THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Appellate Case No. 2017-002472

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2015-CP-37-635

Community First Bank, Inc., Appellant,

v.

Frederick D. Shepherd, Jr., Respondent.

INITIAL BRIEF OF APPELLANT

W. Andrew Arnold
HORTON LAW FIRM, P.A.
307 Pettigru Street
Greenville, SC 29601
Telephone: (864) 233-4351

James C. Adams, II
Justin N. Outling
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
P.O. Box 26000
Greensboro, NC 27420
Telephone: (336) 373-8850

Attorneys for Appellant Community First Bank

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STATEMENT OF THE CASE

On August 21, 2015, Appellant Community First Bank ("Community First," "CFB" or "Bank") filed this action alleging that Defendants former Bank CEO Fred Shepherd ("Shepherd")—who is the sole Respondent here—former Bank Board Member James McCoy ("McCoy"), and their business Partner John Powell ("Powell") conspired, over a 20 year period starting in the 1990s, to defraud the Bank through favorable loans nominally in the name of Powell ("Powell Loan"), but which were intended to improperly, and illegally, benefit themselves and their companies, MPS Golf Course, Inc. and MPS Development, Inc. (collectively, "MPS") (Compl. at 2-14). Most relevant to the discovery dispute and sanctions order that is the subject of this appeal, the Bank alleged that on March 22, 2012, Shepherd covertly approved a charge-off ("the Charge-Off") of those loans in the amount of $810,000. (*Id.* at 12-13 & Ex. M thereto).

Respondent Shepherd answered on September 18, 2015, denying the Bank's allegations related to the Charge-Off and alleging that the FDIC[1] mandated that the Bank charge-off the loan and that his actions and the FDIC's actions were fully known to the Bank's Board of Directors. (Answer of Frederick D. Shepherd, Jr. ("Shepherd Ans."), at 9-10). Among other defenses, Shepherd asserted that the statutes of limitations and repose barred the Bank's claims. (Shepherd

[1] FDIC is the "Federal Deposit Insurance Corporation", which is a federal agency with regulatory authority over banking institutions, including the Bank here.

Ans. at 2). On January 27, 2016, the case was designated a business case and assigned to the Honorable R. Lawton McIntosh.

On September 21, 2015, Shepherd served discovery requests on the Bank, which were timely answered on November 20, 2015. (Shepherd's Motion to Compel Discovery ("Shepherd Mot. to Compel"), at 1). Following entry of a Confidentiality Order, the Bank began to produce documents on February 10, 2016 and provided a privilege log on February 24, 2016. (Shepherd Mot. to Compel at 2). Shepherd filed his Motion to Compel Discovery on February 26, 2016, to which the Bank responded on March 11, 2016. (Pl.'s Return to Mot. to Def. Shepherd's Mot. to Compel Disc.). No other defendant made such a motion.

The trial court heard Shepherd's Motion to Compel on March 15, 2016 and orally ordered the parties to complete certain discovery tasks that are detailed in the fact section of this brief. (Mar. 15, 2016 Hr'g Tr.). The Honorable R. Lawton McIntosh's oral orders were reduced to writing and memorialized in an August 1, 2016 Order on Motion to Compel Discovery ("August 2016 Order"). (*See also id.* at 43, lines 3-17).

On August 19, 2016, Shepherd served the Bank with his First Set of Requests to Admit, asking the Bank to make three admissions regarding the Charge-Off. On September 21, 2016, the Bank denied those requests to admit. (CFB's Resp. to Def. Shepherd's First Reqs. to Admit). Shepherd did not file any motion to compel further or additional answers to the Requests to Admit. Following additional discovery, the Bank maintained its denials, but amended the responses to include additional explanation. (CFB's Am. Ans. to Shepherd's First Reqs. to Admit, June 9, 2017).

On September 29, 2016, Shepherd filed his Motion for Sanctions, alleging that the Bank had failed to comply with its discovery obligations and engaged in "willful disobedience" of the

August 2016 Order. (Shepherd's Mot. for Sanctions at 1). No other defendant filed a motion for sanctions.

On October 12, 2016, the Bank filed its Motion to Strike and for Sanctions Against Defendant Shepherd, asking the Court to strike Shepherd's Motion for Sanctions and award the Bank its fees and expenses incurred as a result of Shepherd's Motion. (Motion to Strike and for Sanctions Against Defendant Shepherd ("Bank's Mot. to Strike"), at 2).

Shepherd submitted his memorandum in support of his Motion for Sanctions on January 13, 2017. Shepherd alleged that there were both "willful and continued violations of discovery and of the Court's [August 2016] order. . . ." (Shepherd's Mem. in Supp. of Mot. for Sanctions at 6). The Bank responded in opposition on February 14, 2017. (Bank's Resp. in Opp'n to Sanctions Mot.). Shepherd replied on February 23, 2017.

The trial court conducted a hearing on the Motion for Sanctions on March 31, 2017. At the trial court's direction, on April 17, 2017 the Bank submitted a written response to issues raised at the hearing. (Resp. to Issues Raised at the Hr'g on the Parties' Cross-Mots. for Sanctions). Shepherd responded on April 24, 2017. (Shepherd's Return to the Bank's Resp.).

On May 25, 2017, the trial court filed its Order on Defendant Frederick D. Shepherd's Motion for Sanctions ("May Sanctions Order"), calling for Shepherd to prepare a formal order. The trial court held a subsequent hearing on July 28, 2017.

On September 14, 2017 the trial court entered a Form 4 Order ordering the Bank to pay Shepherd $64,920.04 in discovery sanctions and ordering counsel for McCoy to prepare an order including his fees and expenses. On November 13, 2017, the trial court ordered the Bank to pay $64,920.04 in discovery sanctions. (Order on Shepherd's Mot. for Sanctions (hereinafter "Nov. Sanctions Order"), at 26-27).

On January 24, 2018, after the Bank entered a settlement agreement with Powell regarding the nearly $1,000,000 owed to it in connection with the Powell Loan, the parties stipulated to voluntary dismissal without prejudice of the Bank's claims against Shepherd and McCoy.

On November 29, 2017, the Bank served its Notice of Appeal on Respondent Shepherd, appealing the November Sanctions Order as well as the May Sanctions Order (collectively, "Sanctions Orders"). (Notice of Appeal at 1, 3).

