

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2017-000180

RECEIVED
JUL 06 2017
SC Court of Appeals

U.S. Bank National Association, as Trustee,
successor-in-interest to Bank of America,
N.A., as successor by merger to LaSalle
Bank National Association, as Trustee for
the registered holders of Bear Stearns
Commercial Mortgage Securities, Inc.,
Commercial Mortgage Pass-Through
Certificates, Series 2007-TOP26,

Respondent,

v.

AW-MAGPIG, LLC; HW-MAGPIG,
LLC; and MW-MAGPIG, LLC,

Appellants,

v.

Wells Fargo Bank, N.A., and Meridian
Capital Group, LLC,

Third-Party Defendants.

AFFIDAVIT OF DAVID H. SIMPKINS, ESQ.

Before the undersigned Notary Public personally appeared David H. Simpkins, Esq., who after being duly sworn stated under oath as follows:

1. My name is David H. Simpkins, Esq.. I am an associate with the law firm of Kilpatrick Townsend & Stockton LLP ("**Kilpatrick Townsend**"), which represents the above-referenced Respondent in this action. As such, I am fully familiar with facts and circumstances regarding this action and the prior proceedings had herein. This affidavit is submitted pursuant to

Rule 240(c)(3), SCACR, in connection with Respondent's Motion to Dismiss Appeal.

2. The Honorable Robert E. Hood entered an Order Requiring Turnover of Collateral and Sequestering Rents dated November 18, 2016, and filed in this action on November 28, 2016 (the "Sequester Order"). A true and correct copy of the Sequester Order is attached hereto as *Exhibit A*.

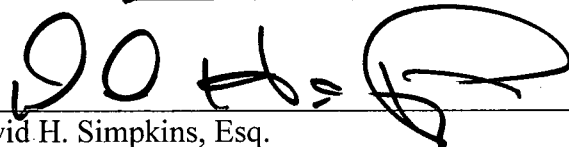
3. Judge Hood also entered an Order filed on December 30, 2016 that denied Appellants' motion for reconsideration or in the alternative staying enforcement of the Sequestration Order (the "Reconsideration Order"). A true and correct copy of the Reconsideration Order is attached hereto as *Exhibit B*.

4. On December 16, 2016, upon Respondent's motion, the Honorable Jean H. Toal entered an order appointing a receiver for the mortgaged property at issue in this case, which order was filed on December 22, 2016 (the "Receiver Order"). A true and correct copy of the Receiver Order is attached hereto as *Exhibit C*.

5. Appellants did not move to alter or amend, and did not appeal, the Receiver Order.

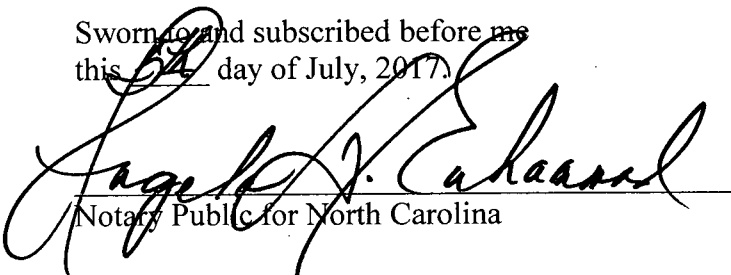
FURTHER AFFIANT SAYETH NOT.

Executed this 5th day of July, 2017.



David H. Simpkins, Esq.

Sworn to and subscribed before me
this 5th day of July, 2017.



Notary Public for North Carolina

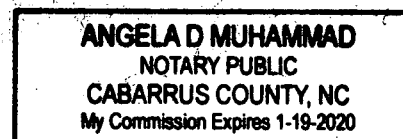


EXHIBIT A
Sequester Order

[attached hereto]

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP4002470

U S Bank National Association

AW MAGPIG LLC

Bank Of America N A

HW MAGBIG LLC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried and heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. No. suit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): Affirmed; Reversed; Remanded; Other _____

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

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case. *The order requiring turnover of collateral and sequestering rents is granted. Formal order attached.*
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge Peltz Judge Code 2164 Date 11/22/16

For Clerk of Court Office Use Only

This judgment was entered on the 20 day of Nov, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 20 day of Nov, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

David Hughes Simpkins

Robert Daniel Dodson

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette White

SCANNED

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 U.S. BANK NATIONAL ASSOCIATION,)
 AS TRUSTEE, AS SUCCESSOR-IN-)
 INTEREST TO BANK OF AMERICA,)
 N.A., AS SUCCESSOR BY MERGER TO)
 LASALLE BANK NATIONAL)
 ASSOCIATION, AS TRUSTEE FOR THE)
 REGISTERED HOLDERS OF BEAR)
 STEARNS COMMERCIAL MORTGAGE)
 SECURITIES, INC., COMMERCIAL)
 MORTGAGE PASS-THROUGH)
 CERTIFICATES, SERIES 2007-TOP26,)
)
 Plaintiff,)
)
 vs.)
)
 AW-MAGPIG, LLC; HW-MAGPIG, LLC;)
 and MW-MAGPIG, LLC,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2016-CP-40-02470

**ORDER REQUIRING
 TURNOVER OF COLLATERAL
 AND SEQUESTERING RENTS**

2016 NOV 28 PM 3:48
 FILED
 RICHLAND COUNTY
 JESSICA W. HOSBRIDE
 CLERK OF COURT & G.S.

This matter came before the Court for a hearing on the Motion for Order Requiring Turnover of Collateral and Sequestering Rents (the “**Motion**”) filed by the plaintiff, U.S. Bank National Association, as Trustee, successor-in-interest to Bank of America, N.A., as successor by merger to LaSalle Bank National Association, as Trustee for the registered holders of Bear Stearns Commercial Mortgage Securities, Inc., Commercial Mortgage Pass-Through Certificates, Series 2007-TOP26 (“**Plaintiff**”).

Having considered the Motion, the affidavits and memorandum submitted in support thereof by Plaintiff, the memorandum in opposition submitted by the defendants AW-MAGPIG, LLC, HW-MAGPIG, LLC and MW-MAGPIG, LLC (individually or collectively, as the context requires, “**Borrowers**”), and the arguments of counsel, the Court finds that the Motion should be granted. Accordingly, I make the following findings of fact:

FINDINGS OF FACT

1. This is a foreclosure action. Borrowers own the Property (defined below) that is the subject of this action. Plaintiff is the current owner and holder, by assignment, of a \$4,500,000.00 commercial mortgage loan (the "**Loan**") made to Borrowers on March 1, 2007, by Bear Stearns Commercial Mortgage, Inc., a New York corporation ("**Original Lender**"). The Loan is evidenced and/or secured by, without limitation:

- (a) Promissory Note dated March 1, 2007, executed by Borrowers and payable to Original Lender in the original principal amount of the Loan (the "**Note**");
- (b) Mortgage, Fixture Filing and Security Agreement dated March 1, 2007, executed by Borrowers and recorded in the Richland County Register of Deeds (the "**Register**") in Book 1288 at Page 3842 (the "**Mortgage**");
- (c) Assignment of Leases and Rents dated March 1, 2007, executed by Borrowers and recorded in the Register in Book 1288 at Page 3902 (the "**ALR**");
- (d) Cash Management Agreement dated March 1, 2007, between Borrowers, Original Lender and The Bank of New York Trust Company, N.A. (the "**Cash Management Agreement**"); and
- (e) Replacement Reserve and Security Agreement dated as of March 1, 2007, between Borrowers and Original Lender (the "**Reserve Agreement**");
- (f) Conditional Assignment of Management Agreement dated March 1, 2007, between Borrowers, Whatfor, LLC, a New York limited liability company ("**Property Manager**") and Original Lender (the "**CAMA**").¹

2. The Mortgage encumbers the Property (as defined therein), which is comprised of certain land and improvements forming Magnolia Pointe retail shopping center, located at 2000-2020 Clemson Road, Columbia, South Carolina. The Property also includes certain other collateral more fully described in the Mortgage, notably including the Leases and the Rents, as such terms are defined in Section 1.1(f) thereof.

