STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
	TENTH JUDICIAL CIRCUIT
COUNTY OF OCONEE	
	2015-CP-37-0635
Community First Bank, Inc.	
Plaintiff,	**ORDER ON FREDERICK D. SHEPHERD'S MOTION FOR SANCTIONS**
v.	
John M. Powell, Frederick D. Shepherd, Jr., James E. McCoy, MPS Golf Course, Inc., and MPS Development, Inc.	
Defendants.	

This case comes before the Court on Defendant Frederick D. Shepherd's (Shepherd) Motion for Sanctions. Generally, Shepherd argued that Plaintiff Community First Bank (Bank) willfully and intentionally violated portions of this Court's discovery Order of August 1, 2016 (Discovery Order), which compelled the Bank to comply with its discovery obligations as set out in the Order. The Bank, generally, argued that it was in full compliance with the Discovery Order and certain of the issues argued were not properly before the Court.

The Court conducted a hearing on March 31, 2017, which was fully briefed by both parties, and a subsequent hearing on July 28, 2017, in which the Bank challenged the amount of attorney's fees and costs awarded in this case. Having fully considered the arguments by the parties in the briefs and at the hearing, the Court hereby GRANTS Shepherd's Motion for Sanctions after reaching the following conclusions.

INTRODUCTION

A short summary of the facts is needed to illustrate the relevancy of discovery

documents and place the discovery dispute in context.

Community First Bank filed a lawsuit on August 21, 2015 Defendants conspired, over a 20 year period starting in the 1990's, to defraud the Bank out of money. The Bank alleged the Defendants, former CEO Fred Shepherd (Shepherd), former Board Member James McCoy (McCoy), and their business partner John Powell (Powell) defrauded the Bank out of money through a series of loans, later consolidated into one loan, that were in the name of Powell, but were allegedly for the benefit of Shepherd, McCoy, and their businesses MPS Golf Course, Inc. and MPS Development, Inc. (the Powell Loan(s))

The Bank further asserted that Powell was treated differently from other borrowers through preferable loan terms and collection efforts, and that Defendants Shepherd and McCoy failed to inform the Bank of their business relationship with Powell, MPS Golf and MPS Development and failed to abstain from voting on the Powell Loans. Based on these allegations, the Bank pled numerous causes of action against Shepherd including fraud, breach of contract with fraud, breach of fiduciary duties, aiding and abetting, civil conspiracy, and unjust enrichment.

In its factual allegations, the Bank's Complaint had a section entitled "The Fraudulent Charge-Off" in which the Bank alleged that the conspiracy continued through March 2012 when Shepherd unilaterally and clandestinely charged-off the loan. The Bank alleged the charge-off should have been presented to the Bank's Board of Directors for approval. The Bank attached a charge-off resume to its Complaint, signed by Shepherd, indicating that the charge-off was done in March 2012. The allegations of the Complaint referenced this charge-off resume as supporting the clandestine, fraudulent charge-off. Because this charge-off was allegedly "clandestine," the Complaint asserted

the Board was not aware of the charge-off of the Powell loan until 2014.

In the ensuing discovery dispute culminating in this Order, the alleged secret charge off has become a central issue since the charge off was the last claim of misconduct and occurred more than three years before the filing of the Bank's Complaint. The Defendants have interposed a statute of limitations defense because the original loans in question date back to the mid-1990's and the Powell loan in dispute was charged-off of the Bank's book in early 2012. Defendants contend that the charge-off was mandated by the FDIC and done with full knowledge of the Bank.

PROCEDURAL POSTURE

On September 21, 2015, Shepherd served discovery requests on the Bank aimed at both the merits of the allegations and the Statute of Limitations defense. The Bank answered the discovery requests on November 20, 2015, that included 34 objections to the 31 discovery requests. The Bank subsequently produced documents on February 10, 2016. The documents were produced in no certain order and without reference to applicable discovery requests and contained numerous documents that were either heavily redacted or illegible. Shepherd promptly corresponded with the Bank asking for correction of these issues, and addressing concerns regarding documents he believed were not produced.

After the Bank refused to supplement discovery and asserted that it had complied with its discovery obligations, Shepherd filed a Motion to Compel discovery. The parties briefed the motion, and Shepherd argued that the Bank had failed to fully produce relevant documents relating to: (1) the charge-off of the Powell loan; (2) comparative similar loans to the Powell loans; (3) board meeting minutes; (4) loan tracing; and (5)

investigations. As to documents the Bank did produce, Shepherd argued that the Bank submitted them in an indiscernible "document dump", with illegible and excessively redacted documents throughout. The Bank asserted that it believed it complied with its discovery obligations.