FACTS

I. SHEPHERD DEFRAUDS THE BANK, AND THIS LAWSUIT AND EXTENSIVE AND DIFFICULT DISCOVERY ENSUES.

Shepherd was the Bank's President and CEO from its inception until December 31, 2014. (Compl. ¶ 14). Starting in 1996, Shepherd caused the Bank to make loans to his business partner Powell that were actually for his personal benefit. Over time the loan balance was increased and extended without any principal payments, eventually reaching a total of $810,000.[2] (*Id.* ¶¶ 18-19). Throughout Shepherd's employment, he concealed from the Bank (and its federal regulators, including the FDIC) these fraudulent and illegal loans nominally for others, but actually for Shepherd's personal benefit and at the expense of the Bank and its shareholders (to which Shepherd owed fiduciary and other duties). (*Id.* ¶¶ 18-76).[3]

In 2012, on the eve of delivery of a report from the FDIC, Shepherd caused the Bank to charge-off the Powell loan because there had been no principal payments since its inception. (Compl. ¶¶ 68-76). Shepherd accomplished this by having the Board of Directors approve a large number of charge-offs that included the Powell loan. (*Id.* ¶ 71). At the time, the members of the Board did not know that they had permitted the charge-off. (*Id.* ¶ 72; Second Affidavit of Richard D. Burleson at 2; Affidavit of Dr. Larry S. Bowman ¶¶ 12-19; Affidavit of John R. Hamrick ¶¶ 11-18). The FDIC's report ("FDIC Report") ultimately directed that the Powell loan be charged off. (Defs.' Ans. to Pl.'s Am. Compl. & Am. Countercls. ¶ 77).. Nowhere in the

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[2] At the same time, also starting in 1996, Shepherd caused the Bank to make loans to another of his business partners, McCoy, that were actually for Shepherd's benefit. (Defs.' Ans. to Pl.'s Am. Compl. & Am. Countercls. ¶¶ 85-108.) Over time, this loan was increased and extended without any principal payments, eventually reaching a total $810,000. (*Id.*) All of these loans violated federal banking laws and Bank policy. (*See, e.g., id.* ¶ 165). In 2008, Shepherd caused the Bank to make another improper loan to McCoy, this time in the amount of $2 million, again for Shepherd's personal benefit. (*Id.* ¶¶ 105-127).

[3] The Bank and Shepherd are parties to lawsuit in the United States District Court for South Carolina, *Shepherd v. Community First*, Civil Action No. 8:15-CV-04337-DCC, relating to the Bank's cessation of payments to Shepherd under an employee benefit plan because of Shepherd's misconduct and violation of the terms of the Plan, which is governed by the Employee Retirement Income Security Act of 1974. (*Id.*)

FDIC Report did the FDIC describe the Powell loan as a loan for the benefit of Shepherd because Shepherd had concealed its true nature. (*See id.* ¶¶ 34, 77).. In the FDIC Report, the FDIC also directed that a similar loan to McCoy be repaid because McCoy was the Bank's Chairman of the Board, a bank insider. Eventually, in 2014, the Board discovered the Powell loan had been charged off and, because Powell was Shepherd's business partner, required Powell to affirm the loan and begin making payments. (Bowman Aff. ¶ 18). In 2015, Shepherd's concealment became known to the Bank when Powell came forward and admitted the loan was for the benefit of Shepherd and McCoy and not for him. (*Id.*, Ex. A). Powell's admission meant that the Powell loan was an illegal loan under Federal Regulation O, which allows only certain loans to bank executives. (Defs.' Ans. to Pl.'s Am. Compl. & Am. Countercls. ¶ 165).

On August 21, 2015, the Bank filed the instant lawsuit against Powell, Shepherd, McCoy, and MPS in connection with their misconduct seeking to recover the Powell Loan, which was in default. (Compl., *passim.*) Thereafter, the parties engaged in extensive document discovery. (*See* Bank's Resp. in Opp'n to Sanctions Mot., Ex. B-000069-70). Community First produced over 40,000 pages of documents to Shepherd and obtained and produced documents from other area banks through which Shepherd and his partners perpetuated their misconduct. (*Id.*) The Bank reviewed approximately 150,000 pages of documents in connection with its numerous document productions to Shepherd. (*Id.*)

The last of the documents produced by the Bank were documents which the Bank was not permitted to produce until permission was granted by the FDIC. The Bank Secrecy Act ("BSA") absolutely prohibited Community First from acknowledging the existence of and disclosing Confidentiality Supervisory Information ("CSI") and Suspicious Activity Report

("SAR") information,[4] without permission under 12 C.F.R. § 309.6. After significant delay by the FDIC, which Shepherd's counsel himself sought to remedy, the Bank produced the FDIC documents within approximately two weeks of receipt of permission. (*See* Bank's Resp. in Opp'n to Sanctions Mot., Ex. B-000061, 64-65, 69-70)..

At issue in this appeal is the propriety of the $64,920.04 in sanctions that the trial court ordered the Bank to pay to Shepherd for the Bank's alleged failure to comply with the August 1, 2016 Order compelling discovery, primarily related to the timing of the production of the FDIC documents. The Bank complied in full with the August 2016 Order, but the trial court sanctioned the Bank for what it termed "discovery abuse" related to issues not addressed in the August 2016 Order. (Mar. 31, 2017 Hr'g Tr. at 111, line 4). The difficult discovery process in this case arises from its unique posture, where the Bank was constrained and delayed in the discovery process by restrictive federal laws and the fact that Shepherd, not current Bank management, had been the custodian of the pertinent records from the Bank's founding until January 2015. Notably, other than Shepherd (who was the Bank's President and CEO in 2012) and McCoy (who was the chairman of the Bank's Board in 2012) "none of the living members of the Bank's Board of Directors who were members of the Board during the period the Powell loan was charged-off recall, at any time, discussing or approving the charge-off." (Bank's Am. Ans. to Shepherd's First Reqs. to Admit, June 9, 2017, at 2-3). Moreover, the "only Board member to sign a document evidencing the charge-off of the Powell loan was Defendant Shepherd." (*Id.).*) Indeed, Shepherd "was the President and CEO of Community First Bank since its inception, [so] he, better than current management, knows what is and what is not in existence." (Bank's Mot. to Strike, Ex. D thereto at 2).

[4] As a former President and Chief Executive Officer of the Bank, Shepherd knew this as well.

As the Bank explained to the trial court:

> Regulation O says a bank officer can't borrow money from the bank except for certain reasons, and he's got to disclose to the board, and the board has to approve that he's getting the money, or she's getting the money.
>
> Well, what this case is about, Your Honor, is about a loan that was made to John Powell a long time ago that wasn't John Powell's. It was Fred Shephard's [sic] and Jim McCoy's and John Powell's together. In violation for 20 years of Federal law. And when Mr. Shephard got caught, he was out of the bank.
>
> So what happened before December 31st, 2014, when he walked out of the bank for the last time? Well, we don't know, Your honor. Because there are records all over the place that should have been, that we thought were, that he was responsible for, that ain't no more. There are electronic files that used to be someplace that are gone.
>
> [Shepherd's counsel] says, well, we got this Power Point, where are the rest of them? Where are the rest of them? Where – we aint' got them, Your Honor.
>
> Now, we got suspicion as to why they're gone, but they're gone. [Shepherd] complains about, well, there's all this board stuff, things that the board members do. Where are they? Where are they? We know they exist, we know they exist.
>
> We don't know. But we know who was in charge of them before the end of December 2014, and that was Fred Shephard.

