded evidentiary hearing presented by his Officers of the Court were inaccurate, (3) the fact that during the unrecorded evidentiary hearing, which lasted approximately one hour, each piece of Plaintiffs' evidence was purportedly presented to the Court for the first time at this evidentiary hearing, including over four hours of police videotape and police audiotape recordings, and over 200 documentary exhibits. Not taking into account the four hours of police recorded videotape and police recorded audiotape evidence, this means that documentary evidence was purportedly introduced, argued and decided upon at the improbable rate of one evidentiary document *every eighteen seconds*. This establishes the Plaintiffs' evidence was summarily dismissed without review by the Court, (4) the fact that the Court Reporter, Mr. Vince Rolland, who was engaged to record the evidentiary hearing, was asked to wait outside Judge Harwell's chambers doors with his camera running, while the evidentiary hearing was held behind the closed chambers doors, (5) the fact that Judge Harwell allowed as legitimate evidence totally redacted documents that were composed, written and obliterated by the Defendants' Counsels' employees, documents which purportedly describe and legitimize the basis for Defendants' inability to locate evidence which the Plaintiffs allege was wrongfully destroyed, and the subsequent finding that Judge Harwell did not see any irregularity in the concealment of relevant evidence by the Defendants in their totally obliterated documents.

The preceding is not an exhaustive list of circumstances providing justification for the Plaintiffs' request for the recusal and/or disqualification of Judge Harwell from further decisions regarding this case. The history of actions and decisions cited herein, coupled with Judge Harwell's

preferences for not recording case defining adjudication make it clear that the strictures of §455(a) have been met, and Plaintiffs pray for Judge Harwell's recusal and/or disqualification in the above captioned case and that Judge Harwell be required to answer what happened regarding the actions and decisions made during the controversial and pivotal evidentiary hearing held on May 8, 2007, a hearing that was unexpectedly held behind closed doors with the Court reporter Vince Roland, kept outside with his camera running.

Significantly, the pivotal May 8, 2007, hearing in which Judge Rakowsky's characterization in written documents (**attached hereto as Plaintiffs' Exhibit "E"**) of the Court's actions and decisions was deemed incorrect to such an extent that Judge Harwell wrote in Court Order No. 510 "the court does not agree with many of the statements by Attorney Rakowsky concerning statements attributed to the court."

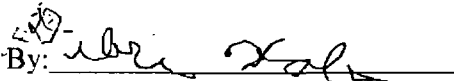
The controversy surrounding this key hearing means the information the Plaintiffs had relied on concerning the results of the hearing could not be used by the Plaintiffs to make a valid decision in this case. The knowledge of a disagreement of what exactly happened during the May 8, 2007, evidentiary hearing was not known by the Plaintiffs until July 3, 2007, when the Court issued Court Order No. 510. The Plaintiffs then verified on July 20, 2007, that the evidentiary hearing was in fact not recorded. The truth about this pivotal and case defining hearing must be publically made known including the truth concerning why the hearing was not allowed to be recorded by Court Reporter Vince Roland.

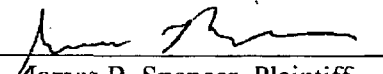
The Plaintiffs state of legal limbo needs to be concluded by the Court's issuance of definitive statements as to the truth of what happened during the evidentiary hearing, including answers as to the accuracy of each and every statement by Officers of the Court Judge John Rakowsky and Adrian Falgione. The Plaintiffs have heretofore taken every legally available

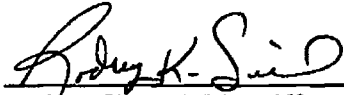
option the Plaintiffs have knowledge of to gain this information that is legally and rightfully due to them.

Based on the aforementioned, to ensure that the evidence is properly reviewed before decisions are made by this Court regarding the evidence, the Plaintiffs request that Judge Harwell recuse himself. Additionally, given the total predictive validity of the perpetrators' documents written seven years prior to the Plaintiff's evidence being dismissed on May 8, 2007, to avoid any appearance of impropriety, the Plaintiffs respectfully request that a Judge out of the Northern District of Virginia, with no ties to this geographic region, be requested to hear the Plaintiffs' motions that are languishing at this time in this case.

Respectfully submitted this 5th day of August, 2008.