A hearing was held on Shepherd's Motion to Compel on March 15, 2016, during which the Court orally required the Bank to correct the "document dump" and identify documents to individual discovery requests, produce legible documents, and limit redactions. The Court also orally instructed the Bank that any redactions considered essential should be submitted for an *in camera* review.

The Court directed Shepherd to provide the Bank with a list of illegible documents and documents he believed to be missing. Shepherd provided the list, and the Bank asserted that they would submit legible and less redacted documents, but took the position that the Court had not directed the Bank to produce any documents Shepherd believed were missing. Following that ruling and exchange between the parties, the Bank engaged in a pattern of delay from April 2016 through December 2016, in which it claimed compliance with discovery but continued productions of documents in what the Bank termed its "rolling production."

As an illustration, the Bank responded to Shepherd's requests for further discovery by producing more documents, alleging compliance, and dismissing Shepherd concerns about the production. Shepherd persisted with numerous letters identifying unproduced documents and categories. In each instance, the Bank would produce more documents in its "rolling production" and claim full compliance with the discovery rules.

This process repeated itself numerous times, further detailed herein, as the Bank

shifted its discovery burden to Shepherd to review the most recent document production, identify specific documents not produced, and request them from the Bank. The Bank persisted in this pattern of conduct throughout the discovery process, including when responding to the Court's Order compelling production, when complying with the Court imposed deadline, after the filing by Shepherd of a Sanctions motion, and up through the last document production in Dec 2016—which the Court finds still is incomplete.

During this burden shifting process, this Court granted Shepherd's Motion to Compel on August 1, 2016 and entered the Discovery Order. As to the Bank's production of documents, the Discovery Order restated its oral directives for the Bank to produce legible documents, less redacted documents, and to cure the "document dump" by referencing bates numbers to their corresponding discovery requests. As to the documents that the Bank failed to produce, Shepherd was directed to, and did, send a list of documents not received. Shepherd timely sent the list, in which he complained of the same documents alleged to have been missing at the hearing. The Bank was ordered to produce documents consistent with that list within 30 days of its receipt.

The Bank previously complied with the oral directives and parts of the Order requiring them to produce legible documents, fewer redacted documents, and to cure the "document dump." As part of the redaction process, the FDIC corresponded with the Court specifically stating discovery may implicate materials redacted pursuant to the Bank Secrecy Act (BSA) with references to 12 § U.S.C. 1829b, §§ 1951-59, and 31 U.S.C. §§ 5311-32. The Court indicated the Bank's remaining redactions on documents, reviewed by the FDIC, appeared to comport with that correspondence. The FDIC had no further communications with the Court concerning any other aspect of discovery.

Instead of fully producing further documents responsive to Shepherd's list, the Bank lodged objections and refused to produce certain documents. It contended it did not have to produce certain documents until they were specifically identified by Shepherd. Shepherd's list, however, mirrored his arguments at the hearing for the production of missing categories of documents. Shepherd also made, as well as in numerous requests for these missing categories of documents from April 2016 forward.

In response to the Bank's refusals and objections, Shepherd filed a Motion for Sanctions arguing that the Bank was in willful violation of the Court's Discovery Order due to its intentional disregard for the discovery rules. Subsequent to that Motion and after the Discovery Order deadline, the Bank produced additional documents, including redacted documents without an *in camera* review or evidence of review by the FDIC, as further detailed herein.

The parties briefed the motion prior to a hearing held on March 31, 2017. At the hearing, the Bank objected to exhibits entered into the record by Shepherd, asserting they were not referred to or provided in the Motion for Sanctions. Shepherd sent the documents to the Bank before the hearing. The objection was overruled Shepherd proceeded, and the Bank responded.

Additionally, the Bank argued its Motion for Sanctions against Shepherd. It alleged Shepherd violated civil procedure rules by failing to meet and confer about his Motion and also alleging that the Court previously determined compliance with the redaction directives of the Discovery Order complained of in the Motion. The Bank failed to brief its motion, and the Court required no argument from Shepherd.

At the conclusion of the hearing, to cure any possible issues concerning the

breadth of Shepherd's Motion, the Bank was given an opportunity to respond to anything it deemed outside of the Motion. The Bank was also given specific instructions to respond to questions the Court had during the course of the hearing. After the hearing, the Bank requested additional time to respond, which the Court granted. It then filed a brief on April 14, 2017, stating its positions on the issues and on the Court's questions. Thereafter, Shepherd submitted a responsive brief on April 21, 2017 clarifying his positions on issues raised in the Bank's brief.

The Court has considered the arguments at the hearings and both parties' briefs, including those submitted before and after the hearing, in deciding this Motion.