(Mar. 31, 2017 Hr'g Tr. at 75, line 4 to 76, line 7). Notwithstanding the difficult discovery process, however, the Bank plainly complied with all of the Court's orders relating to discovery, including the August 2016 Order.

II. THE COURT ISSUES DIRECTIVES AT THE HEARING ON A MOTION TO COMPEL WITH WHICH COMMUNITY FIRST COMPLIES.

The August 2016 Order originated from a March 15, 2016 hearing on a Motion to Compel filed by Shepherd. During that hearing, the trial court gave directives to the Bank to complete four tasks and Shepherd to complete one task ("Hearing Directives"):

- **Attribution.** The trial court ordered the Bank to "Bates stamp that seventy-five-hundred documents. . . [and] attribute them to a particular production request or an interrogatory. . . ." (Mar. 15, 2016 Hr'g Tr. at 13, lines 18 to 25).
- **Privilege Log.** The trial court required the Bank to clarify "if there is a particular privilege being claimed, . . . to assert that privilege for that particular question or production request." (*Id.* at 24, lines 6 to14).
- **Board Minutes.** The trial court ordered the Bank to either provide unredacted minutes of meetings of its board of directors or submit those minutes for in camera review. (*Id.* at 22, lines 16 to 23, line 3; *id.* at 25, lines 19 to 26, line 19).
- **"Missing" Documents.** The trial court ordered Shepherd to "write a[n] itemized list of documents" that he contended he "didn't receive" and also request clearer copies of documents that the Bank had originally retrieved from microfiche. Within thirty days of receipt, the Bank was to respond to those supplemental requests. (*Id.* at 28, lines 21 to 30, line 5).

Of significance to the Sanctions Orders (including, the November Sanctions Order), during the hearing Shepherd's counsel expressed knowledge and familiarity with the various FDIC documents which the Bank was not permitted to produce, including making specific reference to the existence of the FDIC Report. (*Id.* at 33, lines 2 to 33, line 9). Further, Shepherd was well aware of the documents because he was the president and CEO during the relevant period when the FDIC was investigating the Bank and issuing its report. (*See, e.g.,* Bank's Resp. in Opp'n to Sanctions Mot., Ex. B-000047-57, 59-60, 63-66, Ex. A; Mar. 15, 2016 Hr'g Tr. at 33:4-33:6). In fact, Shepherd received, reviewed, and signed the FDIC Report. (Bank's Resp. in Opp'n to Sanctions Mot., Ex. B-000063-66 at 66).

Following the hearing, the parties exchanged correspondence which confirmed their understanding of the Court's Hearing Directives. (*See id.*, Ex. B-000002-13). The parties thereafter worked together to address Shepherd's continued complaints. As will be discussed, *infra*, the Bank complied with all of the hearing directives prior to the entry of the Court's August 2016 Order with the exception of issues that Shepherd was improperly seeking documents which the Bank was not directed to provide.

III. THE COURT MEMORIALIZES ITS HEARING DIRECTIVES IN THE AUGUST 2016 ORDER, WITH WHICH COMMUNITY FIRST HAS ALREADY COMPLIED.

On July 28, 2016, the Hearing Directives were reduced to writing and memorialized in the August 2016 Order. Pursuant to that order, the Bank was to complete the Hearing Directives no later than August 31, 2016—or, for documents that Shepherd contended were illegible or requested but not received, within 30 days of Shepherd making his request. (Aug. 2016 Order at 3-4). The August 2016 Order directed Shepherd to provide Community First a list of "specific documents" he contended he was entitled to, but had not, received from the Bank, and thereafter the Bank was to produce the documents to the extent they existed. (*Id.* at *3*).

Because Community First believed it had fully complied with the requirements of the August 2016 Order through its compliance with the Hearing Directives during the approximate 4 ½ month period between the hearing on the Motion to Compel and the August 2016 Order, Community First wrote to counsel for Shepherd seeking a confirmation of that fact. (Bank's Resp. in Opp'n to Sanctions Mot., Ex. B-000032-33). Shepherd responded by agreeing that Community First had complied as it related to everything but the redactions and the documents to be produced pursuant to Shepherd's list because "we have yet to send the list," (*Id.*, Ex. B-

000034-35), completely ignoring lists he had delivered to the Bank on March 23 and March 31, 2016, with regard to which Community First had complied.

IV. COMMUNITY FIRST COMPLIES WITH FDIC DIRECTIVES.

Because of Shepherd's insistence that all Board Minutes be produced in completely unredacted form, and knowing that the BSA absolutely prohibited Community First from disclosing CSI and SAR information, the Bank contacted the FDIC pursuant to Section 309.6 and requested permission to disclose the BSA information. In response, the FDIC provided the Bank with its directives about what it could, and could not disclose. The FDIC also sent a confidential letter to the Court dated August 24, 2016, which apparently outlined the scope of the FDIC's instructions. (Bank's Resp. in Opp'n to Sanctions Mot., Ex B-000039). On August 29 and 30, 2016, the Bank produced a revised set of Board Minutes, redacted in accordance with the FDIC's instructions. In response, the Court issued an email stating that the Bank appeared to be in compliance with that portion of the August 2016 Order. (*Id.*)

V. SHEPHERD PROVIDES A LIST OF DOCUMENTS THAT FAIL TO COMPLY WITH THE COURT'S AUGUST 2016 ORDER AND FILES A MOTION FOR SANCTIONS WHEN COMMUNITY FIRST OBJECTS.

On August 19, 2016, Shepherd provided the new list in response to the August 2016 Order. (Bank's Resp. in Opp'n to Sanctions Mot., Ex. B-000036-38). It was not a list of "specific documents" as the August 2016 directed. Instead it was a listing of categories, like a Rule 34 document request, demanding any and all documents relating to: (1) all unsecured loans at the Bank for the period of time from 1994 to the present, i.e., 22 years; (2) the Powell Loan Charge-Off; (3) Board meeting documents; (4) investigations of loan issues; (4) accounts at the Bank involving various MPS entities. (*Id.*) In response, on September 16, 2016, the Bank objected, explaining that the August 2016 Order was not Court-sanctioned *carte blanche* for

Shepherd to ask for anything he wanted without regard to the prior motion and hearing and without regard to ordinary rules of discovery and relevance. Community First further indicated that every requested document had been produced other than the documents relating to all insider loans for the previous 22 years. (*Id.*, Ex. B-000040-43).