¹ Copies of the Note, Mortgage, ALR, Cash Management Agreement and Reserve Agreement are attached to the Complaint as Exhibits A, B, D E and G, respectively. A copy of the Management Agreement Assignment is attached as Exhibit 5 to the Dickerson Affidavit.

3. Further, pursuant to both the Mortgage and the ALR, Borrowers assigned and conveyed to Plaintiff, without limitation, all of Borrowers' rights, title and interests in and to the Leases and the Rents, as such terms are defined in Section 1.1(f) of the Mortgage and Sections 1.1(a)-(c) of the ALR.² Upon such assignment, Borrowers were granted a revocable license to, inter alia, collect and receive the Rents (the "License"). Upon an Event of Default or a Default (as defined in the ALR), the License is automatically revoked and Plaintiff becomes immediately entitled to collect and receive the Rents even if Plaintiff does not enter or control the Property.

4. Property Manager is the property manager for the Property and, according to the Dickerson Affidavit, is an affiliate of Borrowers and controlled by one or more of the same principals. Pursuant to the CAMA, upon notice from Plaintiff following a default, Property Manager must directly remit to Plaintiff an amount equal to all Rents received less the Property's operating expenses. Further, during any time that any amount due and owing under the Note or Mortgage is not paid when due, Property Manager is not entitled to any fee, commission or other amount payable to Property Manager under the related management agreement (collectively, "Management Fees").

5. Under the Cash Management Agreement, upon a Cash Management Event^{3,4} Borrowers must, inter alia, establish a Cash Management Account and cause all Rents to be transferred therein from the Clearing Account on a daily basis. Cash Management Account

² "Rents" is broadly defined to encompass, without limitation, all rents, income, revenue or profits from the Leases or the Property. It is expressly noted that Rents include (without limitation) any amounts received by any Borrower Parties (defined below) from any lease guarantors or current or former tenants of any portion of the Property by virtue of any collection efforts, to include, without limitation, any threatened, existing or future litigation and/or judgment obtained against any such lease guarantors or current or former tenants.

³ Capitalized terms used but not defined herein shall have the meanings ascribed or referenced in the Cash Management Agreement.

⁴ A "Cash Management Event" includes "(a) the occurrence of an Event of Default, ..., [or] (d) the date Piggly Wiggly ceases operations at the Property, vacates the Property or otherwise 'goes dark,' or terminates its lease." Cash Management Agreement § 1.1, p. 2.

SCANNED

funds are to be disbursed each month for amounts owed under the Loan Documents and for operating expenses, and all remaining funds (Excess Cash Flow) are to be disbursed to Plaintiff.

6. As indicated by the above-referenced provisions of the Loan Documents, it is readily apparent that Rents were intended to be and are a critical component of Plaintiff's security. The significance of the Rents as security is further heightened by the fact that Borrowers' only asset is to be the Property (including the Rents), which would be divested through foreclosure.

7. In addition, Borrowers are required under the Mortgage to deliver to Plaintiff, inter alia, (a) monthly rent rolls, operating statements and annual balance sheets and profit and loss statements, and (b) upon Plaintiff's request, a property management report, an accounting of tenant security deposits and an annual budget (collectively, "**Required Documentation**").

8. During the spring or summer of 2014, Piggly Wiggly ceased operations at the Property and went "dark", which Borrowers have not disputed. A Cash Management Event (the "**PW Event**") thus occurred.

9. On August 1, 2014, Plaintiff notified Borrowers of the PW Event and demanded compliance with their resulting obligations under the Cash Management Agreement (the "**Aug. 2014 Demand**"). Borrowers failed to do so within 60 days and continuing thereafter, resulting in one or more Events of Default (individually or collectively, the "**CM Default**").

10. As a result, Plaintiff has been deprived of benefits and security afforded by the Cash Management Agreement and the Mortgage, notably including all Excess Cash Flow, since the PW Event occurred over two years ago.

11. As evidenced by the Dickerson Affidavit, shortly after the PW Event and the Aug. 2014 Demand, Borrowers ceased providing Required Documentation to Plaintiff, effectively

concealing the Property's financial performance - including the amount of Excess Cash Flow. Borrowers' failure to provide subsequent Required Documentation, despite Plaintiff's multiple written requests, constitutes one or more further Events of Default.

12. As evidenced by the Dickerson Affidavit, the Property has likely been generating significant Rents and Excess Cash Flow for the past two years. In the first three quarters of 2014 the Property generated \$719,363.19 in total income and \$391,222.42 in net operating income. Plaintiff believes the Property is currently leased similar to September 2014, and Borrowers have offered no evidence to the contrary.

13. Following notice from Plaintiff on December 19, 2014, Borrowers have failed to pay the monthly replacement reserve deposits as required under the Reserve Agreement beginning in January 2015 and each month thereafter, resulting in additional Events of Default.

14. Pursuant to the CAMA, Plaintiff notified Borrowers and Property Manager that Property Manager should begin remitting to Plaintiff all Rents less operating expenses (excluding Management Fees) but Property Manager has failed to do so.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, this Court concludes as follows:

A. The Findings of Fact are denominated Conclusions of Law to the extent that they constitute the same.

B. Upon any above-referenced default, Borrowers' License to collect and receive the Rents was automatically revoked, and Plaintiff immediately became and is contractually entitled to collect and receive the Rents.

C. Further, the assignments of Rents contained in the Mortgage and the ALR (collectively, the "Assignments") and Plaintiff's rights with respect to same are perfected and

enforceable under S.C. Code Ann. § 29-3-100.

(1) The Mortgage and the ALR each constitute an “assignment of leases, rents, issues, or profits” as defined in S.C. Code Ann. 29-3-100(A)(2) (such an assignment is a “document assigning, transferring, pledging, mortgaging, or conveying an interest in leases...and rents, issues, or profits arising from real property...”). As such, upon recording of the Mortgage and the ALR, the Assignments became “enforceable...to pass the interest granted, pledged assigned, or transferred as against [Borrowers],...perfected from the time of recording against subsequent assignees, lien creditors, and purchasers for a valuable consideration from [Borrowers].” S.C. Code Ann. § 29-3-100(B).

(2) Each of the Assignments constitutes a “collateral assignment” under S.C. Code Ann. §29-3-100(A)(3) because each was “delivered in connection with the grant of [the Mortgage]...where the [Borrowers] retain the right to collect or to apply the [Rents] after assignment and prior to default.”

(3) Therefore, upon any above-referenced default, Plaintiff became statutorily entitled “to collect and receive any accrued and unpaid or subsequently accruing [Rents] subject to the [A]ssignment[s], without need for the appointment of a receiver, any act to take possession of the [P]roperty, or any further demand on [Borrowers].” S.C. Code Ann. § 29-3-100(C).

D. Plaintiff is entitled to an Order (i) directing that all Rents presently in the possession, custody or control of Borrowers and/or their respective managers, members, officers, employees, agents (including, without limitation, Property Manager), affiliates or attorneys (with Borrower, collectively “**Borrowers Parties**” and each a “**Borrower Party**”) be immediately

turned over to Plaintiff, (ii) sequestering all Rents hereafter collected or received by any Borrower Parties, and (iii) prohibiting any distribution or disbursement of Rents except as ordered hereunder.

NOW, THEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED, ADJUDGED and DECREED:**

A. Borrowers and all other Borrower Parties are hereby ordered and directed to remit and provide to Plaintiff, within five (5) days of the entry of this Order, (i) all Rents (to include funds in the amount of any Rents collected or received) currently on deposit, collected, retained or held by such Borrower Party and not previously remitted to Plaintiff, together with a complete and accurate accounting thereof, (ii) a complete listing of all account numbers for all bank or other accounts held by or for the benefit of such Borrower Parties and into which Rents were or are being deposited, held, received, collected or transferred, along with the names and addresses of any financial institutions at which such accounts are held.

B. Within five (5) days of the entry of this Order, Borrowers shall also deliver to Plaintiff (1) complete copies of all Leases (including any amendments, extensions, renewals, modifications, supplements or terminations thereof) that were and/or are currently in effect for any portion of the period beginning August 2014 and running through the date this Order is entered, (2) an accounting of all tenant security deposits currently held by any Borrower Parties, (3) monthly rent rolls and monthly operating statements for October 2014 and each month thereafter through and including the month in which this Order is entered, and (4) an annual balance sheet and profit and loss statement for 2014 and 2015. Said rents rolls, operating statements and balance sheet and profit and loss statements shall satisfy the requirements of Sections 3.11(a)(i), (ii) and (iii) of the Mortgage, respectively.