CONCLUSIONS OF FACT

The Court finds the discovery disputes were the result of the Bank's willful and intentional noncompliance with (1) the Rules of Civil Procedure and (2) the Discovery Order. The Court also finds that the intentional and willful noncompliance with the Rules and Discovery Order appear to be a concerted effort to obviate the issues and frustrate discovery. The Court further notes that all documents produced in the Bank's "rolling production" were within the Bank's possession and control prior to the filing of its lawsuit and before Shepherd's September 2015 discovery requests.

In an effort to pare down numerous examples of willful and intentional misconduct, the Court will only focus on several illustrative examples of Bank misconduct that warrant the sanctions imposed.

The FDIC Report of 2012

The first example relates to Shepherd's request for documents concerning the charge-off of the Powell loan in 2012, which centered on an FDIC examination of the

Bank from February 2012 through June 2012. Shepherd, as the former Bank CEO, believed the FDIC required the charge-off of the Powell loan, which he alleged, if true, could undermine the Bank's allegations of fraud and secrecy and also be relevant to his statute of limitations defense.

Shepherd specifically requested the FDIC Report and related documents in his September discovery requests. In every correspondence on discovery matters, Shepherd continued to ask for production of these documents. It is undisputed that the Bank neither acknowledged the existence of the FDIC Report and related documents nor listed them on a privilege log until after expiration of the Court imposed deadline for production. These documents were not produced until December of 2016, even though the Bank had possessed most of the documents since 2012. For example, the terms of the FDIC Report show that it was kept at the Bank more than three years before the Bank filed its lawsuit and continually possessed during the entirety of the discovery dispute.

The substance of the Report showed the FDIC conducted a review of the Bank commencing on February 27, 2012. It submitted a final report to the Bank in June of 2012. The Powell loan is identified, and discussed, throughout the report. In fact, Powell's name and loan are seen as early as page two. The FDIC criticized the Powell loan for its terms; mainly that it was unsecured, had no recent principal curtailment, and was an interest-only loan.

The Report also cited other loans at the Bank that had similar issues, and noted these were repeated concerns brought up at the previous FDIC examination as early as 2010. Consequently, the FDIC recommended the Bank charge-off the Powell loan and others like it. The Bank responded to the recommendations to charge-off these loans in

April 2012, and again in May 2012, by filing reports to the FDIC confirming it had charged-off the loans. In June 2012, as required in the FDIC Report, the Bank's Board of Directors signed the report and affirmed each had reviewed the Report in its entirety. The Report ultimately contained each of the Board members signatures.

Even though this FDIC document was relevant, and contained instructions on the "cover page" detailing how to handle a request for its production during litigation, the Bank failed to disclose or produce this report from September 21, 2015, until December 14, 2016. This procedure was contrary to the instructions on the cover page, which directed the Bank to: (1) immediately notify the FDIC of the request for the report; (2) notify Shepherd, and if necessary this Court, of restrictions on the production of the Report; and (3) refer Shepherd, and if necessary this Court, to Part 309 of the FDIC Rules and Regulations.

Effectively, this undisclosed FDIC report provided the Bank with a blueprint for relevant discovery. First, the report itself was relevant because the FDIC recommended, and specifically referenced, the Powell loan charge-off. Second, the Report encompassed time periods where meeting minutes would be relevant, *i.e.* those occurring during (1) the previous audit; (2) the 2012 audit (3) the special board meetings to discuss the 2012 audit; and (4) meeting minutes responsive to the FDIC examination like the April 2012 meeting. Third, the Report referenced relevant Bank investigations occurring during 2010-2012 by outside auditors. Fourth, the Report identified substantially similar loans to the Powell loan that were recommended to be charged-off. Finally, it indicated that documents relevant to the Powell loan charge-off, such as enacted policy changes, existed. The Bank had these documents within its possession. They were, ~~and~~ subject to

Shepherd's Discovery requests, but they were not produced within the time prescribed by the rules for discovery responses, and they were not produced before the Discovery Order deadline.

In sum, this Report referenced documents and indicated the existence of documents that should have been produced in response to Shepherd's discovery requests. During the time the Report was willfully and intentionally not identified or produced, as discussed below, the Bank maintained a claim of ignorance as to relevant document production.

Shepherds persistence on the Powell charge-off issue throughout the Bank's denials and delays

Although the Bank's initial document production in February failed to include this FDIC report or other related charge-off documents, it did include a March meeting minute indicating the Board was retiring to executive session to discuss the "ongoing FDIC examination." Shepherd immediately, on February 19, 2016, sent correspondence requesting the Report, and related documents, referenced in the March meeting. The correspondence also complained of, *inter alia*, (1) copious redactions; (2) the lack of a privilege log; and (3) missing meeting minutes and accompanying documents.