Instead of seeking to work through the issue, or seeking a clarification from the Court, Shepherd filed a Sanctions Motion on September 29, 2016. In the Motion, Shepherd asserted Community First had violated the August 2016 Order in two respects: (1) the Bank failed to produce unredacted copies of the Board Minutes (even though the Court on September 15, 2016 had indicated the August 2016 Order had been complied with in that regard); and (2) the Bank had failed to produce the documents on the Shepherd list, including 22 years' worth of loan documents for insider loans, certain documents related to the Charge-Off of the Powell Loan, and documents regarding long-paid off loans to MPS. The Motion also claimed that the Bank had generally acted in bad faith in discovery, without regard to any particular aspect of the August 2016 Order. The Motion further claimed that there had been an effort to meet and confer about the subject of the Motion; however, that had not occurred.

On October 12, 2016, Community First filed its own Motion to Strike and for Sanctions related to the filing of Shepherd's Motion, as well as Shepherd's disregard for the obligation to meet and confer.

At the same time the Bank was waiting on the FDIC to grant it permission to produce additional FDIC documents, including the FDIC Report ("FDIC Documents"). Under Section 309 the Bank was not permitted to produce those documents.

Following the filing of the cross Motions for Sanctions, the parties worked together (or so Community First thought) in an effort to resolve the issues raised in the Motion as well as other

discovery issues that were not the subject of the Hearing Directives, the August 2016 Order or the Motion. These efforts took the form of an extensive phone conference on October 19, 2016 and repeated emails and letters. (*See, e.g.,* Bank's Resp. in Opp'n to Sanctions Mot., Ex. B-000044-67). Included in that phone conference, letters and emails, was a joint acknowledgement by the parties that the Bank was waiting on the FDIC to grant permission to produce the remaining Section 309 BSA documents. (*Id.*)

On November 18, 2016, *after* Shepherd filed his Sanctions Motion, Shepherd, for the first time, contacted the FDIC to directly inquire of it about the status of the FDIC Documents. (Shepherd's Mem. In Supp. of Sanctions at 11). Eventually, in December 2016, the FDIC granted the Bank permission to produce certain documents. Those documents – constituting 1,651 pages in total – were produced by the Bank within approximately two weeks of the receipt of the permission. (*See* Bank's Resp. in Opp'n to Sanctions Mot., Ex. B-000061, 64-65, 69-70).

Despite what appeared to be significant progress, during which Community First provided yet additional documents which it believed it had no obligation to provide but which it thought would advance the resolution of the issues, and, perhaps most importantly, following the Bank's production of the FDIC Documents, Shepherd announced, without explanation, that he was not satisfied and wanted a full hearing on the Motion. (*Id.* at Ex. B-000067-68).

VI. SHEPHERD'S BRIEF ABANDONS MOST OF THE ISSUES IN HIS MOTION AND RAISES ISSUES NOT IN THE AUGUST 2016 ORDER OR THE MOTION.

On January 13, 2017, Shepherd filed his Sanctions Brief. Remarkably, the Brief covered topics not in the August 2016 Order and not in the Sanctions Motion (and thus had questionable procedural basis and notice). (Shepherd's Mem. in Supp. of Mot. for Sanctions, *passim.*) In the Sanctions Brief, Shepherd sought sanctions for (1) failure to produce documents reflecting 22 years of insider loans; (2) Community First's "rolling" production (an issue resolved in October

2016); (3) withholding "charge-off documents," (which had been produced); and (4) withholding "non-privileged" and "other" documents (which had been produced). (*Id.*) Only the first category is in the Motion and ostensibly covered by the August 2016 Order. None of the remaining three issues related to the August 2016 Order, and Shepherd made no effort to claim they were, nor were they cited in the Motion. Instead, they all related to the post-Motion issues that the parties discussed. Thus, three of the four issues raised were not properly before the trial court on the Sanctions Motion and should not have formed the basis for any sanctions against the Bank.

VII. THE BANK COMPLIED WITH THE AUGUST 2016 ORDER.

The filings submitted to the trial court related to Shepherd's Sanctions Motion showed that the Bank complied with each of the requirements of it actually contained in the August 2016 Orders. In fact, most had been complied with even before the August 2016 Order was issued because the Bank complied with the Hearing Directives.

Attribution. By letter dated April 11, 2016, the Bank attributed each document produced to the specific discovery request(s) to which it was responsive. (Bank's Mot. to Strike, Ex. F thereto). In supplemental discovery productions, the Bank continued to attribute documents to the specific discovery request(s) to which it was responsive. (*E.g., id.*, Ex. J thereto, at 1-19 of letter Ex. C).

Privilege Log. The trial court itself confirmed on September 15, 2016 that "it appears defense counsel have no objection to the withheld information pursuant to the attorney client privilege." (*Id.*, Ex. B thereto).

Board Minutes. On August 29, 2016, the Bank sent the Court copies of redacted board minutes, noting that the attorney-client and work-product privilege redactions were uncontested

and that the remaining redactions were required by federal banking law. (*Id.* at 4-5 & Ex. A thereto).

"Missing" Documents. On March 23, 2016, Shepherd sent a list of illegible documents (the ones retrieved from microfiche) and categories of documents—not itemized documents—that he alleged that he had requested but had not been produced. The next day, the Bank responded asking for more precise identification of documents by Shepherd. (*Id.* at 6).

On April 11, 2016, the Bank produced all of the claimed illegible documents and all other known documents in its possession, custody, and control, while noting that it was continuing to search for documents and that it would immediately produce any such documents if located. (*Id.* at 6-8 & Ex. F thereto). The Bank confirmed this again on July 1, 2016. (*Id.* at 7 & Ex. H thereto). Notably, the Bank specifically responded to Shepherd's allegation that there were missing loan documents, explaining:

> Attached as Exhibit C is a spreadsheet that lists documents previously provided to you relating to the loans. Almost all of the loan documents were either produced or were merely renewals nearing renewal of loans [sic], the records of which were produced. As to loan documents not included, the Bank documents [sic] does not have them due to ordinary course purging.

(*Id.*, Ex. H thereto, at 4).

On August 19, 2016, more than five months after the list presented by the Hearing Directives and ostensibly pursuant to the August 2016 Order, Shepherd sent a new "list of documents requested but not received," while, at the same time, acknowledging that the allegations at issue related back to the 1990s "and documents may no longer exist." (*Id.*, Ex. I thereto, at 2-3). On September 16, 2016—and before the thirty day deadline in the August 2016 Order expired—the Bank produced additional documents in response to Shepherd's specific requests, identifying the specific request(s) to which those documents were responsive and

providing a detailed privilege log. (*Id.* at 10-11 & Ex. J thereto). With respect to federal banking law, the Bank noted that "[a]s soon as it is permitted to do so, the Bank will provided Defendant Shepherd any of these documents the FDIC allows it to produce" (*Id.*, Ex. J. at 3). On September 15, 2016, the Court sent the parties an email regarding the FDIC Documents, stating "[i]t appears Community First is complying with federal law and regulation concerning its redaction of Confidential Supervisory Information and Suspicious Activity Reporting. It appears defense counsel have no objection to the withheld information pursuant to the attorney client privilege." (Bank's Resp. in Opp'n to Sanctions Mot., Ex. B-000039).