By: 
Doris Holt, Plaintiff, *Pro Se*
Suite 183
7001 Saint Andrews Road
Columbia, SC 29212

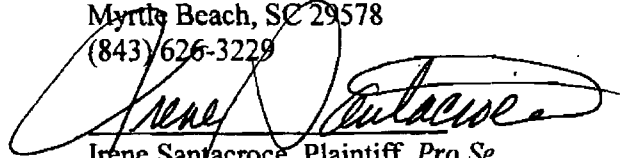

James B. Spencer, Plaintiff,
Pro Se
Suite 183
7001 Saint Andrews Road
Columbia, SC 29212

Rodney K. Lail, Plaintiff, *Pro Se*

PO Box 2753

Myrtle Beach, SC 29578

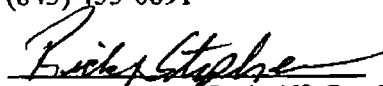
(843) 626-3229

Irene Santacroce, Plaintiff, *Pro Se*

205 Deer Trace Circle

Myrtle Beach, SC 29588

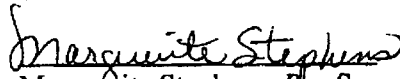
(843) 455-0891

Ricky Stephens, Plaintiff, *Pro Se*

207 Deer Trace Circle

Myrtle Beach, SC 29588

(843) 283-6751

Marguerite Stephens, *Pro Se*

207 Deer Trace Circle

Myrtle Beach, SC 29588

(843) 283-6751

CERTIFICATE OF SERVICE

I, James Rodney Lail, *Pro Se*, hereby certify that I have supplemented the Certificate of Service this day by either mailing, faxing or electronic transfer a true and correct copy of the following document: **PLAINTIFFS' SECOND MOTION FOR CLARIFICATION OF THE EVENTS AND DECISIONS OF THE MAY 8, 2007, EVIDENTIARY HEARING AND SECOND REQUEST FOR THE RECUSAL AND/OR DISQUALIFICATION OF JUDGE R. BRYAN HARWELL**, as follows:

Jefferson Boone Aiken, Edward G Elliott, James
M. Saleeby, Jr., Benjamin A. Baroody
Aiken, Bridges, Nunn, Elliott & Tyler, P.A..
181 East Evans Street,
Suite 409 Florence, SC 29506

Sandra J Senn, Stephanie P McDonald, Robin L Jackson
PO Box 12279
Charleston, SC 29422

John R Rakowsky & Desa A Ballard,
226 State Street, West Columbia, SC 29169

Adrain Falgionie,
PO Box 277 129 1/2 E Main St
Lexington, SC 29072-3420

David Smith
1006 N. Holden Road
Greensboro, NC 27410

Dan Green, CEO
Southern Holdings, Inc.
2620 Regatta Drive
Suite 102
Las Vegas, NV 89128

Ronald N. Serota
Corporate Law Center
2620 Regatta Drive
Suite 102
Las Vegas, NV 89128

Andrew F. Lindemann
Davidson Morrison and Lindemann
PO Box 8568
Columbia, SC 29202-8568

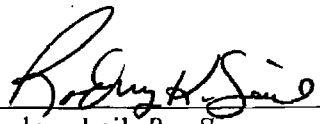
Other interested Parties:

Linda Williamson Lawrence
105 Yadkin Street, Suite 203
Albemarle, NC 28001

Ernest H. Morton
117 W. North St.
PO Box 519
Albemarle, NC 28002

This 5th day of August, 2008.

By:


Rodney Lail, *Pro Se*
P.O. Box 2753
Myrtle Beach, SC 29578

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Southern Holdings, Inc., et al.,

Plaintiff,

vs.

Horry County, South Carolina, et al.,

Defendants.

C.A. No.: 4:02cv-01859-RBH

ORDER

Certain plaintiffs seek the recusal of this court in motion/docket entry #612. Plaintiffs make allegations of inappropriate conduct by this Court ranging from rulings or alleged rulings on evidentiary issues, alleged secret evidentiary hearings or rulings, discovery or pretrial conferences held in chambers or by teleconference, and even possibly claiming bias based on the undersigned's ownership of property. None have merit.