In a response dated February 29, 2016, the Bank generally disagreed that their production was deficient. The Bank did not identify or address the FDIC Report and, instead, requested Shepherd send to the Bank a list of "specific documents" he "speculate[d]" should exist. The Bank conceded that it might have more documents, and would search for and produce relevant documents that it located.

Because of these positions, Shepherd filed a Motion to Compel on February 29, 2016. In response to the motion, the parties briefed the issues and the Bank asserted to

the Court that it believed it had complied with its discovery obligations. Shepherd disagreed, and a hearing was held on March 15, 2016, at which he argued for full production of: (1) meeting minutes; (2) investigations; (3) FDIC Report; (4) other charge-off documents; (5) similar unsecured insider loans; and (6) loan documents. He also maintained the Bank should produce legible copies of certain documents and remove redactions, and contended the 8,000 page "document dump" should be corrected. At the hearing on the Bank never addressed the FDIC report or acknowledged the related charge-off documents in its possession. The Bank issued the oral directives previously discussed, and the parties awaited the Court's formal Order.

While waiting on the Order, Shepherd sent a letter on March 23, 2016, to the Bank requesting, among others, board meeting minutes, loan documents, and, again, charge-off documents to include the FDIC report. The Bank promptly replied on March 24, 2016, disagreeing with Shepherd's request for document production. Specifically to the charge-off documents-- including the FDIC Report-- the Bank told Shepherd, "[w]e have produced the charge-off records for the Powell loan at issue." At this time, the only produced document on the charge-off was Shepherd's charge-off memo attached to the Complaint. The Bank's Complaint contended it was proof of Shepherd's unilateral approval of the charge-off, and the Bank expressly maintained no other documents on the issue were within its possession, custody, or control.

The Bank's reply prompted another letter from Shepherd on March 31, 2016, in which he attempted to clarify the discovery issues. After addressing some preliminary discovery matters, he requested production of documents, specifically asking for the FDIC Report. Since the Bank failed to promptly respond to this letter, and the Court had

yet to formally rule on Shepherd's Motion to Compel, Shepherd sent a letter to the Court on April 28, 2016. In this letter, Shepherd updated the Court on the parties' discovery efforts since the hearing, and specified areas of documents that would still require rulings. One of these areas was the FDIC Report, which he asserted the Bank had refused to produce and ignored repeated requests for production.

The Bank responded to this update approximately two months later on July 1, 2016. and told Shepherd that his April letter was generally without any merit. They further asserted that "the Bank has provided [Shepherd] all documents within its possession to which you are entitled." While the letter addressed areas of documents for which Shepherd had concerns, it failed to identify or mention the FDIC Report.

Shepherd responded via a letter dated July 26, 2016. In that letter, he singled out the FDIC Report and related documents as a specific request while further explaining his persistence in seeking this discovery. In the request, he told the Bank that those documents directly refuted their allegations and addressed the statute of limitations issues. The Bank never responded to this letter, despite having the FDIC report and related charge-off documents in its possession, as well as the instructions for identifying the Report on its cover page.

Up until this time, the Bank had produced 12 different sets of documents productions. The Bank later contended this "rolling production" was provided for by the RULES OF CIVIL PROCEDURE. Accompanying the document productions were four separate privilege logs that asserted documents primarily protected from disclosure by the Attorney-Client privilege, Suspicious Activity Reporting (SAR), and Confidential Supervisory Information (CSI). None of these privilege logs mentioned the FDIC report

and the related Powell charge-off documents in the Bank's possession. These privilege logs also failed to mention Section 309, which the Court notes is not a privilege. Instead, Part 309 has a stated purpose and scope to set forth the procedures for obtaining access to information the FDIC maintains.

After these document productions and disputes, on August 1, 2016, this Court granted Shepherd's Motion to Compel discovery. As previously discussed, the Court order specifically ordered the Bank to cure defects with their initial document production. In addition, the Court directed Shepherd, within 30 days or the Order, to submit a list of documents for the Bank to produce. In response, the Court instructed the Bank to produce the documents within 30 days of receiving Shepherd's list.

Before Shepherd could send his list, however, the Bank sent correspondence on August 2, 2016 asserting that they had already complied with the Order, even though the FDIC Report and charge-off documents were not produced. The Bank gave Shepherd one week to disagree with its assertion of compliance. Shepherd responded on August 2, 2016, that he disagreed with their position. Mainly, he argued the Bank could not have complied with the Order's directive to produce documents, because he had yet to send the required list.