In early December, the FDIC granted its approval for the production of the remaining FDIC Documents. The Bank produced the FDIC Documents in two sets: one set on December 15, 2016 and the other set on December 22, 2016. (*Id.* at 16 & Ex. B-000064).

VIII. THE SANCTIONS ORDERS DO NOT RELATE TO NON-COMPLIANCE WITH THE AUGUST 2016 ORDER.

Shepherd's Motion for Sanctions was heard by the trial court on March 31, 2017. After hearing from both sides, the Court explained why it intended to award sanctions:

> THE COURT: Let me ask you this: I've listened to you about – you know, I'm going to let you get your argument in. How can you rectify or explain, just for example, a month before you file your suit, somebody turned in, the bank clearly did it, and it looks like to me is trying to get criminal advantage for civil gain?
>
> Number two, you have these requests for admission [served on August 19, 2016] where you were taking such a strict interpretation of what was being done – in violation of the rule, where you say, denied, denied, denied. How do you explain that, when you are arguing like you're standing here today, number one, for your sanctions, and number two, that you've complied and you've been acting in good faith?

(Mar. 31, 2017 Hr'g Tr. at 106, lines 20 to 107, line 9).

The Bank submitted the affidavit of its current CEO on April 17, 2017, where he explained that the IRS inquired of the Bank and the Bank responded, because federal law

obligated the Bank "to respond to the IRS' request for information and provide the IRS the information it requested from the Bank." (Burleson Second Aff. at 3).

On May 25, 2017, the trial court granted Shepherd's Motion for Sanctions. The trial court ruled that it was not granting sanctions because of the requests for admission or the IRS issue. (May Sanctions Order at 3-4, ¶¶ 5, 7, 8). Instead, the May Sanctions Order was based on Plaintiff's "rolling discovery" which the trial court held was "not provided for in the Rules of Civil Procedure" referencing the rule governing interrogatories. (*Id.* at 2, ¶ 1). The May Sanctions Order directed Defendants to prepare an order with findings and conclusions, and provide it to the Bank for comment. (*Id.* at 4, ¶¶ 9-10). The May Sanctions Order also directed counsel for Shepherd, Powell and McCoy to file affidavits of fees and costs, despite the fact that neither McCoy nor Powell had filed a motion to compel or a motion for sanctions. (*Id.* at 2, ¶ 2).

Following submission of competing orders, the trial court held another hearing on July 28, 2017, related to the amount of attorneys' fees and costs. (July 28, 2017 Hr'g Tr.). On September 14, 2017, the trial court entered a Form 4 Order awarding $64,920.04 to Shepherd and directing counsel for McCoy to prepare a further order which would include his fees. (Form 4 Order at 1).

The trial court filed its final sanctions order on November 13, 2017. (Nov. Sanctions Order at 19). The basis for sanctions set forth in the November Sanctions Order was that the August 2016 Order created a deadline for final document production at 30 days after Shepherd requested additional documents. (*Id.* at 19). The contents of the November Sanctions Order, including the purported factual findings and citation-less legal conclusions therein, were taken verbatim (or nearly verbatim) from a proposed order Defendants provided to the trial court. (*Compare id.*, *with* Defs.' Proposed Order on Shepherd's Sanctions Mot.)

In the Order, the trial court found that "Bank willfully and intentionally violated that deadline by failing to fully produce documents by that deadline, instead choosing to continue its 'rolling production.' (Nov. Sanctions Order at 19). For example, in connection with the FDIC documents, the Bank produced a report created by the FDIC ("FDIC Report") and numerous related Bank documents months after that deadline." (*Id.* at 19). The trial court similarly faulted the Bank for failing to "timely produce" correspondence with the IRS and "comparable similar loans." (*Id.* at 20-21).

Fundamentally, the trial court faulted the Bank for the fact that it was not able to *immediately* produce the documents that Shepherd sought. Each of the documents that is the basis of the trial court's order *was timely produced* to Shepherd after the Bank had authorization from its federal regulator, the FDIC, to do so or the Bank (through extraordinary and persistent efforts) itself discovered the documents, which had been managed poorly by Shepherd during his long employment as the Bank's President and CEO. The trial court found, however, that the fact that the "belated production of discoverable documents" prejudiced Shepherd. (Nov. Sanctions Order at 24-25).

However, Shepherd did not suffer any prejudice, generally, and certainly not as a result of any misconduct by the Bank. The Bank and Shepherd experienced the delays inherent in a case where the Bank was required to unravel records that Shepherd himself knew better than the Bank, retrieving items from microfiche, and locating electronic files that had not been properly maintained during Shepherd's tenure at the Bank. Further, under federal law and regulations, the Bank could not have produced the documents that are at the center of the Court's November Sanctions Order, the FDIC Documents, earlier than it did. The trial court erred.

LEGAL STANDARD

The standard applied by this Court when reviewing the underlying Sanctions Orders is well-established:

> A trial judge's ruling on discovery matters will not be disturbed on appeal absent an abuse of discretion. The burden is on the appealing party to demonstrate that the trial court abused its discretion. A reviewing court may find abuse of discretion where an appellant shows that the lower court's conclusion is based upon an error of law or without evidentiary support.

Creighton v. Coligny Plaza Ltd. Pshp., 334 S.C. 96, 121-22, 512 S.E.2d 510, 523 (Ct. App. 1998) (citations omitted). "An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law." *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999).

The imposition of sanctions against a party is governed by Rule 37 of the South Carolina Rules of Civil Procedure, as the November Sanctions Order properly notes. (Nov. Sanctions Order at 17-18). Rule 37 expressly limits the imposition of sanctions to violations of discovery orders issued by courts. Rule 37(b), SCRCP (entitled "Failure to Comply With Order"); *see also Downey v. Dixon*, 294 S.C. 42, 44, 362 S.E.2d 317, 318 (Ct. App. 1987) ("Rule 37(b) provides sanctions for the violation of an order of the Court to provide or permit discovery."). Under the Rule, sanctions may not be imposed against a party unless the party violated a discovery order of the court. *Id.*

"In deciding what sanction to impose for failure to disclose evidence during the discovery process under Rule 37, SCRCP, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice." *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 435, 673 S.E.2d 448, 457 (2009).

Here, the November Sanctions Order did not find a basis in the discovery posture, the Bank's willfulness, or the degree of prejudice to Shepherd. Further, trial court's imposition of sanctions against the Bank was unjust and failed to meet the requirements of due process because the August 2016 Order was too vague or unclear about the Bank's discovery obligations. Thus, the trial court erred and its Sanctions Orders (including the November Sanctions Order) should be reversed.

ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT SANCTIONED THE BANK FOR NONCOMPLIANCE WITH MANDATES NOT CONTAINED IN ITS DISCOVERY ORDER.

The trial court plainly erred when it sanctioned the Bank for noncompliance with mandates not contained in the August 2016 Order.

A. The discovery posture of the case does not support the Sanctions Orders.

The parties discovery dispute began with Shepherd's Motion to Compel, which was resolved in the August 2016 Order. That order required the Bank to complete four tasks, three of which are not in dispute—the Bank properly attributed produced documents to each request, provided privilege logs, and redacted minutes of its Board of Directors. And the Bank produced documents that Shepherd requested, so long as it could understand the request and that such request was not overbroad or unduly burdensome. (*E.g.* Bank's Mot. to Strike, Ex. J thereto).

The trial court faulted the Bank for its ongoing production of documents, without citing any precedential authority. Instead, it relied on the plain language of Rules 33 and 34 of the South Carolina Rules of Civil Procedure. (Nov. Sanctions Order at 22). By doing so, the trial court erred. Discovery is intended to allow both parties to more fully investigate and understand their cases—and, when appropriate, correct misinformation. A party's initial response to discovery are not the only responses it is allowed to give. Rule 26(e) of the South Carolina Rules of Civil Procedure specifically contemplates the production of documents on an ongoing (or "rolling") basis, stating that "requests for discovery under Rules 31, 33, 34, and 36 shall be deemed to continue from the time of service until the time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers have been submitted, shall be promptly transmitted to the other party." This fact is supported by rolling-productions being a common practice for parties in document-intensive litigation in South Carolina, as well as South Carolina case law. *See e.g., Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 108, 410 S.E.2d 537, 541 (1991) ("Plaintiffs properly responded to Nassau's Interrogatory 6, which sought information concerning any medical doctor who has diagnosed illness or injury caused by materials from Nassau's plant. When Dr. Panitz's identity became known to them, Plaintiffs promptly notified Nassau."); *Brandi v. Brandi*, 302 S.C. 353, 359, 396 S.E.2d 124, 127 (Ct. App. 1990) ("It does not appear counsel for Mr. Brandi willfully violated S.C.R.Civ.P. 33 by failing to supplement answers to interrogatories. The record supports the inference the witness was literally discovered the night before trial."). Rolling productions allow parties to receive potentially relevant documents as soon as possible, without having to wait until entire document reviews and productions are completed. This allows parties

to litigate matters more expeditiously and efficiently, as they can identify substantive, procedural and practical issues earlier in their cases.

The Bank's production of documents on a rolling-basis was especially proper in this case. Community First produced over 40,000 pages of documents and reviewed over 150,000 pages of documents in order to do so. (Bank's Resp. in Opp'n to Sanctions Mot., Ex. B-000069-70). The relevant documents arguably spanned decades, and the Bank needed to search through old records, microfiche, and computer files, all of which required great amounts of manpower and time. Moreover, Shepherd, as the principal custodian of the records during the relevant time period, was in a position of superior knowledge as to what existed and where it could be found. Neither the trial court nor Shepherd cited a single rule or case even remotely suggesting that Community First using the common practice of producing the documents on a rolling basis was improper, as it plainly was not.

B. The Bank complied with the August 2016 Order. Further, even assuming for argument's sake that the Bank's production delays were non-compliant, those delays were not willful.

As set forth in the fact section of this Brief, the Bank complied with each and every portion of the August 2016 Order on the Motion to Compel. Nonetheless, the November Sanctions Order ultimately penalized the Bank for failing to produce all documents within thirty days of receiving a supplemental list of documents from Shepherd. (Nov. Sanctions Order at 19-21).

Assuming for the sake of argument the Bank could be deemed to fail to comply with some deadline set in the August 2016 Order for the production of documents, such delays were not willful. This is because the delays were not the result of actions (or omissions) by the Bank—instead, those delays were a result of the complex requirements of federal banking law.

See generally, 12 C.F.R. Part 309 (setting forth requirements for banks to disclose records owned by the FDIC); (*see also* Bank's Resp. to Mot. for Sanctions, Ex. B-000045 (August 24, 2016 Letter from Deputy Regional Counsel for the FDIC to the trial court explaining protections of Bank Secrecy Act)).

Through its regulations, the FDIC prohibits the Bank from disclosing records belonging to the FDIC (including FDIC records in the Bank's physical—though not legal—possession) without following certain procedures[5] and obtaining the FDIC's authorization:

> *[N]o person shall disclose or permit the disclosure of any exempt records, or information contained therein*, to any persons other than those officers, directors, employees, or agents of the Corporation[6] who have a need for such records in the performance of their official duties. In any instance in which any person has possession, custody or control of FDIC exempt records or information contained therein, all copies of such records shall remain the property of the Corporation and *under no circumstances shall any person, entity or agency disclose or make public in any manner the exempt records or information* without written authorization from the Director of the Corporation's Division having primary authority over the records or information as provided in this section.

12 C.F.R. § 309.6(a) (emphases added). Moreover, during the process of obtaining FDIC's permission to disclose:

> *All steps practicable shall be taken to protect the confidentiality* of exempt records and information. Any disclosure permitted by paragraph (b) of this section is discretionary and nothing in paragraph (b) of this section shall be construed as requiring the disclosure of information. Wherever practicable, disclosure of exempt records *shall be made pursuant to a protective order and redacted to exclude all irrelevant or non-responsive exempt information.*

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[5] The procedures for disclosures to third parties as part of discovery are found at 12 C.F.R. § 309.6 (b)(6) and (b)(8). *See Benham v. Lenox Sav. Bank*, Civil Action No. 98-30004-MAP, 1998 U.S. Dist. LEXIS 18423, at *3 (D. Mass. Oct. 21, 1998) ("12 C.F.R. § 309.6(b)(8) does in fact set forth the standards under which the FDIC's general counsel may disclose or authorize the disclosure of any exempt record in response to a valid judicial subpoena, court order or other legal process.").

[6] "The terms Corporation or FDIC mean the Federal Deposit Insurance Corporation." 12 C.F.R. § 309.2(b).

Id. § 309.6 (b)(10) (emphases added). Indeed, the federal regulations are clear to define that "disclosure" includes the following:

> (c) The words disclose or disclosure, as used in § 309.6, mean to give access to a record, *whether by producing the written record or by oral discussion of its contents*. Where the Corporation employee authorized to release Corporation documents makes a determination that furnishing copies of the documents is necessary, the words disclose or disclosure include the furnishing of copies of documents or records.

Id. § 309.2 (emphasis added).