Pursuant to 28 U.S.C. § 455(a), a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." "The question is not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his impartiality on the basis of all the circumstances." *Hathcock v Navistar Int'l Transp. Corp.*, 53 F.3d 36, 40 (4th Cir. 1995) citing *Aiken County v. BSP Div. of Envirotech Corp.*, 866 F.2d 661, 679 (4th Cir. 1989); and *Rice v McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978). *Accord People Helpers Found, Inc. v. City of Richmond, Va.*, 12 F.3d 1321, 1325 (4th Cir. 1993) (judge need *not* recuse himself unless his impartiality might reasonably be questioned). The mere fact that a judge has ruled adversely in this or a related proceeding is insufficient to require recusal.

United States v. Parker, 742 F.2d 127, 128-29 (4th Cir. 1984). Rather, to require recusal, the movant must show “*extrajudicial*” bias or conflict. *Liteky v. United States*, 510 U.S. 540, 551 (1994); *United States v. Morris*, 988 F.2d 1335, 1336-37 (4th Cir. 1993); *United States v. Guglielmi*, 929 F.2d 1001, 1007-08 (4th Cir. 1991); *In re Beard*, 811 F.2d 818, 827 (4th Cir. 1987); *Shaw v Martin*, 733 F.2d 304, 308 (4th Cir. 1984).

While it is difficult for the court to specifically recall many of the details of the history of the case (there are over 600 docket entries), this court is certain regarding two things.

First, the Court has not handled any matter in this case on an *ex parte* basis; nor do the plaintiffs claim that any conference or telephone call with the court was held *ex parte* or that their interests were not represented by their lead counsel, Goldberg.

At the outset, Plaintiffs attack this court by making allegations of impropriety concerning the non-recording of a December 6, 2004 conference. The court cannot specifically recall if the conference was held at the Court’s request or the lawyers’ request, and if it took place by telephone or in Chambers. Regardless, the plaintiffs in their supplemental filing, docket #631, then say they agree with defendants that the court was not required to have such a conference on the record with the court reporter.

Second, both of the orders of which the plaintiffs complain were Consent Orders submitted to the court by lawyers for both sides. This court is a neutral, impartial, unbiased third party. The court tries to accommodate parties and their lawyers, and tries to make itself available to the lawyers for the parties when requested. Plaintiffs argue their local lawyers were not involved in some of the matters, and that the local rules of practice mandate their appearance for hearings. First, the local rules may be suspended by the Court. Second, this was not a hearing, but an informal conference in Chambers or by telephone. Third, in most cases, local counsel asks not to be present where there is lead counsel

present. Fourth, the court does not recall Attorney Rakowsky being actively present in the case in early matters. Basically, plaintiffs cry foul because their lawyer Goldberg allegedly did not request a hearing with a court reporter, and they instructed him to do so. However, there is no evidence of any request to the Court for a hearing with a court reporter present. Plaintiffs' complaint stems from problems associated with their own numerous different lawyers and either communications or miscommunications with them. It is not this court's function to become a coordinator between a party and their own lawyers. The function of this court is to deal with disputes between the parties to the lawsuit, not to deal with problems that may exist or develop between clients and their numerous different lawyers¹ or the resulting lack of their lawyers' knowledge about what was going on with a case because of lack of communication between local counsel and lead counsel. This communication problem became apparent at the February 9, 2007 hearing when the court dealt with another unrelated issue and both Mr. Rakowsky and Mr. Serota were counsel of record and neither apparently knew what was going on in the mind of their former co-counsel, Mr. Hardee and Mr. Goldberg. Again, it is not this court's function to coordinate matters between Plaintiffs' various lawyers. It is also not this court's function to deal with disputes between the plaintiff's own lawyers, but that is exactly what this court has had to do. It has had to waste its time dealing with disputes between Attorneys Serota and Rakowsky, both co-counsel for the plaintiffs (*See* docket #367, Motion to Dismiss Serota and Motion for Gag Order on Serota, and docket #410 Order regarding same).

Far from being biased toward the defendants, this court has raised matters *sua sponte* that the plaintiffs' own counsel should have raised, but for lack of communication with their co-counsel. This

¹ The docket reveals (8) different lawyers involved in the representation of the plaintiffs during the history of this case.

court *sua sponte* raised the mischaracterization of Noel Herold as a court appointed Rule 706 expert during his deposition examination; this characterization was unobjected to by plaintiffs' counsel. This lack of understanding or miscommunication between plaintiffs' own lawyers again is not the responsibility of the Court. But rather than allow the defendants to present this twisted characterization that was unobjected to, the court interposed its own objection out of a basic sense of fairness. Some judges may have not raised the matter because there was no objection. It also appeared that the new defense counsel, Ms. Senn, who was at the deposition, was just as confused and similarly may not have communicated with other defense counsel, which was confirmed by Attorney Saleeby. The use of a deposition before a jury, indicating the witness was appointed by the judge, could have a profound impact on a jury. This court prevented that *sua sponte*.

Plaintiffs argue about evidentiary rulings or allowing Noel Herold to testify. Without going into unnecessary detail, this court fed everybody out of the same spoon and will not regurgitate its reasons for its ruling. Plaintiffs were allowed to name a late police liability expert as well, when their other expert abandoned them, and the court took various steps to enable them to take a supplemental deposition of Herold.

At the hearing on May 4, 2007, during the discussion of the Herold deposition, it was the Court's understanding that there were no policies or procedures upon which he relied, but there were photos that Herold used which had not been provided to Rakowsky. This was the basis for the objection to the Herold deposition which was taken care of by the supplemental deposition as indicated at the hearing on May 8, 2007. In addition, to the extent a party wishes to object to any rulings by the Court, the party should make a timely motion for reconsideration and/or appeal the case after final judgment.

Plaintiffs' claim in this filing for recusal and in other filings that the court held a "secret" evidentiary hearing throwing out almost all of their evidence and that the court has in essence tried to hide the truth. Nothing could be farther from the truth. This is the same court that *sua sponte* raised the issue of its disagreement with statements attributed to it by plaintiffs' counsel to third parties (presumably lienholders or creditors of the plaintiffs). Again, this was done *sua sponte* by the Court and again it is not this Court's responsibility to continue dealing with disputes between lawyers and their clients. Additionally, in the same Order the court clearly explained this matter did not require court approval. Any conversations with this Court were with all lawyers present. This Court did not conduct a secret evidentiary hearing and did not rule on any evidentiary matters in chambers. While the lawyers may have generally informally discussed what they thought were strengths or weaknesses of their respective cases, the court had no other evidentiary rulings or considerations pending before it other than the untimely production of certain evidence which the court reserved ruling on. The fact that this court did not have before it, much less ruled on, the numerous matters of which the plaintiffs refer to should be self-evident. The transcript of the hearing of May 8, 2007 does not reference these many items of evidence referred to by the plaintiffs; nor does it appear from the docket that those matters were even before the Court by way of any filed pretrial objections or motions in limine, except to the extent that the defendants would not agree to certain items of plaintiffs' evidence before a proper foundation was laid at trial. Also, the sheer number of matters plaintiffs raise could not have been dealt with in that limited time. When the Court was advised that the case was settled with the represented defendants, and plaintiffs' counsel appeared to the Court to believe that the whole case was disposed of, the Court *sua*

sponte reminded plaintiffs' counsel of the pending claim against (2) *pro se* defendants² who were not present and the Court instructed plaintiffs' counsel to find out if plaintiffs were proceeding with those claims or not, since the Court had a jury waiting. The Court congratulated the lawyers for being able to settle the case as to the represented defendants, and indicated the Court was ready to proceed with regard to the (2) remaining *pro se* defendants since a jury was drawn. Plaintiffs were certainly free to proceed against the remaining (2) *pro se* defendants if they desired. The Court was shortly thereafter advised those claims were also being dismissed. The Court did not have a secret evidentiary hearing, and court approval of any settlement reached was not required. This Court did not bully or force anyone to do anything.

With regard to the undersigned's ownership of property in Horry County, such a claim is so tenuous that it merits no discussion other than that this interest would be unaffected by this proceeding.

For the plaintiffs to claim bias by this court is simply without support. This court has ruled in their favor on many issues. While the Court granted some of defendants' motions, it denied many others, as was appropriate in the case. Without listing each and every ruling, the Court would point out just some of the rulings in plaintiff's favor:

- (1) The Court entered an Order in July of 2005 that involved a denial of defendants' motion for summary judgment of the § 1983 claims based on Qualified Immunity which was appealed by defendants and which the Fourth Circuit dismissed; denial of defendants' summary judgment motion based on *de minimus* injury; denial of defendants' summary judgment motion on various state law claims; denial of Hartness defendants' motion for summary judgment on various state law claims.
- (2) The Court *sua sponte* raising the issue regarding the mischaracterization of Noel Herold as a Court appointed 706 expert.

²This Court had also in fact again *sua sponte* without plaintiffs even requesting it earlier entered default against one of these defendants. The other *pro se* defendant had filed an answer.

- (3) Allowing the plaintiffs to name a late police liability expert when their previous one abandoned them.
- (4) Denying the defendants motion to exclude plaintiffs' expert Cain.
- (5) Granting plaintiffs' motion to strike defendants' expert witness Koenig.

Based on all of the above, no reasonable person could conclude that the impartiality of the undersigned could be reasonably questioned.

For the foregoing reasons, the motion for recusal is hereby **DENIED**.

IT IS SO ORDERED.

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge

Florence, South Carolina
August 13, 2008

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
Florence Division**

SOUTHERN HOLDINGS, INC.,
et al.

Plaintiffs.

v.

HORRY COUNTY, SOUTH
CAROLINA, et al.

Defendants.

Case No.

4:02-CV-01859-RBH

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CLERK, COLUMBIA, SC
2008 SEP 29 P 3:51

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MEMORANDUM
IN OPPOSITION TO
PLAINTIFFS' SECOND MOTION FOR CLARIFICATION
AND SECOND MOTION FOR RECUSAL
(DEFENDANTS' DOCUMENT NO. 711)**

PLAINTIFFS¹ contend that in over eight years of litigation the Defendants have constantly avoided addressing relevant issues raised by the Plaintiffs. Defendants have continued that practice in Document No. 711. To avoid addressing the issues raised by the Plaintiffs in Document No. 659, Defendants' Counsel Lindeman continues his distortion of matters in Document No. 711.

In Defendants Document No. 621, Lindeman centered Defendants argument against Plaintiffs' First Motion for Judge Harwell to recuse himself (Document No. 612) on a Plaintiffs lack of extrajudicial evidence of a bias of Judge Harwell. Plaintiffs clearly center their argument in Document No. 659 on extrajudicial evidence citing a 4th Circuit Court of Appeals ruling involving Judge Harwell's making decisions without properly reviewing evidence (United States v. Under Seal (*In re Grand Jury Proceedings* #5) 401 F.3D 247 (4th Cir. S.C. 2005)).

¹ Doris Holt, Rodney Lail, Irene Santacroce, Ricky Stephens, Marguerite Stephens and James Spencer.

Clearly, Lindeman has misrepresented to the Court in Document No. 711 that Plaintiffs Document No. 659 and Plaintiffs' Document No. 612 are duplicative; clearly, they are not and as such the Defendants have failed to file a legitimate response to Plaintiffs Motion for recusal. Therefore, the Defendants' and Defendants' Counsels' lack of addressing the issues raised by the Plaintiffs in Document No. 659 provides an admission of the validity of the Plaintiffs contentions contained in Document No. 659 and Judge Harwell should accordingly recuse himself from this case.

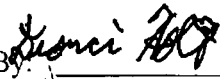
Regarding to the Defendants' Response (Document No. 711) to Plaintiffs Second Motion for Clarification Document No. 659, Defendants' Counsel Lindeman knows quite well Plaintiff Doris Holt and Plaintiff James Spencer have not previously filed a Motion for Clarification. This fact was pointed out in Lindeman's Document No. 594. The Court in Order No. 665 also took this position. Since Defendants' Counsel Lindeman received an extension to research and author his response, (Document No. 711), to Plaintiffs Document No. 659, then presumably Lindemann fully understood the Plaintiffs assertions Lindemann responded to in Defendants' Document No. 711. Therefore, in regard to the Plaintiffs second Motion for Clarification, since the Defendants have failed to address the issues raised by Doris Holt and James Spencer these issues should be deemed admitted and the Plaintiffs Motion for Clarification contained in Document No. 659 should be granted by the Court.

Further, why would Defendants' Counsel object to the truth of an evidentiary hearing be known to the Plaintiffs? Since Judge Harwell conducted the hearing and was present Judge Harwell would have disclosed any attempt at fraud during such a conference; yet Judge Harwell has stated that the version reported to the Plaintiffs by Court Officers Judge John Rakowsky and Adrian Falgione. Esquire was incorrect, but Judge Harwell refuses to clarify this statement, putting Plaintiffs in a state of legal limbo as a result. The controversial report to the Plaintiffs by Judge John Rakowsky and Adrian Falgione was a case defining event; yet there is no consistent version of the events and Judge Harwell and the Defendants' Counsels refuse to allow the truth to be heard. The following question of the Plaintiffs is not a rhetorical one, why is the truth hidden from the Plaintiffs?

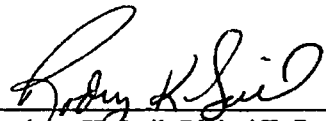
Based on the foregoing, the Plaintiffs Motion for Clarification contained in Document No. 659 should be granted by the Court and Judge Harwell should fully and completely disclose the events that occurred during that secretly held evidentiary hearing. By doing so this will allow the Plaintiffs to identify their legal rights at this point and will permit the Court to avoid any doubt of legitimacy of what transpired behind closed chambers doors on May 8, 2007.

RESPECTFULLY SUBMITTED

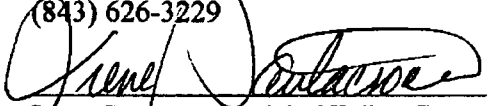
This 29th day of September, 2008.

By: 
Doris E. Holt, Plaintiff, *Pro Se*
Box 183
7001 Saint Andrews Road
Columbia, SC 29212

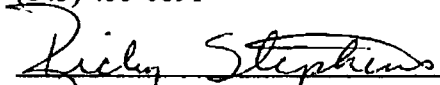

James Spencer, Plaintiff, *Pro Se*
Box 183
7001 Saint Andrews Road
Columbia, SC 29212



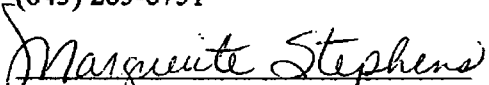
Rodney K. Lail, Plaintiff, *Pro Se*
PO Box 2753
Myrtle Beach, SC 29578
(843) 626-3229



Irene Santacroce, Plaintiff, *Pro Se*
205 Deer Trace Circle
Myrtle Beach, SC 29588
(843) 455-0891



Ricky Stephens, Plaintiff, *Pro Se*
207 Deer Trace Circle
Myrtle Beach, SC 29588
(843) 283-6751



Marguerite Stephens, Plaintiff, *Pro Se*
207 Deer Trace Circle
Myrtle Beach, SC 29588
(843) 283-6751

CERTIFICATE OF SERVICE

I, Rodney Lail, *Pro Se*, do hereby certify that the foregoing **PLAINTIFFS' RESPONSE TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' SECOND MOTION FOR CLARIFICATION AND SECOND MOTION FOR RECUSAL (DEFENDANTS' DOCUMENT NO. 711)** has this day been served on the following person(s) by either mail, fax or electronic transfer a true and correct copy, as follows:

Jefferson Boone Aiken, Edward G Elliott, James
M. Saleeby, Jr., Benjamin A. Baroody
Aiken, Bridges, Nunn, Elliott & Tyler, P.A.,
181 East Evans Street,
Suite 409 Florence, SC 29506

Sandra J Senn, Stephanie P McDonald, Robin L Jackson
PO Box 12279
Charleston, SC 29422

John R Rakowsky & Desa A Ballard,
226 State Street, West Columbia, SC 29169

Adrain Falgionie,
PO Box 277 129 1/2 E Main St
Lexington, SC 29072-3420

David Smith
1006 N. Holden Road
Greensboro, NC 27410

Dan Green, CEO
Southern Holdings, Inc.
2620 Regatta Drive
Suite 102
Las Vegas, NV 89128

Ronald N. Serota
Corporate Law Center
2620 Regatta Drive
Suite 102
Las Vegas, NV 89128

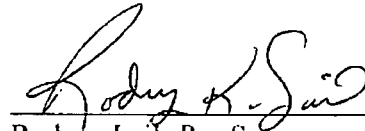
Andrew F. Lindemann
Davidson Morrison and Lindemann
PO Box 8568
Columbia, SC 29202-8568
Other interested Parties:

Linda Williamson Lawrence
105 Yadkin Street, Suite 203
Albemarle, NC 28001

Ernest H. Morton
117 W. North St.
PO Box 519
Albemarle, NC 28002

This 29th day of September, 2008.

By:



Rodney Lail, *Pro Se*
P.O. Box 2753
Myrtle Beach, SC 29578

James

From: Addy, Frank R. Secretary (Freda E. Sartin) <faddysc@sccourts.org>
Sent: Monday, October 12, 2015 12:32 PM
To: JamesBSpencer@sc.rr.com
Cc: Addy, Frank R. Law Clerk (Hallie Willm); Addy, Frank R.
Subject: 2012-CP-32-03428 (spencer v. Rakowsky, et al)

Mr. Spencer,

This is a follow up email pertaining to my conversation with you that took place on Friday, October 9th and to the fax that was received at our office on Saturday, October 10th. I have looked through our office and court term notation files for the term of court that was held on June 5th, 2013 more than once. This particular term of court was held in Laurens County. Judge Addy did hear matters from other counties during this assigned court term and does hear matters outside of the assigned county from time to time. The only documentation that is located in our file notes pertaining to the above case are copies of documents that were sent to the Lexington County Clerk of Court's office for filing. We have copies of the following Order of Dismissal, Order Denying Rule 59(e) Motion, Order Denying Motion to Disqualify and all of the originals were sent to the Lexington County Clerk of Court's office for filing. I can only speak of what is in our office and there is not any letters or correspondence in our notation files pertaining to the above case. Any letters or correspondence may not necessarily be in the Clerk of Court's file but, our office cannot speak to what is or is not in the Clerk of Court's file.

Freda Sartin
Administrative Assistant
Honorable Frank R Addy Jr
Resident Judge, Eighth Judicial Circuit Greenwood County Courthouse
528 Monument St , Room 210
Greenwood, SC 29646
Phone: (864)943-8020
Fax: (864)942-8581
Email: faddysc@sccourts.org<<mailto:faddysc@sccourts.org>>

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

I am an employee or clerk of the Lexington County Clerk of Courts office and state the following regarding the files on Case No: 2012-CP-32-3428. I have searched the files for the following:

- A letter from Judge Griffith dated May 30, 2013, to Judge Addy referencing materials provided to Judge Addy.
- An Order from Justice Toal dated January 17, 2013, which appointed Judge Griffith as chief Judge for administrative purposes to hear specifically Case No: 2012-CP-32-3428.
- Any overview to Judge Addy on Case No: 2012-CP-32-3428 from Judge Griffith's clerk.
- Copies of any of the above records found are attached hereto for a total of \_\_\_\_ pages. Clerk's initials here.

Printed name of Emily L. Hinson  
 Signature of Emily L. Hinson Date: 5-29-15  
 Deputy Clerk of Common Pleas

Affix Seal of the Clerk of Court of Lexington County.

We do not have any of these documents in the Court file. This information was not filed with our office.

FILED

2015 MAY 29 AM 11:00

RELLA M. JONES  
CLERK OF COURT  
LEXINGTON, SC

**RECEIVED**

JUL 08 2016

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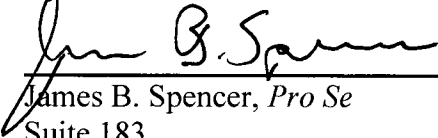
CERTIFICATE OF COMPLIANCE

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**SC Court of Appeals**

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

By:

A handwritten signature in cursive script, appearing to read "James B. Spencer", is written over a horizontal line.

James B. Spencer, *Pro Se*  
Suite 183  
7001 Saint Andrews Road  
Columbia, SC 29212

RECEIVED

JUL 08 2016

SC Court of Appeals

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PROOF OF SERVICE

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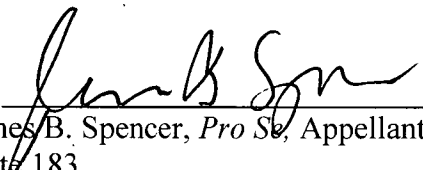
The undersigned hereby certifies that on , the document described below, was(were) served on all parties of record in this case by mailing a copy, by US mail and/or delivery by courier on this date July 8, 2016.

Documents served: **Record On Appeal, Volume II**

**Parties Served:**

Benjamin C. Bruner  
Bruner, Powel, Wall & Mullins, LLC  
1735 St. Julian Place, Suite 200  
Post Office Box 61110  
Columbia, South Carolina 29260-1110

David W. Overstreet  
Carlock, Copeland & Stair, LLP  
40 Calhoun Street, Suite 400  
Charleston, South Carolina 29401  
Attorneys for John Rakowsky

By:   
James B. Spencer, *Pro Se*, Appellant  
Suite 183  
7001 Saint Andrews Road  
Columbia, SC 29212  
(803) 414-0889