Thereafter, on August 19, 2016 Shepherd timely sent a listing of documents that the Bank had failed to produce. The list of requests included a complete privilege log, as well as areas of documents related to loan tracing, substantially similar loans to Powell, and the FDIC report and related documents. Shepherd argued he was frustrated by the Bank's silence on the FDIC Report and related charge-off documents, so he simultaneously submitted three Requests for Admission. He further argued these

Requests were designed to force the Bank to admit the substance of the FDIC Report related to the allegations of a clandestine charge-off of the Powell loan.

The First Request asked the Bank to admit that the Bank's Board approved the Powell loan charge-off in the executive session on March of 2012. The Second request sought an admission that the FDIC recommended the Powell charge-off in a Report, which was presented to the Board in the March 2012 meeting. The third request prompted the Bank to admit that the Board signed a document acknowledging the March 2012 charge-off of the Powell loan. The Bank responded by answering "denied" to each request. In light of the subsequently produced FDIC Report and related documents, the Court finds the Bank's responses questionable, but without question, a clear example of discovery gamesmanship.

On September 16, 2016, the Discovery Order deadline, the Bank produced documents it asserted were responsive to Shepherd's list. This production did not include substantially similar loans, all relevant meeting minutes, or charge-off documents--including the FDIC report. As to FDIC documents, the Bank explained, without referencing the FDIC Report and materials, that it had requested production of Confidential Supervisory Information (CSI) and suspicious Activity Reporting (SAR) documents from the FDIC.

The Bank maintained that the FDIC refused to let the Bank produce SAR material redacted in FDIC reviewed meeting minutes, but it failed to address the FDIC's position on CSI information. The Bank also never mentioned it possessed: the FDIC Report; related charge-off documents; and other Bank documents evidencing its knowledge of the charge-off. The Bank did not produce its correspondence with the FDIC.

Since the Bank failed to comply with the Court's Order compelling production, Shepherd filed a motion on September 21, 2016, requesting this Court sanction the noncompliance. While waiting on a hearing date, the parties continued efforts toward a solution that might avoid the Motion Hearing. The parties held a phone conference, which counsel for Defendant McCoy summarized in a letter on October 28, 2016. During that phone call, for the first time, the Bank acknowledged the existence of the FDIC report. The parties also discussed the "rolling production," missing meeting minutes, and non-production of comparable similar loans. Shortly thereafter, Shepherd sent the Bank a letter that requested the Bank's communications with the FDIC and attempted to aid the Bank in identifying where it kept definitions of, and locations for, similar insider loans.

Additionally during the phone conference, Shepherd requested an unproduced April 2012 meeting minute, asserting that it contained confirmation the Board approved the Powell loan charge-off. The Bank finally produced the meeting minutes on November 14, 2016, which, together with the meeting's handout, confirmed that the Board voted and approved the Powell loan charge-off.

In response to the FDIC issues raised on the phone conference, the Bank asserted that its communications with the FDIC were privileged, and did not produce its correspondence with the FDIC as requested by Shepherd. The Bank did give Shepherd the contact information for a case manager at the FDIC, whom Shepherd contacted at the end of November. The FDIC report was produced to the Bank within weeks, and after it complied with instructions from the FDIC, the Report was produced on December 14, 2016.

Additionally, the Bank contends the FDIC permitted the release of other relevant documents to the Powell loan and March 2012 charge-off. These Bank-possessed documents included: confirmation of meetings with the FDIC on the charge-off of the Powell loan and similar loans; Bank responses to the FDIC confirming the charge-off of Powell's loan; and Bank ledger entries confirming the disposition of the Powell loan. All of these documents were factual Bank documents prepared and in the custody and control of the Bank. These documents were produced by the Bank in its final pre-sanctions hearing production which occurred on Dec 27, 2016. Ultimately, the Bank produced 19 "rolling productions" and 8 privilege logs.

In summary, after the Court imposed deadline, the Bank produced, among other documents: redacted meeting minutes; ledgers; FDIC reports; internal communications; and Bank responses to the FDIC review. All of these dealt with issues in the case, including the Bank's charge-off of the Powell loan and its knowledge of issues relating to the Powell loan. These documents also identify more unproduced documents and aid in identifying comparable similar loans. As of the Court's deadline for production, however, the Bank failed to produce any comparable similar loans.

Bank Corresponds with IRS Criminal Division

As a final related matter, on December 27, 2016, the Bank produced a copy of correspondence it sent to the Internal Revenue Service (IRS) Criminal Division within the production it claims was approved for production by the FDIC. This document was never identified or included on a privilege log. The document shows that one month prior to the Bank filing its lawsuit, it wrote to the IRS Criminal Division alleging misconduct by Defendants Powell, Shepherd, and McCoy.

The Court, concerned that the Bank and its lawyers attempted to use a criminal prosecution to gain an advantage in this civil matter, questioned counsel about their involvement. Counsel at the hearing asserted that no one present at the hearing gave the Bank advice to send the letter.