These federal regulations, though clear in their prohibitions, have not been fully reconciled with the rules governing discovery. As one federal court examining the various decisions on this issue has observed:

> One court has held that bank examination reports held by local banks are the property of the FDIC and are therefore not considered to be in the "custody, possession or control" of the bank; as a result, such reports are undiscoverable under Rule 34. *In re One Bancorp Sec. Litig.*, 134 F.R.D. 4, 9-10 (D. Me. 1991). Another court has described the federal regulations as "restrictive" and held them to be in conflict with Rule 34 of the Federal Rules of Civil Procedure. *Merchants Bank v. Vescio*, 205 B.R. 37, 41 (D. Vt. 1997). *See also In re Bankers Trust Co.*, 61 F.3d 465 (6th Cir. 1995) (Federal Reserve regulations at issue do not except from Rule 34 discovery materials exempt under the regulation. Court holds that Federal Rules of Civil Procedure necessarily prevail over mere "housekeeping" rules such as federal regulations). Still another found that a motion to compel production of bank examination reports was improper if the plaintiff failed to complete regulatory procedures for obtaining the information from the banking agency. *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Midland Bancor, Inc.*, 159 F.R.D. 562, 571-72 (D. Kan. 1994).

Benham, 1998 U.S. Dist. LEXIS 18423, at *5-6. Here, the Bank could have played hardball in discovery and claimed that the FDIC report was entirely "undiscoverable under Rule 34." Further, the Bank could have refused or declined to request permission from the FDIC to produce the FDIC Documents, especially in light of the fact that Shepherd himself could have sought such permission (although for whatever reason, he did not). *See* 12 C.F.R. § 309.6(8)

("Third parties seeking disclosure of exempt records or testimony in litigation to which the FDIC is not a party shall submit a request for discretionary disclosure directly to the General Counsel."). However, the Bank did neither of those things. Instead, it worked cooperatively with the Court, the FDIC, and Shepherd to disclose the documents as soon as practicable. (*See, e.g.*, Bank's Mot. to Strike, Ex. A at 1-2, Ex. B at 1, Ex. J. at 3; Bank's Resp. in Opp'n to Sanctions Mot. at 16 & Ex. B-000064). In fact, on September 15, 2016 (prior to the trial court's issuance of the November Sanctions Order), the Court sent the parties an email regarding the FDIC Documents, stating "[i]t appears Community First is complying with federal law and regulation concerning its redaction of Confidential Supervisory Information and Suspicious Activity Reporting."[7] (Bank's Resp. in Opp'n to Sanctions Mot., Ex. B-000039).[8]

As a result, the Bank's alleged non-compliance with the August 2016 Order compelling discovery is not, as a matter of law, "willful." *Cf. Davis v. Parkview Apartments*, 409 S.C. 266, 283, 762 S.E.2d 535, 544 (2014) (finding "willful" disobedience where "the circuit court made every effort to ensure that no privileged documents were compelled, and Appellants *refused to comply* merely because these rulings had adverse implications on their cases"); *McNair v. Fairfield Cty.*, 379 S.C. 462, 464, 467, 665 S.E.2d 830, 831, 832 (Ct. App. 2008) ("Despite this directive from the trial court, the County made no attempt to correct the deficiencies in its discovery responses.") (affirming discovery sanctions and finding of willful disobedience).

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[7] The November Sanctions Order offers no explanation for the Court's apparent divergent conclusions with regard to whether the Bank appropriately handled the production of the FDIC Documents, perhaps because the November Sanctions Order was taken verbatim (or nearly verbatim) from Defendants' proposed order.

[8] The November Sanctions Order also included language suggesting that the Bank had failed to follow the procedure under Section 309 because it failed to provide Shepherd with notice of the fact that Section 309 existed. (Nov. Sanctions Order at 9). That reference was inserted by Defendants in the proposed order despite a complete absence of any evidence or argument on the procedure. Moreover, such notification were unnecessary because Shepherd, as a former bank CEO, was well aware of the Section 309 procedures and himself knew of the existence of the FDIC documents as evidenced by his Answer and his counsel's argument. (*See, e.g.*, Shepherd Ans. at 9; Bank's Resp. in Opp'n to Sanctions Mot., Ex. B-000047-57, 59-60, 63-66, Ex. A; Mar. 15, 2016 Hr'g Tr. at 33:4-33:6). In fact, Shepherd signed the FDIC report. (Bank's Resp. in Opp'n to Sanctions Mot., Ex. B-000063-66 at 66).

C. Shepherd was not prejudiced by the delays in producing documents.

Fundamentally, Shepherd asserted prejudice because of the delays in the Bank's production of documents. (*E.g.* Nov. Sanctions Order at 25). But the unavoidable delay had no prejudicial impact. Shepherd is complaining about documents *he did receive*, but claims that he did not receive *quickly enough*. He did receive them well in advance of depositions (which never occurred) and trial (which never occurred as this case subsequently settled). As the South Carolina Supreme Court has made clear:

> The entire thrust of our discovery rules involves full and fair disclosure, *to prevent a trial* from becoming a guessing game or one of surprise for either party. In this respect, the discovery process is designed to "*make a trial* less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."

In re Anonymous Member of S.C. Bar, 346 S.C. 177, 193, 552 S.E.2d 10, 18 (2001) (citations omitted). This Court has similarly observed, "The rights of discovery provided by the Rules give the trial lawyer the means to be prepared *for trial*." *Downey v. Dixon*, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987) (emphasis added).

Here, the Bank was caught between Shepherd's repeated—and shifting—demands for documents and requirements of federal law. The Bank complied in good faith with its discovery obligations, repeatedly informing Shepherd—on August 29, 2016,[9] September 16, 2016,[10] October 25, 2016,[11] November 14, 2016,[12] November 17, 2016,[13] and December 1, 2016[14]—of

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[9] (Bank's Mot. to Strike, Ex. A thereto at 1-2).

[10] (*Id.*, Ex. J thereto at 3).

[11] (Bank's Resp. in Opp'n to Sanctions Mot., Ex. B-000047).

[12] (*Id.*, Ex. B-000056).

[13] (*Id.*, Ex. B-000059-60).

[14] (*Id.*, Ex. B-000061).

its progress with getting the FDIC-related documents released and noting that it would produce the FDIC-related documents as soon as it had permission from its federal regulator. And it did produce the FDIC Report on December 14, 2016 and related documents on December 22, 2016.[15] There was no prejudice to Shepherd's trial preparation.

* * * * *

The Bank's discovery conduct did not violate the underlying August 2016 Order, was a result of delays outside of its control, and did not prejudice Shepherd. Accordingly, sanctions were improper. *See* Rule 37, SCRCP.

2. THE TRIAL COURT ERRED WHEN IT SANCTIONED THE BANK BECAUSE THE COURT'S DISCOVERY ORDER WAS TOO VAGUE OR UNCLEAR TO SUPPORT THE IMPOSITION OF SANCTIONS.

"[A]ny [issuance of a] sanction must be just, that is, it must comport with the requirements of due process, and that certain sanctions may only be imposed where the district court finds a willful or bad faith failure to obey discovery orders." *Bush Ranch v. E.I. du Pont de Nemours & Co. (In re E.I. du Pont de Nemours & Co.)*, 918 F. Supp. 1524, 1542 (M.D. Ga. 1995). "[T]he Supreme Court has interpreted the Rule 37 requirement of a 'just' sanction to represent 'general due process restrictions on the court's discretion.'" *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1542 (11th Cir. 1993) (quoting *Insurance Corp. of Ireland, Ltd., v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707, 102 S. Ct. 2099, 2106, 72 L. Ed. 2d 492 (1982)); see *also Davis v. Parkview Apartments*, 409 S.C. 266, 296, 762 S.E.2d 535, 551 (2014) (Pleicones, J., dissenting) ("I agree with appellants that the trial judge's specifications of deficiencies in their compliance with the Discovery Order are simply too vague, and rely too

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[15] (*Id.*, Ex. B-000064, 000069).

heavily on mere references to memoranda prepared by respondents' counsel, to support the finding of contempt.").

Here, the trial court's imposition of sanctions against the Bank was unjust and failed to meet the requirements of due process because the August 2016 Order was too vague or unclear. The August Order failed to sufficiently specify what the Court actually intended to require (or expected) of the Bank on the points in the order on which trial court later ostensibly sanctioned the Bank.

In the August 2016 Order, the trial court stated that Shepherd "shall provide [Community First] with a list of . . . those [documents] requested b[ut] not received" and, in response, Community First was to "produce the *specific documents* requested *if* the documents are in the Plaintiff's *actual and/or constructive possession.*" (Emphasis added). Community First acted in full accordance with the plain language meaning of these words and this directive of the Court. Where Shepherd identified specific documents he desired from the Bank, the Bank produced those documents to Shepherd timely after the documents were identified and discovered. In fact, before the trial court issued the November Sanctions Order, the trial court advised the parties by email that Community First appeared to be "complying with federal law and regulation" regarding the FDIC Documents, indicating that the Bank's plain language interpretation of the August 2016 Order was correct.

In those instances where Shepherd requested *categories* of documents, the Bank objected that the list was not consistent with the trial court's August 2016 Order. Shepherd, by contrast, took the view – ultimately adopted by the trial court – that he was entitled to ask for any document he wished and that the Bank was prohibited by the August 2016 Order from objecting. In the November Sanctions Order, contrary to the plain meaning of the trial court's "specific

documents" language and its prior email to the parties, the trial court agreed with Shepherd. The November Sanctions Order indicated that through the August 2016 Order the trial court intended to require the Bank to produce documents responsive to a list of generic "categories" of documents identified by Shepherd, regardless of whether such documents were (1) inside or outside of the Bank's possession at the time (e.g., the FDIC Documents), (2) the categories were covered by the August 2016 Order, or (3) subject to objection by the Bank for non-disclosure or non-production under state or federal laws or regulations. The trial court therefore abrogated its own authority and delegated it, without legal authority, to Shepherd without restrictions.

However, even assuming for argument's sake the trial court could impose such a boundless requirement upon the Bank, for the trial court to impose this intended requirement on the Bank (such that trial court could properly sanction the Bank as it did), the trial court was obligated to *clearly specify* to the Bank what it actually required of the Bank *before* the imposition of sanctions against the Bank, such that the Bank had fair notice and could act accordingly. *See e.g., Johnson v. United States*, 135 S. Ct. 2551, 2572 (2015) ("A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited . . . ." (quotation and citation omitted)).

The Bank's reliance on the plain language of the trial court's August 2016 Order and the Court's email was appropriate. The Bank had no reasonable basis on which to believe its conduct did not comport with the Court's order or the rules of discovery. The vagueness or lack of clarity of the trial court's August 2016 Order has resulted in the punishment or entrapment of the Bank (which acted in innocence and in good faith), in violation of due process. The trial court's Sanctions Orders (including the November Sanctions Order) should be reversed.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the trial court.

Respectfully submitted,

W. Andrew Arnold (S.C. Bar # 5947)
aarnold@hortonlawfirm.net
HORTON LAW FIRM, P.A.
307 Pettigru Street
Greenville, SC 29601
Telephone: (864)233-4351
Facsimile: (864)233-7142

James C. Adams, II (N.C. Bar # 18063)
jadams@brookspierce.com
Justin N. Outling (N.C. Bar # 38409)
joutling@brookspierce.com
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
P.O. Box 26000
Greensboro, NC 27420
Telephone: 336-373-8850
Facsimile: 336-378-1001

Attorneys for Appellant Community First Bank

CERTIFICATE OF SERVICE

This is to certify that the undersigned did cause a copy of the foregoing document to be served by mailing and depositing a copy of the same in the United States Mail, proper postage affixed thereto, to the following:

Douglas F. Patrick, Esq.
Austin F. Watts, Esq.
COVINGTON PATRICK HAGINS STERN & LEWIS
P.O. Box 2343
Greenville, SC 29602

This the 20th day of February, 2018.

W. Andrew Arnold (S.C. Bar # 5947)
aarnold@hortonlawfirm.net
HORTON LAW FIRM, P.A.
307 Pettigru Street
Greenville, SC 29601
Telephone: (864)233-4351
Facsimile: (864)233-7142

HORTON
LAW FIRM, P.A.

DAVID B. WARD
WALLACE A. MULLINAX, JR.
MICHAEL A. FARRY
THOMAS F. DUGAS
BRUCE B. CAMPBELL
W. ANDREW ARNOLD
JEREMY R. SUMMERLIN

OF COUNSEL
JOSEPH M JENKINS, JR.
RICHARD N. TAPP, P.A.

VANCE B. DRAWDY
1928-1997

J. WRIGHT HORTON
1919-2011

February 20, 2018

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RE: *Community First Bank, Inc. vs. Frederick D. Shepherd, Jr.*
Appellate Case No.: 2017-002472

Dear Sir/Madam:

In reference to the above, enclosed for filing are Initial Brief of Appellant, Designation of Matter to be Included in the Record on Appeal, and Proof of Delivery.

Sincerely,

W. Andrew Arnold

WAA/jdf

cc: Douglas F. Patrick, Esquire (with enclosures)
Austin F. Watts, Esquire (with enclosures)

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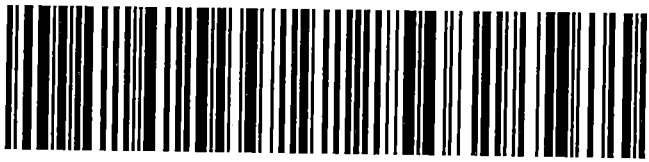

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