C. On or before December 10, 2016, on the tenth day of each calendar month thereafter and on the Friday preceding any foreclosure sale (if any), Borrowers are hereby ordered to remit and provide to Plaintiff:

- i. by wire transfer in immediately available funds all Net Operating Income for the prior calendar month. "Net Operating Income" shall mean all Rents received or held by any Borrower Parties less current (and not past due), actual, ordinary, necessary and reasonable expenses required for the operation and management of the Property (collectively the "Operating Expenses"; Operating Expenses shall not include, by way of example and not limitation, Management Fees, attorneys' fees or other legal costs of any Borrowers Parties, and/or payments or distributions to any Borrower Parties); and
- ii. a monthly rent roll and monthly operating statement for the prior calendar month which satisfy the requirements of Sections 3.11(a)(i) and (ii) of the Mortgage, respectively, along with copies of invoices, checks and receipts, and any other information or documentation reasonably requested by Plaintiff to support or explain a completing accounting of the receipt, collection, use and disbursement of Rents for such month.

D. During the pendency of this action, Borrowers shall deliver or cause to be delivered to Plaintiff (i) copies of all Leases and/or any amendments, extensions, renewals, modifications, supplements or terminations of any Leases entered into on or after the date hereof, within two (2) days of same being executed, and (ii) an annual balance sheet and profit and loss statement as and when required by Section 3.11(a)(iii) of the Mortgage.

E. Rents shall not be commingled with any other funds. Plaintiff may serve this

Order on any financial institutions that maintain or may maintain any bank accounts that are into which Rents were or are being deposited or otherwise related to the management and operation of Property. Any financial institution maintaining such accounts shall provide to Plaintiff a complete listing of account numbers under the name of Borrowers, Property Manager or any other Borrower Parties, including accounts previously closed. For each such account the financial institution shall provide the then-current balance and upon request by Plaintiff shall provide monthly bank statements (and details or copies for any transactions, including check copies, as requested) for the period beginning August 2014 through the date this Order is served on such financial institution.

F. Except as provided hereinabove, no disbursement or distribution of Rents shall be made. Borrowers and any other Borrower Parties shall take no action to divert the payment or receipt of Rents or otherwise to frustrate the intent and purposes of this Order.

IT IS SO ORDERED.



Hon. Robert E. Hood
Circuit Court Judge, Fifth Judicial Circuit

November 18, 2016
Columbia, South Carolina

EXHIBIT B

Reconsideration Order

[attached hereto]

FORM 4

JUDGMENT IN A CIVIL CASE

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

CASE NUMBER: 2016-CP-40-02470

US Bank National
Association

Aw Magpig

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant
---------------------	--

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Non-Suit); Other Dismissed without prejudice
 Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

2016 FEB 30 AM 8:30
 FILED
 CLERK OF COURT
 RICHLAND COUNTY
 S.C.P. & P.S.

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

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case. The Defendant's motion for Reconsideration or
 Additional Information for the Clerk : In the Alternative Staying enforcement is Denied.

INFORMATION FOR THE PUBLIC INDEX

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

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

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

Circuit Court Judge Pet Hood Judge Code 2164 Date 12/28/16

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 4 day of Jan, 2017 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette Whisnide

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 U.S. BANK NATIONAL ASSOCIATION,)
 AS TRUSTEE, AS SUCCESSOR-IN-)
 INTEREST TO BANK OF AMERICA,)
 N.A., AS SUCCESSOR BY MERGER TO)
 LASALLE BANK NATIONAL)
 ASSOCIATION, AS TRUSTEE FOR THE)
 REGISTERED HOLDERS OF BEAR)
 STEARNS COMMERCIAL MORTGAGE)
 SECURITIES, INC., COMMERCIAL)
 MORTGAGE PASS-THROUGH)
 CERTIFICATES, SERIES 2007-TOP26,)
)
 Plaintiff,)
)
 vs.)
)
 AW-MAGPIG, LLC; HW-MAGPIG, LLC;)
 and MW-MAGPIG, LLC,)
)
 Defendants / Third-Party Plaintiffs,)
)
 vs.)
)
 WELLS FARGO BANK, N.A., and)
 MERIDIAN CAPITAL GROUP, LLC,)
)
 Third-Party Defendants.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2016-CP-40-02470

ORDER

FILED
 2016 DEC 30 AM 8:39
 JEANNETTE W. MCBRIDE
 C.C.P. & G.S.
 RICHLAND COUNTY

This matter came before the Court on the Motion for Reconsideration or in the Alternative Requiring that Plaintiff Post a Bond or in the Alternative Staying Enforcement filed by the by the defendants AW-MAGPIG, LLC, HW-MAGPIG, LLC and MW-MAGPIG, LLC on December 8, 2016 (the "Motion"). Having considered the Motion and the record in this case, the Court finds no need for oral argument on the Motion, and the Motion is DENIED.

December 28, 2016
 Columbia, S.C.

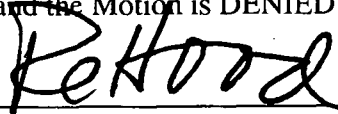

 Hon. Robert E. Hood
 Circuit Court Judge, Fifth Judicial Circuit

EXHIBIT C

Receiver Order

[attached hereto]

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP4002470

U S Bank National Association

AW MAGPIG LLC

Bank Of America N A

HW MAGBIG LLC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Towd

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk :

RICHLAND COUNTY
COURT CLERK'S OFFICE
2016 DEC 22 AM 11:19
C.D. & S.
FLORIDE

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
<u>N/A</u>		\$
		\$
		\$

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

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

Circuit Court Judge [Signature] Judge Code 2158 Date 12-16-16

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 22 day of Dec, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

David Hughes Simpkins

Robert Daniel Dodson

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court [Signature]

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
U.S. BANK NATIONAL ASSOCIATION,)
AS TRUSTEE, AS SUCCESSOR-IN-)
INTEREST TO BANK OF AMERICA,)
N.A., AS SUCCESSOR BY MERGER TO)
LASALLE BANK NATIONAL)
ASSOCIATION, AS TRUSTEE FOR THE)
REGISTERED HOLDERS OF BEAR)
STEARNS COMMERCIAL MORTGAGE)
SECURITIES, INC., COMMERCIAL)
MORTGAGE PASS-THROUGH)
CERTIFICATES, SERIES 2007-TOP26,)

Plaintiff,)

vs.)

AW-MAGPIG, LLC; HW-MAGPIG, LLC;)
and MW-MAGPIG, LLC,)

Defendants / Third-Party Plaintiffs,)

vs.)

WELLS FARGO BANK, N.A., and)
MERIDIAN CAPITAL GROUP, LLC,)

Third-Party Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2016-CP-40-02470

ORDER APPOINTING RECEIVER

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CLERK OF COURT
RICHLAND COUNTY
SOUTH CAROLINA

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The within matter came before the Court upon the Motion for Appointment of Receiver (the “**Motion**”) of the plaintiff U.S. Bank National Association, as Trustee, successor-in-interest to Bank of America, N.A., as successor by merger to LaSalle Bank National Association, as Trustee for the registered holders of Bear Stearns Commercial Mortgage Securities, Inc., Commercial Mortgage Pass-Through Certificates, Series 2007-TOP26 (“**Plaintiff**”), made pursuant to Rule 66, S.C.R.C.P., S.C. Code Ann. § 15-65-10 et. seq. and the below-referenced provisions of the Loan Documents (defined below). Pursuant to the Motion, Plaintiff seeks

appointment of a receiver for the Property,¹ which is owned by the defendants AW-MAGPIG, LLC, HW-MAGPIG, LLC and MW-MAGPIG, LLC (collectively, "**Borrowers**" and each a "**Borrower**").

Upon review of the verified Complaint, the Motion, the Affidavit of S. Michael Dickerson ("**Dickerson Affidavit**") and the Affidavit of Richard Faulkenberry (the "**Faulkenberry Affidavit**"), and having considered the arguments of counsel and evidence presented at the hearing on the Motion, I find that the relief sought in the Motion is proper and that a receiver for the Property should be appointed. Accordingly, I hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT

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1. Borrower owns the Property, which is the subject of this foreclosure action. The Property includes, without limitation, the Land, the Improvements, the Personal Property, the Leases and the Rents. The Land and Improvements form a retail shopping center commonly known as Magnolia Pointe, generally located at 2000-2020 Clemson Road, Columbia, SC 29223, which is managed by Borrowers' affiliate, Whatfor, LLC, a New York limited liability company ("**Property Manager**"). The Land is described on Exhibit 1 attached hereto and incorporated herein by reference.

2. On or about March 1, 2007, Bear Stearns Commercial Mortgage, Inc. ("**Original Lender**") made a \$4,500,000.00 commercial mortgage loan to Borrowers (the "**Loan**"), evidenced and/or secured by, among other documents:

- a. Promissory Note dated March 1, 2007, executed by Borrowers in the original principal amount of the Loan (the "**Note**");

¹ Capitalized terms used but not otherwise defined herein shall have the same meanings ascribed in the Mortgage, as defined in paragraph 2.b hereof.

- b. Mortgage, Fixture Filing and Security Agreement dated March 1, 2007, granted by Borrowers and recorded in the Richland County Register of Deeds (the "Register") on March 6, 2007 in Book 1288 at Page 3842 (the "Mortgage"); and
- c. Assignment of Leases and Rents dated March 1, 2007, made by Borrowers and recorded in the Register on March 6, 2007, in Book 1288 at Page 3902 (the "ALR").²

3. Plaintiff is the present owner and holder of all right, title and interest in and to the Loan and the Note, Mortgage, ALR and all other documents executed and/or delivered in connection with the Loan (collectively, the "Loan Documents").

4. By their terms, the Mortgage and the ALR each grant liens upon the Property (including the Rents), and each provides that South Carolina law applies to the "creation, perfection, priority and enforcement" of such the liens. Mortgage § 18.1; ALR § 6.7.

5. Further, pursuant to the Mortgage and the ALR, Borrowers have unconditionally assigned and granted to Plaintiff, among other rights and collateral, all of their rights, title and interests in and to the Rents. Upon such assignment, Borrowers were granted a revocable license to operate and manage the Property and collect and receive the Rents (the "License").

6. Piggly Wiggly closed its store and vacated its space at the Property in April 2014 (the "PW Event").

7. Borrowers have defaulted on multiple obligations under the Loan Documents, including: (a) failing to establish a Cash Management Account and comply with other applicable obligations under the Cash Management Agreement upon the PW Event, (ii) failing to remit all Excess Cash Flow to Plaintiff each month upon and after the PW Event,³ (iii) failing to make any

² Copies of the Note, the Mortgage and the ALR are attached to the Complaint as Exhibits A, B and D, respectively.

³ As evidenced by the Dickerson Affidavit, and as noted in the Sequestration Order (as defined in this Order), the amount of Rents and Excess Cash Flow generated since the PW Event is likely very significant.

monthly replacement reserve deposits beginning on January 1, 2015 and each month thereafter, and (iv) failing to submit to Plaintiff any financial and property management documentation, as required by Section 3.11 of the Mortgage, after the third quarter of 2014, thereby concealing the amount of Rents (including excess cash flow) received by Borrowers since the PW Event.

8. Upon any such default, pursuant to the applicable provisions of the Mortgage and the ALR, the License was automatically revoked, Plaintiff became immediately entitled to possession of all Rents and Plaintiff became immediately entitled to enter upon the Property by a court-appointed receiver to collect the Rents and operate the Property. Mortgage §§ 1.2 and 3.7; ALR §§ 2.1 and 3.1.

9. On November 28, 2016, Judge Robert E. Hood entered an Order Requiring Turnover of Collateral and Sequestering Rents (the "**Sequestration Order**") in this action. Shortly thereafter, Borrowers, through counsel, expressed to Plaintiff's counsel their intent to abandon management of the Property, discontinue utilities and other services to tenants as of December 5, 2016, and deliver tenant rent checks to Plaintiff's counsel. In furtherance thereof, Borrowers' counsel delivered tenant rent checks to Plaintiff's counsel thereafter,⁴ despite the terms of the Sequestration Order and Plaintiff's counsel's directions not to deliver said checks. Plaintiff's counsel returned said checks to Borrowers' counsel.

10. As set forth in the Faulkenberry Affidavit, Lincoln Harris, LLC, a Delaware limited liability company ("**Lincoln Harris**"), has significant receivership, leasing, and property management experience involving properties similar to the Property and has previously been appointed as receiver for similar properties in South Carolina. Lincoln Harris frequently handles financial matters in fiduciary capacities. Lincoln Harris is willing to serve as receiver and has no

⁴ Said tenant rent checks were payable to Property Manager and not endorsed to Plaintiff or any other party.

affiliation or interest that would impede the proper performance of its fiduciary duties as a receiver in this case or for the Property. Lincoln Harris is fit and proper to act as a receiver in this case and for the Property

CONCLUSIONS OF LAW

Based on the above findings of fact, I hereby make the following conclusions of law:

A. The foregoing findings of fact are denominated conclusions of law to the extent they constitute the same.

B. Borrowers own the Property that is the subject of this foreclosure action. By virtue of its mortgage lien, security interests and assignments of the Rents, Plaintiff has an apparent right to the Property.

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C. Plaintiff's rights with respect to the assignments of Rents contained in the Mortgage and the ALR are perfected and enforceable under S.C. Code Ann. § 29-3-100.

D. By virtue of the defaults and underlying circumstances described above, and further due to Borrowers' expressed intent to abandon management of the Property and action taken in furtherance thereof, Rents have been lost and the Property (including the Rents) is in danger of being lost or materially injured or impaired.

E. Plaintiff is entitled to the appointment of a receiver for the Property and such appointment during the pendency of this action is appropriate under the circumstances of this case. Lincoln Harris is well-qualified to serve and should be appointed as receiver.

NOW, THEREFORE, based upon the foregoing findings of fact and conclusions of law, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1) Lincoln Harris (hereinafter, "Receiver") is hereby appointed receiver to take possession of, manage and operate the Property and to collect all Rents and any other income,

revenue and/or proceeds from the Property. Receiver's fees, costs and expenses (collectively, "Fees and Expenses") are set forth on Exhibit 2 attached hereto and incorporated herein by reference. Receiver is authorized, empowered and directed to deposit all Rents and any other income, revenue and/or proceeds from the Property coming into Receiver's possession into a federally-insured bank having an office in South Carolina to be selected in its sole discretion with due regard for the safety, preservation and protection of such funds, and Receiver shall use said account (the "Receivership Account") as an operating fund for the Property. The Receivership Account shall be designated such that it is clear that Receiver is safeguarding the funds therein in its capacity as a receiver.

2) Receiver:

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(a) shall enter upon and take possession of the Property and the originals of all books, records, statements, ledgers, checkbooks, check registers, cancelled checks, bank and other statements, worksheets, spread sheets, memoranda, statements of account, receipts, files and other related financial information (to include, without limitation, monthly rent rolls and monthly operating statements for October 2014 and each month thereafter through and including the month that this Order is entered, and an annual balance sheet and profit and loss statement for 2014 and 2015, all in compliance with the applicable provisions of the Mortgage); the originals of all keys, key fobs, keycards, security codes, security passes and other means of accessing any Improvements or any other portions of the Property; the originals of all Leases and other agreements relating to the rental, occupancy, licensing and/or use of the Property or any portion thereof, together with all files, correspondence and communications with all past, current and prospective tenants and their agents and representatives; the originals of all marketing,

advertising, listing and promotional materials for the Property; all telephone, facsimile, post office box numbers and addresses for or used in the operation of the Property; the originals of all contracts pertaining to the management or operation of the Property and originals or copies of all correspondence between any Borrower Party (defined below) and Property Manager or any other property manager with respect to the Property; the originals or copies of all listing and commission contracts, agreements and commitments, together with all files, correspondence and communications with all brokers, agents and their employees and representatives; the originals of all pictures, plans, specifications, drawings and other depictions and descriptions of the Property or any portion thereof; the originals of all permits, licenses, authorizations and other approvals; the originals of all contracts, agreements, purchase orders, invoices, bills, receipts, account statements, files, correspondence and communications with all utility companies, service providers, contractors, subcontractors, vendors, vendees, governmental authorities, adjacent land owners and other third parties in any way relating to ownership, repair, maintenance, improvement, management, leasing, use, operation, preservation and/or protection of the Property or any portion thereof; the originals of all insurance policies and all files, correspondence and communications with all insurance companies and their respective agents, brokers and representatives; copies of all local, state and federal tax returns for Borrowers and for the Property for 2016; the originals of all employee contracts and agreements and all correspondence and communications with employees of any of Borrowers, Property Manager or any other Borrower Party with respect to the Property, all employer and employee files, all payroll and employee records; copies of all local, state and federal employer and employee reports, tax deposits and tax records for 2016,

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including each Borrower's tax identification number(s); the originals of all notices, protests, objections, claims, demands, suits, complaints, petitions, injunctions, restraining orders, pleadings and mediation and arbitration proceedings received, sent or filed by or against the Property, any of Borrowers, Property Manager with respect to the Property, or which in any way relate to or involve the Property or any portion thereof (all items, documents, data and other information to be delivered to Receiver or which Receiver is authorized to take possession of pursuant to this Order, whether in tangible form, in the form of computer or electronically stored or generated images, e-mails or other electronic data, or otherwise, are collectively referred to hereinafter as "**Project Information**"). To the extent that any Project Information is computer- or electronically-stored or generated, the original or copies of such computer programs or other computer software, along with any login credentials (including passwords) as may be necessary or reasonably required by Receiver to access, read and make tangible copies thereof shall be provided to Receiver by Borrowers or any other Borrower Party in possession of or with the means to access same;


(b) shall take possession of all bank accounts of Borrower or any other Borrower Party as they pertain to the Property, wherever located, and receive possession of any money on deposit in said bank accounts. Receiver shall also have the authority to close any such account(s) if Receiver deems closure necessary or advisable in the performance of its duties hereunder;

(c) shall not be required to inventory the Personal Property;

(d) is authorized to engage or otherwise employ attorneys, accountants, other professionals, managing agents and any other persons, firms or entities necessary or

appropriate to the orderly and efficient management of the operation of the Property;

(e) is authorized to enforce or enter into contracts and to take such action with respect to Leases and all other contracts, including, without limitation, the termination of existing vendor contracts, as may be necessary or appropriate to assure collection and payment of Rents and the orderly and efficient management and operation of the Property and each portion thereof. Additionally, Receiver is authorized to obtain from Borrowers' insurance carrier the industry standard insurance protections afforded property managers and/or receivers of similarly-situated properties, including but not limited to, being named as an additional insured on Borrowers' liability policies related to the Property or any portion thereof and receiving from Borrowers' property policies and business interruption or rent loss insurance policies, appropriate waivers of subrogation against Receiver with respect to losses payable under such policies. Receiver is authorized to procure policies of insurance as is customary for similarly situated properties and as it deems necessary should any of Borrowers' policies be terminated or lapse during the tenure of the receivership or fail to be in force at the time of the entry of this Order;

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 (f) shall pay Fees and Expenses and all appropriate operating expenses, utility charges and the Property's insurance expenses and taxes, as such expenses and charges become due and shall pay all other expenses and charges related to the operation and management of the Property as Receiver deems reasonably necessary in the exercise of its reasonable business judgment. If the Rents and other revenue generated by the Property are insufficient to pay such expenses and charges, Plaintiff from time to time may advance funds to Receiver in an amount sufficient to pay such expenses and charges as and when they come due, which advances shall constitute part of the Debt. However,

nothing herein shall be construed to compel Plaintiff or Receiver to make any advances. Upon prior written approval by Plaintiff, Receiver may borrow funds for purposes related to the operation of the Property after providing Plaintiff, by advance written notice, reasonable opportunity to advance such funds. The excess of receipts over operating expenses and charges must be paid by Receiver to Plaintiff on a monthly basis or such other frequency as is acceptable to Plaintiff to be applied against the Debt in accordance with the applicable terms of the Loan Documents. However, in making the monthly payments of the surplus proceeds to Plaintiff, Receiver may retain any funds in the Receivership Account, the amount of which are agreed to by Plaintiff in writing, to maintain adequate funds to comply with the terms of this Order. Nothing herein shall obligate Receiver to pay any existing obligations of any Borrower Party that were incurred prior to Receiver's appointment except that, upon receipt of the current gross revenue of the Property, Receiver may in its discretion pay current [i.e., incurred in the previous thirty (30) days], reasonable, normal and necessary expenses of the Property; and

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(g) shall maintain an accurate ledger or similar books of account of all receipts and disbursements made by it pursuant to this Order and shall otherwise safely keep the Project Information provided to it pursuant to this Order.

3) Receiver:

(a) is authorized and directed [subject to the limitations set forth in subparagraph (b) immediately below] to: (i) lease, rent and license the Property or any portion thereof on such commercially reasonable terms and conditions as may be approved in writing by Plaintiff from time to time, (ii) renew, extend, modify, amend or

terminate any Lease or any other agreement (as and if any of same have been validly modified or amended) which relates to the Property or any portion thereof on such commercially reasonable terms and conditions as may be approved in writing by Plaintiff from time to time, (iii) execute and deliver such Leases, such renewals, extensions, modifications and amendments of any Leases and such other contracts and agreements as may be reasonably required to carry out the provisions of this paragraph, and (iv) subject to any limitations set forth in this Order, make such expenditures for leasing commissions and tenant and other improvements of the Property as may be reasonably required to carry out the provisions of this subparagraph (a); and

(b) notwithstanding the provisions of subparagraph (a) immediately above, if Receiver determines that there is not or will not be a sufficient amount of funds to pay any expenditures described in subpart (a)(iv) immediately above, Receiver shall promptly notify Plaintiff, and thereafter, if Plaintiff is unwilling to advance to Receiver the balance of the amounts necessary to fully pay such expenditures or otherwise commit to the payment of such amounts, then Receiver shall not execute any such Lease, renewal, extension, modification or amendment of a Lease or other contract or agreement which would require such unfunded expenditure. Without limiting the generality of Receiver's authority hereunder, Plaintiff and its agents shall be permitted, from time to time, to contact any party or parties which have indicated an interest in entering into a Lease or any other transaction related to the Property and to discuss and negotiate the terms of such Lease or such other transaction provided that Plaintiff or such agent shall report the nature and content of such discussions and negotiations to Receiver periodically, and no such contact, discussion or negotiation with such party or parties shall render or cause, or

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shall be deemed to render or cause, Plaintiff to be a mortgagee in possession of the Property or any portion thereof or otherwise subject Plaintiff to any liability to Borrowers or any other party under the Loan Documents or otherwise. However, nothing herein shall obligate Plaintiff or the receivership estate to any claim or demand for any commission by any Borrower Party or any manager, broker or agent with respect to the Property. Nothing in this Order shall obligate Plaintiff for the payment of any leasing commission or other obligation in the event that a new Lease, or a renewal, extension, modification, amendment or termination of any Lease or any other agreement is entered into for the Property with any tenant or prospective tenant that Receiver contacted, solicited, or negotiated to the extent same is entered into after the conclusion of the receivership; provided, however, that this provision shall not affect Receiver's rights to the Fees and Expenses to which Receiver is entitled as a result of the performance of its duties as a manager or leasing agent for the Property.

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4) Otherwise, with respect to the Property, Receiver shall be vested with the usual powers, rights and duties of receivers as provided by law or otherwise provided in the Mortgage, the ALR and any other applicable Loan Documents. Any and all expenses for the operation of the Property and the receivership estate are the liabilities of the Property and receivership estate and not the personal obligation of Receiver. Receiver shall not be obligated to contribute personal or corporate funds in the performance of its duties hereunder.

5) While this receivership is in effect, Borrowers and their respective members, owners, partners, managers, property managers, agents (including, without limitation, Property Manager), attorneys, officers, affiliates, parents, subsidiaries, any guarantor and/or indemnitor of or related to the Loan, and any and all other persons in active concert with any of the foregoing

with respect to any Borrower or the Property (with each Borrower, collectively, "**Borrower Parties**" and each a "**Borrower Party**"). are hereby enjoined from interfering with Receiver or its duly appointed agents or representatives in connection with the possession and operations of Receiver as herein authorized. Each Borrower Party, as applicable, is hereby ordered to immediately turn over possession of the Property to Receiver together with all Project Information and any other items or information to which Receiver is entitled under this Order, whether in the possession, custody or control of such Borrower Party or hereafter received or obtained. No Borrower Party shall terminate, or cause to be terminated, any paid-up insurance policy related to the Property, and Borrowers shall take such reasonable steps to have Receiver and Plaintiff listed as an additional insureds under each such policy. No Borrower Party shall terminate, or cause to be terminated, any utility service related to the Property. Each Borrower Party is ordered to cooperate with Receiver and to sign such legal documents as may be legally necessary and to furnish such records and other items, information or articles as set forth herein or as Receiver may otherwise require which relate to the Property and which are in such Borrower Party's knowledge, possession, custody, or control. Within 48 hours of the entry of this Order, each Borrower shall deliver or cause to be delivered to Receiver its federal tax identification number and any other federal tax identification number under which such Borrower's taxes have been or are being filed. Receiver may use Borrowers' tax identification numbers to carry out its duties hereunder, but Receiver shall not be responsible for preparing or filing any tax returns of any Borrower or the Property, which responsibility shall remain with Borrowers.

6) Each Borrower Party is hereby further ordered and directed to turn over to Receiver, within five (5) days of the entry of this Order, any and all Rents (including, without

limitation, all tenant security deposits, income, cash - including any "petty cash" or similar fund - and other funds which arose or arise out of the occupation, operation, use and/or ownership of the Property) held or hereafter received by or on behalf of such Borrower Party, whether on deposit or otherwise, along with a complete and accurate accounting of the receipt and distribution of all Rents and other income of the Property held, received or collected by or on behalf of such Borrower Party upon and after April 1, 2014 (to include a separate accounting of all tenant security deposits received from current tenants and/or currently held by any Borrower Parties). Except as set forth in this paragraph, no Borrower Party shall make any disbursement or distribution of any Rents or other income of the Property unless otherwise permitted by Receiver in writing.

7) Any security or other deposits paid by tenants but not turned over to Receiver, and over which Receiver has no control, shall be obligations of Borrowers, not the receivership estate, and Receiver shall not be obligated to refund such deposits, and no such tenant shall be entitled to offset any such deposits against any Rents owed pursuant to its Lease; provided, however, that Receiver may refund any such deposits if Receiver determines in the exercise of commercially reasonable discretion that doing so is in the best interest of the receivership estate.

Any security or other deposits which the tenants or other third parties have paid or may pay to Receiver, if otherwise refundable under the terms of their Leases or agreements with Receiver, shall be expenses of the subject property and refunded by Receiver in accordance with such Leases or agreements.

8) As part of the Project Information to be delivered to Receiver pursuant to this Order, each Borrower Party shall immediately deliver or cause to be delivered to Receiver a complete listing of all account numbers for all bank or other accounts held by or for the benefit

of such Borrower Party and into which Rents held, received or collected were or are being deposited or transferred (whether initially or subsequently), along with the names and addresses of any financial institution(s) at which such accounts are held. Receiver is authorized to serve this Order on any such financial institutions and any other financial institutions that maintain any accounts of Borrowers or any Borrower, or any accounts of any other Borrower Party that are related to the management and operation of Property or into which Rents were or are being deposited (each a "**Financial Institution**"). Each Financial Institution shall take such steps as are reasonably necessary to restrain or prevent any Borrower Parties from withdrawing, disbursing, distributing or causing the diversion of any Rents or other funds, proceeds, cash, income, or deposits in any of such bank accounts and shall immediately turn over to Receiver all Rents and other such funds in such bank accounts or otherwise on hand. Each Financial Institution shall provide to Receiver a complete listing of account numbers under the name of any Borrower Parties at such Financial Institution, including accounts previously closed. For each such account the Financial Institution shall provide the current balance for each account and upon request by Receiver shall provide monthly bank statements (and details of any such transactions as requested) for a period of up to one year prior to entry of this Order. The entry of this Order is without prejudice to Plaintiff's right to challenge or contest Borrowers' historical allocation of expenses for the Property or distribution of Rents or other income generated by the Property, or to otherwise assert or enforce any other rights or remedies to which Plaintiff is entitled.

9) Receiver shall prepare, file with the Court and forward to counsels for the parties, within forty-five (45) days after the date of this Order (which date may be extended by the Court upon good cause shown), a full and detailed report (the "**First Accounting**") regarding the

Property identified herein, including all Rents and other income generated therefrom and otherwise received from any Borrower Party or any Financial Institution. Thereafter, for each calendar month after the period covered by the First Accounting, on or before the twentieth (20th) day of the calendar month immediately following the calendar month for which a report pertains, Receiver shall forward to counsels for the parties an accounting of collections and disbursements and compensation received by Receiver (each, a "Periodic Accounting"). Subsequent to the transfer of title to the Property, or as otherwise directed by this Court, Receiver shall prepare, forward to counsels the parties and file a final accounting, certified to be accurate, reflecting information generally contained within a Periodic Accounting, the totals of all receipts and all disbursements made during the receivership, and how and when any funds remaining on deposit or otherwise held by the receivership will be distributed thereafter (the "Final Accounting"). Unless otherwise ordered by this Court, the Final Accounting must be filed prior to Receiver being discharged of its duties and obligations hereunder.

10) Receiver hereby succeeds to all licenses, permits and privileges now held or owned by Borrowers or any other Borrower Parties or otherwise related to the Property, and all rights, privileges and responsibilities arising therefrom relating thereto, insofar as such licenses, permits, and privileges relate to the Property's operations.

11) Receiver shall have no liability to any party for any claims, actions or causes of action arising out of or relating to events or circumstances occurring prior to the appointment of Receiver or authorized under this Order. This protection of Receiver from liability shall include, but is not limited to, any liability for performance of services or other work rendered by third parties at or related to the Property and any liability to which any Borrower Party is currently or may ultimately be exposed under any applicable laws pertaining to the ownership and use of the

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Property and/or operation of such Borrower Party's businesses related to the Property.

12) All persons having notice of this Order, and having written agreements with Borrowers or any other Borrower Parties for the supply of goods or services to, at or on the Property or any portion thereof, including without limitation, all maintenance, landscape, pest control and utility services, are hereby restrained until further order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by Receiver to preserve and protect the Property, provided in each case the normal prices and charges for all such goods or services received after entry of this Order shall be paid by Receiver in accordance with the ordinary course of business of Borrower and such supplier, or such other practices as may be agreed upon by Receiver and the supplier, or as may be ordered by this Court.

13) Receiver, in holding, retaining, managing, operating, preserving and protecting the Property, shall not be bound by or otherwise subject to any existing management agreement, any real estate listing, brokerage, sales or leasing agreement or any other obligation, contract or agreement or existing financial obligation of Borrowers or any other Borrower Parties which relates in any manner to Borrowers or the Property, excepting valid Leases existing and in effect as of the date of this Order.

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14) Receiver is hereby authorized to institute, carry on and maintain all actions, suits, proceedings and procedures necessary: (a) for the proper management, operation, preservation and protection of the Property or to gain or recover possession of all or any part thereof; (b) for collection of any Rents or other income now due or hereafter to become due or fixed; (c) for the removal of any tenant, or removal of any person otherwise unlawfully possessing, occupying or using any part of the Property; and (d) as otherwise authorized pursuant to this Order.

15) To the extent necessary, the Sheriff of Richland County is hereby authorized and empowered to take possession of and deliver to Receiver, as provided by law, the Property and all Project Information, Rents, funds on deposit, other equipment and personal property pertaining to the management of the Property and any other items or information to which Receiver is entitled under this Order.

16) Receiver shall not be required to post a bond with the Court in connection with this Order.

17) If Receiver receives notice that a petition for relief under the Bankruptcy Code, Title 11, United States Code, has been filed, and part of the bankruptcy estate includes property that is the subject of this Order (for purposes of this paragraph, the "**Bankruptcy Estate Property**"), Receiver shall have the following duties, subject to any Order of any applicable bankruptcy court:

(a) *Turn over Bankruptcy Estate Property if no relief from stay is sought.* Receiver shall immediately contact Plaintiff and determine whether Plaintiff intends to move in the bankruptcy court for an order for (1) relief from the automatic stay, and (2) relief from Receiver's obligation to turn over the Bankruptcy Estate Property (11 U.S.C. § 543). If Plaintiff has no intention to make such a motion, Receiver shall immediately turn over the Bankruptcy Estate Property to the appropriate entity, either to the bankruptcy trustee, if one has been appointed, or, if not, to the debtor in possession, and otherwise comply with 11 U.S.C. § 543.

(b) *Remain in possession pending resolution.* If Plaintiff intends to seek relief immediately from either the automatic stay or Receiver's obligation to turn over the Bankruptcy Estate Property, Receiver shall remain in possession and preserve the

Bankruptcy Estate Property pending the ruling on those motions pursuant to 11 U.S.C. § 543(a). Receiver's authority to preserve the Bankruptcy Estate Property shall be limited as follows:

- i. Receiver may continue to collect Rents and other income of the Property;
- ii. Receiver may make only those disbursements necessary to preserve and protect the Bankruptcy Estate Property;
- iii. Receiver shall not execute any new Lease or other long-term contracts; and
- iv. Receiver shall do nothing that would effect a material change in the circumstances of the Bankruptcy Estate Property.

(c) *Turn over property if no motion for relief is filed within ten (10) days after notice of the bankruptcy.* If Plaintiff fails to file a motion within ten (10) court days after its receipt of notice of the bankruptcy filing, Receiver shall immediately turn over the Bankruptcy Estate Property to the appropriate entity, either to the bankruptcy trustee, if one has been appointed, or, if not, to the debtor in possession, and otherwise comply with 11 U.S.C. § 543.

(d) *Retain bankruptcy counsel.* Receiver may petition this Court to retain legal counsel to assist Receiver with issues arising out of the bankruptcy proceedings that effect Receivership or Receiver's ability to perform its duties.

18) Receiver and the parties to this case may at any time apply to this Court for further clarification, instructions or orders and for further powers necessary to enable Receiver to perform Receiver's duties properly.

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AND IT IS SO ORDERED.

December 16 2016
Columbia, South Carolina

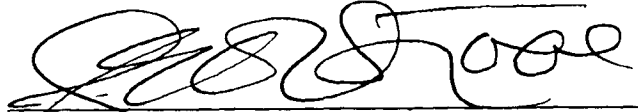

Hon. Jean N. Toal
Circuit Court Judge, Fifth Judicial Circuit

EXHIBIT 1

Land

BEGINNING AT A REBAR MARKER AT THE SOUTHWESTERNMOST CORNER OF THE PROPERTY WHEREAT SAID PROPERTY CORNERS WITH PROPERTY OF CIRCLE K STORES, INC. ALONG THE NORTHERN MARGIN OF THE RIGHT-OF-WAY OF CLEMSON ROAD A DISTANCE OF 191.42 FEET THE SOUTHERNMOST POINT OF THE SITE AREA FOR THE INTERSECTION OF CLEMSON ROAD AND HARD SCRABBLE ROAD, SAID CORNER BEING DESIGNATED "P.O.B." AND RUNNING ALONG PROPERTIES OF CIRCLE K STORES, INC. AND FIRST PALMETTO SAVINGS BANK (OUTPARCEL NO. 4) N 29°03'00" E - 337.62 FEET TO A MAGNETIC NAIL; THENCE TURNING AND RUNNING ALONG PROPERTY OF MALAIPATTY R RANGASWAMI, ET AL (OUTPARCEL NO. 1) FROM MAGNETIC NAIL TO REBAR MARKER AS FOLLOWS: S 60° 34' 20" E - 11.74 FEET; N 28°58'25" E - 233.29 FEET, IN A CURVE TO THE LEFT HAVING A RADIUS OF 59.50 FEET, AN ARC DISTANCE OF 49.52 FEET, THE CHORD OF WHICH RUNS N 05°08'00" E - 48.10 FEET; N 18°42'20" W - 171.77 FEET; IN A CURVE TO THE RIGHT HAVING A RADIUS OF 125.50 FEET, AN ARC DISTANCE OF 48.58 FEET, THE CHORD OF WHICH RUNS N 07°37'00" W - 48.28 FEET; N 62°36'30" W - 55.90 FEET; THENCE TURNING AND RUNNING ALONG THE EASTERN MARGIN OF THE RIGHT-OF-WAY OF HARD SCRABBLE ROAD FROM REBAR MARKER TO REBAR MARKER AS FOLLOWS: IN A CURVE TO THE LEFT HAVING A RADIUS OF 5,326.70 FEET AN ARC DISTANCE OF 359.55 FEET, THE CHORD OF WHICH RUNS N 25°27'25" E - 359.48 FEET; N 24°46'15" E - 25.80 FEET; THENCE TURNING AND RUNNING ALONG PROPERTY OF CLEMSON UNIVERSITY SANDHILL EXPERIMENTAL STATION FROM REBAR MARKER TO REBAR MARKER AS FOLLOWS: S 66° 33' 05" E - 777.28 FEET AND S 28°53'45" W - 760.42 FEET; THENCE TURNING AND RUNNING ALONG PROPERTY OF BULL & JONSIE, INC. FROM REBAR MARKER TO "X" IN CONCRETE AS FOLLOWS: N 61°06'10" W - 141.45 FEET; IN A CURVE TO THE LEFT HAVING A RADIUS OF 61.07 FEET, AN ARC DISTANCE OF 94.61 FEET, THE CHORD OF WHICH RUNS S 73°03'00" W - 85.43 FEET; S 23°11'10" W - 159.12 FEET; IN A CURVE TO THE LEFT HAVING A RADIUS OF 59.50 FEET, AN ARC DISTANCE OF 57.32 FEET, THE CHORD OF WHICH RUNS S 04°24'35" E - 55.13 FEET; THENCE TURNING AND RUNNING ALONG THE NORTHERN MARGIN OF THE RIGHT-OF-WAY OF CLEMSON ROAD IN A CURVE TO THE RIGHT HAVING A RADIUS OF 5,684.58 FEET, AN ARC DISTANCE OF 68.08 FEET, THE CHORD OF WHICH RUNS S 89°59'25" W - 88.08 FEET, THENCE TURNING AND RUNNING ALONG PROPERTY OF FIRST NATIONAL BANK (OUTPARCEL NO. 2) FROM "X" IN CONCRETE TO "X" IN CONCRETE AS FOLLOWS: N 28°53'55" E - 86.39 FEET TO A REBAR; N 34°36'30" E - 52.26 FEET TO AN "X" IN CONCRETE; N 29°43'20" E - 55.61 FEET TO AN "X" IN CONCRETE; N 28°54'25" E - 118.94 FEET TO AN "X" IN CONCRETE; IN A CURVE TO THE LEFT HAVING A RADIUS OF 34.50 FEET, AN ARC DISTANCE OF 54.19 FEET, THE CHORD OF WHICH RUNS N 16°06'10" W - 48.79 FEET TO A REBAR MARKER; THENCE TURNING AND CONTINUING ALONG PROPERTY OF FIRST NATIONAL BANK (OUTPARCEL NO. 2) AND ALSO PROPERTY OF FIRST NATIONAL BANK (OUTPARCEL NO. 5); N 61°06'15" W - 221.57 FEET TO A REBAR MARKER; THENCE TURNING AND CONTINUING ALONG PROPERTY OF FIRST NATIONAL BANK (OUTPARCEL NO. 5); S 28°54'50" W - 210.90 FEET TO A "X" IN CONCRETE; THENCE TURNING AND RUNNING ALONG PROPERTY OF RIC 79 LTD, A CALIFORNIA LIMITED PARTNERSHIP ("LAPETITE ACADEMY") S 28°54'05" W - 247.86 FEET TO A REBAR MARKER; THENCE TURNING AND RUNNING ALONG THE NORTHERN MARGIN OF THE RIGHT-OF-WAY OF CLEMSON ROAD; N 88°39'45" W - 56.64 FEET TO THE POINT OF BEGINNING.

Together with all easements reserved to benefit the above property as stated in that certain Deed, Easement, Restrictions, and Reservation of Easements to Haralambos Botby Ouzounidis and Larry Shirah, as recorded in Deed Book D1327 at page 763, Office of the Register of Deeds for Richland County.

Together with all easements that benefit the above property as stated in that certain Declaration of Easements, Covenants and Restrictions as recorded in Deed Book D1404 at page 726, Office of the Register of Deeds for Richland County.

Being the same property conveyed to AW-MAGPIG, LLC, HW-MAGPIG, LLC and MW-MAGPIG, LLC by deed of Hardscrabble, LLC, dated December 11, 2006, and recorded December 13, 2006 in Record Book 1262 at Page 1243 in the Office of the Register of Deeds for Richland County.

TMS#: 20200-02-07

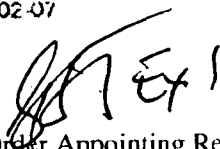

Exhibit 1 to Order Appointing Receiver
12236117V.1 050902/0944530

EXHIBIT 2

Fees and Expenses

Management Fee. Receiver's property management fee shall be the greater of \$2,400.00 or 4% of the gross receipts collected monthly as generated by the Property ("**Management Fee**"). Gross receipts include, without limitation, base rent, additional rent, operating expense recoveries, advertising rents, special events and percentage rents.

The Management Fee includes, but is not limited to:

- Accounting – A/P and A/R
- Human Resources
- Regional office overhead
- Training
- Senior Management oversight

Costs; Court Appearances. Receiver is entitled to reimbursement for reasonable costs incurred in connection with the receivership, including, without limitation:

- Overnight, express, certified mail, courier or similar package delivery services.
- Travel to court for presentation, should it be necessary.
- Bonding required by court order.
- Supplies needed to recover files and or documents as detailed in court order.
- Notary charges.
- Supplies needed to complete repairs or routine maintenance (i.e. light bulbs, filters, wall hooks, janitorial, etc.).

Receiver may charge an hourly rate of \$175.00 for court appearances required of a representative of Receiver.

Property Management and Maintenance Staff. Property management services will be provided on a salary basis of \$400.00 per month. Maintenance services will be provided on an hourly basis, tracked using an automated work order system, and monitored and evaluated each month by Receiver. The hourly cost for maintenance staff shall be:

<u>Position</u>	<u>Hourly Rate</u>
Roving Engineer	\$ 75.00 (normal business hours)
Roving Engineer	\$110.00 (emergency after hours call backs)
Operations Manager	\$ 91.00

Setup Costs Recovery. A setup expense recovery amount equal to one-month's Management Fee shall be payable to Receiver for the initial operational, financial setup and lease audit expense.

*Handwritten signature: SATEY 2
PI*

Leasing Commissions (Retail). Receiver shall be entitled to commissions for in-line retail spaces based upon the following schedule:

	Type	Receiver or Receiver's leasing agent
New Leases and / or Expansions	Direct; no co-broker	4% of net rents ⁵
	With Cooperating Broker	6% of net rents*
Lease Renewals / Extensions	Direct; no co-broker	2% of net rents
	With Cooperating Broker	4% of net rents*

Receiver shall be entitled to commissions for "big box" spaces based upon the following schedule:

	Square footage	Commission Structure*
New Leases	15,001 sf – 55,000 sf	6% of net rents for years 1-10

* Where a Cooperating Broker is involved, Receiver's Leasing Agent shall be responsible for paying the Cooperating Broker commission per separate agreement.

Leasing Marketing Expense. Receiver shall be entitled to reimbursement or payment for leasing signage at the Property and related marketing material.

Project and Construction Management. Fees for general project and construction management, including oversight of tenant improvements, are included in the Management Fee on jobs with a gross construction estimate of less than \$2,000.00. Receiver's fee for all jobs above \$2,000.00 shall be as follows:

Gross Project Amount	Fee
> \$2,000 to \$200,000	5%
>\$200,000 to < \$500,000	4%
≥\$500,000	negotiated with Plaintiff

EX 2 p 2

⁵ Unless otherwise stated, leasing commissions based on "net rents" are based on net receipts over the term of the lease.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2017-000180

U.S. Bank National Association, as Trustee,
successor-in-interest to Bank of America,
N.A., as successor by merger to LaSalle
Bank National Association, as Trustee for
the registered holders of Bear Stearns
Commercial Mortgage Securities, Inc.,
Commercial Mortgage Pass-Through
Certificates, Series 2007-TOP26,

AW-MAGPIG, LLC; HW-MAGPIG,
LLC; and MW-MAGPIG, LLC,

Wells Fargo Bank, N.A., and Meridian
Capital Group, LLC,

Respondent,
v.

Appellants,
v.

Third-Party Defendants.

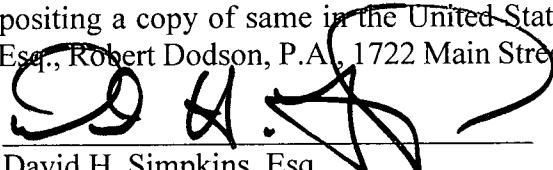
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JUL 06 2017

SC Court of Appeals

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2017 I have caused a copy of the foregoing Respondent's Motion to Dismiss Appeal and the Affidavit of S. Michael Dickerson and Affidavit of David H. Simpkins, Esq. to be served upon Appellants by depositing a copy of same in the United States Mail, addressed to their counsel, Robert D. Dodson, Esq., Robert Dodson, P.A., 1722 Main Street, Suite 200, Columbia, South Carolina 29201.


David H. Simpkins, Esq.
Kilpatrick Townsend & Stockton LLP
214 N. Tryon St., Suite 2400
Charlotte, NC 28202
(704) 338-5000
Attorneys for Respondent



KILPATRICK TOWNSEND & STOCKTON LLP
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t 704 338 5000 f 704 338 5125

July 5, 2017

direct dial 704 338 5287
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dsimpkins@kilpatricktownsend.com

VIA UPS OVERNIGHT DELIVERY

UPS Tracking #1Z8650240197835065

Attn: Jessica, Case Manager
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Calhoun State Office Building
1220 Senate Street
Columbia, SC 29211

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JUL 06 2017

SC Court of Appeals

**RE: *U.S. Bank National Association, as Trustee, et al. Respondent, vs. AW-MAGPIG, LLC;
HW-MAGPIG, LLC; and MW-MAGPIG, LLC, Appellants***
Appellate Case No. 2017-000180

Dear Jessica:

Enclosed for filing is an original and six copies of Respondent's Motion to Dismiss Appeal, Affidavit of David H. Simpkins, Esq. and Affidavit of S. Michael Dickerson, along with our motion filing fee of \$25.00, in the above-referenced case.

Please forward the filed copies to our office in the enclosed self-addressed UPS overnight envelope.

Thank you.

Very truly yours,

David H. Simpkins

Other Counsel of Record:

Robert D. Dodson, Esq.
Robert Dodson, P.A.
1722 Main Street, Suite 200
Columbia, SC 29201

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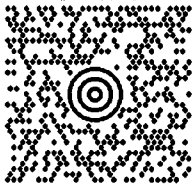
DAVID SIMPKINS
7043385000
KILPATRICK TOWNSEND & STOCKTON
214 NORTH TRYON STREET SUITE 2
CHARLOTTE NC 28202

12 LBS

1 OF 1

SHIP TO:

ATTN: JESSICA, CASE MANAGER
8037347890
CLERK, S.C. COURT OF APPEALS
CALHOUN STATE OFFICE BUILDING
THE HON. JENNY ABBOTT KITCHINGS
1220 SENATE STREET
COLUMBIA SC 29211



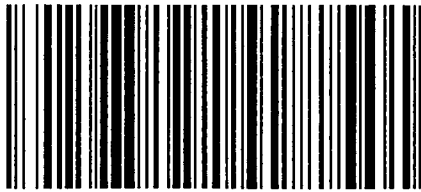
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BILLING: P/P

Reference No.1: 0944530

Reference No.2: 03312 Simpkins, David

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