The Court directed counsel to update the Court concerning whether any member of their law firms, not present at the hearing, participated in the preparation or sending of this letter. The Bank responded that no attorneys provided counsel regarding the letter, and that the IRS specifically requested the Bank send the letter to the Criminal Division. As such, they asserted they complied with the mandates of the IRS.

LEGAL STANDARD

Generally, discovery sanctions are imposed to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent. Creighton v. Coligny Plaza Ltd. Partnership, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998). The imposition of sanctions is entrusted to the sound discretion of the trial judge. Halverson v. Yawn, 328 S.C. 618, 493 S.E.2d 883 (Ct.App.1997)." Barnette v. Adams Bros. Logging, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003).

"Pursuant to Rule 37 of the SOUTH CAROLINA RULES OF CIVIL PROCEDURE, when a party fails to obey an order to provide or permit discovery, the court may 'make such orders in regard to the failure as are just'. See also In re Anonymous Member of South Carolina Bar, 346 S.C. 177, 194, 552 S.E.2d 10, 18 (2001) (noting that 'judges must use their authority to make sure that abusive deposition tactics and other forms of discovery abuse do not succeed in their ultimate goal: achieving success through abuse of the

discovery rules rather than by the rule of law.').

More specifically, "[i]f a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment. Id. In addition, Rule 37(2) allows a court to require payment of reasonable expenses, including attorney's fees, caused by the failure to obey a discovery order, unless the court finds the failure was substantially justified or an award of expense is unjust. In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice. Historic Charleston Holdings, LLC v. Mallon, 673 S.E.2d 448 (2009). The rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, so when a party acts contrary to the rules prejudice *must be* presumed. Samples v. Mitchell, 329 S.C. 105, 113-14 (Ct. App. 1997) (internal citations omitted).

If a court finds sanctions appropriate, whatever sanction chosen "should serve to protect the rights of discovery provided by the Rules. Downey v. Dixon, 294 S.C. 42, 45 (Ct. App. 1987). A court should not be overly lenient when imposing sanctions if that would result in the inadequate protection of discovery. Id.

CONCLUSIONS OF LAW

Sanctions are warranted here, as discussed below, because the Bank has willfully and intentionally failed to obey this Court's Order compelling discovery and the discovery rules. In determining the appropriateness of sanctions, the Court finds that the factors to be considered all weigh heavily in favor of levying sanctions on the Bank. The Court is also mindful that an overly lenient sanction will not result in adequate protection

of the discovery process.

Generally, the Bank's numerous arguments can be summarized as asserting (1) the procedural posture of the Motion is improper (2) the Bank complied with the Discovery Order; and (3) any failure to comply with the Order is the result of either Shepherd requesting document categories instead of specifically referencing documents or the legal inability to identify and produce alleged FDIC documents.

First, the Bank asserts Shepherd's Motion fails to relate to the Court's Order, and relates to post-motion issues. Shepherd generally argues that his Motion is based on the Bank's failure to comply with the document production deadline in the Order, choosing not to produce certain documents and producing others as part of the "rolling production" after the deadline. The Court agrees with Shepherd.

The Order created a deadline for document production in this case, which was 30 days after the Bank received Shepherd's list of documents he had not received. The Bank willfully and intentionally violated that deadline by failing to fully produce documents by that deadline, instead choosing to continue its "rolling production." For example, the Bank produced the FDIC Report and the numerous related Bank documents months after the deadline.

The redacted April 2012 meeting minutes were produced after the deadline and in violation of the Order. These minutes were discoverable because of their proximate timing to the charge-off, as well as their containing the Board's vote and approval of the Powell charge-off. It is difficult for this Court to imagine why this was not produced at the beginning of discovery, in connection with Shepherd's original discovery requests, and was withheld until after the Court's deadline. Its relevance to the Bank's allegations

on secrecy and fraud makes its nondisclosure significant on the issue of the Bank's discovery misconduct.

The Bank also failed to timely produce the correspondence with the IRS Criminal Division-- which specifically deals with the issues in this litigation-- in violation of the Order. It was properly not included on any privilege log because there is no applicable claim of privilege, but it should have been produced before the Order.

There was a complete failure to produce documents concerning comparable similar loans, which the Court finds relevant to ascertain whether Powell was treated favorably in comparison to other borrowers. The Court finds that Shepherd's Motion properly complains of misconduct, and relates to, directives in the Court's previous Order compelling discovery.

The Court does agree, however, with the Bank's assertion that the responses to Shepherd's Requests for Admission are not procedurally part of the Order to Compel and this current Order. Shepherd explained that his Motion does not seek sanctions for the responses, but was discussed, instead, to illustrate the Bank's efforts to obviate discovery.

