

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 31 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) and (f), SCACR, in connection with Respondent's Reply to Appellants' Amended Return Respondent's Motion to Dismiss Appeal. Capitalized terms used but not defined herein shall have the same meanings ascribed in Respondent's Motion to Dismiss Appeal.

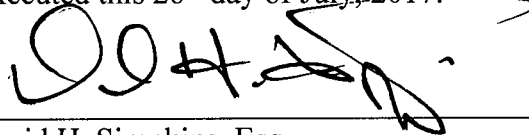
2. On or about December 8, 2016, Appellants filed a motion to reconsider or stay enforcement of the Sequestration Order or to require a bond in connection with (the "**Reconsideration Motion**"). A true and correct copy of the Reconsideration Motion is attached hereto as *Exhibit A*.

3. On or about December 8, 2016, Appellants also filed a motion to dismiss for improper venue and/or lack of jurisdiction (the "**Venue & Jurisdiction Motion**"). A true and correct copy of the Venue & Jurisdiction Motion is attached hereto as *Exhibit B*.

4. Upon Respondent's motion and following a hearing held on December 14, 2016, the Honorable Jean H. Toal entered an order referring this case to the Richland County Master-in-Equity, which order was filed on December 22, 2016 (the "**Reference Order**"). A true and correct copy of the Reference Order is attached hereto as *Exhibit C*.

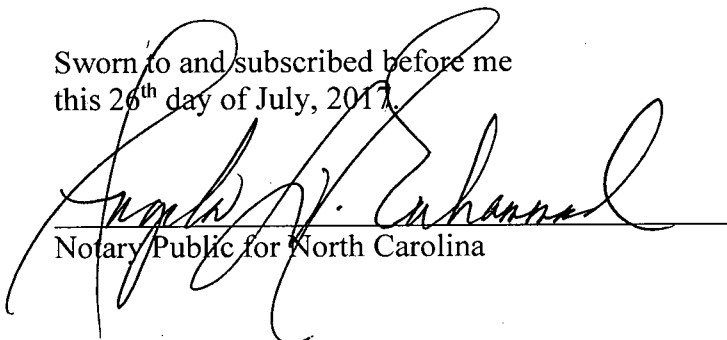
FURTHER AFFIANT SAYETH NOT.

Executed this 26th day of July, 2017.



David H. Simpkins, Esq.

Sworn to and subscribed before me
this 26th day of July, 2017.



Notary Public for North Carolina

ANGELA D MUHAMMAD
NOTARY PUBLIC
CABARRUS COUNTY, NC
My Commission Expires 1-19-2020

EXHIBIT A

Reconsideration Motion

[attached hereto]

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

U.S. Bank National Association et. al.
 Plaintiff)

v.)

Aw-Maggig, Llc Et. Al.
 Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.
2016-CP-40-02470

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: James H. Pulliam And David H. Simpkins, Bar No. Address: Kilpatrick Townsend & Stockton LLP 214 North Tryon Street, Suite 2400 Charlotte, NC 28202 phone: fax: e-mail: other:	Defendant's Attorney: Robert D. Dodson, Bar No. 16205 Address: 1722 Main Street, Suite 200 Columbia, SC 29201 phone: 803-252-2600 fax: 803-771-2259 e-mail: rdodson@rdodsonlaw.com other:
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	

SECTION I: Hearing Information

Nature of Motion: Motion for Reconsideration or in the Alternative Requiring that Plaintiff Post a Bond for the Injunction it Obtained and/or in the Alternative Staying Enforcement of the Court's Previous Order pending Appeal

Estimated Time Needed: 30 Minutes Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

- Written motion attached
- Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for Plaintiff / Defendant

12/8/16

Date submitted

SECTION III: Motion Fee

- PAID – AMOUNT: 25.00
- EXEMPT:
 - Rule to Show Cause in Child or Spousal Support
 - (check reason) Domestic Abuse or Abuse and Neglect
 - Indigent Status State Agency v. Indigent Party
 - Sexually Violent Predator Act Post-Conviction Relief
 - Motion for Stay in Bankruptcy
 - Motion for Publication Motion for Execution (Rule 69, SCRPC)
 - Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
- Name of Court Reporter: _____
- Other: _____

JUDGE'S SECTION

- Motion Fee to be paid upon filing of the attached order.
- Other: _____

JUDGE _____

CODE: _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____

Date Filed: _____

- MOTION FEE COLLECTED: _____
- CONTESTED – AMOUNT DUE: _____

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-MAGPG, LCC; HW-MAGPIG, LLC;
and MW-MAGPIG, LLC,

Defendants/Third-Party Plaintiffs,

vs.

WELL FARGO BANK, N.A. and
MERIDIAN CAPITAL GROUP, LLC,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No: 2016-CP-40-02470

**NOTICE OF MOTION AND MOTION FOR
RECONSIDERATION OR IN THE
ALTERNATIVE REQUIRING THAT
PLAINTIFF POST A BOND FOR THE
INJUNCTION IT OBTAINED AND/OR IN
THE ALTERNATIVE STAYING
ENFORCEMENT OF COURT'S PREVIOUS
ORDER PENDING APPEAL**

TO: PLAINTIFFS AND THEIR ATTORNEYS:

YOU WILL PLEASE TAKE NOTICE that ten (10) days after the filing of this Notice of Motion or as soon thereafter as may be scheduled and heard by the Court, Defendants/Third-Party Plaintiffs will move the Court for the relief sought herein.

MOTION FOR RESONSIDERATION

- I. **The Court should reconsider and retract its prior Order Requiring Turnover of Collateral and Sequestering Rents because the contracts relied upon by Plaintiffs**

contain forum selection clauses and choice of law provisions providing that New York law be applied in New York.

The loan documents cited and relied upon by this Court in issuing its previous Order each contain choice of law provisions and/or venue selection clauses which provide that New York law should be applied in New York. The Promissory Note provides: “This Note shall be deemed to be a contract entered into pursuant to the law of the State of New York...” Promissory Note, p. 9). The Mortgage states: “THIS SECURITY INSTRUMENT SHALL BE DEEMED TO BE A CONTRACT ENTERED INTO PURSUANT TO THE LAW OF THE STATE OF NEW YORK AND SHALL IN ALL RESPECTS BE GOVERNED, CONSTRUED, APPLIED AND ENFORCED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK...” Mortgage, p. 49 (emphasis in original). The Assignment of Leases and Rents provides: “THIS ASSIGNMENT SHALL BE DEEMED TO BE A CONTRACT ENTERED INTO PURSUANT TO THE LAW OF THE STATE OF NEW YORK AND SHALL IN ALL RESPECTS BE GOVERNED, CONSTRUED, APPLIED AND ENFORCED IN ACCORDANCE WITH THE LAW OF THE STATE OF NEW YORK.” Assignment of Leases and Rents, p. 8 (emphasis in original). The Cash Management Agreement states: “**Governing Law. THE LOAN WAS MADE BY LENDER IN THE STATE OF NEW YORK AND...SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAW OF THE STATE OF NEW YORK.**” Cash Management Agreement, p. 24 (emphasis in original). The Replacement Reserve and Security Agreement states: “**CHOICE OF LAW. THIS AGREEMENT SHALL BE DEEMED TO BE A CONTRACT ENTERED INTO PURSUANT TO THE LAWS OF THE STATE OF NEW YORK AND SHALL IN ALL RESPECTS BE GOVERNED, CONSTRUED, APPLIED AND ENFORCED IN ACCORDANCE WITH THE LAW OF THE STATE OF**

NEW YORK.” Replacement Reserve and Security Agreement, p. 11 (emphasis in original). These were the mortgage documents cited and relied upon by this Court in its Order but the Court’s Order never addresses why South Carolina law was applied when the documents relied upon by Plaintiffs all state that New York law should apply.

Equally important is fact there are venue selection clauses in the mortgage documents which provide that venue is only proper in the State of New York. The Clearing Account Agreement, which was attached the loan documents provides: “Borrower, Clearing Bank and Lender hereby submit to the exclusive jurisdiction of the state court of the State of New York for the purposes of all legal proceedings arising out of or relating to this Agreement or the transactions contemplated hereby.” Clearing Account Agreement, p. 5. The Cash Management Agreement also contains a similar venue selection clause that provides for venue “IN ANY FEDERAL OR STATE COURT IN THE CITY OF NEW YORK, COUNTY OF NEW YORK...” p. 24, Cash Management Agreement (emphasis in original).

Plaintiffs to this action simply didn’t follow the terms and conditions of the mortgage documents they drafted. Instead of filing suit in New York and having a New York court apply New York state law, they breached the venue selection clauses they drafted and filed suit in South Carolina. Thereafter, they sought and received an Order from this Court that is based entirely on South Carolina statutory law even though the loan document relied upon by Plaintiffs in obtaining this Order provide for application of New York state law in a New York court.

These issues were previously raised to this Court but were never addressed by this Court. In a Supplemental Memorandum of Law that was previously filed with this Court, Defendants/Third-Party Plaintiffs raised these issues before this Court issued the current Order. However and with all due respect to this Court and His Honor, the current Order simply fails to

address why South Carolina law was applied over New York law. Additionally, the Order fails to address why venue and jurisdiction even rested with this Court for issuance of the Order Requiring Turnover of Collateral and Sequestering Rents.

Defendants/Third-Party Plaintiffs respectfully request that this Court revisit its Order and deny Plaintiffs' Motion that gave rise to the Order. In the alternative, Defendants/Third-Party Plaintiffs request that this Court address the choice of law, venue and jurisdiction issues which were previously raised and which are now raised again.

II. The Court should reconsider and retract its prior Order Requiring Turnover of Collateral and Sequestering Rents because the Order is injunctive relief and Plaintiffs did not sustain their burden of proof or demonstrate that they were entitled the extraordinary injunctive relief granted by this Court.

The Court's Order in this case granted injunctive relief to the Plaintiffs before a full hearing/trial on the merits. In so doing, however, the Court did not explain or address how Plaintiffs were entitled to injunctive relief before Defendants/Third-Party Plaintiffs had even filed an Answer in this case or were required to file an Answer in this case.

"An injunction is a *drastic remedy* issued by the court in its discretion to prevent *irreparable harm* suffered by the plaintiff." Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc., 361 A.S. 117, 121, 603 S.E.2d 905, 907-08 (2004) (citing S.C. Civil Procedure, 507 (2d ed. 1996)). "The *sole purpose* of a temporary injunction is to preserve the status quo and thus avoid possible irreparable injury to a party pending litigation." FOC. Lawshe Ltd. P'ship v. Int'l Paper Co., 352 S.C. 408, 413, 574 S.E.2d 228, 231 (Ct. App. 2002) (quoting Zabinski v. Bright Acres Assocs., 346 S.C. 580, 601, 553 S.E. 2d 110, 121 (2001)) (emphasis

added). With all due respect to the Court and His Honor, the Court's Order simply fails to address any of the requirements necessary before injunctive relief is granted.

More specifically and as noted above the "sole purpose for a temporary injunction is to preserve the status quo" but the Court's Order changes the status quo. Instead of tenant rental payments going to the Defendants/Third-Party-Plaintiffs as they have for the last nine years, this Court's Order changes that arrangement by mandating that rents be remitted to Plaintiffs. Significantly, the Court's Order dictates further that Defendants/Third-Party Plaintiffs may not be reimbursed or paid for "Management Fees...or distributions to any Borrower Parties..." Order, p. 8, paragraph C(i). Presumably, Plaintiffs to this action would have Defendants/Third-Party Plaintiffs manage the property as they have for the last nine years but instead of being paid for managing the property they would use this Court's Order to deny them payment for their time, labor and effort in doing so. Such an outcome does not maintain the status quo. Instead, it significantly changes the status quo from what it has been for the last nine years.

Just as importantly, Plaintiffs cannot establish a likelihood of success on the merits of the case. As noted above, New York state law should apply but the Court's Order is premised entirely on South Carolina statutory law and specifically S.C. Code Ann. §29-3-100. Additionally, the Note and Mortgage are in the names of Bear Stearns Commercial Mortgage, Inc. but the lawsuit and named Plaintiff in this case is not in the name of Bear Stearns Commercial Mortgage, Inc. Rather, it is Bear Stearns Commercial Mortgage Securities, Inc., a different legal entity entirely.

Significantly, the Plaintiffs demonstrated no irreparable harm or injury if an injunction were not granted. Even if the untimely and improper Dickerson Affidavit is considered, it does not establish irreparable harm if an injunction is not granted.¹

The Supreme Court has held that due to their *drastic* and *extraordinary* nature, courts should issue injunctions with caution and only where there is no adequate remedy at law. Strategic Res. Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). With all due respect to this Court and His Honor, the Order Requiring Turnover of Collateral and Sequestering Rents does not address any of the requirements necessary for a preliminary injunction. Defendants/Third-Party Plaintiffs ask that this Court reconsider its previous Order under the legal standard to be applied to motions for preliminary injunctions and that this Court issue an Order that retracts the previous Order.

MOTION TO REQUIRE PLAINTIFF TO POST BOND

SCRCP, Rule 65(c) provides:

Except in divorce, child custody and non-support actions where the giving of security is discretionary, no restraining order or temporary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

¹ As argued at the October 26th Motion Hearing, the Dickerson Affidavit should not have been considered by the Court because it was not timely filed pursuant to Rule 6(d), SCRCP. Rule 6(d) states in part: "When a motion is to be supported by affidavit, the affidavit shall be served with the motion..." That was not done in this case. The Court cited this affidavit but failed to explain how it could properly consider the affidavit. Defendants/Third-Party Plaintiff also ask that the Court specifically address this argument which was not addressed in the Order.

Additionally, Plaintiffs' Counsel referenced a verified complaint in this action. However, a careful review of the Court's docket and the Affidavit of Service related to the Summons and Complaint shows that the verification to the Complaint was never served on the Defendants (it was served on Defense Counsel but only after the October 26th Hearing). Defendants/Third-Party Plaintiff also request that the Court specifically address how this could be properly considered at the October 26th hearing when it was not served in accordance with the applicable Rules of Civil Procedure.

In issuing the Order Requiring Turnover of Collateral and Sequestering Rents, the Court failed to require that Plaintiff post any bond as required by Rule 65(c). In AJG Holdings, LLC v. Dunn, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009), the Court of Appeals noted that even if a temporary injunction was properly granted by a trial court, the trial was still required to assess the proper amount of a bond. Failure to do so is reversible error. Moreover, the Supreme Court has noted that the bond amount must be sufficiently large to cover costs and damages if it is later determined that a preliminary injunction should not have been issued. Atwood Agency v. Black, 374 S.C. 68, 646 S.E.2d 882 (2007). Thus, in Atwood the Supreme Court held that a nominal bond was insufficient to satisfy Rule 65(c)'s requirements and it reversed the trial court's issuance of a nominal amount only.

While Defendants/Third-Party Plaintiffs maintain the Order Requiring Turnover of Collateral and Sequestering Rents should be re-visited and modified as outlined above, they also maintain that if the Order Requiring Turnover of Collateral and Sequestering Rents remains in force and effect, the Court should hold a hearing to determine the appropriate amount of a bond Plaintiffs should be required to post to maintain the Order Requiring Turnover of Collateral and Sequestering Rents.

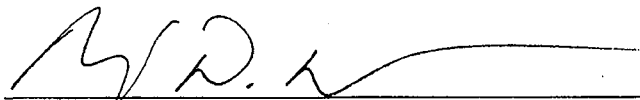
MOTION TO STAY PENDING APPEAL

In the event this Court does not alter, amend or retract its prior Order Requiring Turnover of Collateral and Sequestering Rents as outlined above, Defendants/Third-Party Plaintiffs move that the Court stay the Order pending appeal. Respectfully, there are serious questions as to whether or not the Order should have been issued especially given the venue and forum selection clauses and choice of law provisions in the documents. Moreover, and irrespective of whether this Court views the Order Requiring Turnover of Collateral and Sequestering Rents as a

preliminary or temporary injunction, the Order Requiring Turnover of Collateral and Sequestering Rents undoubtedly makes significant changes to the statute quo that existed before the Order was issued. Before taking effect and changing the status quo, Defendants/Third-Party Plaintiffs maintain those issues should be reviewed by an appellate court before the conditions in the Order Requiring Turnover of Collateral and Sequestering Rents take effect/remain in effect. Therefore, Defendants/Third-Party Plaintiffs request that this Court issue an Order staying the Order Requiring Turnover of Collateral and Sequestering Rents while this matter is on appeal.

Respectfully submitted,

LAW OFFICES OF ROBERT D. DODSON, P.A.



Robert D. Dodson, Esquire
1722 Main Street, Suite 200
Columbia, South Carolina 29201
Phone: (803) 252-2600
Fax: (803) 771-2259
Email: rdodson@rdodsonlaw.com

Attorney for Defendant

December 8, 2016

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-MAGPG, LCC; HW-MAGPIG, LLC;
and MW-MAGPIG, LLC,

Defendants/Third-Party Plaintiffs,

vs.

WELL FARGO BANK, N.A. and
MERIDIAN CAPITAL GROUP, LLC,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

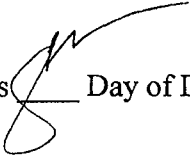
Civil Action No: 2016-CP-40-02470

CERTIFICATE OF SERVICE

I, Lindsay H.V. Protopapas, have served the foregoing **NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE REQUIRING THAT PLAINTIFF POST A BOND FOR THE INJUNCTION IT OBTAINED AND/OR IN THE ALTERNATIVE STAYING ENFORCEMENT OF COURT'S PREVIOUS ORDER PENDING APPEAL** upon the following parties at the following addresses via United States Postal Service, postage pre-paid:

James H. Pulliam
David H. Simpkins
Kilpatrick Townsend & Stockton, LLP
214 N. Tryon Street, Suite 2400
Charlotte, NC 28202-2381
Meridian Capital Group, LLC
CT Corporation System
111 Eight Avenue
New York, NY 10011

Wells Fargo Bank, N.A.
Corporation Service Company
1703 Laurel Street
Columbia, SC 29201

This  Day of December, 2016

Columbia, South Carolina

LAW OFFICES OF ROBERT DODSON, P.A.

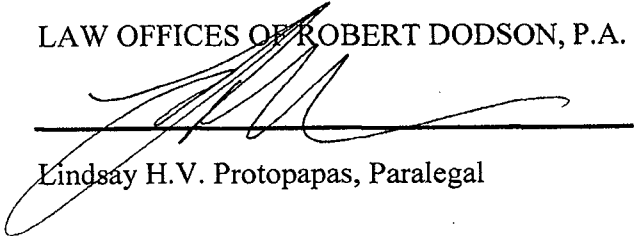

Lindsay H.V. Protopapas, Paralegal

EXHIBIT B

Venue & Jurisdiction Motion

[attached hereto]

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

U.S. Bank National Association et. al.)

Plaintiff)

v.)

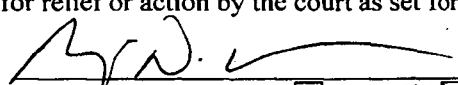
Aw-Maggig, Llc Et. Al.)

Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.
2016-CP-40-02470

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: James H. Pulliam And David H. Simpkins, Bar No. Address: Kilpatrick Townsend & Stockton LLP 214 North Tryon Street, Suite 2400 Charlotte, NC 28202 phone: fax: e-mail: other:	Defendant's Attorney: Robert D. Dodson, Bar No. 16205 Address: 1722 Main Street, Suite 200 Columbia, SC 29201 phone: 803-252-2600 fax: 803-771-2259 e-mail: rdodson@rdodsonlaw.com other:
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion: Motion to Dismiss for Improper Venue and/or Lack of Jurisdiction Estimated Time Needed: 20 Minutes Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO	
SECTION II: Motion/Order Type <input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
<div style="display: flex; justify-content: space-between; align-items: center;"> <div style="text-align: center;">  Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant </div> <div style="text-align: center;"> 12/8/16 Date submitted </div> </div>	
SECTION III: Motion Fee <input checked="" type="checkbox"/> PAID - AMOUNT: 25.00 <input type="checkbox"/> EXEMPT: <ul style="list-style-type: none"> <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other:	
JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	_____ JUDGE CODE: _____ Date: _____
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____	

<input type="checkbox"/> MOTION FEE COLLECTED: _____
<input type="checkbox"/> CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

U.S. BANK NATIONAL ASSOCIATION,
AS TRUSTEE, AS SUCCESSOR-IN-
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MERIDIAN CAPITAL GROUP, LLC,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No: 2016-CP-40-02470

**NOTICE OF MOTION AND MOTION TO
DISMISS FOR IMPROPER VENUE AND/OR
LACK OF JURISDICTION**

TO: PLAINTIFFS AND THEIR ATTORNEYS:

YOU WILL PLEASE TAKE NOTICE that ten (10) days after the filing of this Notice of Motion and Motion Dismiss for Improper Venue and/or Lack of Jurisdiction or as soon thereafter as may be scheduled and heard by the Court, Defendants/Third-Party Plaintiffs will move the Court for Order dismissing Plaintiffs' Complaint for improper venue. The factual and legal basis for this Motion is set forth below.

Plaintiffs filed this action to foreclosure on commercial property owned by Defendants. Attached to Plaintiffs' Complaint were the mortgage documents Plaintiffs allege form the basis for their action. Included in those documents are two documents with venue/forum selection clauses which mandate that cases between the parties be litigated in the state of New York and pursuant to New York law. One of the those documents is a "Clearing Account Agreement." See Exhibit F to Plaintiffs' Complaint. In relevant part, the Clearing Account Agreement states: "Borrower, Clearing Bank and Lender hereby submit to the exclusive jurisdiction of the state courts of the State of New York for the purposes of all legal proceedings arising out of or relating to this Agreement or the transactions contemplated hereby." See p. 5 of Exhibit F to Plaintiffs' Complaint. Another document, the Cash Management Agreement, provides a venue and forum selection clause that provides:

ANY LEGAL SUIT, ACTION, OR PROCEEDING AGAINST LENDER OR BORROWER ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE OTHER SECURITY DOCUMENTS MAY AT LENDER'S OPTION BE INSTITUTED IN ANY FEDERAL OR STATE COURT IN THE CITY OF NEW YORK, COUNTY OF NEW YORK, PURSUANT TO SECTION 5-1402 OF THE NEW YORK GENERAL OBLIGATIONS LAW AND BORROWER WAIVES ANY OBJECTIONS WHICH IT MAY NOW OR HEREAFTER HAVE BASED ON VENUE AND/OR FORUM NON CONVENIENS OF ANY SUCH SUIT, ACTION OR PROCEEDING, AND BORROWER HEREBY IRREVOCABLY SUBMITS TO THE JURISDICTION OR ANY SUCH COURT IN ANY SUIT, ACTION OR PROCEEDING.

See p. 21 of Exhibit G to Plaintiffs' Complaint (emphasis in original).

While Plaintiffs may attempt to argue that the language in the Clearing Account Agreement and Cash Management Agreement quoted above do not appear in the Note or Mortgage itself, those arguments should not be persuasive to this Court for multiple reasons. First, the Clearing Account Agreement and Cash Management Agreement refer to, relate to and arise out of the Note and Mortgage. Both the Clearing Account Agreement and Cash

Management Agreement refer to the Mortgage and Note specifically. See p. 11 of Exhibit A to Plaintiffs' Complaint and p. 4 of Exhibit B to Plaintiffs' Complaint. Just as importantly, the Note specifically incorporates the "terms, covenants and conditions contained in the Security Instrument and the Other Security Documents are hereby made part of this Note to the same extent and with the same force as if they were fully set forth herein." See p. 5 of Exhibit A to Plaintiffs' Complaint.

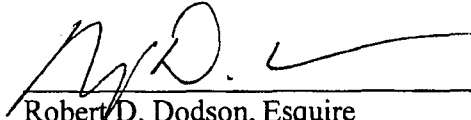
Additionally, Plaintiffs filed these documents together and Plaintiffs' have used the combination of these documents to obtain injunctive relief from this Court in the form of an Order Requiring Turnover of Collateral and Sequestering Rents. Plaintiffs cannot plausibly argue that the Court should grant them the relief they got under the Order Requiring Turnover of Collateral and Sequestering Rents by reading and applying the mortgage foreclosure documents together but then when it does not go to suit them, claiming now that the Note and Mortgage should be viewed separately and apart from the Note and Mortgage.

It is also significant that the other mortgage documents provide for application of New York law. See p. 9 of Exhibit A to Plaintiffs' Complaint; p. 49 of Exhibit B to Plaintiffs' Complaint; p. 8 of Exhibit D to Plaintiffs' Complaint; p. 11 of Exhibit E to Plaintiffs' Complaint. Each of these pages in the loan documents provides for application of New York state law. In fact, the only loan documents attached to Plaintiffs' Complaint that do not contain provisions mandating application of New York law is the legal description of property.

Because the loan documents require application of New York law and contain venue selection clauses such that cases are to be litigated in New York, this Court should dismiss this action.

Respectfully submitted,

LAW OFFICES OF ROBERT D. DODSON, P.A.



Robert D. Dodson, Esquire
1722 Main Street, Suite 200
Columbia, South Carolina 29201
Phone: (803) 252-2600
Fax: (803) 771-2259
Email: rdodson@rdodsonlaw.com

Attorney for Defendants/Third-Party Plaintiffs

December 8th, 2016

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-MAGPG, LCC; HW-MAGPIG, LLC;
and MW-MAGPIG, LLC,

Defendants/Third-Party Plaintiffs,

vs.

WELL FARGO BANK, N.A. and
MERIDIAN CAPITAL GROUP, LLC,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No: 2016-CP-40-02470


CERTIFICATE OF SERVICE

I, Lindsay H.V. Protopapas, have served the foregoing **NOTICE OF MOTION AND MOTION TO DISMISS FOR IMPROPER VENUE AND/OR LACK OF JURISDICTION** upon the following parties at the following addresses via United States Postal Service, postage pre-paid:

James H. Pulliam
David H. Simpkins
Kilpatrick Townsend & Stockton, LLP
214 N. Tryon Street, Suite 2400
Charlotte, NC 28202-2381

Meridian Capital Group, LLC
CT Corporation System
111 Eight Avenue
New York, NY 10011

Wells Fargo Bank, N.A.
Corporation Service Company
1703 Laurel Street
Columbia, SC 29201

This  Day of December, 2016

LAW OFFICES OF ROBERT DODSON, P.A.

Columbia, South Carolina

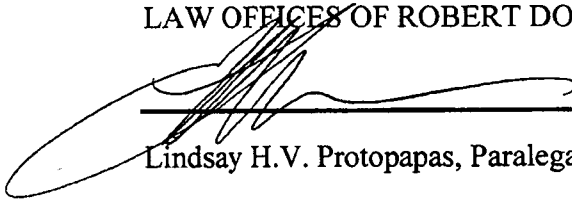

Lindsay H.V. Protopapas, Paralegal

EXHIBIT C
Reference 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 or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF 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 : _____

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 _____ Judge Code 2758 Date _____

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 12 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 *Janette W. ...*

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2016-CP-40-02470

U.S. BANK NATIONAL ASSOCIATION,)
AS TRUSTEE, AS SUCCESSOR-IN-)
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LASALLE BANK NATIONAL)
ASSOCIATION, AS TRUSTEE FOR THE)
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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.)

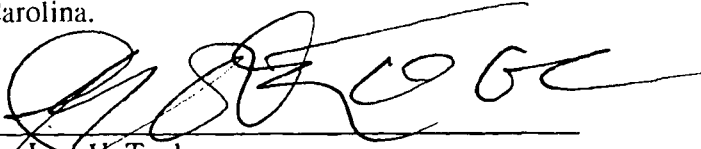
ORDER OF REFERENCE

RICHLAND COUNTY
FILED
2016 DEC 22 AM 11:39
JENNIFER G. S. JORDAN
CLERK OF COURT

The within matter came before the Court upon the Motion for Order of Reference (the "**Motion**") of the plaintiff U.S. Bank National Association, as trustee, successor-in-interest to Bank of America, N.A, as trustee, successor-by-merger to LaSalle Bank National Association, as trustee for the registered holders of LB-UBS Commercial Mortgage Trust 2006-C6, Commercial Mortgage Pass-Through Certificates, Series 2006-C6 ("**Plaintiff**"), by which Plaintiff seeks reference of this action to the master pursuant to Rules 53 and 71, S.C.R.C.P., and applicable law. Upon consideration of the Motion, the evidence submitted in support thereof and the

arguments of counsels for Plaintiff and the defendants AW-MAGPIG, LLC, HW-MAGPIG, LLC and MW-MAGPIG, LLC (collectively, "Defendants"), I find that the Motion should be granted and that this is a proper matter to refer to the Honorable Joseph M. Strickland, Master-in-Equity for Richland County, South Carolina.

NOW, THEREFORE, IT IS HEREBY ORDERED that this case is referred to the Honorable Joseph M. Strickland, as Master-in-Equity for Richland County, South Carolina, who, pursuant to Rule 53, S.C.R.C.P., shall exercise all power and authority which a Circuit Judge sitting without a jury would have, including but not limited to: making findings of fact and conclusions of law; directing entry of a final judgment in this action; to order a sale on any day; to hear any and all petitions, rules to show cause, motions (including, without limitation, Defendants' pending Motion to Dismiss for Improper Venue and/or Lack of Jurisdiction) and other pleadings or filings, whether before or after sale or judgment; to hear any and all issues including, without limitation, any omitted creditors and possession or removal of property, rents and other income; issuing any and all orders, supplemental orders and amendments thereto as said Master-in-Equity deems necessary; and issuing writs of assistance, summonses and rules to show cause. Any appeal from any order or judgment issued by the Master-in-Equity shall be directly to the Supreme Court of South Carolina.


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

December 16, 2016
Columbia, SC