While not specifically part of the sanctions ordered, the Court notes the Bank's answers to be further evidence of discovery gamesmanship in this matter. These Requests were sent in an effort to gain clarity and force the Bank to answer questions regarding the FDIC Report. Because the Bank willfully ignored multiple requests for the Report; the bare denials of the Requests did little to clarify the issue, and are evidence of the Bank's discovery games.

Next, the Bank claims it strictly followed the letter and spirit or the Court's directives and Order. Further, the Bank argues it could not produce documents in accord

with Shepherd's list because it contained categories of documents and the Court's order required a listing of specific documents. Shepherd argued that requesting documents with the Bank's required specificity shifted the discovery burden to Shepherd in violation of the rules.

The Bank violated the Order, as discussed, and clearly failed to comply with the letter or spirit of the Order. As to the argument that Shepherd's list was not specific, the Court finds it meritless. Shepherd properly requested these loans in his lists to the Bank by utilizing the same language he used at the hearing on the Motion to Compel. There was no ambiguity in what Shepherd was requesting or what the Court ordered.

As to Shepherd's argument of burden shifting, the Court notes the FDIC Report was in the Bank's possession during the dispute and that this document discussed the charge-off of the Powell loan. The Report effectively laid out a discovery blueprint of discoverable documents, excluding the Report, including loans it categorized similar to Powell's, relevant meeting minutes discussing the issues, and investigations into these loans. These categories of documents were requested by Shepherd. The rules of discovery do not require a party to be as specific as the Bank contends.

In fact, the rules merely require a request that is reasonably calculated to lead to the discovery of admissible evidence. The discovery requests, and Shepherd's list, sought the same documents. The Bank's repeated requests throughout the discovery process, requiring Shepherd to identify documents he believed existed in order to gain their production, while simultaneously failing to produce documents that contain the blueprint for discovery, strains its credibility. This improperly shifted the Bank's discovery burden to Shepherd. As such, the Court agrees with Shepherd.

The Bank next argues that the "rolling production" is required by the discovery rules. Quite the opposite, the Court notes that Rule 33 of the S.C. RULES OF CIV. PROC. requires responses to be answered separately and fully, while RULE 34 provides sanctionable relief for a failure to respond to a request or any part thereof. The rules clearly don't require 19 "rolling productions" spanning almost a year.

Finally, the Bank contends its failure to produce documents was not sanctionable because the FDIC either required redactions or prohibited disclosure. Shepherd has, generally, taken no issue with the redactions. The Court notes that the Bank produced subsequent meeting minutes after the Discovery Order that included redactions without an *in camera* review or accompanying note from the FDIC. Shepherd mainly argues the meeting minutes are relevant and should have been produced before the deadline. Since his allegations center on the meeting minutes production, and not redaction, the redaction issue is not part of this Sanction Order.

In response to the Bank's argument that the FDIC prohibited disclosure of certain documents, Shepherd counters that the Bank produced documents which were, in actuality, Bank documents. The crux of his argument is that these documents are not privileged. At the hearing he pointed specifically to internal emails of the Bank and the Bank's correspondence with the IRS. The Court agrees with Shepherd.

The Court finds that redactions at the direction of the FDIC were proper. To the extent that documents produced after the Order's deadline are considered privileged by the FDIC, they are not a part of this Order. However, as to Bank documents not protected by FDIC privileges, those were produced in violation of the Court's Order.

At to the Bank's assertion of privileges, the Court also notes that the Bank

produced numerous privilege logs. The logs neither included the FDIC Report nor other documents that the Bank contends it could not produce. To the extent the document was in its possession and there was any claim of privilege, the Bank was required to identify and place it on a privilege log consistent with alleged applicable privileges and 12 C.F.R. § 309.

To the extent the Bank relies on Section 309 to shield it from sanctions for failing to identify and produce documents, that argument is meritless. Section 309.7 directs "persons who ha[v]e custody of records belonging to the FDIC" to "inform the court or tribunal which issued the process and attorney for the party" the "substance of section [309]." The Bank failed to comply with the procedures of Section 309 which mandated it apprise the Court and Shepherd of material that may be subject to this section. This procedure also appeared on the front of the FDIC Report the Bank failed to identify.

Furthermore, the Bank's claim of protection from its discovery obligations due to FDIC involvement does not explain the failure to produce its own factual documents of meeting minutes, internal emails, and Bank ledgers, which are neither FDIC documents nor protected by FDIC privileges. The Bank has asserted privileges such as the Bank Secrecy Act and its protection of Suspicious Activity Reporting in conjunction with the privilege for Confidential Supervisory Information. The Bank asserted that these together, with Section 309, prevent the Bank "from produc[ing] documents which even *may* contain such information."

This, however, is not an accurate statement concerning the breadth of these privileges. The qualified CSI privilege merely protects advice between a bank and the FDIC, but does not protect factual materials within this material. The Bank Secrecy Act

prevents disclosure of materials that contain suspicious activity reports and materials that may reveal their existence.

If the Bank claims that its last production contains these types of materials, it has not provided to the Court any correspondence with the FDIC, other than the FDIC approval of certain redacted minutes relating exclusively to BSA/SAR materials, with which the Court could judge the applicability of these privileges. Thus, the Court finds that the Bank produced many of these documents under the guise of FDIC documents in December of 2016, but these were actually Bank documents.

Finally, FDIC involvement fails to justify the failure of the Bank to identify and produce documents relating to all investigations into the allegations of the Complaint. The Bank specifically told this Court, at the hearing on the Motion to Compel, that it had identified all investigations. The FDIC Report, however, contains references to Bank investigations, exclusive of the FDIC, that were not previously disclosed.

Consideration of Sanctions Factors

In determining whether the willful and intentional violations warrant sanctions, the Court finds that the factors it must consider weigh heavily in favor of sanctions. First, the willfulness of the Bank's efforts to obviate the discovery issues and intentional violation of the Discovery Order require sanctions. The Bank willfully failed to produce documents and used improperly shifted its discovery burden. The Bank willfully and intentionally produced discoverable documents after the Order deadline. It also willfully ignored multiple requests for the FDIC report and accompanying documents, all the while failing to include it on any privilege log or identify it as required by Section 309. This conduct resulted in the belated production of discoverable documents.

The discovery posture of the case weighs heavily in favor of sanctions. This discovery dispute has spanned almost one and one-half years, starting from the initial service of discovery requests until this Motion. These parties have argued over the same set of discovery requests for this period. Moreover, the FDIC report was willfully hidden by ignoring requests for its production and failing to include it on a privilege log and identify it as required by Section 309.

Finally, Shepherd has been prejudiced by this discovery dispute. While the Court recognizes that prejudice is presumed, Shepherd has actually been prejudiced. The Bank's allegations begin in the 1990's. With allegations starting over 20 years ago, time is clearly an important issue. Unfortunately, memories fade, witnesses disappear, and documents vanish as time passes. Delaying the case through willful and intentional discovery violations has cost Shepherd even more time, as well as the added cost of fighting this unnecessary discovery dispute.

To the extent the Bank argues these are normal delays and Shepherd has suffered no prejudice, the Court disagrees. These are deliberate delays procured by the Bank's violations. The Court also finds that Shepherd had to engage in numerous efforts, over an extended period of time, to gain production of documents that should irrefutably been produced at the beginning of discovery. If at any point Shepherd had been less persistent, the Bank's improper behavior would have unfairly tilted the scales of justice. Under these circumstances, the prejudice to Shepherd is clear.

Additionally, the Court denies the Bank's Motion to Sanction Shepherd. The arguments that Shepherd filed his motion without consulting the Defendants are meritless and not supported by the numerous exhibits Shepherd submitted to the Court in

conjunction with his Motion. Even if he had not consulted, Rule 11 of the S.C. RULES OF CIV. PROC. does not require consultation if it would serve no useful purpose. Given the willful and intentional conduct in the dispute here, the Court believes further consultation would have been futile. Nevertheless, the Motion is denied because the record shows there was consultation before the filing of the motion and compliance with the rules.

Furthermore, the Bank's argument that Shepherd sought sanctions for meeting minute redactions which the Court had previously approved is without merit. The Court notes that the Bank produced a subsequent redacted meeting minute after the Discovery Order without an *in camera* determination.

Because of the Bank's willful noncompliance with the rules of Civil Procedure and the Court's prior Order, the Court, having considered all necessary factors for sanctions and attorney fees, orders that the Bank pay Shepherd's and McCoy's attorney fees and costs associated with the misconduct. The Bank challenged the amount of attorney fees requested and a hearing was convened on July 28, 2017. After arguments at that hearing, the Court finds the following attorneys' fees and costs in the following amounts to be reasonable and related to the Bank's willful misconduct:

a. Defendant Shepherd- $50,000 in fees; $14,920.04 in costs; total $64,920.04;

b. Defendant McCoy- Request for fees withdrawn

IT IS SO ORDERED

_____

The Honorable Lawton McIntosh
Judge, Tenth Judicial Circuit

Date:_____

Oconee Common Pleas

Case Caption: Community First Bank Inc , plaintiff, et al VS John Michael Powell , defendant, et al

Case Number: 2015CP3700635

Type: Order/Other

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH