

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Hon. Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2016-002193
Civil Action No. 2014-CP-18-0358
Civil Action No. 2014-CP-18-1792
Civil Action No. 2014-CP-18-1793

RECEIVED
MAR 21 2018
SC Court of Appeals

Bank of North Carolina..... Respondent,

v.

Anthony M. Whitfield and Cindy Whitfield..... Defendants.

Of whom Anthony M. Whitfield is the Appellant and Cindy Whitfield is a Respondent.

Anthony M. Whitfield..... Appellant,

v.

David Swanson Respondent.

AMENDED RECORD ON APPEAL

ALL COUNSEL of RECORD:

FOR THE APPELLANT
ANTHONY M. WHITFIELD:

Andrew J. McCumber, Esquire
Daniel S. Slotchiver, Esquire
SLOTCHIVER & SLOTCHIVER, LLP
44 State Street
Charleston, SC 29401
Telephone: (843) 577-6531

Brent S. Halversen, Esquire
HALVERSEN & ASSOCIATES, LLC
171 Church Street, Suite 330
Charleston, SC 29401
Telephone: (843) 284-5790

FOR RESPONDENT
DAVID SWANSON:

Steven Kropski, Esquire
Mike McCall, Esquire
David Overstreet, Esquire
EARHART OVERSTREET, LLC
Post Office Box 22528
Charleston, SC 29413
Telephone: (843) 972-9400

FOR RESPONDENT
CINDY WHITFIELD:

Paul B. Ferrara, III, Esquire
FERRARA LAW FIRM, PLLC
2300 Otranto Road
North Charleston, SC 29406
Telephone: (843) 569-5911

FOR RESPONDENT
BANK OF NORTH CAROLINA:

Brian C. Duffy, Esquire
Blake A. McKie, Esquire
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, SC 29401
Telephone: (843) 720-2044

INDEX

Table of Contents	<i>i</i>
Order Granting Motion to Dismiss of July 15, 2016 (2014-CP-18-0358).....	1
Order Granting Motion to Dismiss of July 15, 2016 (2014-CP-18-1792).....	7
Order Granting Motion to Dismiss of July 15, 2016 (2014-CP-18-1793).....	13
Order Denying Motion to Alter/Amend of September 29, 2016 (2014-CP-18-0358)	19
Order Denying Motion to Alter/Amend of September 29, 2016 (2014-CP-18-1792)	23
Order Denying Motion to Alter/Amend of September 29, 2016 (2014-CP-18-1793)	27
Consent Order on Motion to Amend Answer of February 9, 2016 (2014-CP-18-0358)	31
Consent Order on Motion to Amend Answer of February 9, 2016 (2014-CP-18-1792)	55
Consent Order on Motion to Amend Answer of February 9, 2016 (2014-CP-18-1793)	80
Summons & Complaint (2014-CP-18-0358).....	105
Summons & Complaint (2014-CP-18-1792).....	135
Summons & Complaint (2014-CP-18-1793).....	163
Defendant’s Anthony Whitfield’s Amended Answer, Affirmative Defenses and Counterclaims (2014-CP-18-0358).....	219
Defendant’s Anthony Whitfield’s Fourth Amended Answer, Affirmative Defenses and Counterclaims (2014-CP-18-1792).....	240
Defendant’s Anthony Whitfield’s Fourth Amended Answer, Affirmative Defenses and Counterclaims (2014-CP-18-1793).....	262
Plaintiff’s Reply to Defendant’s Amended Answer, Affirmative Defenses and Counterclaims (2014-CP-18-0358).....	284
Plaintiff’s Reply to Defendant’s Fourth Amended Answer, Affirmative Defenses and Counterclaims (2014-CP-18-1792).....	300
Plaintiff’s Reply to Defendant’s Fourth Amended Answer, Affirmative Defenses and Counterclaims (2014-CP-18-1793).....	316
Summons & Complaint (2014-CP-10-5887)	332

Plaintiff's Reply to Defendant's Third Amended Answer, Affirmative Defenses and Counterclaims (2014-CP-10-5887).....	364
Defendant's Anthony Whitfield's Fifth Amended Answer, Affirmative Defenses and Counterclaims (2014-CP-10-5887).....	375
Defendant's Anthony Whitfield's Fourth Amended Answer, Affirmative Defenses and Counterclaims (2012-CP-08-2618).....	400
Defendant's Anthony Whitfield's Fourth Amended Answer, Affirmative Defenses and Counterclaims (2012-CP-08-3478).....	415
Third Party Defendant Swanson's Answer to Defendant / Third Party Plaintiff's Amended Answer, Affirmative Defenses, Counterclaim and Third Party Complaint (2014-CP-18-0358).....	438
Third Party Defendant Swanson's Answer to Defendant / Third Party Plaintiff's Fourth Amended Answer, Affirmative Defenses, Counterclaim and Third Party Complaint (2014-CP-18-1792)	446
Third Party Defendant Swanson's Answer to Defendant / Third Party Plaintiff's Fourth Amended Answer, Affirmative Defenses, Counterclaim and Third Party Complaint (2014-CP-18-1793)	454
Third Party Defendant David Swanson's Motion to Strike or Dismiss Defendant / Third Party Plaintiff's Complaint (2014-CP-18-0358)	462
Third Party Defendant David Swanson's Motion to Strike or Dismiss Defendant / Third Party Plaintiff's Complaint (2014-CP-18-1792)	469
Third Party Defendant David Swanson's Motion to Strike or Dismiss Defendant / Third Party Plaintiff's Complaint (2014-CP-18-1793)	476
Defendant Anthony M. Whitfield's Motion to Alter / Amend (2014-CP-18-0358)	483
Defendant Anthony M. Whitfield's Motion to Amend Answer (2014-CP-18-1792)	494
Defendant Anthony M. Whitfield's Motion to Amend Answer (2014-CP-18-1793)	505
Defendant Anthony M. Whitfield's Motion to Amend Answer (2014-CP-18-0358)	516
Defendant Anthony M. Whitfield's Motion to Amend Answer (2014-CP-18-1792)	530
Defendant Anthony M. Whitfield's Motion to Amend Answer (2014-CP-18-1793)	544
Notice of Appeal (2014-CP-18-0358)	558
Notice of Appeal (2014-CP-18-1792)	572
Notice of Appeal (2014-CP-18-1793)	586

Transcript of Proceedings (2014-CP-18-0358, 2014-CP-18-01792 & 2014-CP-18-1793) (August 25, 2016)	600
Transcript of Proceedings (2014-CP-18-0358, 2014-CP-18-01792 & 2014-CP-18-1793) (August 25, 2016)	619
Certificate of Counsel.....	658

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Harbor National Bank,

Plaintiff,

v.

Anthony M. Whitfield and Cindy Whitfield,

Defendant.

) IN THE COURT OF COMMON PLEAS

) CASE NUMBER: 2012-CP-10-5807

SUMMONS

FILED
2012 SEP -7 PM 4:15
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to serve an Answer to the allegations of the Complaint, which is hereby served upon you, within thirty (30) days of the date of service hereof; Your Answer shall be served upon the Clerk of this Court and upon the subscriber at his office, 5418-B Rivers Avenue, North Charleston, South Carolina 29406-6165; If you fail to respond within the time aforesaid, the Plaintiff will take judgment against you by default for the relief demanded in the Complaint.

BERNSTEIN & BERNSTEIN, P.A.

Robert A. Bernstein
Robert A. Bernstein
Post Office Box 20519
Charleston, SC 29413-0519
(843) 529-1111
(843) 529-0035 (fax)
ATTORNEYS FOR THE PLAINTIFF

September 5, 2012
Charleston, South Carolina

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

CASE NUMBER: 2012-CP-10- 5887

Harbor National Bank,)

Plaintiff,)

v.)

Anthony M. Whitfield and Cindy Whitfield,)

Defendants.)

COMPLAINT
(Foreclosure of Real Estate)
(Action On Note)

(Non-Jury)

BY
JULIE J. ARMSTRONG
CLERK OF COURT
2012 SEP -7 PM 4:15

FILED

The Plaintiff, complaining of the Defendant above-named, would respectfully show unto this Court:

1. The Plaintiff is a national banking organization organized and existing pursuant to the laws of the United States of America, with its principal place of business located in South Carolina.

2. Defendant Anthony M. Whitfield is a citizen and resident of the County of Charleston, State of South Carolina.

3. Defendant Cindy Whitfield is a citizen and resident of the County of Charleston, State of South Carolina.

DAB
#1

4. The real property hereinafter described, which is the subject of this action, is situated and located in Charleston County, South Carolina.

5. All parties hereto and all matters herein are within the jurisdiction of this Court.

**FOR A FIRST CAUSE OF ACTION AGAINST
DEFENDANT ANTHONY M. WHITFIELD**
(Action on Note)

6. Heretofore, on or about April 23, 2007, for value received the Defendant Anthony M. Whitfield executed and delivered to Harbor National Bank, a certain Promissory Note, Loan No. 400032000, a copy of which is attached hereto as Exhibit "A" and made a part hereof by reference, by which, according to the terms and conditions set out therein, Anthony M. Whitfield promised to pay to Harbor National Bank the sum of Three Hundred Twenty-Five Thousand and no/100 (\$325,000.00) Dollars, together with interest thereon at the rate of 7.5 % per annum on the unpaid balance, with a maturity date of May 3, 2012.

7. On September 20, 2007, the parties entered into a Commercial Debt Modification Agreement, wherein the date of monthly payments was changed, but the maturity date of the said Note remained the same; a true and correct copy of the said Commercial Debt Modification Agreement is attached hereto as Exhibit "B" to the Complaint.

8. The payment due under the Note referred to in the preceding paragraph is in default, and the conditions of said Note have been broken.

9. Defendant Anthony M. Whitfield has committed an act of default under the aforesaid Note.

10. The Plaintiff has made demand upon Defendant Anthony M. Whitfield to pay the entire amount due under the Note, but the said Defendant has failed and refused to make such payment.

11. The failure of Defendant Anthony M. Whitfield to make payment of the balance due constitutes a breach of the Note.

12. Plaintiff elects to, and does declare the entire balance of said indebtedness due and payable, and that there is due on said note as August 17, 2012, the principal sum of Three Hundred

Fourteen Thousand, Eight Hundred Sixty-Six and 30/100 (\$314,866.30) Dollars, accumulated interest of Seven Thousand, Two Hundred Seventy-Four and 21/100 (\$7,274.21) Dollars, and interest continuing to accumulate at the current rate of \$122.45 per diem from August 17, 2012 until paid in full, together with late charges, the costs and disbursements of this action, and attorney's fees.

13. Plaintiff has retained and employed Bernstein & Bernstein, P.A. for the purpose of instituting and prosecuting this action, and is entitled to recover all costs, expenses and reasonable attorneys' fees incurred with respect to this action.

14. By reason of the aforesaid breach of contract, the Plaintiff has suffered damages in the amount of Three Hundred Fourteen Thousand, Eight Hundred Sixty-Six and 30/100 (\$314,866.30) Dollars, accumulated interest of Seven Thousand, Two Hundred Seventy-Four and 21/100 (\$7,274.21) Dollars, and interest continuing to accumulate at the current rate of \$122.45 per diem from August 17, 2012 until paid in full, together with late charges, the costs and disbursements of this action, and attorney's fees.

**FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANTS
ANTHONY M. WHITFIELD AND CINDY WHITFIELD
(Mortgage Foreclosure)**

15. The allegations of paragraphs One (1) through Fourteen (14) of this Complaint are realleged as if repeated herein verbatim.

AAB
#3

16. To further secure his obligation under the aforesaid Promissory Note, on April 23, 2007, Anthony M. Whitfield executed a Real Estate Mortgage, whereby to secure the liability under the Promissory Note and any further advances thereof, a mortgage was granted to and upon the following described property, to wit:

All that certain piece, parcel or tract of land situate, lying, and being in the Town of

Mt. Pleasant, Charleston County, South Carolina, shown and designated as Lot 78, on that certain plat prepared by Mark S. Busey, S.C.R.L.S., entitled "A FINAL SUBDIVISION PLAT OF PHASE 2 WHISPERING MARSH, DUNES WEST, OWNED BY JOHN WIELAND HOMES OF SOUTH CAROLINA, LOCATED IN THE TOWN OF MT. PLEASANT, CHARLESTON COUNTY, SOUTH CAROLINA", said plat being dated January 13, 2000 and duly recorded in the Charleston County RMC Office in Plat Book ED, Page 822. reference to said plat is hereby made for a more complete description as to distances, courses, metes and bounds.

BEING the same premises as conveyed to Anthony M. Whitfield by deed of Dennis E. Harris and Robin Harris dated April 23, 2007, and recorded in the Office of the R.M.C. for Charleston County on April 24, 2007 in Deed Book C623, Page 352.

TMS #594-10-00-507

Address: 1055 Black Rush Circle, Mt. Pleasant, SC 29466

(hereinafter referred to as the PROPERTY); a true and correct copy of the said Mortgage is attached hereto as Exhibit "C" to this Complaint.

17. On April 24, 2007, the said Mortgage was recorded in the Office of the Register of Mesne Conveyances for Charleston County in Book E623, at page 742.

18. According to the terms and conditions of the aforesaid Real Estate Mortgage, it is provided that in the event of default in the payment of any installment when due, the entire principal and accrued interest shall at once become due and payable without notice, at the option of the holder, and if the same should be placed in the hands of an attorney for collection, all cost of collection, including a reasonable attorney's fees, shall become an obligation of the Defendant Anthony M. Whitfield, to be secured by the said mortgage as part of the debt secured thereby.

19. Further, under the terms and conditions of the said Mortgages, it was agreed that the mortgagor would pay all taxes, assessments, water rates, other governmental or municipal charges, fines or impositions for which provisions were not otherwise made, and if the mortgagor failed to

do so, the mortgagee might pay same, which amount, together with interest thereon, would be secured by said mortgage.

20. According to the terms of the said Mortgages, and as additional security, the mortgagor assigned all rents, issues and profits of the mortgaged premises from and after any default thereunder, and should legal proceedings be instituted pursuant to said mortgage, the mortgagee, its successors or assigns, were given the right to have a Receiver appointed of the rents, issues and profits, who, after deducting all charges and expenses attending such proceedings, and the execution of his trust as Receiver, shall apply the residue of the rents, issues and profits toward the debt secured by said mortgage.

21. On or about July 24, 2007, without the knowledge or consent of the Plaintiff, the Defendant Anthony M. Whitfield transferred a one-half undivided interest in the said property to Defendant Cindy Whitfield.

22. Defendant Cindy Whitfield acquired her one-half undivided interest in the property subject to the mortgage of the Plaintiff herein, and her claim to the said property is subordinate to the claim of the Plaintiff herein.

23. The payments due under said Note is due and has been in default since May 3, 2012, and the conditions of said mortgage have been broken.

24. The entire balance of said indebtedness due and payable, and that there is due on said note as of August 17, 2012, the sum of Three Hundred Fourteen Thousand, Eight Hundred Sixty-Six and 30/100 (\$314,866.30) Dollars, accumulated interest of Seven Thousand, Two Hundred Seventy-Four and 21/100 (\$7,274.21) Dollars, and interest continuing to accumulate at the current rate of \$122.45 per diem from August 17, 2012 until paid in full, together with late charges, the costs and

disbursements of this action, and attorney's fees.

25. Plaintiff has retained and employed Bernstein & Bernstein, P.A. for the purpose of instituting and prosecuting this action, and is entitled to recover all costs, expenses and reasonable attorneys' fees incurred with respect to this action.

26. The Plaintiff is entitled to an Order foreclosing the mortgage upon the PROPERTY, and the proceeds of the said foreclosure to be distributed first to the costs and expenses of the sale thereof, second to be applied against accrued principal and interest under the Note and mortgage, third to payment of the costs, expenses and reasonable attorneys fees incurred by the Plaintiff in prosecuting this foreclosure action, and the Court should thereafter pay any excess proceeds of sale to such claimants in such priorities as their interests may appear.

FOR A THIRD CAUSE OF ACTION
(Appointment of Receiver)

27. The allegations of paragraphs One (1) through Twenty-Six (26) of this Complaint are realleged as if repeated herein verbatim.

28. To further secure his obligation under the aforesaid Promissory Note, on April 23, 2007, Anthony M. Whitfield executed an Assignment of Leases and Rents, whereby to secure the liability under the Promissory Note and any further advances thereof, the Defendant assigned all leases and rents from the subject PROPERTY to the Plaintiff; a true and correct copy of the said Assignment of Leases and Rents is attached hereto as Exhibit "D."

25. On April, 2007, the said Assignment of Leases and Rents was recorded in the Office of the Register of Mesne Conveyances for Charleston County in Book F623, at Page 152.

26. According to the terms of the said Assignment of Leases and Rents, and as additional

security, the Defendant assigned all rents, issues and profits of the PROPERTY from and after any default thereunder, and should legal proceedings be instituted pursuant to said Assignment of Leases and Rents, the Plaintiff were given the right to have a Receiver appointed of the rents, issues and profits, who, after deducting all charges and expenses attending such proceedings, and the execution of his trust as Receiver, shall apply the residue of the rents, issues and profits toward the secured debt.

27. The payments due under said Note is due and has been in default since May 3, 2012, and the conditions of said Assignment of Leases and Rents have been broken.

28. The entire balance of said indebtedness due and payable, and that there is due on said note of August 17, 2012, the sum of Three Hundred Fourteen Thousand, Eight Hundred Sixty-Six and 30/100 (\$314,866.30) Dollars, accumulated interest of Seven Thousand, Two Hundred Seventy-Four and 21/100 (\$7,274.21) Dollars, and interest continuing to accumulate at the current rate of \$122.45 per diem from August 17, 2012 until paid in full, together with late charges, the costs and disbursements of this action, and attorney's fees.

AAB
#7

29. The Plaintiff is entitled to have a Receiver appointed for the PROPERTY to collect all income from the said PROPERTY, to pay expenses associated therewith, including the fees of the Receiver, and to remit the balance of such collections to the Plaintiff to apply toward the secured debt hereunder.

WHEREFORE, the Plaintiff prays for judgment as follows:

(1) Under the First Cause of Action, for judgment against Defendant Anthony M. Whitfield the amount of Three Hundred Fourteen Thousand, Eight Hundred Sixty-Six and 30/100 (\$314,866.30) Dollars, accumulated interest of Seven Thousand, Two Hundred Seventy-Four and 21/100 (\$7,274.21) Dollars, and interest continuing to accumulate at the current rate of \$122.45 per diem from August 17, 2012 until paid in full, together with late charges, the costs and disbursements of this action, and attorney's fees;

- (2) Under the Second Cause of Action, that
- (a) That the amount due upon the said Note and Mortgage held by the Plaintiff be ascertained and determined under the direction of this Court, together with attorneys fees and the costs of this action.
- (b) That the Plaintiff's Mortgage be declared a first lien and that Plaintiff has judgment of foreclosure for the amount found to be due and owing under the promissory note, together with any taxes or insurance premiums which may be due, with a reasonable sum as attorney's fees, and the costs of this action.
- (c) That the PROPERTY be sold under the direction of this Court, the equities of redemption are barred, and that the proceeds of sale are applied as follows:

First, to the costs and expenses of the within action and sale,

Second, to the payment and discharge of the amount due on the Plaintiff's Note and Mortgage, with the costs and disbursements of this action together with attorneys' fees, and

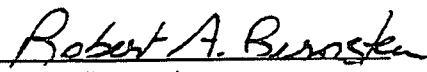
Third, the surplus, if any, be distributed according to law; and

#8

3) Under the Third Cause of Action, for the Appointment of a Receiver to collect all income from the said PROPERTY, to pay expenses associated therewith, including the fees of the Receiver, and to remit the balance of such collections to the Plaintiff to apply toward the secured debt

4) For such other and further relief as may be just and proper.

BERNSTEIN & BERNSTEIN, P.A.


Robert A. Bernstein
Post Office Box 20519
Charleston, SC 29413-0519
(843) 529-1111
(843) 529-0035 (fax)
ATTORNEYS FOR THE PLAINTIFF

September 5, 2012
Charleston, South Carolina

ARTHUR M WHITFIELD 2141 DOBCHESSTER ROAD NORTH CHARLESTON, SC 29405	Harbor National Bank 1503 Old Towne Road Charleston, SC 29407	247-86-7213 Loan Number <u>40032009</u> Date <u>04/23/2007</u> Maturity Date <u>08/03/2012</u> Loan Amount \$ <u>325,000.00</u> Renewed 0? _____
BORROWER'S NAME AND ADDRESS <small>* Includes each borrower above, jointly and severally.</small>	LENDER'S NAME AND ADDRESS: <small>"You" means the lender, its successors and assigns.</small>	

For value received, I promise to pay to you, or your order, at your address listed above the PRINCIPAL sum of Three Hundred Twenty-Five Thousand Dollars Dollars \$ 325,000.00

Single Advance: I will receive all of this principal sum on 04/23/2007. No additional advances are contemplated under this note.
 Multiple Advances: The principal sum shown above is the maximum amount of principal I can borrow under this note. On _____ I will receive the amount of \$ _____ and future principal advances are contemplated.
 Conditions: The conditions for future advances are _____

Open End Credit: You and I agree that I may borrow up to the maximum amount of principal more than one time. This feature is subject to all other conditions and expires on _____
 Closed End Credit: You and I agree that I may borrow up to the maximum only one time (and subject to all other conditions).

INTEREST: I agree to pay interest on the outstanding principal balance from 04/23/2007 at the rate of 7.500 % per year until Maturity

Variable Rate: This rate may then change as stated below.
 Index Rate: The future rate will be _____ the following index rate: _____

No Index: The future rate will not be subject to any internal or external index. It will be entirely in your control.
 Frequency and Timing: The rate on this note may change as often as _____
 A change in the interest rate will take effect _____
 Limitations: During the term of this loan, the applicable annual interest rate will not be more than _____ % or less than _____ % . The rate may not change more than _____ % each _____

Effect of Variable Rate: A change in the interest rate will have the following effect on the payments:
 The amount of each scheduled payment will change. The amount of the final payment will change.

ACCUAL METHOD: Interest will be calculated on a Actual/360 basis.
 POST MATURITY RATE: I agree to pay interest on the unpaid balance of this note owing after maturity, and until paid in full, as stated below:
 on the same fixed or variable rate basis in effect before maturity (as indicated above).
 at a rate equal to 14.000%

LATE CHARGE: If a payment is not made within 10 days after it is due, I agree to pay a late charge of 5.000% of the payment amount with a minimum of \$20.00
 ADDITIONAL CHARGES: In addition to interest, I agree to pay the following charges which are are not included in the principal amount above: APPRAISAL FEE \$125.00, FLOOD SEARCH FEE \$15, ORIENTATION FEE \$1625.00

PAYMENTS: I agree to pay this note as follows:
 Interest: I agree to pay accrued interest See Additional Terms

Principal: I agree to pay the principal See Additional Terms

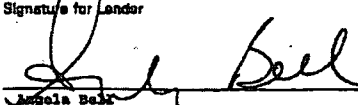
Installments: I agree to pay this note in _____ payments. The first payment will be in the amount of \$ _____ and will be due _____ . A payment of \$ _____ will be due _____ thereafter. The final payment of the entire unpaid balance of principal and interest will be due _____

ADDITIONAL TERMS: I AGREE TO PAY 24 MONTHLY INTEREST ONLY PAYMENTS BEGINNING 06/03/2007, FOLLOWED BY 36 MONTHLY PRINCIPAL AND INTEREST PAYMENTS OF \$2,297.15 BEGINNING 06/03/2009 WITH 1 (ONE) FINAL PAYMENT OF THE OUTSTANDING PRINCIPAL AND ACCRUED INTEREST ON 05/03/2012.

SECURITY: This note is separately secured by (describe separate document by type and date):
MORTGAGE AND ASSIGNMENT OF LEASES & REENTS OF EVEN DATE ON 1055 BLACK BUSH CIRCLE, RT. PLEASANT, SC
(This section is for your internal use. Failure to list a separate security document does not mean the agreement will be enforceable.)

PURPOSE: The purpose of this loan is TO PURCHASE 1055 BLACK BUSH CIRCLE, RT PLEASANT, SC

SIGNATURES: I AGREE TO THE TERMS OF THIS NOTE (INCLUDING THOSE ON PAGE 2). I have received a copy on today's date.

Signature for Lender

 Angela Bell
 Commercial Lender



 ARTHUR M. WHITFIELD

EXHIBIT A
 Page 1 of 2

DEFINITIONS: As used on page 1, "I" means the terms that apply to this loan. "me" or "my" means each Borrower who signs this note and each other person or legal entity (including guarantors, endorsers, and sureties) who agree to pay this note together referred to as "us". "You" or "your" means the Lender and its successors and assigns.

APPLICABLE LAW: The law of the state of South Carolina will govern this note. Any term of this note which is contrary to applicable law will not be effective, unless the law permits you and me to agree to such a variation. If any provision of this agreement cannot be enforced according to its terms, this fact will not affect the enforceability of the remainder of this agreement. No modification of this agreement may be made without your express written consent. Time is of the essence in this agreement.

COMMISSIONS OR OTHER REMUNERATION: I understand and agree that any insurance premiums paid to insurance companies as part of this note will involve money retained by you or paid back to you as commissions or other remuneration.

In addition, I understand and agree that some other payments to third parties as part of this note may also involve money retained by you or paid back to you as commissions or other remuneration.

PAYMENTS: Each payment I make on this note will first reduce the amount I owe you for charges which are neither interest nor principal. The remainder of each payment will then reduce accrued unpaid interest, and then unpaid principal. If you and I agree to a different application of payments, we will describe our agreement on this note. I may prepay a part of, or the entire balance of this loan without penalty, unless we specify to the contrary on this note. Any partial prepayment will not excuse or reduce any later scheduled payment until this note is paid in full (unless, when I make the prepayment, you and I agree in writing to the contrary).

INTEREST: Interest accrues on the principal remaining unpaid from time to time, until paid in full. If I receive the principal in more than one advance, each advance will start to earn interest only when I receive the advance. The interest rate in effect on this note at any given time will apply to the entire principal advanced at that time. Notwithstanding anything to the contrary, I do not agree to pay and you do not intend to charge any rate of interest that is higher than the maximum rate of interest you could charge under applicable law for the extension of credit that is agreed to here, either before or after maturity. If any notice of interest is sent and is in error, we mutually agree to correct it, and if you actually collect more interest than allowed by law and this agreement, you agree to refund it to me.

INDEX RATE: The index will serve only as a device for setting the rate on this note. You do not guarantee by selecting this index, or the margin, that the rate on this note will be the same rate you charge on any other loans or class of loans to me or other borrowers.

ACCRUAL METHOD: The amount of interest that I will pay on this loan will be calculated using the interest rate and accrual method stated on page 1 of this note. For the purpose of interest calculation, the accrual method will determine the number of days in a "year." If no accrual method is stated, then you may use any reasonable accrual method for calculating interest.

POST MATURITY RATE: For purposes of deciding when the "Post Maturity Rate" (shown on page 1) applies, the term "maturity" means the date of the last scheduled payment indicated on page 1 of this note or the date you accelerate payment on the note, whichever is earlier.

SINGLE ADVANCE LOANS: If this is a single advance loan, you and I expect that you will make only one advance of principal. However, you may add other amounts to the principal if you make any payments described in the "PAYMENTS BY LENDER" paragraph below.

MULTIPLE ADVANCE LOANS: If this is a multiple advance loan, you and I expect that you will make more than one advance of principal. If this is closed end credit, repaying a part of the principal will not entitle me to additional credit.

PAYMENTS BY LENDER: If you are authorized to pay, on my behalf, charges I am obligated to pay (such as property insurance premiums), then you may treat those payments made by you as advances and add them to the unpaid principal under this note, or you may demand immediate payment of the charges.

SET-OFF: I agree that you may set off any amount due and payable under this note against any right I have to receive money from you.

"Right to receive money from you" means:

- (1) any deposit account balance I have with you;
- (2) any money owed to me on an item presented to you or in your possession for collection or exchange; and
- (3) any repurchase agreement or other nondeposit obligation.

"Any amount due and payable under this note" means the total amount of which you are entitled to demand payment under the terms of this note at the time you set off. This total includes any balance the due date for which you properly accelerate under this note.

If my right to receive money from you is also owned by someone who has not agreed to pay this note, your right of set-off will apply to my interest in the obligation, and to any other amounts I could withdraw on my sole request or endorsement. Your right of set-off does not apply to an account or other obligation where my rights are only as a representative. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set off this debt against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

REAL ESTATE OR RESIDENCE SECURITY: If this note is secured by real estate or a residence that is personal property, the existence of a default

and your remedies for such a default will be determined by applicable law, by the terms of any separate instrument creating the security interest and, to the extent not prohibited by law and not contrary to the terms of the separate security instrument, by the "Default" and "Remedies" paragraphs herein.

DEFAULT: I will be in default if any one or more of the following occur: (1) I fail to make a payment on time or in the amount due; (2) I fail to keep the property insured, if required; (3) I fail to pay, or keep any promise, on any debt or agreement I have with you; (4) any other creditor of mine attempts to collect any debt I owe him through court proceedings; (5) I die, am declared incompetent, make an assignment for the benefit of creditors, or become insolvent (either because my liabilities exceed my assets or I am unable to pay my debts as they become due); (6) I make any written statement or provide any financial information that is untrue or inaccurate at the time it was provided; (7) I do or fail to do something which causes you to believe that you will have difficulty collecting the amount I owe you; (8) any collateral securing this note is used in a manner or for a purpose which threatens confiscation by a legal authority; (9) I change my name or assume an additional name without first notifying you before making such a change; (10) I fail to plant, cultivate and harvest crops in due season if I am a producer of crops; (11) any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in 7 C.F.R. Part 1840, Subpart G, Exhibit M.

REMEDIES: If I am in default on this note you have, but are not limited to, the following remedies:

- (1) You may demand immediate payment of all I owe you under this note (principal, accrued unpaid interest and other accrued charges).
- (2) You may set off this debt against any right I have to the payment of money from you, subject to the terms of the "SET-OFF" paragraph herein.
- (3) You may demand security, additional security, or additional parties to be obligated to pay this note as a condition for not using any other remedy.
- (4) You may refuse to make advances to me or allow purchases on credit by me.
- (5) You may use any remedy you have under state or federal law.

By selecting any one or more of these remedies you do not give up your right to later use any other remedy. By waiving your right to declare an event to be a default, you do not waive your right to later consider the event as a default if it continues or happens again.

COLLECTION COSTS AND ATTORNEY'S FEES: I agree to pay all costs of collection, replevin or any other or similar type of cost if I am in default. In addition, if you hire an attorney to collect this note, I also agree to pay any fee you incur with such attorney plus court costs (except where prohibited by law). To the extent permitted by the United States Bankruptcy Code, I also agree to pay the reasonable attorney's fees and costs you incur to collect this debt as awarded by any court exercising jurisdiction under the Bankruptcy Code.

WAIVER: I give up my rights to require you to do certain things. I will not require you to:

- (1) demand payment of amounts due (presentment);
- (2) obtain official certification of nonpayment (protest); or
- (3) give notice that amounts due have not been paid (notice of dishonor).

I waive any defenses I have based on suretyship or impairment of collateral.

OBLIGATIONS INDEPENDENT: I understand that I must pay this note even if someone else has also agreed to pay it (by, for example, signing this form or a separate guarantee or endorsement). You may sue me alone, or anyone else who is obligated on this note, or any number of us together, to collect this note. You may without notice release any party to this agreement without releasing any other party. If you give up any of your rights, with or without notice, it will not affect my duty to pay this note. Any extension of new credit to any of us, or renewal of this note by all or less than all of us will not release me from my duty to pay it. (Of course, you are entitled to only one payment in full.) I agree that you may at your option extend this note or the debt represented by this note, or any portion of the note or debt, from time to time without limit or notice and for any term without affecting my liability for payment of the note. I will not assign my obligation under this agreement without your prior written approval. You may, without notice, fail to perfect your security interest in, impair, or release any security and I will still be obligated to pay this loan.

FINANCIAL INFORMATION: I agree to provide you, upon request, any financial statement or information you may deem necessary. I warrant that the financial statements and information I provide to you are or will be accurate, correct and complete.

NOTICE: Unless otherwise required by law, any notice to me shall be given by delivering it or by mailing it by first class mail addressed to me at my last known address. My current address is on page 1. I agree to inform you in writing of any change in my address. I will give any notice to you by mailing it first class to your address stated on page 1 of this agreement, or to any other address that you have designated.

WAIVER OF HEARING PRIOR TO IMMEDIATE POSSESSION: If this loan is for a business purpose I agree to waive the right to five days' notice and a pressizero hearing prior to seizure of any personal property which may secure this loan.

DATE OF TRANSACTION	PRINCIPAL ADVANCE	BORROWER'S INITIALS (SEE REMARKS)	PRINCIPAL PAYMENTS	PRINCIPAL BALANCE	INTEREST RATE	INTEREST PAYMENTS	INTEREST PAID THROUGH:
	0		0	0	% 0		
	0		0	0	% 0		
	0		0	0	% 0		
	0		0	0	% 0		
	0		0	0	% 0		
	0		0	0	% 0		
	0		0	0	% 0		
	0		0	0	% 0		
	0		0	0	% 0		
	0		0	0	% 0		

Page 2 of 2
 BIT A
 2 OF 2

Angie,
 Do I need a modification for the other
 two loans to pay payments over same
 time?
 Thanks JW

BORROWER NAME AND ADDRESS	LENDER NAME AND ADDRESS	LOAN DESCRIPTION
BURGESS B BURGESS 2343 COMMERCE ROAD WOODRIDGE, NC 29405	Banker National Bank 1803 Old Town Road Charleston, SC 29407	Number 400000000 Amount \$251,000.00 Date 09/20/07

Refer to the attached Signature Addendum, transportation records, for additional Borrowers and their signatures.

COMMERCIAL DEBT MODIFICATION AGREEMENT

DATE AND PARTIES: The date of this Debt Modification Agreement (Modification) is 09/20/07.
DEFINITIONS: As used in this Modification, the terms have the following meanings:
 "Borrower," the person(s) "it," "his," "her" and "they" refer to each Borrower (including this Modification, individually and together with their heirs, successors, administrators, executors, and assigns. "You" and "your" refer to the Lender, with its participants or affiliates, successors and assigns, or any person or entity that acquires an interest in this Modification or Prior Obligation.
 "Prior Obligation," "Prior Obligations" refers to any previous agreement providing any promise to pay you money, including any loan agreement, note, or document that evidences any indebtedness, and any amendments, supplements, modifications, and addendums.

REPRESENTATIONS: You and I have entered into a Prior Obligation which is evidenced by MEMORANDUM OF AGREEMENT RE: LOAN # 400000000 dated 09/20/07.
 payable on demand / payable on demand but if so demand is made, by the maturity date of 09/20/2011 with a maturity date of 09/20/2011
 in the original principal amount of \$ 251,000.00 with a maximum possible principal amount of \$ 251,000.00
 with a maturity date of 09/20/2011

As of the date of this Modification, the amount remaining due is / correct amount remaining on the Prior Obligation is \$ 251,000.00 principal (Principal) plus \$ 0.00 interest accrued, for a total of \$ 251,000.00

MODIFICATION: For values entered, you and I agree to modify the Prior Obligation as follows:
 INTEREST RATE MODIFICATION
 DIFFERENT RATE
 Maximum Interest Amount. Any amount assessed or collected as interest will be limited to the maximum lawful amount of interest allowed by state or federal law. Amounts collected in excess of the maximum lawful amount will be applied first to the unpaid principal balance. Any remainder will be returned to you.
 Pre-Adjudicated Default Interest Rate.

CONVERSION: This Modification provides for the conversion of interest.
 PAYMENT MODIFICATION:
 THE MONTHLY PAYMENT IS BEING CHANGED FROM THE END DAY OF EACH MONTH TO THE 15TH DAY OF EACH MONTH BEGINNING ON SEPTEMBER 15, 2007 UNTIL APRIL 15, 2011. THE PERCENT PERCENT OF THE OUTSTANDING PRINCIPAL AND ACCRUED INTEREST WILL REMAIN AT 09/03/2011. ALL OTHER TERMS AND CONDITIONS REMAIN THE SAME.

DRAW PRINCIPAL MODIFICATION
 FEES AND CHARGES MODIFICATION

ADDITIONAL TERMS:

CONFIRMATION OF TERMS: Except as specifically provided in this Modification, all terms of the Prior Obligation remain in effect.
ENTIRE AGREEMENT: Whichever used, the duplicate includes the plain and the plain includes the duplicate. The entire contents are for convenience only and are not to be used to interpret or define the terms of this Modification.

NOTICE TO BORROWER: THIS IS A DEMAND NOTE AND SO MAY BE COLLECTED BY THE LENDER AT ANY TIME. A NEW NOTE MUTUALLY AGREED UPON AND SUBSEQUENTLY ISSUED MAY CARRY A HIGHER OR LOWER RATE OF INTEREST.

ORAL AGREEMENTS OR COMMITMENTS TO LOAN MONEY, EXTEND CREDIT OR TO FORBEAR FROM ENFORCING PAYMENT OF A DEBT INCLUDING PROCEEDS TO EXTEND OR RENEW SUCH DEBT ARE NOT ENFORCEABLE, REGARDLESS OF THE LEGAL THEORY UPON WHICH IT IS BASED THAT IS IN ANY WAY RELATED TO THE CREDIT AGREEMENT, TO PROTECT YOU (BORROWER/BESTRIES AND US (LENDER/SUBSCRIBED PARTY)) FROM MISUNDERSTANDING OR MISAPPOINTMENT. ANY AMBIGUITIES AND DISCREPANCIES IN THE AGREEMENT ESPECIALLY IN THIS WRITING, WHICH IS THE COMPLETE AND EXCLUSIVE STATEMENT OF THE MODIFICATION, THE PARTIES AFFIRM THAT NO UNWRITTEN ORAL AGREEMENT EXISTS BETWEEN THEM.

SIGNATURES: By signing under and, Borrower agrees to the terms contained in this form. Borrower also acknowledges receipt of a copy of this form.

BORROWER:
 Signature: Angie Burgess Date: 9/20/07
 Signature: _____ Date: _____
 Signature: _____ Date: _____
 Signature: _____ Date: _____
LENDER:
 Signature: _____ Date: _____
 Signature: _____ Date: _____
 Signature: _____ Date: _____
 Signature: _____ Date: _____

EXHIBIT B
 Page 1 of 1

J. STANLEY CLAYPOOLE, PA
2155 NORTH PARK LANE
NORTH CHARLESTON, S.C. 29406
Whitfield OT-0513

BK E 623PG742

This document was prepared by (name, address, phone):

Harbor National Bank
1503 Old Towne Road
Charleston, SC 29407

State of South Carolina

Space Above This Line For Recording Data

REAL ESTATE MORTGAGE

(With Future Advance Clause)

1. **DATE AND PARTIES.** The date of this Mortgage is 04/23/2007 and the parties and their addresses are as follows:

MORTGAGOR: ANTHONY M WHITFIELD
2141 DORCHESTER ROAD
NORTH CHARLESTON, SC 29405

Refer to the Addendum which is attached and incorporated herein for additional Mortgages.

LENDER: Harbor National Bank
1503 Old Towne Road
Charleston, SC 29407

2. **MORTGAGE.** For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debt (hereafter defined), Mortgagor grants, bargains, conveys and mortgages to Lender the following described property:

SEE ATTACHED EXHIBIT 'A'

The property is located in CHARLESTON at 1055 BLACK RUSH
(County)
CIRCLE MOUNT PLEASANT South Carolina 29466
(Address) (City) (Zip Code)

Together with all rights, easements, appurtenances, royalties, mineral rights, oil and gas rights, crops, timber, all diversion payments or third party payments made to crop producers, and all existing and future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate described above (all referred to as "Property"). The term Property also includes, but is not limited to, any and all water wells, water, ditches, reservoirs, reservoir sites and dams located on the real estate and all riparian and water rights associated with the Property, however established.

SOUTH CAROLINA - AGRICULTURAL/COMMERCIAL REAL ESTATE SECURITY INSTRUMENT NOT FOR FIMA, FPLMC, FHA OR VA USE, AND NOT FOR CONSUMER PURPOSES

(page 1 of 8)

Exhibit © 1994, 2001 Bankers Systems, Inc., St. Cloud, MN Form AGCO-RES-SC 1/21/2003

EXHIBIT C
Page 1 of 10

R. 344

3. **MAXIMUM OBLIGATION LIMIT.** The total principal amount of the Secured Debt (hereafter defined) secured by this Mortgage at any one time shall not exceed \$ 325,000.00. This limitation of amount does not include interest, loan charges, commitment fees, brokerage commissions, attorneys' fees and other charges validly made pursuant to this Mortgage and does not apply to advances (or interest accrued on such advances) made under the terms of this Mortgage to protect Lender's security and to perform any of the covenants contained in this Mortgage. Interest under the Note will be deferred, accrued or capitalized; however, Mortgagee shall not be required to defer, accrue or capitalize any interest except as provided in the Note. Future advances are contemplated and, along with other future obligations, are secured by this Mortgage even though all or part may not yet be advanced. Nothing in this Mortgage, however, shall constitute a commitment to make additional or future loans or advances in any amount. Any such commitment would need to be agreed to in a separate writing.
4. **SECURED DEBT DEFINED.** The term "Secured Debt" includes, but is not limited to, the following:
- A. The promissory note(s), contract(s), guaranty(ies) or other evidence of debt described below and all extensions, renewals, modifications or substitutions (Evidence of Debt) (e.g., borrower's name, note amount, interest rate, maturity date):
 One note of even date in the principal amount of 325,000.00 with final payment due 05/03/2012
 - B. All future advances from Lender to Mortgagor or other future obligations of Mortgagor to Lender under any promissory note, contract, guaranty, or other evidence of debt existing now or executed after this Mortgage whether or not this Mortgage is specifically referred to in the evidence of debt.
 - C. All obligations Mortgagor owes to Lender, which now exist or may later arise, to the extent not prohibited by law, including, but not limited to, liabilities for overdrafts relating to any deposit account agreement between Mortgagor and Lender.
 - D. All additional sums advanced and expenses incurred by Lender for insuring, preserving or otherwise protecting the Property and its value and any other sums advanced and expenses incurred by Lender under the terms of this Mortgage, plus interest at the highest rate in effect, from time to time, as provided in the Evidence of Debt.
 - E. Mortgagor's performance under the terms of any instrument evidencing a debt by Mortgagor to Lender and any Mortgage securing, guarantying, or otherwise relating to the debt.

If more than one person signs this Mortgage as Mortgagor, each Mortgagor agrees that this Mortgage will secure all future advances and future obligations described above that are given to or incurred by any one or more Mortgagor, or any one or more Mortgagor and others. This Mortgage will not secure any other debt if Lender falls, with respect to such other debt, to make any required disclosure about this Mortgage or if Lender fails to give any required notice of the right of rescission.

5. **PAYMENTS.** Mortgagor agrees to make all payments on the Secured Debt when due and in accordance with the terms of the Evidence of Debt or this Mortgage.
6. **WARRANTY OF TITLE.** Mortgagor covenants that Mortgagor is lawfully seized of the estate conveyed by this Mortgage and has the right to grant, bargain, convey, sell, and mortgage the Property and warrants that the Property is unencumbered, except for encumbrances of record.
7. **CLAIMS AGAINST TITLE.** Mortgagor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities, and other charges relating to the Property when due. Lender may require Mortgagor to provide to Lender copies of all notices that such amounts are due and the receipts evidencing Mortgagor's payment. Mortgagor will defend title to the Property against any claims that would impair the lien of this Mortgage. Mortgagor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses which Mortgagor may have against parties who supply labor or materials to improve or maintain the Property.
8. **PRIOR SECURITY INTERESTS.** With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Property and that may have priority over this Mortgage, Mortgagor agrees:
- A. To make all payments when due and to perform or comply with all covenants.
 - B. To promptly deliver to Lender any notices that Mortgagor receives from the holder.
 - C. Not to make or permit any modification or extension of, and not to request or accept any future advances under any note or agreement secured by, the other mortgage, deed of trust or security agreement unless Lender consents in writing.
9. **DUE ON SALE OR ENCUMBRANCE.** Lender may, at its option, declare the entire balance of the Secured Debt to be immediately due and payable upon the creation of any lien, encumbrance, transfer, or sale, or contract for any of these on the Property. However, if the Property includes Mortgagor's residence, this section shall be subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable. For the purposes of this section, the term "Property" also includes any interest to all or any part of the Property. This covenant shall run with the Property and shall remain in effect until the Secured Debt is paid in full and this Mortgage is released.

10. **TRANSFER OF AN INTEREST IN THE MORTGAGOR.** If Mortgagor is an entity other than a natural person (such as a corporation or other organization), Lender may demand immediate payment if (1) a beneficial interest in Mortgagor is sold or transferred; (2) there is a change in either the identity or number of members of a partnership or similar entity; or (3) there is a change in ownership of more than 25 percent of the voting stock of a corporation or similar entity. However, Lender may not demand payment in the above situations if it is prohibited by law as of the date of this Mortgage.
11. **ENTITY WARRANTIES AND REPRESENTATIONS.** If Mortgagor is an entity other than a natural person (such as a corporation or other organization), Mortgagor makes to Lender the following warranties and representations which shall be continuing as long as the Secured Debt remains outstanding:
- A. Mortgagor is an entity which is duly organized and validly existing in the Mortgagor's state of incorporation (or organization). Mortgagor is in good standing in all states in which Mortgagor transacts business. Mortgagor has the power and authority to own the Property and to carry on its business as now being conducted and, as applicable, is qualified to do so in each state in which Mortgagor operates.
 - B. The execution, delivery and performance of this Mortgage by Mortgagor and the obligation evidenced by the Evidence of Debt are within the power of Mortgagor, have been duly authorized, have received all necessary governmental approval, and will not violate any provision of law, or order of court or governmental agency.
 - C. Other than disclosed in writing Mortgagor has not changed its name within the last ten years and has not used any other trade or fictitious name. Without Lender's prior written consent, Mortgagor does not and will not use any other name and will preserve its existing name, trade names and franchises until the Secured Debt is satisfied.

12. **PROPERTY CONDITION, ALTERATIONS AND INSPECTION.** Mortgagor will keep the Property in good condition and make all repairs that are reasonably necessary. Mortgagor will give Lender prompt notice of any loss or damage to the Property. Mortgagor will keep the Property free of noxious weeds and grasses. Mortgagor will not initiate, join in or consent to any change in any private restrictive covenant, zoning ordinance or other public or private restriction limiting or defining the uses which may be made of the Property or any part of the Property, without Lender's prior written consent. Mortgagor will notify Lender of all demands, proceedings, claims, and actions against Mortgagor or any other owner made under law or regulation regarding use, ownership and occupancy of the Property. Mortgagor will comply with all legal requirements and restrictions, whether public or private, with respect to the use of the Property. Mortgagor also agrees that the nature of the occupancy and use will not change without Lender's prior written consent.

No portion of the Property will be removed, demolished or materially altered without Lender's prior written consent except that Mortgagor has the right to remove items of personal property comprising a part of the Property that become worn or obsolete, provided that such personal property is replaced with other personal property at least equal in value to the replaced personal property, free from any title retention device, security agreement or other encumbrance. Such replacement of personal property will be deemed subject to the security interest created by this Mortgage. Mortgagor shall not partition or subdivide the Property without Lender's prior written consent. Lender or Lender's agents may, at Lender's option, enter the Property at any reasonable time for the purpose of inspecting the Property. Any inspection of the Property shall be entirely for Lender's benefit and Mortgagor will in no way rely on Lender's inspection.

13. **AUTHORITY TO PERFORM.** If Mortgagor fails to perform any of Mortgagor's duties under this Mortgage, or any other mortgage, deed of trust, security agreement or other lien document that has priority over this Mortgage, Lender may, without notice, perform the duties or cause them to be performed. Mortgagor appoints Lender as attorney in fact to sign Mortgagor's name or pay any amount necessary for performance. If any construction on the Property is discontinued or not carried on in a reasonable manner, Lender may do whatever is necessary to protect Lender's security interest in the Property. This may include completing the construction.

Lender's right to perform for Mortgagor shall not create an obligation to perform, and Lender's failure to perform will not preclude Lender from exercising any of Lender's other rights under the law or this Mortgage. Any amounts paid by Lender for insuring, preserving or otherwise protecting the Property and Lender's security interest will be due on demand and will bear interest from the date of the payment until paid in full at the interest rate in effect from time to time according to the terms of the Evidence of Debt.

14. **ASSIGNMENT OF LEASES AND RENTS.** Mortgagor assigns, grants, bargains, conveys and mortgages to Lender as additional security all the right, title and interest in the following (Property).

- A. Existing or future leases, subleases, licenses, guaranties and any other written or verbal agreements for the use and occupancy of the Property, including but not limited to, any extensions, renewals, modifications or replacements (Leases).
- B. Rents, issues and profits, including but not limited to, security deposits, minimum rents, percentage rents, additional rents, common area maintenance charges, parking charges, real estate taxes, other applicable taxes, insurance premium contributions, liquidated damages following default, cancellation premiums, "loss of rents" insurance, guest receipts, revenues, royalties, proceeds, bonuses, accounts, contract rights, general intangibles, and all rights and claims which Mortgagor may have that in any way pertain to or are on account of the use or occupancy of the whole or any part of the Property (Rents).

In the event any item listed as Leases or Rents is determined to be personal property, this Assignment will also be regarded as a security agreement.

Mortgagor will promptly provide Lender with copies of the Leases and will certify these Leases are true and correct copies. The existing Leases will be provided on execution of the Assignment, and all future Leases and any other information with respect to these Leases will be provided immediately after they are executed. Mortgagor may collect, receive, enjoy and use the Rents so long as Mortgagor is not in default. Mortgagor will not collect in advance any Rents due in future lease periods, unless Mortgagor first obtains Lender's written consent. Upon default, Mortgagor will receive

(page 3 of 8)

any Rents in trust for Lender and Mortgagor will not commingle the Rents with any other funds. When Lender so directs, Mortgagor will endorse and deliver any payments of Rents from the Property to Lender. Amounts collected will be applied at Lender's discretion to the Secured Debts, the costs of managing, protecting and preserving the Property, and other necessary expenses. Mortgagor agrees that this Security Instrument is immediately effective between Mortgagor and Lender and effective as to third parties on the recording of this Assignment.

As long as this Assignment is in effect, Mortgagor warrants and represents that no default exists under the Leases, and the parties subject to the Leases have not violated any applicable law on leases, licenses and landlords and tenants. Mortgagor, at its sole cost and expense, will keep, observe and perform, and require all other parties to the Leases to comply with the Leases and any applicable law. If Mortgagor or any party to the Lease defaults or fails to observe any applicable law, Mortgagor will promptly notify Lender. If Mortgagor neglects or refuses to enforce compliance with the terms of the Leases, then Lender may, at Lender's option, enforce compliance.

Mortgagor will not sublet, modify, extend, cancel, or otherwise alter the Leases, or accept the surrender of the Property covered by the Leases (unless the Leases so require) without Lender's consent. Mortgagor will not assign, compromise, subordinate or encumber the Leases and Rents without Lender's prior written consent. Lender does not assume or become liable for the Property's maintenance, depreciation, or other losses or damages when Lender acts to manage, protect or preserve the Property, except for losses and damages due to Lender's gross negligence or intentional torts. Otherwise, Mortgagor will indemnify Lender and hold Lender harmless for all liability, loss or damage that Lender may incur when Lender opts to exercise any of its remedies against any party obligated under the Leases.

15. CONDOMINIUMS; PLANNED UNIT DEVELOPMENTS. If the Property includes a unit in a condominium or a planned unit development, Mortgagor will perform all of Mortgagor's duties under the covenants, by-laws, or regulations of the condominium or planned unit development.

16. DEFAULT. Mortgagor will be in default if any of the following occur:

- A. Any party obligated on the Secured Debt fails to make payment when due;
- B. A breach of any term or covenant in this Mortgage, any prior mortgage or any construction loan agreement, security agreement or any other document evidencing, guarantying, securing or otherwise relating to the Secured Debt;
- C. The making or furnishing of any verbal or written representation, statement or warranty to Lender that is false or incorrect in any material respect by Mortgagor or any person or entity obligated on the Secured Debt;
- D. The death, dissolution, or insolvency of, appointment of a receiver for, or application of any debtor relief law to, Mortgagor or any person or entity obligated on the Secured Debt;
- E. A good faith belief by Lender at any time that Lender is insecure with respect to any person or entity obligated on the Secured Debt or that the prospect of any payment is impaired or the value of the Property is impaired;
- F. A material adverse change in Mortgagor's business including ownership, management, and financial conditions, which Lender in its opinion believes impairs the value of the Property or repayment of the Secured Debt; or
- G. Any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in 7 C.F.R. Part 1940, Subpart G, Exhibit M.

17. REMEDIES ON DEFAULT. In some instances, federal and state law will require Lender to provide Mortgagor with notice of the right to cure, mediation notices or other notices and may establish time schedules for foreclosure actions. Subject to these limitations, if any, Lender may accelerate the Secured Debt and foreclose this Mortgage in a manner provided by law if this Mortgage is in default.

At the option of Lender, all or any part of the agreed fees and charges, accrued interest and principal shall become immediately due and payable, after giving notice if required by law, upon the occurrence of a default or anytime thereafter. In addition, Lender shall be entitled to all the remedies provided by law, the Evidence of Debt, other evidences of debt, this Mortgage and any related documents. All remedies are distinct, cumulative and not exclusive, and the Lender is entitled to all remedies provided at law or equity, whether expressly set forth or not. The acceptance by Lender of any sum in payment or partial payment on the Secured Debt after the balance is due or is accelerated or after foreclosure proceedings are filed shall not constitute a waiver of Lender's right to require full and complete cure of any existing default. By not exercising any remedy on Mortgagor's default, Lender does not waive Lender's right to later consider the event a default if it continues or happens again.

18. EXPENSES; ADVANCES ON COVENANTS; ATTORNEYS' FEES; COLLECTION COSTS. Except when prohibited by law, Mortgagor agrees to pay all of Lender's expenses if Mortgagor breaches any covenant in this Mortgage. Mortgagor will also pay on demand all of Lender's expenses incurred in collecting, insuring, preserving or protecting the Property or in any inventories, audits, inspections or other examination by Lender in respect to the Property. Mortgagor agrees to pay all costs and expenses incurred by Lender in enforcing or protecting Lender's rights and remedies under this Mortgage, including, but not limited to, attorneys' fees, court costs, and other legal expenses. Once the Secured Debt is fully and finally paid, Lender agrees to release this Mortgage and Mortgagor agrees to pay for any recordation costs. All such amounts are due on demand and will bear interest from the time of the advance at the highest rate in effect, from time to time, as provided in the Evidence of Debt and as permitted by law.

19. ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES. As used in this section, (1) "Environmental Law" means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.), all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) "Hazardous Substance" means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has

characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substances," "hazardous waste" or "hazardous substance" under any Environmental Law. Mortgagor represents, warrants and agrees that, except as previously disclosed and acknowledged in writing:

- A. No Hazardous Substance has been, is, or will be located, transported, manufactured, treated, refined, or handled by any person on, under or about the Property, except in the ordinary course of business and in strict compliance with all applicable Environmental Law.
 - B. Mortgagor has not and will not cause, contribute to, or permit the release of any Hazardous Substance on the Property.
 - C. Mortgagor will immediately notify Lender if (1) a release or threatened release of Hazardous Substance occurs on, under or about the Property or migrates or threatens to migrate from nearby property; or (2) there is a violation of any Environmental Law concerning the Property. In such an event, Mortgagor will take all necessary remedial action in accordance with Environmental Law.
 - D. Mortgagor has no knowledge of or reason to believe there is any pending or threatened investigation, claim, or proceeding of any kind relating to (1) any Hazardous Substance located on, under or about the Property; or (2) any violation by Mortgagor or any tenant of any Environmental Law. Mortgagor will immediately notify Lender in writing as soon as Mortgagor has reason to believe there is any such pending or threatened investigation, claim, or proceeding. In such an event, Lender has the right, but not the obligation, to participate in any such proceeding including the right to receive copies of any documents relating to such proceedings.
 - E. Mortgagor and every tenant have been, are and shall remain in full compliance with any applicable Environmental Law.
 - F. There are no underground storage tanks, private dumps or open wells located on or under the Property and no such tank, dump or well will be added unless Lender first consents in writing.
 - G. Mortgagor will regularly inspect the Property, monitor the activities and operations on the Property, and confirm that all permits, licenses or approvals required by any applicable Environmental Law are obtained and complied with.
 - H. Mortgagor will permit, or cause any tenant to permit, Lender or Lender's agent to enter and inspect the Property and review all records at any reasonable time to determine (1) the existence, location and nature of any Hazardous Substance on, under or about the Property; (2) the existence, location, nature, and magnitude of any Hazardous Substance that has been released on, under or about the Property; or (3) whether or not Mortgagor and any tenant are in compliance with applicable Environmental Law.
 - I. Upon Lender's request and at any time, Mortgagor agrees, at Mortgagor's expense, to engage a qualified environmental engineer to prepare an environmental audit of the Property and to submit the results of such audit to Lender. The choice of the environmental engineer who will perform such audit is subject to Lender's approval.
 - J. Lender has the right, but not the obligation, to perform any of Mortgagor's obligations under this section at Mortgagor's expense.
 - K. As a consequence of any breach of any representation, warranty or promise made in this section, (1) Mortgagor will indemnify and hold Lender and Lender's successors or assigns harmless from and against all losses, claims, demands, liabilities, damages, cleanup, response and remediation costs, penalties and expenses, including without limitation all costs of litigation and attorneys' fees, which Lender and Lender's successors or assigns may sustain; and (2) at Lender's discretion, Lender may release this Mortgage and in return Mortgagor will provide Lender with collateral of at least equal value to the Property secured by this Mortgage without prejudice to any of Lender's rights under this Mortgage.
 - L. Notwithstanding any of the language contained in this Mortgage to the contrary, the terms of this section shall survive any foreclosure or satisfaction of this Mortgage regardless of any passage of title to Lender or any disposition by Lender of any or all of the Property. Any claims and defenses to the contrary are hereby waived.
- 20. CONDEMNATION.** Mortgagor will give Lender prompt notice of any action, real or threatened, by private or public entities to purchase or take any or all of the Property, including any easements, through condemnation, eminent domain, or any other means. Mortgagor further agrees to notify Lender of any proceedings instituted for the establishment of any sewer, water, conservation, ditch, drainage, or other district relating to or binding upon the Property or any part of it. Mortgagor authorizes Lender to intervene in Mortgagor's name in any of the above described actions or claims and to collect and receive all sums resulting from the action or claim. Mortgagor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property. Such proceeds shall be considered payments and will be applied as provided in this Mortgage. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.
- 21. INSURANCE.** Mortgagor agrees to maintain insurance as follows:
- A. Mortgagor shall keep the Property insured against loss by fire, theft and other hazards and risks reasonably associated with the Property due to its type and location. Other hazards and risks may include, for example, coverage against loss due to floods or flooding. This insurance shall be maintained in the amounts and for the periods that Lender requires. What Lender requires pursuant to the preceding three sentences can change during the term of the Secured Debt. The insurance carrier providing the insurance shall be chosen by Mortgagor subject to Lender's approval, which shall not be unreasonably withheld. If Mortgagor fails to maintain the coverage described above, Lender may, at Lender's option, obtain coverage to protect Lender's rights in the Property according to the terms of this Mortgage.

All insurance policies and renewals shall be acceptable to Lender and shall include a standard "mortgage clause" and, where applicable, "lender loss payee clause." Mortgagor shall immediately notify Lender of cancellation or termination of the insurance. Lender shall have the right to hold the policies and renewals. If Lender requires, Mortgagor shall immediately give to Lender all receipts of paid premiums and renewal notices. Upon loss, Mortgagor shall give immediate notice to the insurance carrier and Lender. Lender may make proof of loss if not made immediately by Mortgagor.

(page 5 of 8)

Unless Lender and Mortgagor otherwise agree in writing, insurance proceeds shall be applied to restoration or repair of the Property damaged if the restoration or repair is economically feasible and Lender's security is not lessened. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the Secured Debt, whether or not then due, with any excess paid to Mortgagor. If Mortgagor abandons the Property, or does not answer within 30 days a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may collect the insurance proceeds. Lender may use the proceeds to repair or restore the Property or to pay the Secured Debt whether or not then due. The 30-day period will begin when the notice is given.

Unless Lender and Mortgagor otherwise agree in writing, any application of proceeds to principal shall not extend or postpone the due date of scheduled payments or change the amount of the payments. If the Property is acquired by Lender, Mortgagor's right to any insurance policies and proceeds resulting from damage to the Property before the acquisition shall pass to Lender to the extent of the Secured Debt immediately before the acquisition.

- B. Mortgagor agrees to maintain comprehensive general liability insurance naming Lender as an additional insured in an amount acceptable to Lender, insuring against claims arising from any accident or occurrence in or on the Property.
- C. Mortgagor agrees to maintain rental loss or business interruption insurance, as required by Lender, in an amount equal to at least coverage of one year's debt service, and required escrow account deposits (if agreed to separately in writing), under a form of policy acceptable to Lender.

22. NO ESCROW FOR TAXES AND INSURANCE. Unless otherwise provided in a separate agreement, Mortgagor will not be required to pay to Lender funds for taxes and insurance in escrow.

23. FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS. Mortgagor will provide to Lender upon request, any financial statement or information Lender may deem necessary. Mortgagor warrants that all financial statements and information Mortgagor provides to Lender are, or will be, accurate, correct, and complete. Mortgagor agrees to sign, deliver, and file as Lender may reasonably request any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Mortgagor's obligations under this Mortgage and Lender's lien status on the Property. If Mortgagor fails to do so, Lender may sign, deliver, and file such documents or certificates in Mortgagor's name and Mortgagor hereby irrevocably appoints Lender or Lender's agent as attorney in fact to do the things necessary to comply with this section.

24. JOINT AND INDIVIDUAL LIABILITY; CO-SIGNERS; SUCCESSORS AND ASSIGNS BOUND. All duties under this Mortgage are joint and individual. If Mortgagor signs this Mortgage but does not sign the Evidence of Debt, Mortgagor does so only to mortgage Mortgagor's interest in the Property to secure payment of the Secured Debt and Mortgagor does not agree to be personally liable on the Secured Debt. Mortgagor agrees that Lender and any party to this Mortgage may extend, modify or make any change in the terms of this Mortgage or the Evidence of Debt without Mortgagor's consent. Such a change will not release Mortgagor from the terms of this Mortgage. The duties and benefits of this Mortgage shall bind and benefit the successors and assigns of Mortgagor and Lender.

If this Mortgage secures a guaranty between Lender and Mortgagor and does not directly secure the obligation which is guaranteed, Mortgagor agrees to waive any rights that may prevent Lender from bringing any action or claim against Mortgagor or any party indebted under the obligation including, but not limited to, anti-deficiency or one-action laws.

25. APPLICABLE LAW; SEVERABILITY; INTERPRETATION. This Mortgage is governed by the laws of the jurisdiction in which Lender is located, except to the extent otherwise required by the laws of the jurisdiction where the Property is located. This Mortgage is complete and fully integrated. This Mortgage may not be amended or modified by oral agreement. Any section or clause in this Mortgage, attachments, or any agreement related to the Secured Debt that conflicts with applicable law will not be effective, unless that law expressly or impliedly permits the variations by written agreement. If any section or clause of this Mortgage cannot be enforced according to its terms, that section or clause will be severed and will not affect the enforceability of the remainder of this Mortgage. Whenever used, the singular shall include the plural and the plural the singular. The captions and headings of the sections of this Mortgage are for convenience only and are not to be used to interpret or define the terms of this Mortgage. Time is of the essence in this Mortgage.

26. NOTICE. Unless otherwise required by law, any notice shall be given by delivering it or by mailing it by first class mail to the appropriate party's address on page 1 of this Mortgage, or to any other address designated in writing. Notice to one mortgagor will be deemed to be notice to all mortgagors.

27. WAIVER OF HOMESTEAD. Except to the extent prohibited by law, Mortgagor waives all homestead exemption rights relating to the Property.

28. U.C.C. PROVISIONS. If checked, the following are applicable to, but do not limit, this Mortgage:

- Construction Loan.** This Mortgage secures an obligation incurred for the construction of an improvement on the Property.
- Fixture Filing.** Mortgagor grants to Lender a security interest in all goods that Mortgagor owns now or in the future and that are or will become fixtures related to the Property.
- Crops; Timber; Minerals; Rents, Issues and Profits.** Mortgagor grants to Lender a security interest in all crops, timber, and minerals located on the Property as well as all rents, issues, and profits of them including, but not limited to, all Conservation Reserve Program (CRP) and Payment in Kind (PIK) payments and similar governmental programs (all of which shall also be included in the term "Property").

(page 6 of 8)

- Personal Property.** Mortgagor grants to Lender a security interest in all personal property located on or connected with the Property. This security interest includes all farm products, inventory, equipment, accounts, documents, instruments, chattel paper, general intangibles, and all other items of personal property Mortgagor owns now or in the future and that are used or useful in the construction, ownership, operation, management, or maintenance of the Property. The term "personal property" specifically excludes that property described as "household goods" secured in connection with a "consumer" loan as those terms are defined in applicable federal regulations governing unfair and deceptive credit practices.
- Filing As Financing Statement.** Mortgagor agrees and acknowledges that this Mortgage also suffices as a financing statement and as such, may be filed of record as a financing statement for purposes of Article 9 of the Uniform Commercial Code. A carbon, photographic, image or other reproduction of this Mortgage is sufficient as a financing statement.

29. OTHER TERMS. If checked, the following are applicable to this Mortgage:

- Line of Credit.** The Secured Debt includes a revolving line of credit provision. Although the Secured Debt may be reduced to a zero balance, this Mortgage will remain in effect until released.
- Waiver of Appraisal Rights.** The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may, within thirty days after the sale of the mortgaged property, apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. **THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.**
- Separate Assignment.** The Mortgagor has executed or will execute a separate assignment of leases and rents. If the separate assignment of leases and rents is properly executed and recorded, then the separate assignment will supersede this Security Instrument's "Assignment of Leases and Rents" section.
- Additional Terms.**

SIGNATURES: By signing below, Mortgagor agrees to the terms and covenants contained in this Mortgage and in any attachments. Mortgagor also acknowledges receipt of a copy of this Mortgage on the date stated above on Page 1.

Actual authority was granted to the parties signing below by resolution signed and dated _____.

Entity Name: _____


Entity Name: _____



(Signature) ANTHONY R. WHITFIELD (Date) 04/23/2007 (Seal)

(Signature) _____ (Date) _____ (Seal)

Signed, Sealed and delivered in the presence of:

+ 

(Witness)



(Witness)

Refer to the Addendum which is attached and incorporated herein for additional Mortgagors, signatures and acknowledgments.

BKE 623PG749

PROBATE:

STATE OF South Carolina, COUNTY OF Charleston) ss.

Personally appeared before me the undersigned witness who, being duly sworn, deposed and said that (s)he saw the Mortgagor (and each Mortgagor if more than one) sign, seal and deliver the foregoing Mortgage and that (s)he, together with the other witness whose name appears as a witness, witnessed the execution thereof.

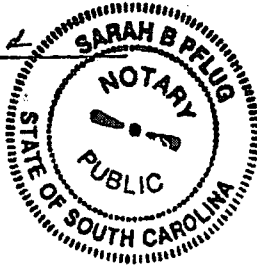
Sworn to and subscribed before me this 23rd day

of April, 2007

[Signature]
Notary Public for South Carolina

x [Signature]

My commission expires: 1-28-2012



BK E 623PG750

Exhibit "A"

ALL that certain piece, parcel or tract of land, situate, lying and being in the Town of Mt. Pleasant, Charleston County, South Carolina, shown and designated as Lot 78, on that certain plat prepared by Mark S. Busey, S.C.R.L.S., entitled "A FINAL SUBDIVISION PLAT OF PHASE 2 WHISPERING MARSH, DUNES WEST, OWNED BY JOHN WIELAND HOMES OF SOUTH CAROLINA, LOCATED IN THE TOWN OF MT. PLEASANT, CHARLESTON COUNTY, SOUTH CAROLINA" said plat being dated January 13, 2000 and duly recorded in the Charleston County RMC Office in Plat Book ED, Page 822. Reference to said plat is hereby made for a more complete description as to distances, courses, metes and bounds.

BEING the same premises as conveyed to the Mortgagor herein by deed of Dennis E. Harris and Robin J. Harris dated this date and recorded simultaneously herewith.

EXHIBIT C
Page 9 of 10

BKE 623PG751

RECORDER'S PAGE

NOTE: This page MUST remain with the original document



FILED
April 24, 2007
3:54:11 PM
BKE 623PG742
Charlie Lybrand, Register
Charleston County, SC

Filed By:

J. Stanley Claypoole, P.A.
Attorney at Law
2155 Northpark Lane
North Charleston SC 29406

Number of Pages:

10

DWI
[Signature]

DESCRIPTION	AMOUNT
	\$ 15.00
Postage	
TOTAL	\$ 15.00

DRAWER:
A - bmm

DO NOT STAMP BELOW THIS LINE

EXHIBIT C
Page 10 of 10

J. STANLEY CLAYPOOLE, PA
2155 NORTH PARK LANE
NORTH CHARLESTON, S.C. 29406

Whitfield 01-0513

BKF 623PG152

State of South Carolina

Space Above This Line For Recording Data

This document was prepared by (name, address, phone number):

Harbor National Bank
1503 Old Towne Road
Charleston, SC 29407

(843) 852-6400

ASSIGNMENT OF LEASES AND RENTS

1. **DATE AND PARTIES.** The date of this Assignment of Leases and Rents (Assignment) is 04/23/2007. The parties and their addresses are:

ASSIGNOR: ANTHONY M WHITFIELD
2141 DORCHESTER ROAD
NORTH CHARLESTON, SC 29405

Refer to the Addendum that is attached and incorporated herein for additional Assignors.

LENDER: Harbor National Bank
1503 Old Towne Road
Charleston, SC 29407

2. **ASSIGNMENT OF LEASES AND RENTS.** For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debts and Assignor's performance under this Assignment, Assignor irrevocably assigns, grants, bargains, conveys and mortgages to Lender as additional security all the right, title and interest in the following (all referred to as Property).

A. Existing or future leases, subleases, licenses, guaranties and any other written or verbal agreements for the use and occupancy of the Property, including any extensions, renewals, modifications or replacements (all referred to as Leases).

B. Rents, issues and profits (all referred to as Rents), including but not limited to security deposits, minimum rent, percentage rent, additional rent, common area maintenance charges, parking charges, real estate taxes, other applicable taxes, insurance premium contributions, liquidated damages following default, cancellation premiums, "loss of rents" insurance, guest receipts, revenues, royalties, proceeds, bonuses, accounts, contract rights, general intangibles, and all rights and claims which Assignor may have that in any way pertain to or are on account of the use or occupancy of the whole or any part of the Property.

C. The term Property as used in this Assignment shall include the following described real property:

SEE ATTACHED EXHIBIT 'A'

SOUTH CAROLINA ASSIGNMENT OF LEASES AND RENTS
(NOT FOR FNMA, FHL/FC, OR VA USE AND NOT FOR CONSUMER PURPOSES)
© 2001 Bankers Systems, Inc., St. Cloud, MN Form ASMT-RENT-SC 2/27/2002

(page 1 of 7)

EXHIBIT D
Page 1 of 9

R. 354

BKF 623PG153

The Property is located in CHARLESTON County at 1055 BLACK RUSH CIRCLE MOUNT PLEASANT, SC 29466 (Address, City, State, ZIP Code).

In the event any item listed as Leases or Rents is determined to be personal property, this Assignment will also be regarded as a security agreement.

3. **MAXIMUM OBLIGATION LIMIT.** The total principal amount secured by this Assignment at any one time will not exceed \$ 325,000.00. This limitation of amount does not include interest and other fees and charges validly made pursuant to this Assignment. Also, this limitation does not apply to advances made under the terms of this Assignment to protect Lender's security and to perform any of the covenants contained in this Assignment. Interest under the Note will be deferred, accrued or capitalized; however, Lender will not be required to defer, accrue or capitalize any interest except as provided in the Note.

4. **SECURED DEBTS.** This Assignment will secure the following Secured Debts:

A. **Specific Debts.** The following debts and all extensions, renewals, refinancings, modifications and replacements. (Include items such as borrowers' names, note amounts, interest rates, maturity dates, etc.)

One or more of the debts secured by this Assignment contains a future advance provision.

B. **All Debts.** All present and future debts from Assignor and _____

to Lender, even if this Assignment is not specifically referenced or if the future debt is unrelated to or of a different type than this debt. If more than one person signs this Assignment, each agrees that it will secure debts incurred either individually or with others who may not sign this Assignment. Nothing in this Assignment constitutes a commitment to make additional or future loans or advances. Any such commitment must be in writing. In the event that Lender fails to provide notice of the right of rescission, Lender waives any subsequent security interest in the Assignor's principal dwelling that is created by this Assignment. This Assignment will not secure any debt for which a non-possessory, non-purchase money security interest is created in "household goods" in connection with a "consumer loan," as those terms are defined by federal law governing unfair and deceptive credit practices. This Assignment will not secure any debt for which a security interest is created in "margin stock" and Lender does not obtain a "statement of purpose," as defined and required by federal law governing securities.

C. **Sums Advanced.** All sums advanced and expenses incurred by Lender under the terms of this Assignment.

5. **PAYMENTS.** Assignor agrees that all payments under the Secured Debts will be paid when due and in accordance with the terms of the Secured Debts and this Assignment.

6. **COLLECTION OF RENTS.** Assignor may collect, receive, enjoy and use the Rents so long as Assignor is not in default. Assignor will not collect in advance any Rents due in future lease periods, unless Assignor first obtains Lender's written consent. Upon default, Assignor will receive any Rents in trust for Lender and Assignor will not commingle the Rents with any other funds. When Lender so directs, Assignor will endorse and deliver any payments of Rents from the Property to Lender. Amounts collected will be applied at Lender's discretion to the Secured Debts, the costs of managing, protecting and preserving the Property, and other necessary expenses. Assignor agrees that this Assignment is immediately effective between Assignor and Lender and effective as to third parties on the recording of this Assignment.

7. **WARRANTIES AND REPRESENTATIONS.** To induce Lender to enter into the Loan, Assignor makes these representations and warranties for as long as this Assignment is in effect.

A. **Power.** Assignor is duly organized, validly existing and in good standing under the laws in the jurisdiction where Assignor was organized and is duly qualified, validly existing and in good standing in all jurisdictions in which Assignor operates or Assignor owns or leases property. Assignor has the power and authority to enter into this transaction and to carry on Assignor's business or activity as now conducted.

B. **Authority.** The execution, delivery and performance of this Assignment and the obligation evidenced by this Assignment: are within Assignor's duly authorized powers; has received all necessary governmental approval; will not violate any provision of law or order of court or governmental agency; and will not violate any agreement to which Assignor is a party or to which Assignor is or any of Assignor's property is subject.

(page 2 of 7)

EXHIBIT D
Page 2 of 9

- C. **Name and Place of Business.** Other than previously disclosed in writing to Lender, Assignor has not changed Assignor's name or principal place of business within the last ten years and has not used any other trade or fictitious name. Without Lender's prior written consent, Assignor does not and will not use any other name and will preserve Assignor's existing name, trade names and franchises.
- D. **Ownership or Lease of Property.** Assignor owns or leases all property that Assignor needs to conduct Assignor's business and activities. All of Assignor's property is free and clear of all liens, security interests, encumbrances and other adverse claims and interests, except those Lender previously agreed to in writing.
- E. **Compliance with Laws.** Assignor is not violating any laws, regulations, rules, orders, judgments or decrees applicable to Assignor or Assignor's property, except for those that Assignor is challenging in good faith through proper proceedings after providing adequate reserves to fully pay the claim and its challenge should Assignor lose.
- F. **Title.** Assignor has good title to the Leases, Rents and Property and the right to assign, grant, bargain, convey and mortgage to Lender as additional security the Leases and Rents, and no other person has any right in the Leases and Rents.
- G. **Recordation.** Assignor has recorded the Leases as required by law or as otherwise prudent for the type and use of the Property.
- H. **Default.** No default exists under the Leases, and the parties subject to the Leases have not violated any applicable law on leases, licenses and landlords and tenants. Assignor, at its sole cost and expense, will keep, observe and perform, and require all other parties to the Leases to comply with the Leases and any applicable law. If Assignor or any party to the Lease defaults or fails to observe any applicable law, Assignor will promptly notify Lender.
- I. **Lease Modification.** Assignor has not sublet, modified, extended, canceled, or otherwise altered the Leases, or accepted the surrender of the Property covered by the Leases (unless the Leases so required).
- J. **Encumbrance.** Assignor has not assigned, compromised, subordinated or encumbered the Leases and Rents.

8. **COVENANTS.** Assignor agrees to the following covenants:

- A. **Rent Abatement and Insurance.** When any Lease provides for an abatement of Rents due to fire, flood or other casualty, Assignor will insure against this risk of loss with a policy satisfactory to Lender. Assignor may choose the insurance company, subject to Lender's approval, which will not be unreasonably withheld.
- B. **Copies of Leases.** Assignor will promptly provide Lender with copies of the Leases and will certify these Leases are true and correct copies. The existing Leases will be provided on execution of the Assignment, and all future Leases and any other information with respect to these Leases will be provided immediately after they are executed.
- C. **Right to Rents.** Immediately after the execution of this Assignment, Assignor will notify all current and future tenants and others obligated under the Leases of Lender's right to the Leases and Rents, and will request that they immediately pay all future Rents directly to Lender when Assignor or Lender asks them to do so.
- D. **Accounting.** When Lender requests, Assignor will provide to Lender an accounting of Rents, prepared in a form acceptable to Lender, subject to generally accepted accounting principles and certified by Assignor or Assignor's accountant to be current, accurate and complete as of the date requested by Lender.
- E. **Lease Modification.** Assignor will not sublet, modify, extend, cancel, or otherwise alter the Leases, or accept the surrender of the Property covered by the Leases (unless the Leases so required) without Lender's written consent.
- F. **Encumbrance.** Assignor will not assign, compromise, subordinate or encumber the Leases and Rents without Lender's prior written consent.
- G. **Future Leases.** Assignor will not enter into any future Leases without prior written consent from Lender. Assignor will execute and deliver such further assurances and assignments as to these future Leases as Lender requires from time to time.
- H. **Personal Property.** Assignor will not sell or remove any personal property on the Property, unless Assignor replaces this personal property with like kind for the same or better value.
- I. **Prosecution and Defense of Claims.** Assignor will appear in and prosecute its claims or defend its title to the Leases and Rents against any claims that would impair Assignor's interest under this Assignment and, on Lender's request, Assignor will also appear in any action or proceeding on behalf of Lender. Assignor agrees to assign to Lender, as requested by Lender, any right, claims or defenses which Assignor may have against parties who supply labor or materials to improve or maintain the leaseholds subject to the Leases and/or the Property.
- J. **Liability and Indemnification.** Lender does not assume or become liable for the Property's maintenance, depreciation, or other losses or damages when Lender acts to manage, protect or preserve the Property, except for losses or damages due to Lender's gross negligence or intentional torts to the extent permitted by law. Otherwise, Assignor will indemnify Lender and hold Lender harmless for all liability, loss or damage that Lender may incur when Lender opts to exercise any of its remedies against any party obligated under the Leases.
- K. **Leasehold Estate.** Assignor will not cause or permit the leasehold estate under the Leases to merge with Assignor's reversionary interest, and agree that the Leases shall remain in full force and effect regardless of any merger of the Assignor's interests and of any merger of the interests of Assignor and any party obligated under the Leases.
- L. **Insolvency.** Lender will be the creditor of each tenant and of anyone else obligated under the Leases who is subject to an assignment for the benefit of creditors, an insolvency, a dissolution or a receivership proceeding, or a bankruptcy.

(page 3 of 7)

EXPENS D
Page 3 of 9

9. **TRANSFER OF AN INTEREST IN THE ASSIGNOR.** If Assignor is an entity other than a natural person (such as a corporation or other organization), Lender may demand immediate payment if:
- A. A beneficial interest in Assignor is sold or transferred.
 - B. There is a change in either the identity or number of members of a partnership or similar entity.
 - C. There is a change in ownership of more than 25 percent of the voting stock of a corporation or similar entity.
- However, Lender may not demand payment in the above situations if it is prohibited by law as of the date of this Assignment.
10. **DEFAULT.** Assignor will be in default if any of the following occur with regard to the Secured Debts that are secured by this Assignment:
- A. **Payments.** Assignor fails to make a payment in full when due.
 - B. **Insolvency or Bankruptcy.** Assignor makes an assignment for the benefit of creditors or becomes insolvent, either because Assignor's liabilities exceed Assignor's assets or Assignor is unable to pay Assignor's debts as they become due; or Assignor petitions for protection under federal, state or local bankruptcy, insolvency or debtor relief laws, or is the subject of a petition or action under such laws and fails to have the petition or action dismissed within a reasonable period of time not to exceed 80 days.
 - C. **Death or Incompetency.** If Assignor is an individual, Assignor dies or is declared legally incompetent.
 - D. **Business Termination.** If Assignor is not an individual, Assignor merges, dissolves, reorganizes or ends its business or existence, or a partner or majority owner dies or is declared legally incompetent.
 - E. **Failure to Perform.** Assignor fails to perform any condition or to keep any promise or covenant of this Assignment, any other document evidencing or pertaining to the Loan, or any other debt or agreement Assignor has with Lender.
 - F. **Misrepresentation.** Assignor makes any verbal or written statement or provides any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.
 - G. **Property Transfer.** Assignor transfers all or a substantial part of Assignor's money or property.
 - H. **Property Value.** The value of the Property declines or is impaired.
 - I. **Name Change.** Assignor changes Assignor's name or assumes an additional name without notifying Lender before making such a change.
 - J. **Material Change.** Without first notifying Lender, there is a material change in Assignor's business, including ownership, management, and financial conditions.
 - K. **Insecurity.** Lender reasonably believes that Lender is insecure.
11. **REMEDIES.** After Assignor defaults, and after Lender gives any legally required notice and opportunity to cure the default, Lender may at Lender's option do any one or more of the following:
- A. **Acceleration.** Lender may make all or any part of the amount owing by the terms of the Secured Debts immediately due.
 - B. **Additional Security.** Lender may demand additional security or additional parties to be obligated to pay the Secured Debts.
 - C. **Sources.** Lender may use any and all remedies Lender has under the state law where the Property is located or federal law or in any instrument evidencing or pertaining to the Secured Debts.
 - D. **Insurance Benefits.** Lender may make a claim for any and all insurance benefits or refunds that may be available on Assignor's default.
 - E. **Payments Made On Assignor's Behalf.** Amounts advanced on Assignor's behalf will be immediately due and may be added to the Secured Debts.
 - F. **Rents.** Lender may terminate Assignor's right to collect Rents and directly collect and retain Rents in Lender's name without taking possession of the Property and to demand, collect, receive, and sue for the Rents, giving proper receipts and releases. In addition, after deducting all reasonable expenses of collection from any collected and retained Rents, Lender may apply the balance as provided for by the Secured Debts.
 - G. **Entry.** Lender may enter, take possession, manage and operate all or any part of the Property; make, modify, enforce or cancel or accept the surrender of any Leases; obtain or evict any tenants and licensees; increase or reduce Rents; decorate, clean and make repairs or do any other act or incur any other cost Lender deems proper to protect the Property as fully as Assignor could do. Any funds collected from the operation of the Property may be applied in such order as Lender may deem proper, including, but not limited to, payment of the following: operating expenses, management, brokerage, attorneys' and accountants' fees, the Secured Debts, and toward the maintenance of reserves for repair or replacement. Lender may take such action without regard to the adequacy of the security, with or without any action or proceeding, through any person or agent, or receiver to be appointed by a court, and irrespective of Assignor's possession. The collection and application of the Rents or the entry upon and taking possession of the Property as set out in this section shall not cure or waive any notice of default under the Secured Debts, this Assignment, or invalidate any act pursuant to such notice. The enforcement of such remedy by Lender, once exercised, shall continue for so long as Lender shall elect, notwithstanding that such collection and application of Rents may have cured the original default.

(page 4 of 7)

- H. **Waiver.** Except as otherwise required by law, by choosing any one or more of these remedies you do not give up any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.
12. **APPOINTMENT OF A RECEIVER.** On or after an Assignor's default, Assignor agrees to Lender making an application to the court for an appointment of a receiver for the benefit of Lender to take possession of the Property and the Leases, with the power to receive, collect and apply the Rents. Any Rents collected will be applied as the court authorizes to pay taxes, to provide insurance, to make repairs and to pay costs or any other expenses relating to the Property, the Leases and Rents, and any remaining sums shall be applied to the Secured Debts. Assignor agrees that this appointment of a receiver may be without giving bond, without reference to the then-existing value of the Property, and without regard to the insolvency of any person liable for any of the Secured Debts.
13. **COLLECTION EXPENSES AND ATTORNEYS' FEES.** To the extent permitted by law, Assignor agrees to pay all expenses of collection, enforcement or protection of Lender's rights and remedies under this Assignment. Unless the applicable law that governs this Assignment is North Dakota, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. These expenses are due and payable immediately. These expenses will bear interest from the date of payment until paid in full at the contract interest rate then in effect for the Loan. To the extent permitted by the United States Bankruptcy Code, Assignor agrees to pay the reasonable attorneys' fees Lender incurs to collect this Assignment as awarded by any court exercising jurisdiction under the Bankruptcy Code.
14. **ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES.** As used in this section, (1) Environmental Law means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.), all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) Hazardous Substance means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substances," "hazardous waste," "hazardous substance," or "regulated substances" under any Environmental Law.
- Assignor represents, warrants and agrees that:
- A. Except as previously disclosed and acknowledged in writing to Lender, no Hazardous Substance has been, is, or will be located, transported, manufactured, treated, refined, or handled by any person on, under or about the Property, except in the ordinary course of business and in strict compliance with all applicable Environmental Law.
 - B. Except as previously disclosed and acknowledged in writing to Lender, Assignor has not and will not cause, contribute to, or permit the release of any Hazardous Substance on the Property.
 - C. Assignor will immediately notify Lender if (1) a release or threatened release of Hazardous Substance occurs on, under or about the Property or migrates or threatens to migrate from nearby property; or (2) there is a violation of any Environmental Law concerning the Property. In such an event, Assignor will take all necessary remedial action in accordance with Environmental Law.
 - D. Except as previously disclosed and acknowledged in writing to Lender, Assignor has no knowledge of or reason to believe there is any pending or threatened investigation, claim, or proceeding of any kind relating to (1) any Hazardous Substance located on, under or about the Property; or (2) any violation by Assignor or any tenant of any Environmental Law. Assignor will immediately notify Lender in writing as soon as Assignor has reason to believe there is any such pending or threatened investigation, claim, or proceeding. In such an event, Lender has the right, but not the obligation, to participate in any such proceeding including the right to receive copies of any documents relating to such proceedings.
 - E. Except as previously disclosed and acknowledged in writing to Lender, Assignor and every tenant have been, are and will remain in full compliance with any applicable Environmental Law.
 - F. Except as previously disclosed and acknowledged in writing to Lender, there are no underground storage tanks, private dumps or open wells located on or under the Property and no such tank, dump or well will be added unless Lender first consents in writing.
 - G. Assignor will regularly inspect the Property, monitor the activities and operations on the Property, and confirm that all permits, licenses or approvals required by any applicable Environmental Law are obtained and complied with.
 - H. Assignor will permit, or cause any tenant to permit, Lender or Lender's agent to enter and inspect the Property and review all records at any reasonable time to determine (1) the existence, location and nature of any Hazardous Substance on, under or about the Property; (2) the existence, location, nature, and magnitude of any Hazardous Substance that has been released on, under or about the Property; or (3) whether or not Assignor and any tenant are in compliance with applicable Environmental Law.

(page 5 of 7)

EXHIBIT D
e 5 of 2

- I. Upon Lender's request and at any time, Assignor agrees, at Assignor's expense, to engage a qualified environmental engineer to prepare an environmental audit of the Property and to submit the results of such audit to Lender. The choice of the environmental engineer who will perform such audit is subject to Lender's approval.
 - J. Lender has the right, but not the obligation, to perform any of Assignor's obligations under this section at Assignor's expense.
 - K. As a consequence of any breach of any representation, warranty or promise made in this section, (1) Assignor will indemnify and hold Lender and Lender's successors or assigns harmless from and against all losses, claims, demands, liabilities, damages, cleanup, response and remediation costs, penalties and expenses to the extent permitted by law, including without limitation all costs of litigation and attorneys' fees, which Lender and Lender's successors or assigns may sustain; and (2) at Lender's discretion, Lender may release this Assignment and in return Assignor will provide Lender with collateral of at least equal value to the Property secured by this Assignment without prejudice to any of Lender's rights under this Assignment.
 - L. Notwithstanding any of the language contained in this Assignment to the contrary, the terms of this section will survive any foreclosure or satisfaction of this Assignment regardless of any passage of title to Lender or any disposition by Lender of any or all of the Property. Any claims and defenses to the contrary are hereby waived.
15. **TERM.** This Assignment will remain in full force and effect until the Secured Debts are paid or otherwise discharged and Lender is no longer obligated to advance funds under any loan or credit agreement which is a part of the Secured Debts. If any or all payments of the Secured Debts are subsequently invalidated, declared void or voidable, or set aside and are required to be repaid to a trustee, custodian, receiver or any other party under any bankruptcy act or other state or federal law, then the Secured Debts will be revived and will continue in full force and effect as if this payment had not been made.
16. **CO-SIGNERS.** If Assignor signs this Assignment but does not sign the Secured Debts, Assignor does so only to assign Assignor's interest in the Property to secure payment of the Secured Debts and Assignor does not agree to be personally liable on the Secured Debts. If this Assignment secures a guaranty between Lender and Assignor, Assignor agrees to waive any rights that may prevent Lender from bringing any action or claim against Assignor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or one-action laws.
17. **WAIVERS.** Except to the extent prohibited by law, Assignor waives all homestead exemption rights relating to the Property.
18. **U.C.C. PROVISIONS.**
- Construction Loan.** This Assignment secures an obligation incurred for the construction of an improvement on the Property.
19. **OTHER TERMS.** If checked, the following are applicable to this Assignment:
- Line of Credit.** The Secured Debts include a revolving line of credit provision. Although the Secured Debts may be reduced to a zero balance, this Assignment will remain in effect until the Secured Debts and all underlying agreements have been terminated in writing by Lender.
 - Additional Terms.**
20. **APPLICABLE LAW.** This Assignment is governed by the laws of South Carolina, except to the extent otherwise required by the laws of the jurisdiction where the Property is located, and the United States of America.
21. **JOINT AND INDIVIDUAL LIABILITY AND SUCCESSORS.** Each Assignor's obligations under this Assignment are independent of the obligations of any other Assignor. Lender may sue each Assignor individually or together with any other Assignor. Lender may release any part of the Property and Assignor will still be obligated under this Assignment for the remaining Property. The duties and benefits of this Assignment will bind and benefit the successors and assigns of Lender and Assignor.
22. **AMENDMENT, INTEGRATION AND SEVERABILITY.** This Assignment may not be amended or modified by oral agreement. No amendment or modification of this Assignment is effective unless made in writing and executed by Assignor and Lender. This Assignment is the complete and final expression of the agreement. If any provision of this

(page 6 of 7)

Assignment is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

23. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Assignment.

24. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail and by registered or certified mail, return receipt requested, to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one party will be deemed to be notice to all parties. Assignor will inform Lender in writing of any change in Assignor's name, address or other application information. Assignor will provide Lender any financial statements or information Lender requests. All financial statements and information Assignor gives Lender will be correct and complete. Assignor agrees to sign, deliver, and file any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Assignor's obligations under this Assignment and to confirm Lender's lien status on any Property. Time is of the essence.

25. SIGNATURES. By signing under seal, Assignor agrees to the terms and covenants contained in this Assignment. Assignor also acknowledges receipt of a copy of this Assignment.

(Entity Name)

[Signature] (Seal)
(Signature) ANTHONY M WHITFIELD

(Seal) (Signature)

Signed, sealed and delivered in the presence of:

x [Signature]
(Witness)

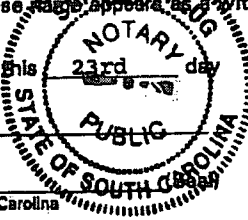
[Signature]
(Witness)

PROBATE: STATE OF South Carolina, COUNTY OF Charleston) ss.

Personally appeared before me the undersigned witness who, being duly sworn, deposed and said that (s)he saw the Assignor (and each Assignor if more than one) sign, seal and deliver the foregoing Assignment and that (s)he, together with the other witness whose name appears as a witness, witnessed the execution thereof.

Sworn to and subscribed before me this 23rd day of April, 2007

[Signature]
Notary Public for South Carolina



x [Signature]

My commission expires: 1-28-2014

Exhibit "A"

ALL that certain piece, parcel or tract of land, situate, lying and being in the Town of Mt. Pleasant, Charleston County, South Carolina, shown and designated as Lot 78, on that certain plat prepared by Mark S. Busey, S.C.R.L.S., entitled "A FINAL SUBDIVISION PLAT OF PHASE 2 WHISPERING MARSH, DUNES WEST, OWNED BY JOHN WIELAND HOMES OF SOUTH CAROLINA, LOCATED IN THE TOWN OF MT. PLEASANT, CHARLESTON COUNTY, SOUTH CAROLINA" said plat being dated January 13, 2000 and duly recorded in the Charleston County RMC Office in Plat Book ED, Page 822. Reference to said plat is hereby made for a more complete description as to distances, courses, metes and bounds.

BEING the same premises as conveyed to the Mortgagor herein by deed of Dennis E. Harris and Robin J. Harris dated this date and recorded simultaneously herewith.

BKF 623PG160

RECORDER'S PAGE

NOTE: This page MUST remain with the original document



FILED

April 24, 2007

3:54:44 PM

BKF 623PG152

Charlie Lybrand, Register
Charleston County, SC

Filed By:

J. Stanley Claypoole, P.A.
Attorney at Law
2155 Northpark Lane
North Charleston SC 29406

Number of Pages:

9

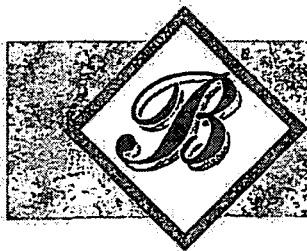
DESCRIPTION	AMOUNT
MISC/ASGT	\$ 14.00
Postage	
TOTAL	\$ 14.00

DRAWER:

A - bmm

DO NOT STAMP BELOW THIS LINE

D
Page 9 of 9



BERNSTEIN & BERNSTEIN, P.A.
ATTORNEYS AT LAW

P.O. Box 20519 • CHARLESTON, SC 29413-0519
5418 RIVERS AVENUE • NORTH CHARLESTON, SC 29406-6129
PHONE (843) 529-1111 • FAX (843) 529-0035

CHARLES S. BERNSTEIN, ESQUIRE
cbernstein@bernsteinpa.com

September 5, 2012

ROBERT A. BERNSTEIN, ESQUIRE
rbernstein@bernsteinpa.com

The Honorable Julie J. Armstrong
CHARLESTON COUNTY CLERK OF COURT
100 Broad Street, Suite 106
Charleston, SC 29401

Re: Harbor National Bank
v. Anthony M. Whitfield and Cindy
Whitfield

Dear Ms. Armstrong:

Enclosed herein for filing please find a Civil Coversheet, Lis Pendens, Summons and Complaint, along with our firm's check to cover the filing fee. Please file the originals with your office, and return a clocked copy to us in the envelope enclosed herein for your convenience. We appreciate your assistance, and should you have any questions, please do not hesitate to call or write at your convenience. With kind regards, we are

Yours Very Truly,

BERNSTEIN & BERNSTEIN, P.A.

Robert A. Bernstein

Robert A. Bernstein

cc: Mr. Ryan Werking

STATE OF SOUTH CAROLINA **FILED** IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON 2014 SEP 10 AM 11:54 FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2012-CP-10-5887

HARBOR NATIONAL BANK, JULIE J. ARMSTRONG
CLERK OF COURT

Plaintiff

v.

ANTHONY M. WHITFIELD AND CINDY
WHITFIELD,

Defendants.

REPLY TO THIRD AMENDED ANSWER,
AFFIRMATIVE DEFENSES, AND
COUNTERCLAIMS

The Plaintiff, replying to the allegations of the Third Amended Answer, Affirmative Defenses, and Counterclaims, would show unto this Court:

1. Each and every allegation contained in said Third Amended Answer, Affirmative Defenses and Counterclaims not hereinafter specifically admitted is denied.
2. The allegations of Paragraphs One (1) through Nineteen (19) of the Answer, Affirmative Defenses and Counterclaims fail to make allegations against the Plaintiff requiring a response; to the extent they make such allegations, the same are hereby denied.
3. Responding to the allegations of Paragraph Twenty (20) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff admits that the Defendant applied to the Plaintiff for a credit commitment to purchase and refinance commercial real estate in the furtherance of his business in the Berkeley, Dorchester and Charleston County areas, and that the Defendant had financed other transactions with Southtrust Bank; the remaining allegations of Paragraph Twenty (20) of the Third Amended Answer, Affirmative Defenses and Counterclaims are denied.
4. The allegations of Paragraphs Twenty-One (21) and Twenty-Two (22) of the

Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

5. Responding to the allegations of Paragraph Twenty-Three (23) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff admits that it provided the attached Exhibit "A" to the Defendant setting forth the terms and conditions upon which it would agree to extend credit to the Defendant, the terms and conditions of which are explicitly set forth in the said correspondence, and the Plaintiff craves reference to the said correspondence to determine the terms and conditions of such commitment; any allegations contained in Paragraph Twenty-Three (23) of the Third Amended Answer, Affirmative Defenses and Counterclaims not hereinafter specifically admitted are denied.

6. The allegations of Paragraph Twenty-Four (24) of the Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

7. Responding to the allegations of Paragraph Twenty-Five (25) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff admits that the Defendant chose a fixed interest rate as set forth in the applicable Note; any allegations contained in Paragraph Twenty-Five (25) of the Third Amended Answer, Affirmative Defenses and Counterclaims in addition to or other than this specific admission are denied.

8. The allegations of Paragraph Twenty-Six (26) of the Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

9. Responding to the allegations of Paragraph Twenty-Seven (27) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff admits that the Defendant made payments under the terms of and pursuant to the Promissory Note; any allegations contained in Paragraph Twenty-Seven (27) of the Third Amended Answer,

Affirmative Defenses and Counterclaims in addition to or other than this specific admission are denied.

10. Responding to the allegations of Paragraph Twenty-Eight (28) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff admits that it requested copies of the Defendant's tax returns pursuant to the terms of line of credit and the note and mortgage, that Defendant requested to be provided with a lower interest rate, and that the Plaintiff was considering terminating the loans due to the Defendant's failure to provide necessary documentation; any allegations contained in Paragraph Twenty-Eight (28) of the Third Amended Answer, Affirmative Defenses and Counterclaims in addition to or other than this specific admission are denied.

11. Responding to the allegations of Paragraph Twenty-Nine (29) of the Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff admits that it wrote to the Defendant again advising of the need for sufficient financial information, including tax returns, to evaluate the proposal to renew loans with the Defendant, that the Defendant thereafter advised of the completion of the tax returns, that the Defendant requested modified terms for the loans, and that Angela Bell communicated with a senior credit analyst regarding the successful receipt of required documentation from the Defendant; any allegations contained in Paragraph Twenty-Nine (29) of the Amended Answer, Affirmative Defenses and Counterclaims in addition to or other than this specific admission are denied.

12. Responding to the allegations of Paragraph Thirty (30) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff admits the Notes secured by mortgages on 732 Gahagan and 110 Mepkin matured by their terms, that in a meeting with the

Defendant that an agreement was reached upon the terms and conditions upon which certain loans could be renewed, that renewal terms included the terms contained in a June 26, 2012 letter to Mr. Whitfield; any allegations contained in Paragraph Thirty (30) of the Third Amended Answer, Affirmative Defenses and Counterclaims in addition to or other than this specific admission are denied.

13. Responding to the allegations of Paragraph Thirty-One (31) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff admits the Scott Warren issued a terms letter to Mr. Whitfield setting forth the terms and conditions under which it would agree to renew the loans in existence, and that the letter is attached to the Third Amended Answer, Affirmative Defenses and Counterclaims as Exhibit "B"; any allegations contained in Paragraph Thirty-One (31) of the Third Amended Answer, Affirmative Defenses and Counterclaims in addition to or other than this specific admission are denied.

14. Responding to the allegations of Paragraph Thirty-Two (32) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff admits the Plaintiff attended a scheduled closing at the office of attorney Mark Weeks, that it was discovered that Defendant had transferred an interest in the Black Rush property to his ex-wife, Cindy Whitfield, and that it was required as a condition of the closing either that Mrs. Whitfield sign the new mortgage or that a title endorsement be obtained; any allegations contained in Paragraph Thirty-Two (32) of the Third Amended Answer, Affirmative Defenses and Counterclaims in addition to or other than this specific admission are denied.

15. Responding to the allegations of Paragraph Thirty-Three (33) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff admits the closing of

the new loans never took place; any allegations contained in Paragraph Thirty-Three (33) of the Third Amended Answer, Affirmative Defenses and Counterclaims in addition to or other than this specific admission are denied.

FOR A FIRST DEFENSE TO THE FIRST COUNTERCLAIM
(DENIAL)

16. Responding to the allegations of Paragraph Thirty-Four (34) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Fifteen (15) of this Reply as if repeated herein verbatim.

17. The allegations of Paragraphs Thirty-Five (35), Thirty-Six (36), and Thirty-Seven (37) of the Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

FOR A FIRST DEFENSE TO THE SECOND COUNTERCLAIM
(DENIAL)

18. Responding to the allegations of Paragraph Thirty-Eight (38) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Seventeen (17) of this Reply as if repeated herein verbatim.

19. Responding to the allegations of Paragraph Thirty-Nine (39), the Plaintiff admits that it proposed to finance the line of credit through either a fixed rate or floating rate to be chosen by the Defendant, and that it stated its intention to agree to refinance the book of loans the Defendant had with the Plaintiff provided that the Defendant met the terms and conditions imposed upon the proposed transaction; the remaining allegations of Paragraph Thirty-Nine (39) of the Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

20. The allegations of Paragraph Forty (40) of the Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

FOR A FIRST DEFENSE TO THE THIRD COUNTERCLAIM
(DENIAL)

21. Responding to the allegations of Paragraph Forty-One (41) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Twenty (20) of this Reply as if repeated herein verbatim.

22. The allegations of Paragraphs Forty-Two (42), Forty-Three (43), Forty-Four (44), Forty-Five (45), Forty-Six (46) and Forty-Seven (47) of the Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

FOR A FIRST DEFENSE TO THE FOURTH COUNTERCLAIM
(DENIAL)

23. Responding to the allegations of Paragraph Forty-Eight (48) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Twenty-Two (22) of this Reply as if repeated herein verbatim.

24. Responding to the allegations of Paragraphs Forty-Nine (49) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff admits that it proposed to finance the line of credit through either a fixed rate or floating rate to be chosen by the Defendant, and that it stated its intention to agree to refinance the book of loans the Defendant had with the Plaintiff provided that the Defendant met the terms and conditions imposed upon the proposed transaction; the remaining allegations of Paragraph Forty-Nine (49) of the Third

Amended Answer, Affirmative Defenses and Counterclaims are denied.

25. The allegations of Paragraphs Fifty (50) and Fifty-One (51) of the Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

FOR A FIRST DEFENSE TO THE FIFTH COUNTERCLAIM
(DENIAL)

26. Responding to the allegations of Paragraph Fifty-Two (52) of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Twenty-Five (25) of this Reply as if repeated herein verbatim.

27. The allegations of Paragraphs Fifty-Three (53), Fifty-Four (54), Fifty-Five (55) and Fifty-Six (56) of the Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

FOR A FIRST DEFENSE TO THE SIXTH COUNTERCLAIM
(DENIAL)

28. Responding to the allegations of Paragraph 57 (57) of the Third Amended Answer, Affirmative Defenses, and Counterclaims, the Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Twenty-Seven (27) of this Reply as if repeated herein verbatim.

29. The allegations of Paragraphs Fifty-Eight (58), Fifty-Nine (59) and Sixty (60) of the Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

FOR A FIRST DEFENSE TO THE SEVENTH COUNTERCLAIM
(DENIAL)

30. Responding to the allegations of Paragraph Sixty-One (61) of the Third Amended

Answer, Affirmative Defenses, and Counterclaims, the Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Twenty-Nine (29) of this Reply as if repeated herein verbatim.

31. The allegations of Paragraphs Sixty-Two (62), Sixty-Three (63), and Sixty-Four (64) of the Third Amended Answer, Affirmative Defenses and Counterclaims are denied.

FOR A SECOND DEFENSE
(STATUTES OF LIMITATIONS)

32. Further responding to the allegations of all Counterclaims, the Plaintiff would show that such claims are barred by the applicable statutes of limitations, for which reason the Defendant cannot recover in any sum whatsoever.

FOR A THIRD DEFENSE
(FAILURE TO STATE A CLAIM)

33. Further responding to the allegations of all Counterclaims, the Plaintiff would show that such Counterclaims fail to state claims upon which relief can be granted, for which reason the Defendant cannot recover in any sum whatsoever.

FOR A FOURTH DEFENSE
(LACK OF RELIANCE)

34. Further responding to the allegations of the Second and Third Counterclaims, the Plaintiff would show that the Defendant failed to rely or have any right to rely upon the alleged representations other than as contained in the written contracts between the parties, for which reason the Defendant cannot recover in any sum whatsoever.

FOR A FIFTH DEFENSE
(REGULATED TRANSACTIONS)

35. Further responding to the allegations of the Fourth Counterclaim, the Plaintiff

would show that the actions and activities of the Plaintiff are regulated by the state and federal government, that the performance of said actions were in compliance with said state and federal regulations, and thus that the transactions are exempt from S.C. Code Ann. §39-5-10 et seq.

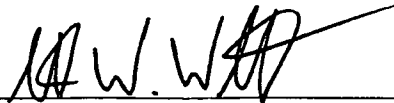
FOR A SIXTH DEFENSE
(OTHER CLAIM ALREADY PENDING)

36. Further responding to the allegations of the Counterclaims, the Plaintiff would show that another action is pending between the same parties for the same counterclaims, for which reason the said counterclaims are improper and should be dismissed pursuant to Rule 12(b)(8), SCRPC.

FOR A SEVENTH DEFENSE
(STATUTE OF FRAUDS)

37. Further responding to the allegations of the Counterclaims, the Plaintiff would show that Defendant's claim fails to comply with the statute of frauds, S.C. Code § 32-3-10, and the lender liability statute of frauds, S.C. Code § 37-10-107.

WHEREFORE, having fully responded to the allegations of the Third Amended Answer, Affirmative Defenses and Counterclaims, the Plaintiff prays that the same be dismissed, and that this Court enter judgment for the relief sought in the Complaint.



Brian C. Duffy
Seth W. Whitaker
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, South Carolina 29401
(843) 720-2044 (phone)
(843) 720-2047 (fax)

and

Robert A. Bernstein
BERNSTEIN & BERNSTEIN, P.A.
Post Office Box 20519
Charleston, SC 29413-0519
(843) 529-1111
(843) 529-0035 (fax)
Attorneys for the Plaintiff

September 10, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2012-CP-10-5887

HARBOR NATIONAL BANK,

Plaintiff,

v.

ANTHONY M. WHITFIELD AND CINDY
WHITFIELD,

Defendants.

CERTIFICATE OF SERVICE

The undersigned, an employee of Duffy & Young, LLC, does hereby certify that on September 10, 2014, he/she served a copy of the Reply of the Plaintiff to the Third Amended Answer, Affirmative Defenses and Counterclaims upon Anthony M. Whitfield by placing a copy of the same in the United States Mail, postage prepaid, and addressed to the following:

Brent S. Halversen, Esquire
HALVERSEN & ASSOCIATES, LLC
171 Church Street, Suite 330
Charleston, SC 29401

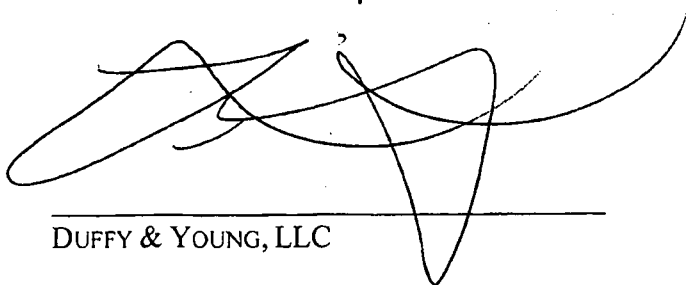
Daniel S. Slotchiver, Esq.
Andrew J. McCumber, Esq.
SLOTCHIVER & SLOTCHIVER, LLP
44 State Street
Charleston, SC 29401

BY _____

JULIE J. ARMSTRONG
CLERK OF COURT

2014 SEP 10 AM 11:54

FILED



DUFFY & YOUNG, LLC

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

HARBOR NATIONAL BANK,)
)
Plaintiff,)

vs.)

ANTHONY WHITFIELD, CINDY)
WHITFIELD AND DAVID SWANSON)
)
Defendants.)

IN THE COURT OF COMMON PLEAS)
)
CASE NO. 2012-CP-10-5887)

DEFENDANT'S FIFTH AMENDED
ANSWER, AFFIRMATIVE DEFENSES,
CROSSCLAIM AND COUNTERCLAIMS

(Breach of Contract, Breach of Contract
Accompanied by Fraudulent Act,
Negligent Misrepresentation, Fraud in the
Inducement, Unfair Trade Practices,
Promissory Estoppel, Tortious
Interference with Prospective Contractual
Relations, Abuse of Process, Civil
Conspiracy, and Equitable Indemnity)

(Jury Trial Demanded)

TO: ROBERT A. BERNSTEIN, BRIAN DUFFY, AND SETH WHITAKER, ATTORNEYS
FOR PLAINTIFF

Comes now Defendant, Anthony Whitfield (hereinafter, "Mr. Whitfield") and
responds to the allegations of Plaintiff's Complaint as follows:

1. Mr. Whitfield admits the allegations of Paragraphs 2, 3, 4, 10 and 19.
2. Mr. Whitfield denies, the allegations of Paragraphs 15 and 27 to the
extent such Paragraphs reference previous allegations which are herein
denied.
3. Mr. Whitfield admits an assignment was made but denies the event
of default as alleged in Paragraph 20, 28, 25, 26 and 27.

FILED
JAN - 8 PM 2:36
JULIE J. ARNSTRONG
CLERK OF COURT

4. Mr. Whitfield denies Paragraphs 1, 5, 6, 7, 8, 9, 11, 12, 13, 14, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 28 and 29.

5. Mr. Whitfield denies each and every allegation not specifically enumerated herein.

FIRST AFFIRMATIVE DEFENSE

6. Plaintiff's claims to foreclose on the 2007 Mortgage should be waived, estopped, barred, and/or dismissed as Defendant made all payments as was required under the Note and was told by Plaintiff numerous times that the maturity date as referenced in the Note would be automatically extended.

SECOND AFFIRMATIVE DEFENSE

7. Plaintiff's claims in equity are barred by the doctrine of unclean hands and equitable estoppel.

THIRD AFFIRMATIVE DEFENSE

8. Plaintiff's action should be barred by the doctrines of unconscionability, waiver, fraud and duress.

FOURTH AFFIRMATIVE DEFENSE

9. Plaintiff has failed to comply with the mandatory provisions of the South Carolina Supreme Court Administrative Order 2011-05-02-01. As such, this matter should be stayed or dismissed.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's Failure to Provide Required Truth in Lending Disclosures; Set-Off

10. Defendants, whose ownership interest in the residential property being

foreclosed upon with address of 1055 Black Rush Circle, Mount Pleasant, SC 29466 (the "Subject Property") is subject to the security interest created by the Plaintiff's 2007 mortgage, elect to rescind the mortgage and note being foreclosed upon (the "2007 Loan").

Plaintiff violated TILA and Regulation Z by, inter alia:

- a. failing to provide interest rate disclosures at the 2007 closing;
- b. failing to provide material disclosures in a form Defendants could keep prior to consummation of the 2007 closing;
- c. failing to provide Notices of Right to Cancel;
- d. failing to provide disclosures as part of the 2007 Loan.

11. Plaintiff was obligated to provide the information set forth in the preceding Paragraph as Plaintiff knew, at all material times, that the subject property was residential and was Defendant Cindy Whitfield's primary residence.

12. Plaintiff's violations of the Truth-in-Lending Act give rise to a three year continuing right of rescission on the part of Defendants.

13. Defendants hereby elect to rescind the 2007 loan transaction with Plaintiff, pursuant to the continuing right of rescission.

14. When a consumer elects to rescind pursuant to the Truth-in-Lending Act, any security interest taken in connection with the transaction becomes void. 15 U.S.C. § 1635(b).

15. When a consumer elects to rescind pursuant to the Truth-in-Lending Act, the consumer is not liable for any finance or other charge. 15 U.S.C. § 1635(b).

16. The 2007 mortgage that is the subject of this foreclosure action was taken

in connection with the transaction that Defendant has elected to rescind.

17. Defendant has the ability to tender repayment of their rescission obligations through procurement of a buyer of the home.

18. Since the mortgage is void, the foreclosure action must be dismissed.

SIXTH AFFIRMATIVE DEFENSE

19. Upon information and belief, the subject note attempted to be foreclosed upon is not the original note and therefore Plaintiff does not have standing pursue this foreclosure action.

COUNTERCLAIMS

Factual Allegations

20. In 2006, Mr. Whitfield approached Charlie Rivers (hereinafter, "Mr. Rivers") of Harbor National Bank to purchase and refinance certain real estate in the lowcountry counties of Berkeley, Dorchester and Charleston. Mr. Rivers previously helped Mr. Whitfield refinance over 25 loans when Mr. Rivers was a loan officer with Southtrust Bank. These loans always had 30 year terms and never had balloon payments or required refinancing or re-approval.

21. Mr. Rivers promised Mr. Whitfield the same loans as he was previously given by Mr. Rivers, to-wit, 30 year loans with the best rate possible, with a ½ point origination fee. There was no mention of balloon payments or re-qualification anytime during the 30 year loans. After a review of Mr. Whitfield's financial condition, Mr. Rivers approved \$1.5 million in loans to refinance rental properties. At the time, Mr. Whitfield

made clear to Mr. Rivers that the loans could not have demand features or have a balloon payment. Mr. Rivers agreed.

22. In reliance on Mr. Rivers' representations, Mr. Whitfield purchased the property at 1055 Black Rush Circle, Mount Pleasant, SC 29466 (hereinafter, "the Subject Property" or "Black Rush Property").

23. On or about March 27, 2007 Mr. Whitfield was provided documentation from Plaintiff stating that Mr. Whitfield would have the choice of a 7.5% interest rate or a floating rate of prime minus $\frac{1}{4}$ % (See Exhibit "A" attached hereto).

24. Plaintiff was aware at all material times, before and after the loan was closed, that the home was being purchased as a primary residence for Mr. Whitfield's ex-wife, Cindy Whitfield.

25. Despite being provided documentation by Plaintiff that Mr. Whitfield would have the choice of a 7.5% interest rate or a floating rate of prime minus $\frac{1}{4}$ %, Mr. Whitfield was provided the higher 7.5% rate as opposed to the lower floating rate of prime minus $\frac{1}{4}$ %.

26. Despite being provided documents at the closing with a April 13, 2012 maturity date on some of the loans, Mr. Whitfield was assured numerous times by loan officer Angela Bell that the maturity date was just a formality and in fact was just a renewal date and would be extended automatically with only adjustments of interest without any re-qualifying or costs to extend. Despite making such assurances to Mr. Whitfield, loan officer Angela Bell determined as early as 2010 that the loans would not be renewed as she felt Mr. Whitfield was not providing financial information to her. At the time she indicated she needed to "grease the wheel" with Mr. Whitfield's accountant so the

accountant would tell her more information about Mr. Whitfield's financial status.

27. Because of Ms. Bell's assurances and representations, Mr. Whitfield made payments on the loan for the subject properties from the origination of the loan every month until the renewal date.

28. In January, 2012, Plaintiff asked Mr. Whitfield for a copy of his recent tax returns so that the loan could be automatically extended. As late as February 6, 2012, loan officer Angela Bell sent an email to Mr. Whitfield asking him for tax information to work on the "renewals." On February 21, 2012, Mr. Whitfield informed loan officer Angela Bell that he was under some financial pressure, that his health was suffering, and that he wanted interest rates on par with the other mortgages he held with other banks. The following day, Ms. Bell informed Harbor National Bank personnel (but not Mr. Whitfield) that she was going to let Mr. Whitfield know that she would be asking him to move the loans. Although she informed others of her intention not to renew the loans, Ms. Bell never told Mr. Whitfield that he needed to move the loans- at any point in time. Had Mr. Whitfield known Plaintiff never intended to renew the loan, Mr. Whitfield would have previously refinanced the loan with another lender at a time when it was possible.

29. One week later, on February 28, 2012 loan officer Angela Bell wrote Mr. Whitfield to let him know that she would have to have his 2010 tax returns in order to request approval for renewal of his upcoming maturing loans. On April 2, 2012, Mr. Whitfield informed loan officer Angela Bell that his 2010 tax returns were complete and that he urgently wanted his loans modified since the rates were extremely high, and that his health had been an issue. After receiving the information about receiving the tax returns, the following day loan officer Angela Bell told a senior credit analyst at Harbor

National Bank, "I'm just glad the threats of no renewals finally worked." Five days later, on April 8, 2012, Mr. Whitfield suffered a heart attack.

30. Despite making assurances the loans would renew, two notes (732 Gahagan and 110 Mepkin) matured on April 13, 2012 without having been renewed by the Plaintiff. The note for the Black Rush Property came due on May 3, 2012, again without renewal. On June 21, 2012 Charlie Rivers orally agreed to modify the notes and specifically agreed to: (a) extend the notes for a 25 year amortization with another 5 year maturity; (b) eliminate the need for any principal pay downs; (c) eliminate the need for additional collateral to secure the notes; (d) eliminate the need to cross collateralize the loans; (e) waive the default interest rate of 14%; (f) back date the rate of 4.75% to the maturity the May 3, 2012 maturity date; and (g) credit Mr. Whitfield's overpayment of interest.

31. On June 26, 2012, Harbor National Bank vice president Scott Warren signed a loan commitment letter to Mr. Whitfield outlining the terms and conditions of the renewals of all Mr. Whitfield's loans held by Harbor National Bank. The proposed new loans dropped the interest rate to 4.75% and extended the maturities another 5 years. (See loan commitment, attached hereto as Exhibit "B"). On the same day, Mr. Whitfield was given drafts of new notes to sign for the closing which was to be held on June 28, 2012. The new documents contained clauses that all of Mr. Whitfield's properties would be cross collateralized, despite Mr. River's agreement and assurances not to cross collateralize the properties (See Paragraph 30 (d) herein).

32. In reliance upon Mr. Warren's June 26, 2012 commitment letter, Mr. Whitfield attended a scheduled closing at attorney Mark Weeks' law office. At the closing,

Mr. Warren informed Mr. Whitfield that a signed endorsement from a title company was needed so that Mr. Whitfield's ex-spouse Cindy Whitfield would not be required to sign the loan documents for the Black Rush Property, the home that Cindy Whitfield resided in.¹ At a certain point, Mr. Whitfield was informed by the closing attorney that the endorsement could not be procured, that Mrs. Whitfield was refusing to sign the mortgage to the Black Rush Property, and Mr. Warren proposed that it would only be possible to close two of the subject properties -Mepkin and Gahagan, but that if the Black Rush Property ultimately couldn't be closed, all properties including Mepkin and Gahagan would have to be foreclosed upon.

33. Despite Harbor National Bank's representations that a title endorsement was required to renew the Black Rush Property, Mr. Whitfield has subsequently learned that no such endorsement was required from the title company. Moreover, Harbor National Bank failed to renew any of the loans listed in the June 26, 2012 commitment letter despite agreeing to do so, willfully breaching their agreements, and causing Mr. Whitfield damages as to be determined by the trier of fact.

FOR A FOR FIRST COUNTERCLAIM
(Breach of Contract)

34. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

¹ Plaintiff also attempted to procure a "Business Purpose Statement" from Mr. Whitfield indicating that the property was to be used in Mr. Whitfield's business despite having previous knowledge that the Black Rush Property was in a fact residential property for Mr. Whitfield's ex-wife Cindy Whitfield.

35. As described above, Plaintiff indicated before and after the origination of the loan, verbally and in writing, that the loan to the Subject Property would be automatically renewed.

36. Despite repeatedly making these representations and reassurances, Plaintiff failed to renew the loan and instead declared Mr. Whitfield to be in default despite being paid all monthly installments on time, as and when due, breaching their agreement with Mr. Whitfield.

37. Although Plaintiff ultimately promised in writing to renew the loan on June 26, 2012, Plaintiff refused to close the loan on June 28, 2012, as described above, breaching the terms of the offer contained in the writing. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A SECOND CAUSE OF ACTION
(Negligent Misrepresentation)

38. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

39. As described above, Harbor National Bank made affirmative representations to Mr. Whitfield that: (1) the initial loans would be 30 year loans; (2) the maturity date referenced in the Note was simply a renewal date; and (3) the interest rate to be charged would be Mr. Whitfield's choice of 7.5% or prime minus ¼ %. The Plaintiff also made representations, and an offer, that the loans would be renewed at 4.75% with a new maturity date of July 10, 2017.

40. Plaintiff knew these representations were false, misleading, and incomplete when they were made. Such representations were (1) false, misleading and incomplete when made; (2) were made for a pecuniary interest of the Plaintiff; (3) the Plaintiff owed a duty of care to convey truthful information to Mr. Whitfield; (4) the Plaintiff breached that duty by failing to exercise due care; (5) Mr. Whitfield was unaware that the representations were false - and had no reason to suspect they were false as he placed his trust and confidence in Plaintiff. As such, Mr. Whitfield had a right to rely on such information, and did so rely on said information to his financial detriment as outlined above. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A THIRD CAUSE OF ACTION
(Fraud in the Inducement)

41. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

42. At or about the time of the initial loan originations, Plaintiff made affirmative representations to Mr. Whitfield that: (1) the loans would be 30 year loans; (2) that the maturity date referenced in the Notes were simply renewal dates; and (3) that the interest rate to be charged would be Mr. Whitfield's choice of 7.5% or prime minus ¼ %. The Plaintiff also made representations, and an offer, that the loans would be renewed at 4.75% with new maturity dates of July 10, 2017. Such representations were false, incomplete and misleading when made, were material, were known by the Plaintiff to be

false, misleading and incomplete, and were intended to be relied upon.

43. Mr. Whitfield was unaware that the representations were false and had no reason to suspect they were false, as he placed his trust and confidence in Plaintiff. As such, Mr. Whitfield had a right to rely on such information, and did so rely on said information to his detriment financial as outlined above. Had Mr. Whitfield known Plaintiff never intended to renew the loan, Mr. Whitfield would have previously refinanced the loan with another lender at a time when it was possible. At a minimum, the Plaintiff should have relayed their concerns about renewals as early as documentary evidence suggest Harbor National Bank had a concern, to-wit, the year 2010.

44. These false representations were made to induce the Mr. Whitfield to enter a high cost loan, and were made by the Plaintiff with the knowledge of their falsity.

45. Mr. Whitfield reasonably relied on the material representations of Plaintiff and had no knowledge the representations made by the Plaintiff were false and the Mr. Whitfield was, therefore, fraudulently induced by the Plaintiff to enter into the high cost loan.

46. Mr. Whitfield made a mistake in entering into the loan, which mistake was unilateral. Mr. Whitfield was fraudulently induced by the Plaintiff to make the unilateral mistake as a direct, proximate and foreseeable result of the fraud, deceit, misrepresentation, and active concealment perpetrated upon Mr. Whitfield by the Plaintiff.

47. Subsequent to the origination of the loan, Mr. Whitfield has been informed and now believes that the Plaintiff misrepresented the terms of the loan, verbally and in writing by (1) not receiving 30 year loans, (2) representing that the maturity date was simply a renewal date; and (3) charging, and refusing to change, the interest rate of 7.5%.

The Plaintiff also made representations, and an offer, to renew the loans at 4.75% with a new maturity date of July 10, 2017 as agreed. As such, Mr. Whitfield is entitled to avoid or rescind the loan and to be returned to the status quo ante whereby the Plaintiff returns to Mr. Whitfield all monies paid by Mr. Whitfield in exchange for Mr. Whitfield returning the amount of the loan proceeds to the Plaintiff. In addition thereto, Mr. Whitfield is entitled to all incidental, consequential, direct and indirect damages proximately caused by Plaintiff when they fraudulently induced Mr. Whitfield to enter into the loan transaction. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A FOURTH CAUSE OF ACTION

(Violation of Federal Trade Commission Act Section 5(a) 15 U.S.C. §45)
(As made applicable through SC Code §39-5-10 et.seq.)

48. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

49. As stated above, Plaintiff made affirmative representations to Mr. Whitfield that: (1) the loans would be 30 year loans; (2) that the maturity dates referenced in the Notes were simply renewal dates; and (3) that the interest rate to be charged would be Mr. Whitfield's choice of 7.5% or prime minus ¼ %. The Plaintiff also represented, and made an offer, that the loans would be renewed at 4.75% with new maturity dates of July 10, 2017.

50. Plaintiff's acts enumerated above constitute "unfair or deceptive acts or practices in or affecting commerce," as those terms are defined in the Act. This prohibition

applies to all persons engaged in commerce, including banks. An act or practice is unfair where it: (1) causes or is likely to cause substantial injury to consumers; (2) cannot be reasonably avoided by consumers and; (3) is not outweighed by countervailing benefits to consumers or to competition. In this case, Plaintiff's actions discussed above have caused substantial injury to Mr. Whitfield.

51. An act or practice is deceptive where: (1) a representation, omission, or practice misleads or is likely to mislead the consumer; (2) a consumer's interpretation of the representation, omission, or practice is considered reasonable under the circumstances and; (3) the misleading representation, omission, or practice is material. In this case, Plaintiff's actions were deceptive because Plaintiff clearly misrepresented that the loans would be renewed. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A FIFTH CAUSE OF ACTION
(Promissory Estoppel / Detrimental Reliance)

52. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

53. Mr. Whitfield relied on the promises of Angela Bell, Charlie Rivers, and Scott Warren to renew and modify the loans.

54. These promises were unambiguous in their terms and were relied upon by Mr. Whitfield. In particular, there were no contingencies placed upon the June 26, 2012 written offer to renew any of the loans as title insured first mortgages were already in place on the subject properties.

55. The reliance by Mr. Whitfield regarding renewing the loans was more than expected and more than foreseeable by Harbor National Bank.

56. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A SIXTH CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Act)

57. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

58. As stated above, Mr. Rivers made an agreement to renew the loans at the June 21, 2012 meeting with Mr. Whitfield.

59. Plaintiff breached the agreement with Mr. Whitfield by failing to close the renewal of the loan which is the subject of this lawsuit. Such breach was made with the fraudulent intent of never actually intending to close the renewal when that representation was made, and such fraudulent intent was manifested by the fraudulent act of claiming a title endorsement was required to renew the loan when in fact one was never needed.

60. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A SEVENTH CAUSE OF ACTION
(Tortious Interference with Prospective Contractual Relations)

61. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

62. The acts of Plaintiff described herein constituted an interference with Mr. Whitfield's business, were without justification, were done with improper purpose and motive, knowing it would place Mr. Whitfield under duress when filing these unfounded legal proceedings and knowing that it would interfere with Mr. Whitfield's ability to sell and/or rent his properties.

63. As a result of Plaintiff's actions Mr. Whitfield has lost the ability to enter into contracts with identifiable prospective buyers and/or renters of his properties. As a direct and proximate result of the Plaintiff's actions, Mr. Whitfield has suffered special damages including but not limited to a diminished value of their property in the eyes of third parties, loss of income and loss of profits.

64. Plaintiff's actions proximately caused actual, consequential, and special damages, including but not limited to: a) inability to sell and/or rent his properties to third parties who meet requirements for sale and/or rental of his properties; b) foreclosure proceedings having been instituted on his properties; c) a diminished value of his properties in the eyes of third parties; d) damage to Mr. Whitfield's reputation and business standing in the real estate profession; e) financial damage to Mr. Whitfield's business because of time spent away to defend these charges; f) financial damage for his inability to sell his properties following filing of the lis pendens and lawsuit; g) attorneys' fees and costs incurred; h) time spent away from work as a result of the lis pendens and lawsuit; i) emotional distress to Mr. Whitfield; j) injury to his health and mental pain and

suffering; and k) adverse tax consequences.

FOR AN EIGHTH CAUSE OF ACTION

(Abuse of Process as to David Swanson and BNC Bancorp through its employee/agent Scott Warren)

65. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

66. Mr. Scott Warren claims he called Mr. David Swanson for the advice to procure a title endorsement in order to renew the loan for the Black Rush Property.

67. Mr. Swanson claims that Mr. Scott Warren called him regarding the anticipated closing between Mr. Whitfield and Harbor National Bank, said closing set to occur on June 28, 2012.

68. Despite providing such sworn testimony by each Mr. Scott Warren and Mr. David Swanson that this advice was given and received before the June 28, 2012 closing, there is no evidence of any such phone call as the phone records from Mr. David Swanson's cell phone and his office line show no record of a phone call from Mr. Scott Warren cell phone or office line in June of 2012.

69. Because the telephone records show the phone call never occurred, the sworn testimony that the call was made, when in fact evidence shows it was not made at the time, was given with the ulterior purpose of fabricating a legal defense for the bank's failure to renew its contractual obligations to renew Mr. Whitfield's loans.

70. Mr. David Swanson has represented that Scott Warren called him regarding an anticipated closing, in which he gave advice to Mr. Warren to procure a title endorsement. As alleged previously, Mr. Swanson and his law firm have no proof the advice was ever given as there is no engagement letter, fee agreement, correspondence,

records of any kind, opinion letters, or billing entries at the firm to corroborate the legal defense that Mr. Swanson provided the information at the time he claims the advice was made. Additionally, there is no evidence of the communication itself from Mr. Warren's cell phone or office line to Mr. Swanson's cell phone or office line, further evidence that the communication was never made, when Mr. Swanson and Mr. Warren claim it was.

71. The sworn testimony that the call was placed before closing, when in fact it was not, was a willful or overt act, done with the intent and collateral objective of furnishing a legal defense (advice of counsel) for the bank and injuring Mr. Whitfield.

72. The sworn testimony by each Mr. Scott Warren and Mr. David Swanson was a misuse and perversion of legal process by fabricating a legal defense (advice of counsel) when one in fact had never been given at the time claimed to have been given. The acts described above and herein have caused damage to Mr. Whitfield by incurring actual damages, both mental and pecuniary, including by way of example only and without limitation: loss of time, injury to property and financial standing, shame, mortification, mental anguish, mental pain and suffering, emotional distress, loss of enjoyment of life, injury to feelings, an overall degradation of health, and was hindered from, and will continue to be hindered from attending to his usual duties and affairs of life, as a direct and proximate result of the aforesaid conduct of Harbor National Bank, in an exact amount of actual, consequential and special damages as to be determined by a trier of fact.

FOR A NINTH CAUSE OF ACTION

(Civil Conspiracy as to David Swanson and BNC Bancorp through its employee/agent
Scott Warren)

73. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

74. As alleged above, Mr. Scott Warren claims he called Mr. David Swanson for the advice to procure a title endorsement in order to renew the loan for the Black Rush Property.

75. Mr. Swanson claims that Mr. Scott Warren called him regarding the anticipated closing between Mr. Whitfield and Harbor National Bank, said closing set to occur on June 28, 2012.

76. Despite providing such **sworn testimony** by each Mr. Scott Warren and Mr. David Swanson that this advice was given and received before the June 28, 2012 closing, there is **no evidence of any such phone call** as the phone records from Mr. David Swanson's cell phone and his office line show no record of a phone call from Mr. Scott Warren cell phone or office line in June of 2012.

77. Because the telephone records show the phone call never occurred, the sworn testimony that the call was made, **when in fact it was not made at the time**, was given with the ulterior purpose of fabricating a legal defense for the bank's failure to renew its contractual obligations to renew Mr. Whitfield's loans.

78. Mr. David Swanson has represented that Scott Warren called him regarding an anticipated closing, in which he gave advice to Mr. Warren to procure a title endorsement. As alleged previously, Mr. Swanson and his law firm have no proof the advice was ever given as there is **no engagement letter, fee agreement, correspondence,**

records of any kind, opinion letters, or billing entries at the firm to corroborate the legal defense that Mr. Swanson provided the information at the time he claims the advice was made. Additionally, there is no evidence of the communication itself from Mr. Warren's cell phone or office line to Mr. Swanson's cell phone or office line, further evidence that the communication was never made, when Mr. Swanson and Mr. Warren claim it was.

79. The sworn testimony that the call was placed before closing, when in fact it was not, was a willful or overt act, done with the intent and collateral objective of furnishing a legal defense (advice of counsel) for the bank and injuring Mr. Whitfield.

80. The sworn testimony by each Mr. Scott Warren and Mr. David Swanson was a misuse and perversion of legal process by fabricating a legal defense (advice of counsel) when one in fact had never been given at the time claimed to have been given.

81. Mr. David Swanson's actions described above and herein were made for his own personal interest as they were performed outside the scope of his law firm's representation of Harbor National Bank.

82. The actions of David Swanson and Scott Warren as alleged above and herein constitute an combination of two or more persons that was done with the purpose of furnishing a legal defense (advice of counsel) for the bank and injuring Mr. Whitfield which has caused him special damages, beyond damages specified in his other causes of action for having to incur attorney's fees and costs associated with Harbor National Bank's advice of counsel defense which should never have been incurred.

FOR A TENTH CAUSE OF ACTION

(Cross-Claim for Equitable Indemnity as to Co-Defendant Cindy Whitfield)

83. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

84. To the extent, if any, that Mr. Whitfield is held liable to the Plaintiff in this action, which such liability is expressly denied, such liability would be a proximate result of the wrongful acts, breach of duties, omissions, and/or negligence of Cindy Whitfield and/or her agents in failing to give her permission and/or authorization to renew the loan for the subject property located at 1055 Black Rush Circle, Mount Pleasant, South Carolina, said demand being made as a defense of Harbor National Bank to close all of the renewal loans set forth in Exhibit "C".

85. Specifically, the closing attorney Mark Weeks and Mr. Whitfield's previous counsel Lauren Felder have stated that Mrs. Cindy Whitfield's counsel Stanley Jaskiewicz was contacted regarding procuring her consent for the renewal of the Black Rush Property. Lauren Felder was advised by either Stanley Jaskiewicz or his paralegal Dena Hardison that Mrs. Cindy Whitfield, "would not sign off on the mortgage as Mr. Whitfield was solely responsible under the Final Family Court Order." Additionally, Mrs. Cindy Whitfield was told by Mr. Jaskiewicz' paralegal Dena Hardison that, "he [Mr. Whitfield] could not refinance my home or borrow the equity in it as he would be putting another nail in his coffin." According to Mrs. Whitfield, Ms. Dena Hardison gave her this advice before the closing² and was also told by Ms. Hardison not to, "do anything until I talk to Stan,"

² Mrs. Whitfield indicated this statement was made by Ms. Hardison at the time the appraiser was attempting to gain access to Mrs. Whitfield's home-- in May and June of 2012. Correspondence was sent to Stanley Jaskiewicz advising him of appraisal access issue on June 11, 2012.

regarding gaining access to her home for an appraisal. According to Mrs. Whitfield, Mr. Jaskiewicz never called her back regarding any issues related to procuring her consent to renew her home.

86. To the extent, if any, that Mr. Whitfield is held liable to the Plaintiff in this action, which such liability is expressly denied, these wrongful acts, breach of duties, omissions, and/or negligence of Cindy Whitfield and/or her agents have damaged Mr. Whitfield, including but not limited to consequential and special damages, and the imposition of attorney's fees and costs in defending the foreclosure and prosecuting the Counterclaims as alleged herein. Mr. Whitfield and Mrs. Cindy Whitfield had a special relationship by virtue of their continuing family court obligations that would support a claim for indemnity against Mrs. Cindy Whitfield. Moreover, Mr. Whitfield is wholly without fault for Cindy Whitfield failing to provide her permission and/or authorization to renew the loan for the Black Rush Property.

87. To the extent, if any, that Mr. Whitfield is held liable to the Plaintiff in this action, which such liability is expressly denied, Mr. Whitfield would be entitled to be equitably indemnified for such liability from Cindy Whitfield for any liability that Mr. Whitfield is found to have incurred to the Plaintiff such that Mr. Whitfield would be entitled to recover his consequential and special damages, attorney's fees and costs, monies adjudged owed to the Plaintiff and/or monies expended by way of settlement of Plaintiff's claims as a result of Cindy Whitfield and/or her agents wrongful acts, breach of duties, omissions, and/or negligence as afore-described.

WHEREFORE, Plaintiff prays for relief as set forth below together with such further relief as this court deems just:


- a. Actual damages
- b. Consequential and Special damages;
- c. Statutory damages;
- d. Treble Damages
- e. Disgorgement of profits;
- f. Restitution;
- g. Rescission;
- h. Injunctive relief;
- i. Attorneys' fees and costs;
- j. Punitive Damages;

DEMAND FOR JURY TRIAL

Mr. Whitfield demands a jury trial on all counts stated above. These causes of action must be tried before any equitable causes of action asserted by either party can be disposed of. See Gardner v. Travis, 316 S.C. 315, 450 S.E.2d 54 (Ct. App. 1994).

Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

By: 

Brent S. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com

Attorneys for Defendant

-and-

Andrew J. McCumber, Esquire

SLOTCHIVER & SLOTCHIVER, LLP
44 State Street
Charleston, SC 29401
Phone: (843) 577-6531
Facsimile: (843) 577-0261
andrew@slotchiverlaw.com
S.C. Bar No. 101559

&

Daniel S. Slotchiver, Esquire

SLOTCHIVER & SLOTCHIVER, LLP
44 State Street
Charleston, SC 29401
Phone: (843) 577-6531
Facsimile: (843) 577-0261
dan@slotchiverlaw.com
S.C. Bar No. 15129

Attorneys for Defendant

Charleston, SC
January 8, 2016

12-5887

CERTIFICATE OF SERVICE

I certify that I served the foregoing Fifth Amended Answer, Affirmative Defenses and Counterclaims and Crossclaim upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to the parties and counsel's last known address on this 8th day of January, 2016.

HALVERSEN & ASSOCIATES, LLC

By: *Brent S. Halversen*

Brent S. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com

Charleston, SC
January 8, 2015

FILED
2016 JAN - 8 PM 2:36
JULIE J. ARMSTRONG
CLERK OF COURT

HALVERSEN &
ASSOCIATES, L.L.C
Attorneys - at - Law

BRENT S. HALVERSEN*
Direct Line: (843) 284-5790
brent@halversenlaw.com

*ALSO ADMITTED IN FLORIDA

January 8, 2016

VIA HAND DELIVERY

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad St., Ste 106
Charleston, SC 29401-2258

Re: Harbor National Bank v. Anthony M. Whitfield
Case No.: 2012-CP-10-5887

Dear Ms. Armstrong:

Attached please find the original and one copy of the Defendant's Fifth Amended Answer; Affirmative Defenses, Crossclaim, and Counterclaims for the above captioned matter.

By copy of this correspondence I am serving all counsel with a copy. If you have any questions or comments, please do not hesitate to contact me.

Thank you for your assistance in this matter.

Sincerely yours,



Brent Souther Halversen

BSH/ak
Enclosure(s)

cc: Mr. Anthony M. Whitfield (Via E-Mail Only)
Mr. Brian Duffy (Via E-Mail and U.S. Mail Only)
Mr. Robert Bernstein (Via U.S. Mail Only)
Mr. Paul Ferrera (Via E-Mail and U.S. Mail)

DW

FILED

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

2014 APR 24 PM 10:24

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2012-CP-08-2618

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

HARBOR NATIONAL BANK,

Plaintiff,

vs.

ANTHONY WHITFIELD

Defendant.

**DEFENDANT'S FOURTH AMENDED
ANSWER, AFFIRMATIVE DEFENSES
AND COUNTERCLAIMS**

(Breach of Contract, Negligent
Misrepresentation, Fraud in the
Inducement, Unfair Trade Practices,
Promissory Estoppel, Tortious
Interference with Prospective Contractual
Relations, and Breach of Contract
Accompanied by Fraudulent Act)

(Jury Trial Demanded)

TO: ROBERT A. BERNSTEIN, ATTORNEY FOR PLAINTIFF

Comes now Defendant, Anthony Whitfield (hereinafter, "Mr. Whitfield") and responds to the allegations of Plaintiff's Complaint as follows:

1. Mr. Whitfield admits the allegations of Paragraphs 2, 3, 8, 14, 15, 16, 17, 18 and 25.
2. Mr. Whitfield denies, the allegations of Paragraphs 13 and 23 to the extent such Paragraphs reference previous allegations which are herein denied.
3. Mr. Whitfield admits the allegations of Paragraph 5, but denies that he chose the stated interest rate and alleges that at all material times Plaintiff represented the maturity date of the loan would be automatically extended by Plaintiff.

BH

DW

4. Mr. Whitfield admits an assignment was made but denies the event of default as alleged in Paragraph 24, 26 and 29.

5. Mr. Whitfield denies Paragraphs 1, 4, 6, 7, 9, 10, 11, 12, 19, 20, 21, 22, 27 and 28.

6. Mr. Whitfield denies each and every allegation not specifically enumerated herein.

FIRST AFFIRMATIVE DEFENSE

7. Plaintiff's claims to foreclose on the 2007 Mortgage should be waived, estopped, barred, and/or dismissed as Defendant made all payments as was required under the Note and was told by Plaintiff numerous times that the April 13, 2012 maturity date as referenced in the Note would be automatically extended.

SECOND AFFIRMATIVE DEFENSE

8. Plaintiff's claims in equity are barred by the doctrine of unclean hands and equitable estoppel.

THIRD AFFIRMATIVE DEFENSE

9. Plaintiff's action should be barred by the doctrine of unconscionability, fraud and duress.

FOURTH AFFIRMATIVE DEFENSE

10. Upon information and belief, the subject note attempted to be foreclosed upon is not the original note and therefore Plaintiff does not have standing pursue this foreclosure action.

COUNTERCLAIMS

Factual Allegations

11. In 2006, Mr. Whitfield approached Charlie Rivers (hereinafter, "Mr. Rivers") of Harbor National Bank to purchase and refinance certain real estate in the lowcountry counties of Berkeley, Dorchester and Charleston. Mr. Rivers previously helped Mr. Whitfield refinance over 25 loans when Mr. Rivers was a loan officer with Southtrust Bank. These loans always had 30 year terms and never had balloon payments or required refinancing or re-approval.

12. Mr. Rivers promised Mr. Whitfield the same loans as he was previously given by Mr. Rivers, to-wit, 30 year loans with the best rate possible, with a ½ point origination fee. There was no mention of balloon payments or re-qualification anytime during the 30 year loans. After a review of Mr. Whitfield's financial condition, Mr. Rivers approved \$1.5 million in loans to refinance rental properties. At the time, Mr. Whitfield made clear to Mr. Rivers that the loans could not have demand features or have a balloon payment. Mr. Rivers agreed.

13. In reliance on Mr. Rivers' representations, Mr. Whitfield purchased the property at 110 Mepkin Drive, Summerville, SC 29483 (hereinafter, "the Subject Property").

14. On or about March 27, 2007 Mr. Whitfield was provided documentation from Plaintiff stating that Mr. Whitfield would have the choice of a 7.5% interest rate or a floating rate of prime minus ¼ % (See Exhibit "A" attached hereto).

15. Despite being provided documentation by Plaintiff that Mr. Whitfield would have the choice of a 7.5% interest rate or a floating rate of prime minus ¼ %, Mr.

Whitfield was provided the higher 7.5% rate as opposed to the lower floating rate of prime minus ¼ %.

16. Despite being provided documents at the closing with a April 13, 2012 maturity date on some of the loans, Mr. Whitfield was assured numerous times by loan officer Angela Bell that the maturity date was just a formality and in fact was just a renewal date and would be extended automatically with only adjustments of interest without any re-qualifying or costs to extend. Despite making such assurances to Mr. Whitfield, loan officer Angela Bell determined as early as 2010 that the loans would not be renewed as she felt Mr. Whitfield was not providing financial information to her. At the time she indicated she needed to "grease the wheel" with Mr. Whitfield's accountant so the accountant would tell her more information about Mr. Whitfield's financial status.

17. Because of Ms. Bell's assurances and representations, Mr. Whitfield made payments on the loan for the subject property from the origination of the loan every month until the renewal date.

18. In January, 2012, Plaintiff asked Mr. Whitfield for a copy of his recent tax returns so that the loan could be automatically extended. As late as February 6, 2012, loan officer Angela Bell sent an email to Mr. Whitfield asking him for tax information to work on the "renewals." On February 21, 2012, Mr. Whitfield informed loan officer Angela Bell that he was under some financial pressure, that his health was suffering, and that he wanted interest rates on par with the other mortgages he held with other banks. The following day, Ms. Bell informed Harbor National Bank personnel (but not Mr. Whitfield) that she was going to let Mr. Whitfield know that she would be asking him to move the loans. Although she informed others of her intention not to renew the loans,

Ms. Bell never told Mr. Whitfield that he needed to move the loans- at any point in time. Had Mr. Whitfield known Plaintiff never intended to renew the loan, Mr. Whitfield would have previously refinanced the loan with another lender at a time when it was possible.

19. One week later, on February 28, 2012 loan officer Angela Bell wrote Mr. Whitfield to let him know that she would have to have his 2010 tax returns in order to request approval for renewal of his upcoming maturing loans. On April 2, 2012, Mr. Whitfield informed loan officer Angela Bell that his 2010 tax returns were complete and that he urgently wanted his loans modified since the rates were extremely high, and that his health had been an issue. After receiving the information about receiving the tax returns, the following day loan officer Angela Bell told a senior credit analyst at Harbor National Bank, "I'm just glad the threats of no renewals finally worked." Five days later, on April 8, 2012, Mr. Whitfield suffered a heart attack.

20. Despite making assurances the loans would renew, two notes (732 Gahagan and 110 Mepkin) matured on April 13, 2012 without having been renewed by the Plaintiff. On June 21, 2012 Charlie Rivers orally agreed to modify the notes and specifically agreed to: (a) extend the notes for a 25 year amortization with another 5 year maturity; (b) eliminate the need for any principal pay downs; (c) eliminate the need for additional collateral to secure the notes; (d) eliminate the need to cross collateralize the loans; (e) waive the default interest rate of 14%; (f) back date the rate of 4.75% to the maturity of the April 13, 2012 maturities; and (g) credit Mr. Whitfield's overpayment of interest.

21. On June 26, 2012, Harbor National Bank vice president Scott Warren signed a loan commitment letter to Mr. Whitfield outlining the terms and conditions of

the renewals of all Mr. Whitfield's loans held by Harbor National Bank. The proposed new loans dropped the interest rate to 4.75% and extended the maturities another 5 years. (See loan commitment, attached hereto as Exhibit "B"). On the same day, Mr. Whitfield was given drafts of new notes to sign for the closing which was to be held on June 28, 2012. The new documents contained clauses that all of Mr. Whitfield's properties would be cross collateralized, despite Mr. River's agreement and assurances not to cross collateralize the properties (See Paragraph 20 (d) herein).

22. In reliance upon Mr. Warren's June 26, 2012 commitment letter, Mr. Whitfield attended a scheduled closing at attorney Mark Weeks' law office. At the closing, Mr. Warren informed Mr. Whitfield that a signed endorsement from a title company was needed so that Mr. Whitfield's ex-spouse Cindy Whitfield would not be required to sign the loan documents for one of the properties that Cindy Whitfield resided in (hereinafter, the "Black Rush Property")¹. At a certain point, Mr. Whitfield was informed by the closing attorney that the endorsement could not be procured, that Mrs. Whitfield was refusing to sign the mortgage to the Black Rush Property, and Mr. Warren proposed that it would only be possible to close two of the subject properties - Mepkin and Gahagan, but that if the Black Rush Property ultimately couldn't be closed, all properties including Mepkin and Gahagan would have to be foreclosed upon.

23. Despite Harbor National Bank's representations that a title endorsement was required to renew the Black Rush Property, Mr. Whitfield has subsequently learned that no such endorsement was required from the title company. Moreover, Harbor National Bank failed to renew any of the loans listed in the June 26, 2012 commitment

¹ Plaintiff also attempted to procure a "Business Purpose Statement" from Mr. Whitfield indicating that the property was to be used in Mr. Whitfield's business despite having previous knowledge that the Black Rush Property was in a fact residential property for Mr. Whitfield's ex-wife Cindy Whitfield.

letter despite agreeing to do so, willfully breaching their agreements, and causing Mr. Whitfield damages as to be determined by the trier of fact.

FOR A FOR FIRST COUNTERCLAIM
(Breach of Contract)

24. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

25. As described above, Plaintiff indicated before and after the origination of the loan, verbally and in writing, that the loan to the Subject Property would be automatically renewed.

26. Despite repeatedly making these representations and reassurances, Plaintiff failed to renew the loan and instead declared Mr. Whitfield to be in default despite being paid all monthly installments on time, as and when due, breaching their agreement with Mr. Whitfield.

27. Although Plaintiff ultimately promised in writing to renew the loan on June 26, 2012, Plaintiff refused to close the loan on June 28, 2012, as described above, breaching the terms of the offer contained in the writing. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A SECOND CAUSE OF ACTION
(Negligent Misrepresentation)

28. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

29. As described above, Harbor National Bank made affirmative representations to Mr. Whitfield that: (1) the initial loans would be 30 year loans; (2) the maturity date referenced in the Note was simply a renewal date; and (3) the interest rate to be charged would be Mr. Whitfield's choice of 7.5% or prime minus ¼ %. The Plaintiff also made representations, and an offer, that the loans would be renewed at 4.75% with a new maturity date of July 10, 2017.

30. Plaintiff knew these representations were false, misleading, and incomplete when they were made. Such representations were (1) false, misleading and incomplete when made; (2) were made for a pecuniary interest of the Plaintiff; (3) the Plaintiff owed a duty of care to convey truthful information to Mr. Whitfield; (4) the Plaintiff breached that duty by failing to exercise due care; (5) Mr. Whitfield was unaware that the representations were false - and had no reason to suspect they were false as he placed his trust and confidence in Plaintiff. As such, Mr. Whitfield had a right to rely on such information, and did so rely on said information to his financial detriment as outlined above. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A THIRD CAUSE OF ACTION
(Fraud in the Inducement)

31. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

32. At or about the time of the initial loan originations, Plaintiff made affirmative representations to Mr. Whitfield that: (1) the loans would be 30 year loans; (2) that the maturity date referenced in the Notes were simply renewal dates; and (3) that the interest rate to be charged would be Mr. Whitfield's choice of 7.5% or prime minus ¼ %. The Plaintiff also made representations, and an offer, that the loans would be renewed at 4.75% with new maturity dates of July 10, 2017. Such representations were false, incomplete and misleading when made, were material, were known by the Plaintiff to be false, misleading and incomplete, and were intended to be relied upon.

33. Mr. Whitfield was unaware that the representations were false and had no reason to suspect they were false, as he placed his trust and confidence in Plaintiff. As such, Mr. Whitfield had a right to rely on such information, and did so rely on said information to his detriment financial as outlined above. Had Mr. Whitfield known Plaintiff never intended to renew the loan, Mr. Whitfield would have previously refinanced the loan with another lender at a time when it was possible. At a minimum, the Plaintiff should have relayed their concerns about renewals as early as documentary evidence suggest Harbor National Bank had a concern, to-wit, the year 2010.

34. These false representations were made to induce the Mr. Whitfield to enter a high cost loan, and were made by the Plaintiff with the knowledge of their falsity.

35. Mr. Whitfield reasonably relied on the material representations of Plaintiff and had no knowledge the representations made by the Plaintiff were false and the Mr.

Whitfield was, therefore, fraudulently induced by the Plaintiff to enter into the high cost loan.

36. Mr. Whitfield made a mistake in entering into the loan, which mistake was unilateral. Mr. Whitfield was fraudulently induced by the Plaintiff to make the unilateral mistake as a direct, proximate and foreseeable result of the fraud, deceit, misrepresentation, and active concealment perpetrated upon Mr. Whitfield by the Plaintiff.

37. Subsequent to the origination of the loan, Mr. Whitfield has been informed and now believes that the Plaintiff misrepresented the terms of the loan, verbally and in writing by (1) not receiving 30 year loans, (2) representing that the maturity date was simply a renewal date; and (3) charging, and refusing to change, the interest rate of 7.5%. The Plaintiff also made representations, and an offer, to renew the loans at 4.75% with a new maturity date of July 10, 2017 as agreed. As such, Mr. Whitfield is entitled to avoid or rescind the loan and to be returned to the status quo ante whereby the Plaintiff returns to Mr. Whitfield all monies paid by Mr. Whitfield in exchange for Mr. Whitfield returning the amount of the loan proceeds to the Plaintiff. In addition thereto, Mr. Whitfield is entitled to all incidental, consequential, direct and indirect damages proximately caused by Plaintiff when they fraudulently induced Mr. Whitfield to enter into the loan transaction. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A FOURTH CAUSE OF ACTION
(Violation of Federal Trade Commission Act Section 5(a) 15 U.S.C. §45)
(As made applicable through SC Code §39-5-10 et.seq.)

38. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

39. As stated above, Plaintiff made affirmative representations to Mr. Whitfield that: (1) the loans would be 30 year loans; (2) that the maturity dates referenced in the Notes were simply renewal dates; and (3) that the interest rate to be charged would be Mr. Whitfield's choice of 7.5% or prime minus ¼ %. The Plaintiff also represented, and made an offer, that the loans would be renewed at 4.75% with new maturity dates of July 10, 2017.

40. Plaintiff's acts enumerated above constitute "unfair or deceptive acts or practices in or affecting commerce," as those terms are defined in the Act. This prohibition applies to all persons engaged in commerce, including banks. An act or practice is unfair where it: (1) causes or is likely to cause substantial injury to consumers; (2) cannot be reasonably avoided by consumers and; (3) is not outweighed by countervailing benefits to consumers or to competition. In this case, Plaintiff's actions discussed above have caused substantial injury to Mr. Whitfield.

41. An act or practice is deceptive where: (1) a representation, omission, or practice misleads or is likely to mislead the consumer; (2) a consumer's interpretation of the representation, omission, or practice is considered reasonable under the circumstances and; (3) the misleading representation, omission, or practice is material. In this case, Plaintiff's actions were deceptive because Plaintiff clearly misrepresented that the loans would be renewed. Mr. Whitfield has been injured in reliance upon Harbor

National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A FIFTH CAUSE OF ACTION
(Promissory Estoppel / Detrimental Reliance)

42. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

43. Mr. Whitfield relied on the promises of Angela Bell, Charlie Rivers, and Scott Warren to renew and modify the loans.

44. These promises were unambiguous in their terms and were relied upon by Mr. Whitfield. In particular, there were no contingencies placed upon the June 26, 2012 written offer to renew any of the loans as title insured first mortgages were already in place on the subject properties.

45. The reliance by Mr. Whitfield regarding renewing the loans was more than expected and more than foreseeable by Harbor National Bank.

46. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A SIXTH CAUSE OF ACTION
(Tortious Interference with Prospective Contractual Relations)

47. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

48. The acts of Plaintiff described herein constituted an interference with Mr.

Whitfield's business, were without justification, were done with improper purpose and motive, knowing it would place Mr. Whitfield under duress when filing these unfounded legal proceedings and knowing that it would interfere with Mr. Whitfield's ability to sell and/or rent the subject property.

49. As a result of Plaintiff's actions Mr. Whitfield has lost the ability to enter into contracts with identifiable prospective buyers and/or renters of the subject property. As a direct and proximate result of the Plaintiff's actions, Mr. Whitfield has suffered special damages including but not limited to a diminished value of their property in the eyes of third parties, loss of income and loss of profits.

50. Plaintiff's actions proximately caused actual, consequential, and special damages, including but not limited to: a) inability to sell the subject property to third parties who met requirements for sale and/or rental of the subject property; b) foreclosure proceedings having been instituted on the subject property; c) a diminished value of the subject property in the eyes of third parties; d) damage to Mr. Whitfield's reputation and business standing in the real estate profession; e) financial damage to Mr. Whitfield's business because of time spent away to defend these charges, f) financial damage for his inability to sell the subject property following filing of the lis pendens and lawsuit, g) attorneys' fees and costs incurred; h) time spent away from work as a result of the lis pendens and lawsuit, i) emotional distress to Mr. Whitfield, j) injury to his health and mental pain and suffering.

FOR A SEVENTH CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Act)

51. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

52. As stated above, Mr. Rivers made an agreement to renew the loans at the June 21, 2012 meeting with Mr. Whitfield.

53. Plaintiff breached the agreement with Mr. Whitfield by failing to close the renewal of the loan which is the subject of this lawsuit. Such breach was made with the fraudulent intent of never actually intending to close the renewal when that representation was made, and such fraudulent intent was manifested by the fraudulent act of claiming a title endorsement was required to renew the loan when in fact one was never needed.

54. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

WHEREFORE, Defendants prays for relief as set forth below together with such further relief as this court deems just:

- a. Actual damages;
- b. Statutory damages;
- c. Treble Damages
- d. Disgorgement of profits;
- e. Restitution;

- f. Rescission;
- g. Injunctive relief; and
- h. Attorneys' fees and costs

DEMAND FOR JURY TRIAL

Mr. Whitfield demands a jury trial on all counts stated above. These causes of action must be tried before any equitable causes of action asserted by either party can be disposed of. See Gardner v. Travis, 316 S.C. 315, 450 S.E.2d 54 (Ct. App. 1994)

Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

By: _____

Brent S. Halversen
Brent S. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com
Attorneys for the Defendant

April 23rd, 2014.
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

BANK OF NORTH CAROLINA,)
Plaintiff,)

vs.)

ANTHONY WHITFIELD, CINDY)
WHITFIELD, AND DAVID SWANSON)
Defendant.)

IN THE COURT OF COMMON PLEAS)
FOR THE NINTH JUDICIAL CIRCUIT)
CASE NO. 2012-CP-08-2618)

FILED
2016 MAR 8 AM 11:36
CLERK OF COURT
NINTH JUDICIAL CIRCUIT

DEFENDANT'S FIFTH AMENDED
ANSWER, AFFIRMATIVE DEFENSES
AND COUNTERCLAIMS

(Breach of Contract, Negligent
Misrepresentation, Fraud in the
Inducement, Unfair Trade Practices,
Promissory Estoppel, Tortious
Interference with Prospective Contractual
Relations, and Breach of Contract
Accompanied by Fraudulent Act, Abuse
of Process, Civil Conspiracy, and
Equitable Indemnification)

(Jury Trial Demanded)

TO: ROBERT A. BERNSTEIN, ATTORNEY FOR PLAINTIFF

Comes now Defendant, Anthony Whitfield (hereinafter, "Mr. Whitfield") and responds to the allegations of Plaintiff's Complaint as follows:

1. Mr. Whitfield admits the allegations of Paragraphs 2, 3, 8, 14, 15, 16, 17, 18 and 25.
2. Mr. Whitfield denies, the allegations of Paragraphs 13 and 23 to the extent such Paragraphs reference previous allegations which are herein denied.
3. Mr. Whitfield admits the allegations of Paragraph 5, but denies that he chose the stated interest rate and alleges that at all material times Plaintiff

BH

represented the maturity date of the loan would be automatically extended by Plaintiff.

4. Mr. Whitfield admits an assignment was made but denies the event of default as alleged in Paragraph 24, 26 and 29.

5. Mr. Whitfield denies Paragraphs 1, 4, 6, 7, 9, 10, 11, 12, 19, 20, 21, 22, 27 and 28.

6. Mr. Whitfield denies each and every allegation not specifically enumerated herein.

FIRST AFFIRMATIVE DEFENSE

7. Plaintiff's claims to foreclose on the 2007 Mortgage should be waived, estopped, barred, and/or dismissed as Defendant made all payments as was required under the Note and was told by Plaintiff numerous times that the April 13, 2012 maturity date as referenced in the Note would be automatically extended.

SECOND AFFIRMATIVE DEFENSE

8. Plaintiff's claims in equity are barred by the doctrine of unclean hands and equitable estoppel.

THIRD AFFIRMATIVE DEFENSE

9. Plaintiff's action should be barred by the doctrine of unconscionability, fraud and duress.

FOURTH AFFIRMATIVE DEFENSE

10. Upon information and belief, the subject note attempted to be foreclosed upon is not the original note and therefore Plaintiff does not have

standing pursue this foreclosure action.

COUNTERCLAIMS

Factual Allegations

11. In 2006, Mr. Whitfield approached Charlie Rivers (hereinafter, "Mr. Rivers") of Harbor National Bank to purchase and refinance certain real estate in the lowcountry counties of Berkeley, Dorchester and Charleston. Mr. Rivers previously helped Mr. Whitfield refinance over 25 loans when Mr. Rivers was a loan officer with Southtrust Bank. These loans always had 30 year terms and never had balloon payments or required refinancing or re-approval.

12. Mr. Rivers promised Mr. Whitfield the same loans as he was previously given by Mr. Rivers, to-wit, 30 year loans with the best rate possible, with a ½ point origination fee. There was no mention of balloon payments or re-qualification anytime during the 30 year loans. After a review of Mr. Whitfield's financial condition, Mr. Rivers approved \$1.5 million in loans to refinance rental properties. At the time, Mr. Whitfield made clear to Mr. Rivers that the loans could not have demand features or have a balloon payment. Mr. Rivers agreed.

13. In reliance on Mr. Rivers' representations, Mr. Whitfield purchased the property at 110 Mepkin Drive, Summerville, SC 29483 (hereinafter, "the Subject Property").

14. On or about March 27, 2007 Mr. Whitfield was provided documentation from Plaintiff stating that Mr. Whitfield would have the choice of a 7.5% interest rate or a floating

rate of prime minus ¼ % (See Exhibit "A" attached hereto).

15. Despite being provided documentation by Plaintiff that Mr. Whitfield would have the choice of a 7.5% interest rate or a floating rate of prime minus ¼ %, Mr. Whitfield was provided the higher 7.5% rate as opposed to the lower floating rate of prime minus ¼ %.

16. Despite being provided documents at the closing with a April 13, 2012 maturity date on some of the loans, Mr. Whitfield was assured numerous times by loan officer Angela Bell that the maturity date was just a formality and in fact was just a renewal date and would be extended automatically with only adjustments of interest without any re-qualifying or costs to extend. Despite making such assurances to Mr. Whitfield, loan officer Angela Bell determined as early as 2010 that the loans would not be renewed as she felt Mr. Whitfield was not providing financial information to her. At the time she indicated she needed to "grease the wheel" with Mr. Whitfield's accountant so the accountant would tell her more information about Mr. Whitfield's financial status.

17. Because of Ms. Bell's assurances and representations, Mr. Whitfield made payments on the loan for the subject property from the origination of the loan every month until the renewal date.

18. In January, 2012, Plaintiff asked Mr. Whitfield for a copy of his recent tax returns so that the loan could be automatically extended. As late as February 6, 2012, loan officer Angela Bell sent an email to Mr. Whitfield asking him for tax information to work on the "renewals." On February 21, 2012, Mr. Whitfield informed loan officer Angela Bell that he was under some financial pressure, that his health was suffering, and that he wanted interest rates on par with the other mortgages he held with other banks. The

following day, Ms. Bell informed Harbor National Bank personnel (but not Mr. Whitfield) that she was going to let Mr. Whitfield know that she would be asking him to move the loans. Although she informed others of her intention not to renew the loans, Ms. Bell never told Mr. Whitfield that he needed to move the loans- at any point in time. Had Mr. Whitfield known Plaintiff never intended to renew the loan, Mr. Whitfield would have previously refinanced the loan with another lender at a time when it was possible.

19. One week later, on February 28, 2012 loan officer Angela Bell wrote Mr. Whitfield to let him know that she would have to have his 2010 tax returns in order to request approval for renewal of his upcoming maturing loans. On April 2, 2012, Mr. Whitfield informed loan officer Angela Bell that his 2010 tax returns were complete and that he urgently wanted his loans modified since the rates were extremely high, and that his health had been an issue. After receiving the information about receiving the tax returns, the following day loan officer Angela Bell told a senior credit analyst at Harbor National Bank, "I'm just glad the threats of no renewals finally worked." Five days later, on April 8, 2012, Mr. Whitfield suffered a heart attack.

20. Despite making assurances the loans would renew, two notes (732 Gahagan and 110 Mepkin) matured on April 13, 2012 without having been renewed by the Plaintiff. On June 21, 2012 Charlie Rivers orally agreed to modify the notes and specifically agreed to: (a) extend the notes for a 25 year amortization with another 5 year maturity; (b) eliminate the need for any principal pay downs; (c) eliminate the need for additional collateral to secure the notes; (d) eliminate the need to cross collateralize the loans; (e) waive the default interest rate of 14%; (f) back date the rate of 4.75% to the maturity of the April 13, 2012 maturities; and (g) credit Mr. Whitfield's overpayment of

interest.

21. On June 26, 2012, Harbor National Bank vice president Scott Warren signed a loan commitment letter to Mr. Whitfield outlining the terms and conditions of the renewals of all Mr. Whitfield's loans held by Harbor National Bank. The proposed new loans dropped the interest rate to 4.75% and extended the maturities another 5 years. (See loan commitment, attached hereto as Exhibit "B"). On the same day, Mr. Whitfield was given drafts of new notes to sign for the closing which was to be held on June 28, 2012. The new documents contained clauses that all of Mr. Whitfield's properties would be cross collateralized, despite Mr. River's agreement and assurances not to cross collateralize the properties (See Paragraph 20 (d) herein).

22. In reliance upon Mr. Warren's June 26, 2012 commitment letter, Mr. Whitfield attended a scheduled closing at attorney Mark Weeks' law office. At the closing, Mr. Warren informed Mr. Whitfield that a signed endorsement from a title company was needed so that Mr. Whitfield's ex-spouse Cindy Whitfield would not be required to sign the loan documents for one of the properties that Cindy Whitfield resided in (hereinafter, the "Black Rush Property")¹. At a certain point, Mr. Whitfield was informed by the closing attorney that the endorsement could not be procured, that Mrs. Whitfield was refusing to sign the mortgage to the Black Rush Property, and Mr. Warren proposed that it would only be possible to close two of the subject properties - Mepkin and Gahagan, but that if the Black Rush Property ultimately couldn't be closed, all properties including Mepkin and Gahagan would have to be foreclosed upon.

¹ Plaintiff also attempted to procure a "Business Purpose Statement" from Mr. Whitfield indicating that the property was to be used in Mr. Whitfield's business despite having previous knowledge that the Black Rush Property was in a fact residential property for Mr. Whitfield's ex-wife Cindy Whitfield.

23. Despite Harbor National Bank's representations that a title endorsement was required to renew the Black Rush Property, Mr. Whitfield has subsequently learned that no such endorsement was required from the title company. Moreover, Harbor National Bank failed to renew any of the loans listed in the June 26, 2012 commitment letter despite agreeing to do so, willfully breaching their agreements, and causing Mr. Whitfield damages as to be determined by the trier of fact.

FOR A FOR FIRST COUNTERCLAIM
(Breach of Contract)

24. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

25. As described above, Plaintiff indicated before and after the origination of the loan, verbally and in writing, that the loan to the Subject Property would be automatically renewed.

26. Despite repeatedly making these representations and reassurances, Plaintiff failed to renew the loan and instead declared Mr. Whitfield to be in default despite being paid all monthly installments on time, as and when due, breaching their agreement with Mr. Whitfield.

27. Although Plaintiff ultimately promised in writing to renew the loan on June 26, 2012, Plaintiff refused to close the loan on June 28, 2012, as described above, breaching the terms of the offer contained in the writing. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A SECOND CAUSE OF ACTION
(Negligent Misrepresentation)

28. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

29. As described above, Harbor National Bank made affirmative representations to Mr. Whitfield that: (1) the initial loans would be 30 year loans; (2) the maturity date referenced in the Note was simply a renewal date; and (3) the interest rate to be charged would be Mr. Whitfield's choice of 7.5% or prime minus ¼ %. The Plaintiff also made representations, and an offer, that the loans would be renewed at 4.75% with a new maturity date of July 10, 2017.

30. Plaintiff knew these representations were false, misleading, and incomplete when they were made. Such representations were (1) false, misleading and incomplete when made; (2) were made for a pecuniary interest of the Plaintiff; (3) the Plaintiff owed a duty of care to convey truthful information to Mr. Whitfield; (4) the Plaintiff breached that duty by failing to exercise due care; (5) Mr. Whitfield was unaware that the representations were false - and had no reason to suspect they were false as he placed his trust and confidence in Plaintiff. As such, Mr. Whitfield had a right to rely on such information, and did so rely on said information to his financial detriment as outlined above. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of

punitive damages.

FOR A THIRD CAUSE OF ACTION
(Fraud in the Inducement)

31. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

32. At or about the time of the initial loan originations, Plaintiff made affirmative representations to Mr. Whitfield that: (1) the loans would be 30 year loans; (2) that the maturity date referenced in the Notes were simply renewal dates; and (3) that the interest rate to be charged would be Mr. Whitfield's choice of 7.5% or prime minus ¼ %. The Plaintiff also made representations, and an offer, that the loans would be renewed at 4.75% with new maturity dates of July 10, 2017. Such representations were false, incomplete and misleading when made, were material, were known by the Plaintiff to be false, misleading and incomplete, and were intended to be relied upon.

33. Mr. Whitfield was unaware that the representations were false and had no reason to suspect they were false, as he placed his trust and confidence in Plaintiff. As such, Mr. Whitfield had a right to rely on such information, and did so rely on said information to his detriment financial as outlined above. Had Mr. Whitfield known Plaintiff never intended to renew the loan, Mr. Whitfield would have previously refinanced the loan with another lender at a time when it was possible. At a minimum, the Plaintiff should have relayed their concerns about renewals as early as documentary evidence suggest Harbor National Bank had a concern, to-wit, the year 2010.

34. These false representations were made to induce the Mr. Whitfield to enter

a high cost loan, and were made by the Plaintiff with the knowledge of their falsity.

35. Mr. Whitfield reasonably relied on the material representations of Plaintiff and had no knowledge the representations made by the Plaintiff were false and the Mr. Whitfield was, therefore, fraudulently induced by the Plaintiff to enter into the high cost loan.

36. Mr. Whitfield made a mistake in entering into the loan, which mistake was unilateral. Mr. Whitfield was fraudulently induced by the Plaintiff to make the unilateral mistake as a direct, proximate and foreseeable result of the fraud, deceit, misrepresentation, and active concealment perpetrated upon Mr. Whitfield by the Plaintiff.

37. Subsequent to the origination of the loan, Mr. Whitfield has been informed and now believes that the Plaintiff misrepresented the terms of the loan, verbally and in writing by (1) not receiving 30 year loans, (2) representing that the maturity date was simply a renewal date; and (3) charging, and refusing to change, the interest rate of 7.5%. The Plaintiff also made representations, and an offer, to renew the loans at 4.75% with a new maturity date of July 10, 2017 as agreed. As such, Mr. Whitfield is entitled to avoid or rescind the loan and to be returned to the status quo ante whereby the Plaintiff returns to Mr. Whitfield all monies paid by Mr. Whitfield in exchange for Mr. Whitfield returning the amount of the loan proceeds to the Plaintiff. In addition thereto, Mr. Whitfield is entitled to all incidental, consequential, direct and indirect damages proximately caused by Plaintiff when they fraudulently induced Mr. Whitfield to enter into the loan transaction. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an

award of punitive damages.

FOR A FOURTH CAUSE OF ACTION

(Violation of Federal Trade Commission Act Section 5(a) 15 U.S.C. §45)
(As made applicable through SC Code §39-5-10 et.seq.)

38. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

39. As stated above, Plaintiff made affirmative representations to Mr. Whitfield that: (1) the loans would be 30 year loans; (2) that the maturity dates referenced in the Notes were simply renewal dates; and (3) that the interest rate to be charged would be Mr. Whitfield's choice of 7.5% or prime minus ¼ %. The Plaintiff also represented, and made an offer, that the loans would be renewed at 4.75% with new maturity dates of July 10, 2017.

40. Plaintiff's acts enumerated above constitute "unfair or deceptive acts or practices in or affecting commerce," as those terms are defined in the Act. This prohibition applies to all persons engaged in commerce, including banks. An act or practice is unfair where it: (1) causes or is likely to cause substantial injury to consumers; (2) cannot be reasonably avoided by consumers and; (3) is not outweighed by countervailing benefits to consumers or to competition. In this case, Plaintiff's actions discussed above have caused substantial injury to Mr. Whitfield.

41. An act or practice is deceptive where: (1) a representation, omission, or practice misleads or is likely to mislead the consumer; (2) a consumer's interpretation of the representation, omission, or practice is considered reasonable under the circumstances and; (3) the misleading representation, omission, or practice is material.

In this case, Plaintiff's actions were deceptive because Plaintiff clearly misrepresented that the loans would be renewed. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A FIFTH CAUSE OF ACTION
(Promissory Estoppel / Detrimental Reliance)

42. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

43. Mr. Whitfield relied on the promises of Angela Bell, Charlie Rivers, and Scott Warren to renew and modify the loans.

44. These promises were unambiguous in their terms and were relied upon by Mr. Whitfield. In particular, there were no contingencies placed upon the June 26, 2012 written offer to renew any of the loans as title insured first mortgages were already in place on the subject properties.

45. The reliance by Mr. Whitfield regarding renewing the loans was more than expected and more than foreseeable by Harbor National Bank.

46. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR A SIXTH CAUSE OF ACTION
(Tortious Interference with Prospective Contractual Relations)

47. Mr. Whitfield hereby incorporates the allegations of the foregoing

paragraphs as if fully restated herein.

48. The acts of Plaintiff described herein constituted an interference with Mr. Whitfield's business, were without justification, were done with improper purpose and motive, knowing it would place Mr. Whitfield under duress when filing these unfounded legal proceedings and knowing that it would interfere with Mr. Whitfield's ability to sell and/or rent the subject property.

49. As a result of Plaintiff's actions Mr. Whitfield has lost the ability to enter into contracts with identifiable prospective buyers and/or renters of the subject property. As a direct and proximate result of the Plaintiff's actions, Mr. Whitfield has suffered special damages including but not limited to a diminished value of their property in the eyes of third parties, loss of income and loss of profits.

50. Plaintiff's actions proximately caused actual, consequential, and special damages, including but not limited to: a) inability to sell the subject property to third parties who met requirements for sale and/or rental of the subject property; b) foreclosure proceedings having been instituted on the subject property; c) a diminished value of the subject property in the eyes of third parties; d) damage to Mr. Whitfield's reputation and business standing in the real estate profession; e) financial damage to Mr. Whitfield's business because of time spent away to defend these charges, f) financial damage for his inability to sell the subject property following filing of the lis pendens and lawsuit, g) attorneys' fees and costs incurred; h) time spent away from work as a result of the lis pendens and lawsuit, i) emotional distress to Mr. Whitfield, j) injury to his health and mental pain and suffering.

FOR A SEVENTH CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Act)

51. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

52. As stated above, Mr. Rivers made an agreement to renew the loans at the June 21, 2012 meeting with Mr. Whitfield.

53. Plaintiff breached the agreement with Mr. Whitfield by failing to close the renewal of the loan which is the subject of this lawsuit. Such breach was made with the fraudulent intent of never actually intending to close the renewal when that representation was made, and such fraudulent intent was manifested by the fraudulent act of claiming a title endorsement was required to renew the loan when in fact one was never needed.

54. Mr. Whitfield has been injured in reliance upon Harbor National Bank's promises to him as will shown to the trier of fact, including but not limited to, physical and mental distress and financial loss. In addition thereto, the actions of the Plaintiff entitle Mr. Whitfield to an award of punitive damages.

FOR AN EIGHTH CAUSE OF ACTION
(Abuse of Process as to David Swanson and BNC Bancorp through its employee/agent Scott Warren)

55. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

56. Mr. Scott Warren claims he called Mr. David Swanson for the advice to procure a title endorsement in order to renew the loan for the Black Rush Property.

57. Mr. Swanson claims that Mr. Scott Warren called him regarding the anticipated closing between Mr. Whitfield and Harbor National Bank, said closing set to occur on June 28, 2012.

58. Despite providing such sworn testimony by each Mr. Scott Warren and Mr. David Swanson that this advice was given and received before the June 28, 2012 closing, there is no evidence of any such phone call as the phone records from Mr. David Swanson's cell phone and his office line show no record of a phone call from Mr. Scott Warren cell phone or office line in June of 2012.

59. Because the telephone records show the phone call never occurred, the sworn testimony that the call was made, when in fact evidence shows it was not made at the time, was given with the ulterior purpose of fabricating a legal defense for the bank's failure to renew its contractual obligations to renew Mr. Whitfield's loans.

60. Mr. David Swanson has represented that Scott Warren called him regarding an anticipated closing, in which he gave advice to Mr. Warren to procure a title endorsement. As alleged previously, Mr. Swanson and his law firm have no proof the advice was ever given as there is no engagement letter, fee agreement, correspondence, records of any kind, opinion letters, or billing entries at the firm to corroborate the legal defense that Mr. Swanson provided the information at the time he claims the advice was made. Additionally, there is no evidence of the communication itself from Mr. Warren's cell phone or office line to Mr. Swanson's cell phone or office line, further evidence that the communication was never made, when Mr. Swanson and Mr. Warren claim it was.

61. The sworn testimony that the call was placed before closing, when in fact it was not, was a willful or overt act, done with the intent and collateral objective of furnishing a legal defense (advice of counsel) for the bank and injuring Mr. Whitfield.

62. The sworn testimony by each Mr. Scott Warren and Mr. David Swanson was a misuse and perversion of legal process by fabricating a legal defense (advice of counsel) when one in fact had never been given at the time claimed to have been given. The acts described above and herein have caused damage to Mr. Whitfield by incurring actual damages, both mental and pecuniary, including by way of example only and without limitation: loss of time, injury to property and financial standing, shame, mortification, mental anguish, mental pain and suffering, emotional distress, loss of enjoyment of life, injury to feelings, an overall degradation of health, and was hindered from, and will continue to be hindered from attending to his usual duties and affairs of life, as a direct and proximate result of the aforesaid conduct of Harbor National Bank, in an exact amount of actual, consequential and special damages as to be determined by a trier of fact.

FOR A NINTH CAUSE OF ACTION

(Civil Conspiracy as to David Swanson and BNC Bancorp through its employee/agent
Scott Warren)

63. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

64. As alleged above, Mr. Scott Warren claims he called Mr. David Swanson for the advice to procure a title endorsement in order to renew the loan for the Black Rush Property.

65. Mr. Swanson claims that Mr. Scott Warren called him regarding the anticipated closing between Mr. Whitfield and Harbor National Bank, said closing set to occur on June 28, 2012.

66. Despite providing such sworn testimony by each Mr. Scott Warren and Mr. David Swanson that this advice was given and received before the June 28, 2012 closing, there is no evidence of any such phone call as the phone records from Mr. David Swanson's cell phone and his office line show no record of a phone call from Mr. Scott Warren cell phone or office line in June of 2012.

67. Because the telephone records show the phone call never occurred, the sworn testimony that the call was made, when in fact it was not made at the time, was given with the ulterior purpose of fabricating a legal defense for the bank's failure to renew its contractual obligations to renew Mr. Whitfield's loans.

68. Mr. David Swanson has represented that Scott Warren called him regarding an anticipated closing, in which he gave advice to Mr. Warren to procure a title endorsement. As alleged previously, Mr. Swanson and his law firm have no proof the advice was ever given as there is no engagement letter, fee agreement, correspondence, records of any kind, opinion letters, or billing entries at the firm to corroborate the legal defense that Mr. Swanson provided the information at the time he claims the advice was made. Additionally, there is no evidence of the communication itself from Mr. Warren's cell phone or office line to Mr. Swanson's cell phone or office line, further evidence that the communication was never made, when Mr. Swanson and Mr. Warren claim it was.

69. The sworn testimony that the call was placed before closing, when in fact it was not, was a willful or overt act, done with the intent and collateral objective of furnishing a legal defense (advice of counsel) for the bank and injuring Mr. Whitfield.

70. The sworn testimony by each Mr. Scott Warren and Mr. David Swanson was a misuse and perversion of legal process by fabricating a legal defense (advice of counsel) when one in fact had never been given at the time claimed to have been given.

71. Mr. David Swanson's actions described above and herein were made for his own personal interest as they were performed outside the scope of his law firm's representation of Harbor National Bank.

72. The actions of David Swanson and Scott Warren as alleged above and herein constitute an combination of two or more persons that was done with the purpose of furnishing a legal defense (advice of counsel) for the bank and Injuring Mr. Whitfield which has caused him special damages, beyond damages specified in his other causes of action for having to incur attorney's fees and costs associated with Harbor National Bank's advice of counsel defense which should never have been incurred.

FOR A TENTH CAUSE OF ACTION
(Cross-Claim for Equitable Indemnity as to Co-Defendant Cindy Whitfield)

73. Mr. Whitfield hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

74. To the extent, if any, that Mr. Whitfield is held liable to the Plaintiff in this action, which such liability is expressly denied, such liability would be a proximate result of the wrongful acts, breach of duties, omissions, and/or negligence of Cindy Whitfield

and/or her agents in failing to give her permission and/or authorization to renew the loan for the subject property located at 1055 Black Rush Circle, Mount Pleasant, South Carolina, said demand being made as a defense of Harbor National Bank to close all of the renewal loans set forth in Exhibit "C".

75. Specifically, the closing attorney Mark Weeks and Mr. Whitfield's previous counsel Lauren Felder have stated that Mrs. Cindy Whitfield's counsel Stanley Jaskiewicz was contacted regarding procuring her consent for the renewal of the Black Rush Property. Lauren Felder was advised by either Stanley Jaskiewicz or his paralegal Dena Hardison that Mrs. Cindy Whitfield, "would not sign off on the mortgage as Mr. Whitfield was solely responsible under the Final Family Court Order." Additionally, Mrs. Cindy Whitfield was told by Mr. Jaskiewicz' paralegal Dena Hardison that, "he [Mr. Whitfield] could not refinance my home or borrow the equity in it as he would be putting another nail in his coffin." According to Mrs. Whitfield, Ms. Dena Hardison gave her this advice before the closing² and was also told by Ms. Hardison not to, "do anything until I talk to Stan," regarding gaining access to her home for an appraisal. According to Mrs. Whitfield, Mr. Jaskiewicz never called her back regarding any issues related to procuring her consent to renew her home.

76. To the extent, if any, that Mr. Whitfield is held liable to the Plaintiff in this action, which such liability is expressly denied, these wrongful acts, breach of duties, omissions, and/or negligence of Cindy Whitfield and/or her agents have damaged Mr. Whitfield, including but not limited to consequential and special damages, and the

² Mrs. Whitfield indicated this statement was made by Ms. Hardison at the time the appraiser was attempting to gain access to Mrs. Whitfield's home-- in May and June of 2012. Correspondence was sent to Stanley Jaskiewicz advising him of appraisal access issue on June 11, 2012.

imposition of attorney's fees and costs in defending the foreclosure and prosecuting the Counterclaims as alleged herein. Mr. Whitfield and Mrs. Cindy Whitfield had a special relationship by virtue of their continuing family court obligations that would support a claim for indemnity against Mrs. Cindy Whitfield. Moreover, Mr. Whitfield is wholly without fault for Cindy Whitfield failing to provide her permission and/or authorization to renew the loan for the Black Rush Property.

77. To the extent, if any, that Mr. Whitfield is held liable to the Plaintiff in this action, which such liability is expressly denied, Mr. Whitfield would be entitled to be equitably indemnified for such liability from Cindy Whitfield for any liability that Mr. Whitfield is found to have incurred to the Plaintiff such that Mr. Whitfield would be entitled to recover his consequential and special damages, attorney's fees and costs, monies adjudged owed to the Plaintiff and/or monies expended by way of settlement of Plaintiff's claims as a result of Cindy Whitfield and/or her agents wrongful acts, breach of duties, omissions, and/or negligence as afore-described.

WHEREFORE, Defendants prays for relief as set forth below together with such further relief as this court deems just:

- a. Actual damages;
- b. Statutory damages;
- c. Treble Damages
- d. Disgorgement of profits;
- e. Restitution;
- f. Rescission;
- g. Injunctive relief; and

h. Attorneys' fees and costs

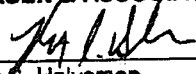
DEMAND FOR JURY TRIAL

Mr. Whitfield demands a jury trial on all counts stated above. These causes of action must be tried before any equitable causes of action asserted by either party can be disposed of. See Gardner v. Travis, 316 S.C. 315, 450 S.E.2d 54 (Ct. App. 1994)

Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

By: _____


Brent G. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com
Attorneys for the Defendant

March 4th, 2016.
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that I served the foregoing Fifth Amended Answer, Affirmative Defenses and Counterclaims upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to the parties and counsel's last known address on this 4th day of March, 2016.

HALVERSEN & ASSOCIATES, LLC

By: *Brent S. Halversen*
Brent S. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com

Charleston, South Carolina
March 4th, 2016

2016 MAR -8 AM 11:36
MARY P. BROWN
CLERK OF COURT
CHARLESTON COUNTY
FILED
KRC

HALVERSEN 
ASSOCIATES, L.L.C.
Attorneys - at - Law

BRENT S. HALVERSEN*
Direct Line: (843) 284-5790
brent@halversenlaw.com

*ALSO ADMITTED IN FLORIDA

March 4, 2016

VIA US MAIL

Clerk of Court
Berkeley County Clerk of Court
300-B California Avenue
P.O. Box 219
Moncks Corner, SC 29461


Re: Bank of North Carolina v. Anthony M. Whitfield, Cindy Whitfield and
David Swanson
Case No.: 2012-CP-08-2618

Dear Clerk of Court:

Enclosed please find the original and one copy of the Defendant's Fifth Amended Answer, Affirmative Defenses and Counterclaims in the above referenced matter. Please file the original and return file stamped copy to our office in the enclosed envelope.

By copy of this correspondence I am serving all counsel with the Fifth Amended Answer, Affirmative Defenses and Counterclaims. If you have any questions or comments, please do not hesitate to contact me.

Sincerely yours,



Brent Souther Halversen

BSH/ak
Enclosures

cc: Mr. Brian Duffy, Esquire (Via U.S. Mail Only)
Mr. Paul Ferrara, Esquire (Via U.S. Mail Only)
Mr. Dan Slotchiver, Esquire (Via E-Mail Only)
Mr. David Overstreet, Esquire (Via U.S. Mail Only)

171 Church Street, Suite 330, Charleston, South Carolina 29401 • Telephone (843) 284-5790 • Fax (864) 326-4844
www.HalversenLaw.com

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER 2016 APR -7) CASE NO.: 2014-CP-18-358
AM 11:08

Bank of North Carolina,

Plaintiff,

vs.

Anthony Whitfield and
Cindy Whitfield

Defendants.

Anthony Whitfield

Third Party Plaintiff

vs.

David Swanson

Third Party Defendant

CHESTER
CLERK OF COURT
DORCHESTER COUNTY

**THIRD PARTY DEFENDANT DAVID
SWANSON'S ANSWER TO
DEFENDANT/THIRD PARTY
PLAINTIFF'S AMENDED ANSWER
AFFIRMATIVE DEFENSES,
CROSSCLAIM, COUNTERCLAIMS AND
THIRD PARTY COMPLAINT
(Jury Trial Demanded)**

TO: BRENT HALVERSEN, ESQ. AND DANIEL SLOTCHIVER, ESQ., ATTORNEYS FOR
DEFENDANT/THIRD PARTY PLAINTIFF ANTHONY WHITFIELD:

Third Party Defendant David Swanson hereby responds to the above-captioned Third Party
Plaintiff's Complaint as follows:

1. The Allegations contained in Paragraphs 1 through 10 of Defendant's Fourth
Answer, Crossclaim, Counterclaims and Third Party Complaint (hereinafter "Third Party
Complaint") assert defenses to Plaintiff's Complaint, to which Third Party Defendant need not
respond. To the extent the allegations in Paragraphs 1 through 10 suggest or imply liability against
the Third Party Defendant, those allegations are expressly denied.

2. Third Party Defendant is without sufficient knowledge and information to form an
opinion as to the allegations contained in Paragraphs 11 through 55 of the Third Party Complaint,
and therefore denies the same.

3. Responding to the allegations contained in Paragraphs 56 and 57 of the Third Party Complaint, Third Party Defendant admits only so much of the allegations as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraphs 56 and 57.

4. Third Party Defendant denies the allegations contained in Paragraphs 58 and 59 of the Third Party Complaint.

5. Responding to Paragraph 60 of the Third Party Complaint, Third Party Defendant admits only so much of the allegations as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraph 60.

6. Third Party Defendant denies the allegations contained in Paragraphs 61 and 62 of the Third Party Complaint.

7. In response to Paragraph 63 of the Third Party Complaint, Third Party Defendant repeats and re-alleges every preceding paragraph of this Third Party Answer as if restated herein verbatim.

8. Responding to Paragraphs 64 and 65 of the Third Party Complaint, Third Party Defendant admits only so much of the allegations as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraphs 64 and 65.

9. Third Party Defendant denies the allegations contained in Paragraphs 66 and 67 of the Third Party Complaint.

10. Responding to Paragraph 68 of the Third Party Complaint, Third Party Defendant admits only so much of the allegations as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraph 68.

11. Third Party Defendant denies the allegations contained in Paragraphs 69 through 72 of the Third Party Complaint.

12. In response to Paragraph 73 of the Third Party Complaint, Third Party Defendant repeats and re-alleges every preceding paragraph of this Third Party Answer as if restated herein verbatim.

13. Third Party Defendant is without sufficient knowledge and information to form an opinion as to the allegations contained in Paragraphs 74 through 77 of the Third Party Complaint, and therefore denies the same.

14. Defendant denies each and every allegation not specifically admitted herein.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

15. Third Party Plaintiff's Complaint fails to allege facts sufficient to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6), SCRCP.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

16. Third Party Defendant was at all times acting as an attorney in the course and scope of providing legal services to his client and is immune from liability to third-parties such as Third Party Plaintiff.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

17. No act or omission of Third Party Defendant was the cause of any damages to Third Party Plaintiff.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

18. Third Party Plaintiff's claims against Third Party Defendant are barred to the extent relief is obtainable from other avenues.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

19. Third Party Plaintiff lacks standing to pursue one or more claims against Third Party Defendant.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

20. Third Party Plaintiff's claims are or may be barred by the doctrines of waiver, estoppel and/or unclean hands.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

21. At all relevant times, Third Party Defendant exercised the necessary degree of care and skill maintained by other attorneys under similar conditions and in like circumstances.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

22. Third Party Plaintiff's Complaint alleges duplicative causes of action that should be dismissed or merged as provided by law.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

23. Third Party Plaintiff's Complaint fails to state a claim upon which attorney's fees can be awarded or allege facts which, if proven, would entitle Third Party Plaintiff to an award of attorney's fees.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

24. Third Party Plaintiff's Complaint fails to state a claim upon which treble damages can be awarded or allege facts which, if proven, would entitle Third Party Plaintiff to an award of treble damages.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

25. Third Party Plaintiff's Complaint fails to state a claim upon which punitive damages can be awarded or allege facts which, if proven, would entitle Third Party Plaintiff to an award of punitive damages.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

26. Any award of punitive or exemplary damages in this action would be in violation of the rights of Third Party Defendant under the United States Constitution and the Constitution of the State of South Carolina.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

27. Third Party Defendant reserves any additional and further defenses that may be revealed by information obtained during the course of investigation and discovery as consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the allegations of Third Party Plaintiff's Complaint, Third Party Defendant prays that Third Party Plaintiff's Complaint be dismissed with prejudice, for all costs of the action to be cast upon Third Party Plaintiff, and for such other and further relief as this Court may deem just and proper.

This 4 day of April, 2016.

Respectfully submitted,

EARHART OVERSTREET LLC

By:


DAVID W. OVERSTREET

State Bar No.: 16965

MICHAEL B. MCCALL

State Bar No.: 73028

STEVEN R. KROPSKI

State Bar No.: 101441

Attorneys for Third Party Defendant David Swanson

PO Box 22528
Charleston, SC 29413
843-972-9400

STATE OF SOUTH CAROLINA RECORDED IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER CASE NO.: 2014-CP-18-358
16 APR -7 AM 11:08

Bank of North Carolina,

CHEYNE BERRY
CLERK OF COURT
DORCHESTER COUNTY
Plaintiff,

CERTIFICATE OF SERVICE

vs.

Anthony Whitfield and
Cindy Whitfield

Defendants.

Anthony Whitfield

Third Party Plaintiff

vs.

David Swanson

Third Party Defendant

I hereby certify that I have this day served a copy of the within and foregoing pleading upon all parties to this matter by via electronic mail or by depositing a true copy of same via in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

Brent S. Halverson, Esq.
Halverson & Associates, LLC
171 Church Street, Suite 300
Charleston, SC 29401

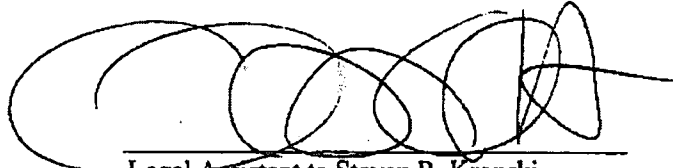
Andrew J. McCumber, Esq.
Daniel S. Slotchiver, Esq.
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, SC 29401

Brian C. Duffy, Esq.
Seth W. Whitaker, Esq.

Stephen Jenkins Bell, Esq.
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401

Robert A. Bernstein, Esq.
Bernstein & Bernstein PA
5418-B Rivers Avenue
North Charleston, SC 29406

This 4th day of April, 2016.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Legal Assistant to Steven R. Kropski



STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

FILED - RECORDS
2015 APR 07 10:01 AM
IN THE COURT OF COMMON PLEAS
CASE NO. 2014-CP-18-1792

Bank of North Carolina,

CHESTER COUNTY
CLERK OF COURT
DORCHESTER COUNTY

Plaintiff,

vs.

Anthony Whitfield and
Cindy Whitfield

Defendants.

**THIRD PARTY DEFENDANT DAVID
SWANSON'S ANSWER TO
DEFENDANT/THIRD PARTY
PLAINTIFF'S FOURTH AMENDED
ANSWER AFFIRMATIVE DEFENSES,
CROSSCLAIM, COUNTERCLAIMS AND
THIRD PARTY COMPLAINT
(Jury Trial Demanded)**

Anthony Whitfield

Third Party Plaintiff

vs.

David Swanson

Third Party Defendant

TO: BRENT HALVERSEN, ESQ. AND DANIEL SLOTCHIVER, ESQ., ATTORNEYS FOR
DEFENDANT/THIRD PARTY PLAINTIFF ANTHONY WHITFIELD:

Third Party Defendant David Swanson hereby responds to the above-captioned Third Party
Plaintiff's Complaint as follows:

1. The Allegations contained in Paragraphs 1 through 10 of Defendant's Fourth
Answer, Crossclaim, Counterclaims and Third Party Complaint (hereinafter "Third Party
Complaint") assert defenses to Plaintiff's Complaint, to which Third Party Defendant need not
respond. To the extent the allegations in Paragraphs 1 through 10 suggest or imply liability against
the Third Party Defendant, those allegations are expressly denied.

2. Third Party Defendant is without sufficient knowledge and information to form an
opinion as to the allegations contained in Paragraphs 11 through 55 of the Third Party Complaint,
and therefore denies the same.

3. Responding to the allegations contained in Paragraphs 56 and 57 of the Third Party Complaint, Third Party Defendant admits only so much of the allegations as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraphs 56 and 57.

4. Third Party Defendant denies the allegations contained in Paragraphs 58 and 59 of the Third Party Complaint.

5. Responding to Paragraph 60 of the Third Party Complaint, Third Party Defendant admits only so much of the allegations as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraph 60.

6. Third Party Defendant denies the allegations contained in Paragraphs 61 and 62 of the Third Party Complaint.

7. In response to Paragraph 63 of the Third Party Complaint, Third Party Defendant repeats and re-alleges every preceding paragraph of this Third Party Answer as if restated herein verbatim.

8. Responding to Paragraphs 64 and 65 of the Third Party Complaint, Third Party Defendant admits only so much of the allegations as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraphs 64 and 65.

9. Third Party Defendant denies the allegations contained in Paragraphs 66 and 67 of the Third Party Complaint.

10. Responding to Paragraph 68 of the Third Party Complaint, Third Party Defendant admits only so much of the allegations as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraph 68.

11. Third Party Defendant denies the allegations contained in Paragraphs 69 through 72 of the Third Party Complaint.

12. In response to Paragraph 73 of the Third Party Complaint, Third Party Defendant repeats and re-alleges every preceding paragraph of this Third Party Answer as if restated herein verbatim.

13. Third Party Defendant is without sufficient knowledge and information to form an opinion as to the allegations contained in Paragraphs 74 through 77 of the Third Party Complaint, and therefore denies the same.

14. Defendant denies each and every allegation not specifically admitted herein.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

15. Third Party Plaintiff's Complaint fails to allege facts sufficient to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6), SCRCF.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

16. Third Party Defendant was at all times acting as an attorney in the course and scope of providing legal services to his client and is immune from liability to third-parties such as Third Party Plaintiff.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

17. No act or omission of Third Party Defendant was the cause of any damages to Third Party Plaintiff.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

18. Third Party Plaintiff's claims against Third Party Defendant are barred to the extent relief is obtainable from other avenues.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

19. Third Party Plaintiff lacks standing to pursue one or more claims against Third Party Defendant.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

20. Third Party Plaintiff's claims are or may be barred by the doctrines of waiver, estoppel and/or unclean hands.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

21. At all relevant times, Third Party Defendant exercised the necessary degree of care and skill maintained by other attorneys under similar conditions and in like circumstances.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

22. Third Party Plaintiff's Complaint alleges duplicative causes of action that should be dismissed or merged as provided by law.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

23. Third Party Plaintiff's Complaint fails to state a claim upon which attorney's fees can be awarded or allege facts which, if proven, would entitle Third Party Plaintiff to an award of attorney's fees.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

24. Third Party Plaintiff's Complaint fails to state a claim upon which treble damages can be awarded or allege facts which, if proven, would entitle Third Party Plaintiff to an award of treble damages.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

25. Third Party Plaintiff's Complaint fails to state a claim upon which punitive damages can be awarded or allege facts which, if proven, would entitle Third Party Plaintiff to an award of punitive damages.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

26. Any award of punitive or exemplary damages in this action would be in violation of the rights of Third Party Defendant under the United States Constitution and the Constitution of the State of South Carolina.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

27. Third Party Defendant reserves any additional and further defenses that may be revealed by information obtained during the course of investigation and discovery as consistent with the South Carolina Rules of Civil Procedure.

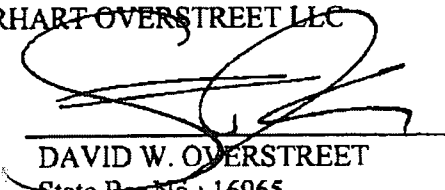
WHEREFORE, having fully answered the allegations of Third Party Plaintiff's Complaint, Third Party Defendant prays that Third Party Plaintiff's Complaint be dismissed with prejudice, for all costs of the action to be cast upon Third Party Plaintiff, and for such other and further relief as this Court may deem just and proper.

This 4 day of April, 2016.

Respectfully submitted,

~~EARHART OVERSTREET LLC~~

By:


DAVID W. OVERSTREET
State Bar No.: 16965

MICHAEL B. MCCALL
State Bar No.: 73028

STEVEN R. KROPSKI
State Bar No.: 101441

Attorneys for Third Party Defendant David Swanson

PO Box 22528
Charleston, SC 29413
843-972-9400

STATE OF SOUTH CAROLINA - RECORDS IN THE COURT OF COMMON PLEAS
 COUNTY OF DORCHESTER) CASE NO.: 2014-CP-18-1792
 APR -7 AM 11:11

Bank of North Carolina,
 Plaintiff,
)
)
 vs.)
)
 Anthony Whitfield and)
 Cindy Whitfield)
 Defendants.)
)
 Anthony Whitfield)
)
 Third Party Plaintiff)
)
 vs.)
)
 David Swanson)
 Third Party Defendant)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing pleading upon all parties to this matter by via electronic mail or by depositing a true copy of same via in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

Brent S. Halverson, Esq.
 Halverson & Associates, LLC
 171 Church Street, Suite 300
 Charleston, SC 29401

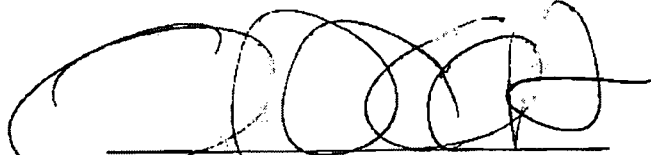
Andrew J. McCumber, Esq.
 Daniel S. Slotchiver, Esq.
 Slotchiver & Slotchiver, LLP
 44 State Street
 Charleston, SC 29401

Brian C. Duffy, Esq.
 Seth W. Whitaker, Esq.

Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401

Robert A. Berstein, Esq.
Berstein & Berstein PA
5418-B Rivers Avenue
North Charleston, SC 29406

This 4th day of April, 2016.



Legal Assistant to Steven R. Kropski

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
Bank of North Carolina,)
Plaintiff,)
vs.)
Anthony Whitfield and)
Cindy Whitfield)
Defendants.)
Anthony Whitfield)
Third Party Plaintiff)
vs.)
✓ David Swanson)
Third Party Defendant)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2014-CP-18-1793
**THIRD PARTY DEFENDANT DAVID
SWANSON'S ANSWER TO
DEFENDANT/THIRD PARTY
PLAINTIFF'S FOURTH AMENDED
ANSWER AFFIRMATIVE DEFENSES,
CROSSCLAIM, COUNTERCLAIMS AND
THIRD PARTY COMPLAINT
(Jury Trial Demanded)**

2016 APR -7 AM 11:11
CLERK OF COURT
DORCHESTER COUNTY

TO: BRENT HALVERSEN, ESQ. AND DANIEL SLOTCHIVER, ESQ., ATTORNEYS FOR DEFENDANT/THIRD PARTY PLAINTIFF ANTHONY WHITFIELD:

Third Party Defendant David Swanson hereby responds to the above-captioned Third Party Plaintiff's Complaint as follows:

1. The Allegations contained in Paragraphs 1 through 10 of Defendant's Fourth Answer, Crossclaim, Counterclaims and Third Party Complaint (hereinafter "Third Party Complaint") assert defenses to Plaintiff's Complaint, to which Third Party Defendant need not respond. To the extent the allegations in Paragraphs 1 through 10 suggest or imply liability against the Third Party Defendant, those allegations are expressly denied.
2. Third Party Defendant is without sufficient knowledge and information to form an opinion as to the allegations contained in Paragraphs 11 through 55 of the Third Party Complaint, and therefore denies the same.

3. Responding to the allegations contained in Paragraphs 56 and 57 of the Third Party Complaint, Third Party Defendant admits only so much of the allegations as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraphs 56 and 57.

4. Third Party Defendant denies the allegations contained in Paragraphs 58 and 59 of the Third Party Complaint.

5. Responding to Paragraph 60 of the Third Party Complaint, Third Party Defendant admits only so much of the allegations as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraph 60.

6. Third Party Defendant denies the allegations contained in Paragraphs 61 and 62 of the Third Party Complaint.

7. In response to Paragraph 63 of the Third Party Complaint, Third Party Defendant repeats and re-alleges every preceding paragraph of this Third Party Answer as if restated herein verbatim.

8. Responding to Paragraphs 64 and 65 of the Third Party Complaint, Third Party Defendant admits only so much of the allegations as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraphs 64 and 65.

9. Third Party Defendant denies the allegations contained in Paragraphs 66 and 67 of the Third Party Complaint.

10. Responding to Paragraph 68 of the Third Party Complaint, Third Party Defendant admits only so much of the allegations as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraph 68.

11. Third Party Defendant denies the allegations contained in Paragraphs 69 through 72 of the Third Party Complaint.

12. In response to Paragraph 73 of the Third Party Complaint, Third Party Defendant repeats and re-alleges every preceding paragraph of this Third Party Answer as if restated herein verbatim.

13. Third Party Defendant is without sufficient knowledge and information to form an opinion as to the allegations contained in Paragraphs 74 through 77 of the Third Party Complaint, and therefore denies the same.

14. Defendant denies each and every allegation not specifically admitted herein.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:

15. Third Party Plaintiff's Complaint fails to allege facts sufficient to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6), SCRC.P.

FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:

16. Third Party Defendant was at all times acting as an attorney in the course and scope of providing legal services to his client and is immune from liability to third-parties such as Third Party Plaintiff.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

17. No act or omission of Third Party Defendant was the cause of any damages to Third Party Plaintiff.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

18. Third Party Plaintiff's claims against Third Party Defendant are barred to the extent relief is obtainable from other avenues.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

19. Third Party Plaintiff lacks standing to pursue one or more claims against Third Party Defendant.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

20. Third Party Plaintiff's claims are or may be barred by the doctrines of waiver, estoppel and/or unclean hands.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

21. At all relevant times, Third Party Defendant exercised the necessary degree of care and skill maintained by other attorneys under similar conditions and in like circumstances.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

22. Third Party Plaintiff's Complaint alleges duplicative causes of action that should be dismissed or merged as provided by law.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

23. Third Party Plaintiff's Complaint fails to state a claim upon which attorney's fees can be awarded or allege facts which, if proven, would entitle Third Party Plaintiff to an award of attorney's fees.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

24. Third Party Plaintiff's Complaint fails to state a claim upon which treble damages can be awarded or allege facts which, if proven, would entitle Third Party Plaintiff to an award of treble damages.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

25. Third Party Plaintiff's Complaint fails to state a claim upon which punitive damages can be awarded or allege facts which, if proven, would entitle Third Party Plaintiff to an award of punitive damages.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

26. Any award of punitive or exemplary damages in this action would be in violation of the rights of Third Party Defendant under the United States Constitution and the Constitution of the State of South Carolina.

**FURTHER RESPONDING TO THE THIRD PARTY COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO:**

27. Third Party Defendant reserves any additional and further defenses that may be revealed by information obtained during the course of investigation and discovery as consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the allegations of Third Party Plaintiff's Complaint, Third Party Defendant prays that Third Party Plaintiff's Complaint be dismissed with prejudice, for all costs of the action to be cast upon Third Party Plaintiff, and for such other and further relief as this Court may deem just and proper.

This 4 day of April, 2016.

Respectfully submitted,

EARHART OVERSTREET LLC

By: 

DAVID W. OVERSTREET

State Bar No.: 16965

MICHAEL B. MCCALL

State Bar No.: 73028

STEVEN R. KROPSKI

State Bar No.: 101441

Attorneys for Third Party Defendant David Swanson

PO Box 22528
Charleston, SC 29413
843-972-9400

Q
STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
Bank of North Carolina,)
Plaintiff,)
vs.)
Anthony Whitfield and)
Cindy Whitfield)
Defendants.)
Anthony Whitfield)
Third Party Plaintiff)
vs.)
David Swanson)
Third Party Defendant)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2014-CP-18-1792

CERTIFICATE OF SERVICE

FILED - RECORDED
2016 APR -7 AM 11:11
CLERK OF COURT
DORCHESTER COUNTY

I hereby certify that I have this day served a copy of the within and foregoing pleading upon all parties to this matter by via electronic mail or by depositing a true copy of same via in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

Brent S. Halverson, Esq.
Halverson & Associates, LLC
171 Church Street, Suite 300
Charleston, SC 29401

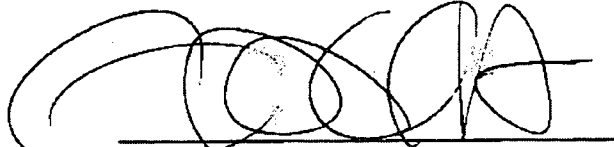
Andrew J. McCumber, Esq.
Daniel S. Slotchiver, Esq.
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, SC 29401

Brian C. Duffy, Esq.

Seth W. Whitaker, Esq.
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401

Robert A. Bernstein, Esq.
Bernstein & Bernstein PA
5418-B Rivers Avenue
North Charleston, SC 29406

This 14th day of April, 2016.



Legal Assistant to Steven R. Kropski

STATE OF SOUTH CAROLINA - REC'D IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER APR -7 AM 11:13) CASE NO.: 2014-CP-18-358

Bank of North Carolina,

CHERYL J. JONES
CLERK OF COURT
DORCHESTER COUNTY
Plaintiff,

vs.

Anthony Whitfield and
Cindy Whitfield

Defendants.

Anthony Whitfield

Third Party Plaintiff

vs.

David Swanson

Third Party Defendant

THIRD PARTY DEFENDANT DAVID
SWANSON'S MOTION TO STRIKE OR
DISMISS DEFENDANT/THIRD
PLAINTIFF'S COMPLAINT
(JURY TRIAL DEMANDED)

TO: BRENT HALVERSEN, ESQ. AND DANIEL SLOTCHIVER, ESQ., ATTORNEYS FOR
DEFENDANT/THIRD PARTY PLAINTIFF ANTHONY WHITFIELD:

YOU WILL PLEASE TAKE NOTICE that Third Party Defendant David Swanson ("Swanson"), by and through his undersigned attorneys, will move before the presiding Judge in the Court of Common Pleas for an Order dismissing and/or striking Defendant/Third Party Plaintiff's Complaint against him in the above-captioned case. This Motion is brought pursuant to Rule 12(b)(8), 12(f) and 14(a), SCRCPP, and upon such other law and argument as is appropriate. This Motion is based on the pleadings, and any memoranda of law to be submitted prior to oral argument.

BACKGROUND

This action is one of six foreclosures initiated by Plaintiffs against Defendant arising out of his failure to pay loans held by the Plaintiff. Currently pending are: Civil Action 2012-CP-10-5887 in

Charleston County; Civil Actions 2014-CP-18-358, 2014-CP-18-1792, 2014-CP-18-1793 in Dorchester County; and Civil Actions 2012-CP-08-2618, and 2012-CP-08-3478 in Berkley County.

Defendant/Third Party Plaintiff has interposed identical Third Party Claims against David Swanson and the Plaintiff in all six of the foreclosures, which have no connection to Defendant's liability to Plaintiff in its foreclosure action. In all six Third Party Complaints, Defendant/Third Party Plaintiff alleges claims for "abuse of process" and "civil conspiracy" alleging that Swanson and a bank representative lied about the existence of a phone call in order to "fabricate" a defense to Defendant's Counterclaims against the bank. The Third Party Complaint alleges:

- o Warren claims he called Mr. David Swanson for advice to procure a title endorsement in order to renew the loan for the Black Rush Property. (Charleston Third Party Compl. ¶¶66, 74; Dorchester/Berkley Third Party Compl. ¶¶56, 64).
- o Swanson claims that Mr. Scott Warren called him regarding the anticipated closing between Mr. Whitfield and Harbor National Bank. (Charleston Third Party Compl. ¶¶67, 75; Dorchester/Berkley Third Party Compl. ¶¶57, 65).
- o Despite providing such sworn testimony...there is no evidence of any such phone call. (Charleston Third Party Compl. ¶¶68, 76; Dorchester/Berkley Third Party Compl. ¶¶58, 66).
- o [T]he sworn testimony that the call was made...was given for the ulterior purpose of fabricating a legal defense for the bank's failure to renew its contractual obligations to renew Mr. Whitfield's loans. (Charleston Third Party Compl. ¶¶69, 77; Dorchester/Berkley Third Party Compl. ¶¶59, 67).

Defendant/Third Party Plaintiff alleges that the purported "abuse of process" has caused him emotional harm (Charleston Third Party Compl. ¶72; Dorchester/Berkley Third Party Compl. ¶62), while the alleged "civil conspiracy" has caused him damages in the form of "attorney's fees and costs incurred associated with Harbor National Bank's advice of counsel defense." (Charleston Third Party Compl. ¶82; Dorchester/Berkley Third Party Compl. ¶72).

BRIEF ARGUMENT

The allegations in all six of Defendant/Third Party Plaintiff's Third Party Complaints are identical. The Parties are actively engaged in litigating the exact same claims in the Charleston County Foreclosure action, which was filed approximately two months prior to the Third Party Complaint in the Dorchester County Foreclosure actions.

Additionally, Third Party Plaintiff's claims for "abuse of process" and "civil conspiracy" relate exclusively to the "Black Rush Property", which is located in Charleston County. The Third Party claims have no relationship to the properties located in Dorchester County.

A first filed action between the exact same parties, litigating identical claims, is already pending in Charleston County. To require the trial of the exact same claims in six different lawsuits would be an undue burden on the parties and the Court, in addition to presenting the possibility of inconsistent verdicts in each case. Accordingly, Dismissal is proper under Rule 12(b)(8), SCRPC.

Furthermore, the Third Party Claims have no relationship to the Property that is the subject of this Foreclosure, nor do they relate in any way to the Plaintiff's claims against Defendant. "When considering a request to strike...a third-party claim, the court may properly consider the effect the additional parties and claims will have on the adjudication of the main action-in particular, whether continued joinder will serve to complicate the litigation unduly or will prejudice the other parties in any substantial way." *Beach v. Hudson*, 298 S.C. 424, 426 (Ct. App. 1989). "A third-party claim may be asserted...only when the third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to defendant." *Id.* (citing, 6 C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE §1446 at 246 (1971) (emphasis added).

Here, the "abuse of process" and "civil conspiracy" claims clearly do not allege that Swanson can be held secondarily liability to the Plaintiff. Likewise, they will not be impacted by the outcome of the Foreclosure. Accordingly, the third party claims against Swanson should be struck.

CONCLUSION


Third Party Plaintiff's Complaint alleged claims that are already being litigated in a first filed Charleston County lawsuit. Moreover, the Third Party claims have no relationship to Defendant's liability to Plaintiff for their Foreclosure action, nor are they dependent on the outcome of the Foreclosure action. Accordingly, Third Party Defendant Swanson prays that Third Party Plaintiff's Complaint be dismissed with prejudice or Struck from this action; for all costs of the action to be cast upon Third Party Plaintiff, and for such other and further relief as this Court may deem just and proper.

This 4 day of April, 2016.

Respectfully submitted,

EARHART OVERSTREET LLC

By:


DAVID W. OVERSTREET
State Bar No.: 16965

MICHAEL B. MCCALL
State Bar No.: 73028

STEVEN R. KROPSKI
State Bar No.: 101441

Attorneys for Defendant David Swanson

PO Box 22528
Charleston, SC 29413
843-972-9400

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
RECORDS) CASE NO.: 2014-CP-18-358

COUNTY OF DORCHESTER)
SEPTEMBER -7 AM 11:13)

Bank of North Carolina,)
CLERK OF COURT)
DORCHESTER COUNTY)
Plaintiff,)

CERTIFICATE OF SERVICE

vs.)

Anthony Whitfield and)
Cindy Whitfield)
Defendants.)

Anthony Whitfield)
Third Party Plaintiff)

vs.)

David Swanson)
Third Party Defendant)

I hereby certify that I have this day served a copy of the within and foregoing pleading upon all parties to this matter by via electronic mail or by depositing a true copy of same via in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

Brent S. Halverson, Esq.
Halverson & Associates, LLC
171 Church Street, Suite 300
Charleston, SC 29401

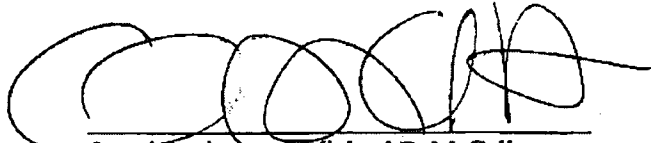
Andrew J. McCumber, Esq.
Daniel S. Slotchiver, Esq.
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, SC 29401

Brian C. Duffy, Esq.
Seth W. Whitaker, Esq.

Stephen Jenkins Bell, Esq.
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401

Robert A. Berstein, Esq.
Berstein & Berstein PA
5418-B Rivers Avenue
North Charleston, SC 29406

This 6th day of April, 2016.



Legal Assistant to Michael B. McCall

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

\$25.00 MB

COUNTY OF DORCHESTER

Bank of North Carolina,

CASE NO.: 2014-CP-18-358

Plaintiff,

FILED - RECORD
2016 APR -7 AM 11:13

MOTION INFORMATION FORM
AND COVER SHEET

vs.

Whitfield, et al.

Defendant,

CHERYL...
CLERK OF COURT
DORCHESTER COUNTY

Anthony Whitfield

Third Party Plaintiff

v.

David Swanson

Third Party Defendant.

Check box above indicating submitting party.

<p><u>Third Party Plaintiff's Counsel</u> Brent S Halverson, Esq. Halverson & Associates, LLC 171 Church Street, Suite 300 Charleston, SC 29401</p> <p>Daniel S. Slotchiver, Esq. Slotchiver & Slotchiver, LLP 44 State Street Charleston, SC 29401</p>	<p><u>Attorneys for Third Party Defendant</u> David W. Overstreet, Esq. State Bar No.: 16965 Steven R. Kropski, Esq. State Bar No.: 101441 Earhart Overstreet LLC P.O. Box 22528 Charleston, SC 29413 (843) 972-9400</p>
<p><input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)</p>	
<p align="center">SECTION I: Hearing Information</p> <p>Nature of Motion: Motion to Strike/Dismiss Estimated Time Needed: 15mins Court Reporter Needed: yes</p>	
<p align="center">SECTION II: Motion Type</p> <p><input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion</p> <p>I hereby move for relief or action by the court as set forth in the attached proposed order.</p> <p>Signature of Attorney for Third Party Defendant Date: 4/4/16</p>	
<p align="center">SECTION III: Motion Fee</p> <p><input checked="" type="checkbox"/> PAID - AMOUNT: \$25.00 <input type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ <input type="checkbox"/> Other:</p>	
<p align="center">JUDGE'S SECTION</p> <p><input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:</p>	<p>JUDGE _____ CODE: _____ Date: _____</p>
<p align="center">CLERK'S VERIFICATION</p> <p align="center"><u>DATE FILED</u></p> <p>Collected by: _____ (print name) <input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____</p>	

STATE OF SOUTH CAROLINA - RECORD) IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER) CASE NO.: 2014-CP-18-1792
2016 APR -7 AM 11:42

Bank of North Carolina,

CLERK OF COURT
DORCHESTER COUNTY
Plaintiff,

vs.

Anthony Whitfield and
Cindy Whitfield

Defendants.

Anthony Whitfield

Third Party Plaintiff

vs.

David Swanson

Third Party Defendant

**THIRD PARTY DEFENDANT DAVID
SWANSON'S MOTION TO STRIKE OR
DISMISS DEFENDANT/THIRD
PLAINTIFF'S COMPLAINT
(JURY TRIAL DEMANDED)**

TO: BRENT HALVERSEN, ESQ. AND DANIEL SLOTCHIVER, ESQ., ATTORNEYS FOR
DEFENDANT/THIRD PARTY PLAINTIFF ANTHONY WHITFIELD:

YOU WILL PLEASE TAKE NOTICE that Third Party Defendant David Swanson ("Swanson"), by and through his undersigned attorneys, will move before the presiding Judge in the Court of Common Pleas for an Order dismissing and/or striking Defendant/Third Party Plaintiff's Complaint against him in the above-captioned case. This Motion is brought pursuant to Rule 12(b)(8), 12(f) and 14(a), SCRCPP, and upon such other law and argument as is appropriate. This Motion is based on the pleadings, and any memoranda of law to be submitted prior to oral argument.

BACKGROUND

This action is one of six foreclosures initiated by Plaintiffs against Defendant arising out of his failure to pay loans held by the Plaintiff. Currently pending are: Civil Action 2012-CP-10-5887 in

Charleston County; Civil Actions 2014-CP-18-358, 2014-CP-18-1792, 2014-CP-18-1793 in Dorchester County; and Civil Actions 2012-CP-08-2618, and 2012-CP-08-3478 in Berkley County.

Defendant/Third Party Plaintiff has interposed identical Third Party Claims against David Swanson and the Plaintiff in all six of the foreclosures, which have no connection to Defendant's liability to Plaintiff in its foreclosure action. In all six Third Party Complaints, Defendant/Third Party Plaintiff alleges claims for "abuse of process" and "civil conspiracy" alleging that Swanson and a bank representative lied about the existence of a phone call in order to "fabricate" a defense to Defendant's Counterclaims against the bank. The Third Party Complaint alleges:

- o Warren claims he called Mr. David Swanson for advice to procure a title endorsement in order to renew the loan for the Black Rush Property. (Charleston Third Party Compl. ¶¶66, 74; Dorchester/Berkley Third Party Compl. ¶¶56, 64).
- o Swanson claims that Mr. Scott Warren called him regarding the anticipated closing between Mr. Whitfield and Harbor National Bank. (Charleston Third Party Compl. ¶¶67, 75; Dorchester/Berkley Third Party Compl. ¶¶57, 65).
- o Despite providing such sworn testimony...there is no evidence of any such phone call. (Charleston Third Party Compl. ¶¶68, 76; Dorchester/Berkley Third Party Compl. ¶¶58, 66).
- o [T]he sworn testimony that the call was made...was given for the ulterior purpose of fabricating a legal defense for the bank's failure to renew its contractual obligations to renew Mr. Whitfield's loans. (Charleston Third Party Compl. ¶¶69, 77; Dorchester/Berkley Third Party Compl. ¶¶59, 67).

Defendant/Third Party Plaintiff alleges that the purported "abuse of process" has caused him emotional harm (Charleston Third Party Compl. ¶72; Dorchester/Berkley Third Party Compl. ¶62), while the alleged "civil conspiracy" has caused him damages in the form of "attorney's fees and costs incurred associated with Harbor National Bank's advice of counsel defense." (Charleston Third Party Compl. ¶82; Dorchester/Berkley Third Party Compl. ¶72).

BRIEF ARGUMENT

The allegations in all six of Defendant/Third Party Plaintiff's Third Party Complaints are identical. The Parties are actively engaged in litigating the exact same claims in the Charleston County Foreclosure action, which was filed approximately two months prior to the Third Party Complaint in the Dorchester County Foreclosure actions.

Additionally, Third Party Plaintiff's claims for "abuse of process" and "civil conspiracy" relate exclusively to the "Black Rush Property", which is located in Charleston County. The Third Party claims have no relationship to the properties located in Dorchester County.

A first filed action between the exact same parties, litigating identical claims, is already pending in Charleston County. To require the trial of the exact same claims in six different lawsuits would be an undue burden on the parties and the Court, in addition to presenting the possibility of inconsistent verdicts in each case. Accordingly, Dismissal is proper under Rule 12(b)(8), SCRPC.

Furthermore, the Third Party Claims have no relationship to the Property that is the subject of this Foreclosure, nor do they relate in any way to the Plaintiff's claims against Defendant. "When considering a request to strike...a third-party claim, the court may properly consider the effect the additional parties and claims will have on the adjudication of the main action-in particular, whether continued joinder will serve to complicate the litigation unduly or will prejudice the other parties in any substantial way." *Beach v. Hudson*, 298 S.C. 424, 426 (Ct. App. 1989). "A third-party claim may be asserted...only when the third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to defendant." *Id.* (citing, 6 C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE §1446 at 246 (1971) (emphasis added).

Here, the "abuse of process" and "civil conspiracy" claims clearly do not allege that Swanson can be held secondarily liability to the Plaintiff. Likewise, they will not be impacted by the outcome of the Foreclosure. Accordingly, the third party claims against Swanson should be struck.

CONCLUSION

Third Party Plaintiff's Complaint alleged claims that are already being litigated in a first filed Charleston County lawsuit. Moreover, the Third Party claims have no relationship to Defendant's liability to Plaintiff for their Foreclosure action, nor are they dependent on the outcome of the Foreclosure action. Accordingly, Third Party Defendant Swanson prays that Third Party Plaintiff's Complaint be dismissed with prejudice or Struck from this action, for all costs of the action to be cast upon Third Party Plaintiff, and for such other and further relief as this Court may deem just and proper.

This 4 day of April, 2016.

Respectfully submitted,

EARHART OVERSTREET LLC

By:


DAVID W. OVERSTREET
State Bar No.: 16965

MICHAEL B. MCCALL
State Bar No.: 73028

STEVEN R. KROPSKI
State Bar No.: 101441

Attorneys for Defendant David Swanson

PO Box 22528
Charleston, SC 29413
843-972-9400

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
Bank of North Carolina,)
Plaintiff,)
vs.)
Anthony Whitfield and)
Cindy Whitfield)
Defendants.)
Anthony Whitfield)
Third Party Plaintiff)
vs.)
David Swanson)
Third Party Defendant)

) IN THE COURT OF COMMON PLEAS
) CASE NO.: 2014-CP-18-1792

CERTIFICATE OF SERVICE

CHERYL L. BROWN
CLERK OF COURT
DORCHESTER COUNTY

FILED - RECORD
2016 APR - 7 AM 11:42

I hereby certify that I have this day served a copy of the within and foregoing pleading upon all parties to this matter by via electronic mail or by depositing a true copy of same via in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

Brent S. Halverson, Esq.
Halversen & Associates, LLC
171 Church Street, Suite 300
Charleston, SC 29401

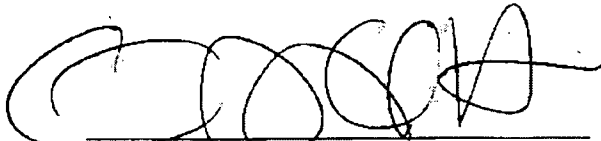
Andrew J. McCumber, Esq.
Daniel S. Slotchiver, Esq.
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, SC 29401

Brian C. Duffy, Esq.

Seth W. Whitaker, Esq.
Stephen Jenkins Bell, Esq.
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401

Robert A. Bernstein, Esq.
Bernstein & Bernstein PA
5418-B Rivers Avenue
North Charleston, SC 29406

This 9th day of April, 2016.



Legal Assistant to Michael B. McCall

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS

1725.00 KEB

mb ✓

Bank of North Carolina,

CASE NO.: 2014-CP-18-1792

Plaintiff,

2016 APR -7 AM 11:42

MOTION INFORMATION FORM
AND COVER SHEET

vs.

Whitfield, et al.

Defendant,

CHEERY L. LADD
CLERK OF COURT
DORCHESTER COUNTY

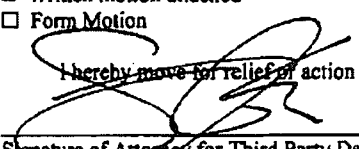
Anthony Whitfield

Third Party Plaintiff

David Swanson

Third Party Defendant.

Check box above indicating submitting party.

<u>Third Party Plaintiff's Counsel</u> Brent S Halverson, Esq. Halverson & Associates, LLC 171 Church Street, Suite 300 Charleston, SC 29401 Daniel S. Slotchiver, Esq. Slotchiver & Slotchiver, LLP 44 State Street Charleston, SC 29401	<u>Attorneys for Third Party Defendant</u> David W. Overstreet, Esq. State Bar No.: 16965 Steven R. Kropski, Esq. State Bar No.: 101441 Earhart Overstreet LLC P.O. Box 22528 Charleston, SC 29413 (843) 972-9400
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: Motion to Strike/Dismiss Estimated Time Needed: 15mins Court Reporter Needed: yes	
SECTION II: Motion Type	
<input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion	
I hereby move for relief of action by the court as set forth in the attached proposed order.  Signature of Attorney for Third Party Defendant	
Date: 4/4/16	
SECTION III: Motion Fee	
<input checked="" type="checkbox"/> PAID - AMOUNT: \$25.00 <input type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ <input type="checkbox"/> Other:	
JUDGE'S SECTION	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	JUDGE _____ CODE: _____ Date: _____
CLERK'S VERIFICATION	
DATE FILED	
Collected by: _____ (print name)	
<input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

RECORDED
2015 APR -7 AM 11:40
CLERK OF COURT
DORCHESTER COUNTY

IN THE COURT OF COMMON PLEAS
CASE NO.: 2014-CP-18-1793

Bank of North Carolina,

Plaintiff,

vs.

Anthony Whitfield and
Cindy Whitfield

Defendants.

Anthony Whitfield

Third Party Plaintiff

vs.

David Swanson

Third Party Defendant

**THIRD PARTY DEFENDANT DAVID
SWANSON'S MOTION TO STRIKE OR
DISMISS DEFENDANT/THIRD
PLAINTIFF'S COMPLAINT
(JURY TRIAL DEMANDED)**

TO: BRENT HALVERSEN, ESQ. AND DANIEL SLOCHIVER, ESQ., ATTORNEYS FOR
DEFENDANT/THIRD PARTY PLAINTIFF ANTHONY WHITFIELD:

YOU WILL PLEASE TAKE NOTICE that Third Party Defendant David Swanson ("Swanson"), by and through his undersigned attorneys, will move before the presiding Judge in the Court of Common Pleas for an Order dismissing and/or striking Defendant/Third Party Plaintiff's Complaint against him in the above-captioned case. This Motion is brought pursuant to Rule 12(b)(8), 12(f) and 14(a), SCRCF, and upon such other law and argument as is appropriate. This Motion is based on the pleadings, and any memoranda of law to be submitted prior to oral argument.

BACKGROUND

This action is one of six foreclosures initiated by Plaintiffs against Defendant arising out of his failure to pay loans held by the Plaintiff. Currently pending are: Civil Action 2012-CP-10-5887 in

Charleston County; Civil Actions 2014-CP-18-358, 2014-CP-18-1792, 2014-CP-18-1793 in Dorchester County; and Civil Actions 2012-CP-08-2618, and 2012-CP-08-3478 in Berkley County.

Defendant/Third Party Plaintiff has interposed identical Third Party Claims against David Swanson and the Plaintiff in all six of the foreclosures, which have no connection to Defendant's liability to Plaintiff in its foreclosure action. In all six Third Party Complaints, Defendant/Third Party Plaintiff alleges claims for "abuse of process" and "civil conspiracy" alleging that Swanson and a bank representative lied about the existence of a phone call in order to "fabricate" a defense to Defendant's Counterclaims against the bank. The Third Party Complaint alleges

- Warren claims he called Mr. David Swanson for advice to procure a title endorsement in order to renew the loan for the Black Rush Property. (Charleston Third Party Compl. ¶¶66, 74; Dorchester/Berkley Third Party Compl. ¶¶56, 64).
- Swanson claims that Mr. Scott Warren called him regarding the anticipated closing between Mr. Whitfield and Harbor National Bank. (Charleston Third Party Compl. ¶¶67, 75; Dorchester/Berkley Third Party Compl. ¶¶57, 65).
- Despite providing such sworn testimony...there is no evidence of any such phone call. (Charleston Third Party Compl. ¶¶68, 76; Dorchester/Berkley Third Party Compl. ¶¶58, 66).
- [T]he sworn testimony that the call was made...was given for the ulterior purpose of fabricating a legal defense for the bank's failure to renew its contractual obligations to renew Mr. Whitfield's loans. (Charleston Third Party Compl. ¶¶69, 77; Dorchester/Berkley Third Party Compl. ¶¶59, 67).

Defendant/Third Party Plaintiff alleges that the purported "abuse of process" has caused him emotional harm (Charleston Third Party Compl. ¶72; Dorchester/Berkley Third Party Compl. ¶62), while the alleged "civil conspiracy" has caused him damages in the form of "attorney's fees and costs incurred associated with Harbor National Bank's advice of counsel defense." (Charleston Third Party Compl. ¶82; Dorchester/Berkley Third Party Compl. ¶72).

BRIEF ARGUMENT

The allegations in all six of Defendant/Third Party Plaintiff's Third Party Complaints are identical. The Parties are actively engaged in litigating the exact same claims in the Charleston County Foreclosure action, which was filed approximately two months prior to the Third Party Complaint in the Dorchester County Foreclosure actions.

Additionally, Third Party Plaintiff's claims for "abuse of process" and "civil conspiracy" relate exclusively to the "Black Rush Property", which is located in Charleston County. The Third Party claims have no relationship to the properties located in Dorchester County.

A first filed action between the exact same parties, litigating identical claims, is already pending in Charleston County. To require the trial of the exact same claims in six different lawsuits would be an undue burden on the parties and the Court, in addition to presenting the possibility of inconsistent verdicts in each case. Accordingly, Dismissal is proper under Rule 12(b)(8), SCRPC.

Furthermore, the Third Party Claims have no relationship to the Property that is the subject of this Foreclosure, nor do they relate in any way to the Plaintiff's claims against Defendant. "When considering a request to strike...a third-party claim, the court may properly consider the effect the additional parties and claims will have on the adjudication of the main action-in particular, whether continued joinder will serve to complicate the litigation unduly or will prejudice the other parties in any substantial way." *Beach v. Hudson*, 298 S.C. 424, 426 (Ct. App. 1989). "A third-party claim may be asserted...only when the third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to defendant." *Id.* (citing, 6 C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE §1446 at 246 (1971) (emphasis added).

Here, the "abuse of process" and "civil conspiracy" claims clearly do not allege that Swanson can be held secondarily liability to the Plaintiff. Likewise, they will not be impacted by the outcome of the Foreclosure. Accordingly, the third party claims against Swanson should be struck or dismissed.

CONCLUSION

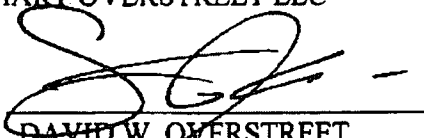
Third Party Plaintiff's Complaint alleges claims that are already being litigated in a first filed Charleston County lawsuit. Moreover, the Third Party claims have no relationship to Defendant's liability to Plaintiff for their Foreclosure action, nor are they dependent on the outcome of the Foreclosure action. Accordingly, Third Party Defendant Swanson prays that Third Party Plaintiff's Complaint be dismissed with prejudice or Struck from this action, for all costs of the action to be cast upon Third Party Plaintiff, and for such other and further relief as this Court may deem just and proper.

This 4 day of April, 2016.

Respectfully submitted,

EARHART OVERSTREET LLC

By:


DAVID W. OVERSTREET

State Bar No.: 16965

MICHAEL B. MCCALL

State Bar No.: 73028

STEVEN R. KROPSKI

State Bar No.: 101441

Attorneys for Third Party Defendant David Swanson

PO Box 22528
Charleston, SC 29413
843-972-9400

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
Bank of North Carolina,)
Plaintiff,)
vs.)
Anthony Whitfield and)
Cindy Whitfield)
Defendants.)
Anthony Whitfield)
Third Party Plaintiff)
vs.)
David Swanson)
Third Party Defendant)

) IN THE COURT OF COMMON PLEAS
) CASE NO.: 2014-CP-18-1793

CERTIFICATE OF SERVICE

2016 APR -7 AM 11:40
CLERK OF COURT
DORCHESTER COUNTY

I hereby certify that I have this day served a copy of the within and foregoing pleading upon all parties to this matter by depositing a true copy of same via in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

Brent S. Halverson, Esq.
Halverson & Associates, LLC
171 Church Street, Suite 300
Charleston, SC 29401

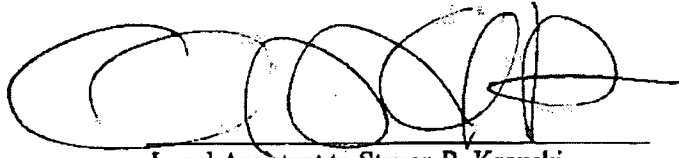
Andrew J. McCumber, Esq.
Daniel S. Slotchiver, Esq.
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, SC 29401

Brian C. Duffy, Esq.
Seth W. Whitaker, Esq.
Stephen Jenkins Bell, Esq.
Duffy & Young, L.L.C

96 Broad Street
Charleston, SC 29401

Robert A. Bernstein, Esq.
Bernstein & Bernstein PA
5418-B Rivers Avenue
North Charleston, SC 29406

This 4th day of April, 2016.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end, positioned above a horizontal line.

Legal Assistant to Steven R. Kropski

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

9/25/00 R&B

MB ✓

COUNTY OF DORCHESTER

Bank of North Carolina,

CASE NO.: 2014-CP-18-1793

Plaintiff,

RECORDED
2016 APR -7 11:39
CLERK OF COURT
DORCHESTER COUNTY

vs.

MOTION INFORMATION FORM
AND COVER SHEET

Whitfield, et al.

Defendant,

Anthony Whitfield

Third Party Plaintiff

v.

David Swanson

Third Party Defendant.

Check box above indicating submitting party.

<p>Third Party Plaintiff's Counsel Brent S Halverson, Esq. Halverson & Associates, LLC 171 Church Street, Suite 300 Charleston, SC 29401</p> <p>Daniel S. Slotchiver, Esq. Slotchiver & Slotchiver, LLP 44 State Street Charleston, SC 29401</p>	<p>Attorneys for Third Party Defendant David W. Overstreet, Esq. State Bar No.: 16965 Steven R. Kropski, Esq. State Bar No.: 101441 Earhart Overstreet LLC P.O. Box 22528 Charleston, SC 29413 (843) 972-9400</p>
---	--

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Strike/Dismiss
Estimated Time Needed: 15mins Court Reporter Needed: yes

SECTION II: Motion Type

- Written motion attached
- Form Motion

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

Signature of Attorney for Third Party Defendant

Date

SECTION III: Motion Fee

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

JUDGE'S SECTION

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

JUDGE CODE: _____ Date: _____

CLERK'S VERIFICATION
DATE FILED

Collected by: _____
(print name)

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

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)
)
BANK OF NORTH CAROLINA,)

Plaintiff,)

vs.)

ANTHONY M. WHITFIELD)

Defendant.)

ANTHONY M. WHITFIELD)

Counterclaim Plaintiff)

vs.)

BANK OF NORTH CAROLINA and)
DAVID SWANSON)

Counterclaim Defendants)

ANTHONY M. WHITFIELD)

Third-Party Plaintiff,)

vs.)

CINDY WHITFIELD)

Third-Party Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO. 2014-CP-18-358

MOTION TO ALTER OR AMEND
JUDGMENT PURSUANT TO RULE
59(e)

RECORDED - RECORD
2014 JUL 25 PM 1:30
CLERK OF COURT
DORCHESTER COUNTY

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Defendant, Anthony M. Whitfield, respectfully moves the Court to alter or amend the Order on Defendant David Swanson's Motion to Strike or Dismiss Mr. Anthony Whitfield's Counterclaims, which was filed in this matter on or about April 7, 2016, and heard on June 1, 2016. Anthony M. Whitfield through counsel received written notification of entry of the order on July 11, 2016. The Defendant believes the Court failed to rule on all arguments or issues that have been presented to the Court and states that there presently exists a judicial inconsistency between how these exact same issues have been disposed of in different counties.

Grounds for Motion

A party may file a motion to reconsider and alter or amend an order when it believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. See *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

Introduction and Argument

In 2007 and 2008, Plaintiff made nine loans to Mr. Whitfield, for nine different residential properties. The loans were for five year terms. Beginning in 2012, those loans began coming due. In 2012, Plaintiff initiated five (5) foreclosure lawsuits covering eight of those properties in Berkeley, Dorchester, and Charleston Counties. In March of 2014, another foreclosure lawsuit covering one of the

properties was filed in Dorchester County, bringing the total of six (6) foreclosure lawsuits covering nine (9) different properties. All of the properties were single family residential rental properties, except the Charleston County property which was purchased by Mr. Whitfield for his spouse at the time, Mrs. Cindy Whitfield, in order to meet his family court obligations in 2007.

In response to the foreclosure lawsuits, Mr. Whitfield counterclaimed in each of the lawsuits claiming, *inter-alia*, that Plaintiff made an agreement to renew all the loans for another five year term, breached that agreement, and caused him damages. Specifically, Mr. Whitfield met the president of the bank on June 21, 2012 where an agreement was made to renew all nine of Mr. Whitfield's loans for another five year term, at a reduced interest rate of 4.75%. After the meeting, the bank contacted the closing attorney and set up a closing for the following week, on June 28, 2012. Mr. Whitfield attended the closing for the renewal of all nine (9) loans on June 28, 2012, and the bank refused to close any of the nine (9) loans at the closing.

Plaintiff has denied that it made a contract to renew the loans, and has mainly defended Mr. Whitfield's claims that the bank breached an agreement to renew the loans on two grounds as enumerated in its various Replies: 1) that Mr. Whitfield's ex-wife Cindy Whitfield was required to sign a mortgage to her home in Charleston County in order to renew all of the loans in Charleston, Berkeley, and Dorchester County; or 2) that a title endorsement was necessary for the property in Charleston County to renew all of the loans in Charleston, Berkeley, and Dorchester County.

As part of the Plaintiff's "title endorsement" defense for the failure to renew the loans, Plaintiff claims it sought the advice of a real estate transactional attorney, Mr. David Swanson, who recommended that the bank should procure a title endorsement to the Charleston County property out of his hypothetical concern for an objection to the loan renewal by Cindy Whitfield (who lives in the Charleston County Property) on the grounds of an equitable subordination theory that has never been applied to a fee interest in real estate in South Carolina¹.

As alleged in Mr. Whitfield's Counterclaims², the bank has defended its actions in each Charleston, Berkeley, and Dorchester Counties by claiming it sought Mr. Swanson's advice in their decisions not to renew loans that cover properties in each Charleston, Berkeley, and Dorchester Counties. (See, e.g., Plaintiff's Reply filed March 24, 2016, ¶¶ 13, 32, 33, 35, 38, 39 and 41).

Because of newly discovered evidence (See Counterclaims filed on March 8, 2016, ¶¶ 55-72) that supports Mr. Whitfield's claim that the bank never received the advice it claims to have received and relied upon, Mr. Whitfield sued David Swanson for civil conspiracy and abuse of process.

David Swanson moved to dismiss in the Berkeley and Dorchester cases primarily travelling under Rule 12(b)(8) by arguing that all of the claims being made in all six lawsuits are the same. As stated above, Mr. Whitfield was sued six different times by the Plaintiff for foreclosure of nine different individual properties in each county. Each of the properties in Berkeley and Dorchester were separate,

¹ The undersigned is unaware that the theory has been successfully applied in any other state.

² David Swanson was made a party to the counterclaims as a "Counterclaim Defendant" pursuant to Rule 19 and 20, not a "Third Party Defendant" as claimed by Mr. Swanson in his motion to dismiss.

income producing properties³. Mr. Whitfield has already counterclaimed against the bank six different times that the bank made an agreement to renew the loans and he should never have been foreclosed upon. He has sought and will receive a jury trial in each action. Moreover, the bank has interposed its reliance upon the advice of David Swanson in each Charleston, Berkeley, and Dorchester Counties, including this matter.

In order to succeed on a Rule 12(b)(8) motion, the claims sought to be dismissed, "must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8)." Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 701 S.E. 39 (Ct. App. 2010)(emphasis added). As stated above, the claims against David Swanson are not "precisely or substantially the same" as they involve advice the bank is relying upon for foreclosure of six different income producing properties (six different subject matters). See also, Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 674 S.E.2d 524 (Ct. App. 2009) (Citing Indiana court with approval that the "subject matter" must be the same to prevail on Rule 12(b)(8) motion).

To allow the Plaintiff bank to interpose a defense that it relied upon Mr. David's Swanson's advice in the Berkeley and Dorchester cases and yet simultaneously disallow Mr. Whitfield the ability to claim that the advice was never given and was fabricated-- would be fundamentally unfair and a perversion of justice, to-wit, allowing one a litigant to make certain defenses, and deny another

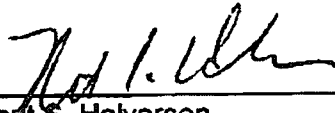
³ Plaintiff took possession of all of the properties through receivership proceedings early in the litigation. Mr. Whitfield is claiming separate damages for each income producing property that was confiscated without legal cause.

to make claims based upon those same set of facts. For these reasons, the motion to dismiss must be denied, and the claim should be allowed to proceed.

Finally, these exact same motions were filed by David Swanson in the Berkeley County cases 2012-CP-08-2618 and 2012-CP-08-3478 and were summarily denied by the Hon. Markley Dennis at the June 27, 2016 hearing. See attached Orders attached hereto as Exhibits "A" and "B". Obviously there presently exists a inter-county judicial inconsistency in the way the issues presented to the Court have been disposed of. For these reasons, Mr. Whitfield would respectfully request this Court reconsider its previous order dated July 7, 2016 of this matter and align its ruling to those in Berkeley County.

Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

By: 
Brent S. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com

Attorneys for Defendant


_____, 2016
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that I served the foregoing Motion to Alter or Amend upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to the parties and counsel's last known address on this 15th day of July, 2016.

HALVERSEN & ASSOCIATES, LLC

By: _____


Brent S. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com

Charleston, SC
July 13, 2016

RECORDED
2016 JUL 25 PM 1:30
CHERYL D. BROWN
CLERK OF COURT
DORCHESTER COUNTY

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP 08-2618

Harbor National Bank, et al

Anthony M. Orfield, et al

FILED
16 JUN 30 PM 1:32

RECORDED
JUL 25 PM 1:30
CLERK OF COURT
BERKELEY COUNTY

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	LARRY BROWN CLERK OF COURT BERKELEY COUNTY, S.C.	Attorney for <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
		<input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): Affirmed; Reversed; Remanded; Other

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

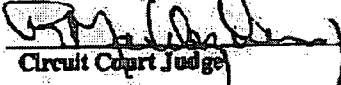
IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Defendant's Motion to Strike or Dismiss Third Party Complaint, filed on 4/7/16, is DENIED

ORDER INFORMATION

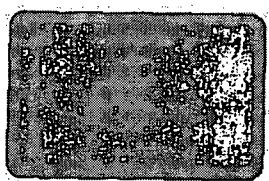
This order ends does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

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

	2060	6/28/16
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only



FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-08-3478

Harbor National Bank, et al

Anthony M. Whitfield, et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

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

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Defendant's Motion to Strike or Dismiss Third Party Complaint, filed on 4/11/16, is DENIED

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

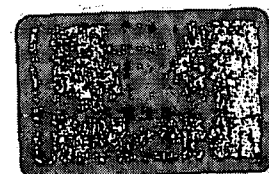
The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time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

[Signature]
 Circuit Court Judge

2060
 Judge Code

6/28/16
 Date

For Clerk of Court Office Use Only



STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS

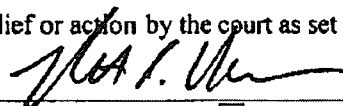
Harbor National Bank
 Plaintiff

2016 JUL 25 PM 1:30
RECORDED
CASE NO. 2014-CP-18-358

v.

CLERK OF COURT
DORCHESTER COUNTY
MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Anthony M. Whitfield
 Defendant.

Plaintiff's Attorney: , Bar No. Address: Robert A. Bernstein, Esq. Bernstein & Bernstein, P.A. 5418-B Rivers Avenue N. Charleston, SC 29406-6129 phone: fax: e-mail: other:	Defendant's Attorney: Brent S. Halversen, Bar No. 76495 Address: Halversen & Associates, LLC 171 Church Street, Suite 330 Charleston, SC 29401 phone: (843) 284-5790 fax: e-mail: other:
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion: Motion to Alter or Amend Judgement Pursuant to Rule 59(e) Estimated Time Needed: 20 minutes Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO	
SECTION II: Motion/Order Type <input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
<div style="display: flex; justify-content: space-between;"> <div>  Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant </div> <div> July 13, 2016 Date submitted </div> </div>	
SECTION III: Motion Fee <input checked="" type="checkbox"/> PAID - AMOUNT: \$25.00 <input type="checkbox"/> EXEMPT:	
<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other:	
JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	JUDGE _____ CODE: _____ Date: _____
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____	

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

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
BANK OF NORTH CAROLINA,

Plaintiff,

vs.

ANTHONY M. WHITFIELD

Defendant.

ANTHONY M. WHITFIELD

Counterclaim Plaintiff

vs.

BANK OF NORTH CAROLINA and
DAVID SWANSON

Counterclaim Defendants

ANTHONY M. WHITFIELD

Third-Party Plaintiff,

vs.

CINDY WHITFIELD

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO. 2014-CP-18-1792

MOTION TO ALTER OR AMEND
JUDGMENT PURSUANT TO RULE
59(e)

2016 JUL 25 PM 1:33
CLERK OF COURT
DORCHESTER COUNTY

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Defendant, Anthony M. Whitfield, respectfully moves the Court to alter or amend the Order on Defendant David Swanson's Motion to Strike or Dismiss Mr. Anthony Whitfield's Counterclaims, which was filed in this matter on or about April 7, 2016, and heard on June 1, 2016. Anthony M. Whitfield through counsel received written notification of entry of the order on July 11, 2016. The Defendant believes the Court failed to rule on all arguments or issues that have been presented to the Court and states that there presently exists a judicial inconsistency between how these exact same issues have been disposed of in different counties.

Grounds for Motion

A party may file a motion to reconsider and alter or amend an order when it believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. See *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

Introduction and Argument

In 2007 and 2008, Plaintiff made nine loans to Mr. Whitfield, for nine different residential properties. The loans were for five year terms. Beginning in 2012, those loans began coming due. In 2012, Plaintiff initiated five (5) foreclosure lawsuits covering eight of those properties in Berkeley, Dorchester, and Charleston Counties. In March of 2014, another foreclosure lawsuit covering one of the

properties was filed in Dorchester County, bringing the total of six (6) foreclosure lawsuits covering nine (9) different properties. All of the properties were single family residential rental properties, except the Charleston County property which was purchased by Mr. Whitfield for his spouse at the time, Mrs. Cindy Whitfield, in order to meet his family court obligations in 2007.

In response to the foreclosure lawsuits, Mr. Whitfield counterclaimed in each of the lawsuits claiming, *inter-alia*, that Plaintiff made an agreement to renew all the loans for another five year term, breached that agreement, and caused him damages. Specifically, Mr. Whitfield met the president of the bank on June 21, 2012 where an agreement was made to renew all nine of Mr. Whitfield's loans for another five year term, at a reduced interest rate of 4.75%. After the meeting, the bank contacted the closing attorney and set up a closing for the following week, on June 28, 2012. Mr. Whitfield attended the closing for the renewal of all nine (9) loans on June 28, 2012, and the bank refused to close any of the nine (9) loans at the closing.

Plaintiff has denied that it made a contract to renew the loans, and has mainly defended Mr. Whitfield's claims that the bank breached an agreement to renew the loans on two grounds as enumerated in its various Replies: 1) that Mr. Whitfield's ex-wife Cindy Whitfield was required to sign a mortgage to her home in Charleston County in order to renew all of the loans in Charleston, Berkeley, and Dorchester County; or 2) that a title endorsement was necessary for the property in Charleston County to renew all of the loans in Charleston, Berkeley, and Dorchester County.

As part of the Plaintiff's "title endorsement" defense for the failure to renew the loans, Plaintiff claims it sought the advice of a real estate transactional attorney, Mr. David Swanson, who recommended that the bank should procure a title endorsement to the Charleston County property out of his hypothetical concern for an objection to the loan renewal by Cindy Whitfield (who lives in the Charleston County Property) on the grounds of an equitable subordination theory that has never been applied to a fee interest in real estate in South Carolina¹.

As alleged in Mr. Whitfield's Counterclaims², the bank has defended its actions in each Charleston, Berkeley, and Dorchester Counties by claiming it sought Mr. Swanson's advice in their decisions not to renew loans that cover properties in each Charleston, Berkeley, and Dorchester Counties. (See, e.g., Plaintiff's Reply filed March 24, 2016, ¶¶ 13, 32, 33, 35, 38, 39 and 41).

Because of newly discovered evidence (See Counterclaims filed on March 8, 2016, ¶¶ 55-72) that supports Mr. Whitfield's claim that the bank never received the advice it claims to have received and relied upon, Mr. Whitfield sued David Swanson for civil conspiracy and abuse of process.

David Swanson moved to dismiss in the Berkeley and Dorchester cases primarily travelling under Rule 12(b)(8) by arguing that all of the claims being made in all six lawsuits are the same. As stated above, Mr. Whitfield was sued six different times by the Plaintiff for foreclosure of nine different individual properties in each county. Each of the properties in Berkeley and Dorchester were separate,

¹ The undersigned is unaware that the theory has been successfully applied in any other state.

² David Swanson was made a party to the counterclaims as a "Counterclaim Defendant" pursuant to Rule 19 and 20, not a "Third Party Defendant" as claimed by Mr. Swanson in his motion to dismiss.

income producing properties³. Mr. Whitfield has already counterclaimed against the bank six different times that the bank made an agreement to renew the loans and he should never have been foreclosed upon. He has sought and will receive a jury trial in each action. Moreover, the bank has interposed its reliance upon the advice of David Swanson in each Charleston, Berkeley, and Dorchester Counties, including this matter.

In order to succeed on a Rule 12(b)(8) motion, the claims sought to be dismissed, **"must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8)."** Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 701 S.E. 39 (Ct. App. 2010)(emphasis added). As stated above, the claims against David Swanson are not "precisely or substantially the same" as they involve advice the bank is relying upon for foreclosure of six different income producing properties (six different subject matters). See also, Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 674 S.E.2d 524 (Ct. App. 2009) (Citing Indiana court with approval that the "subject matter" must be the same to prevail on Rule 12(b)(8) motion).

To allow the Plaintiff bank to interpose a defense that it relied upon Mr. David's Swanson's advice in the Berkeley and Dorchester cases and yet simultaneously disallow Mr. Whitfield the ability to claim that the advice was never given and was fabricated-- would be fundamentally unfair and a perversion of justice, to-wit, allowing one a litigant to make certain defenses, and deny another

³ Plaintiff took possession of all of the properties through receivership proceedings early in the litigation. Mr. Whitfield is claiming separate damages for each income producing property that was confiscated without legal cause.

to make claims based upon those same set of facts. For these reasons, the motion to dismiss must be denied, and the claim should be allowed to proceed.

Finally, these exact same motions were filed by David Swanson in the Berkeley County cases 2012-CP-08-2618 and 2012-CP-08-3478 and were summarily denied by the Hon. Markley Dennis at the June 27, 2016 hearing. See attached Orders attached hereto as Exhibits "A" and "B". Obviously there presently exists a inter-county judicial inconsistency in the way the issues presented to the Court have been disposed of. For these reasons, Mr. Whitfield would respectfully request this Court reconsider its previous order dated July 7, 2016 of this matter and align its ruling to those in Berkeley County.


Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

By: 

Brent S. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com

Attorneys for Defendant

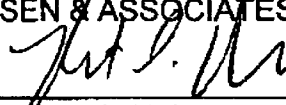

_____, 2016
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that I served the foregoing Motion to Alter or Amend upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to the parties and counsel's last known address on this 7th day of July, 2016.

HALVERSEN & ASSOCIATES, LLC

By: _____



Brent S. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com

Charleston, SC
July 13, 2016

RECORDED
2016 JUL 25 PM 1:33
CHERYL B. WATSON
CLERK OF COURT
DORCHESTER COUNTY

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-08-2618

Harbor National Bank, et al

Anthony M. Griggsfield, et al

FILED
 16 JUN 30 PM 1:32

2016 JUL 25 RECORDED
 1:33
 CLERK OF COURT
 BERKELEY COUNTY

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	CLERK OF COURT BERKELEY COUNTY, S.C.	Attorney for : <input checked="" type="checkbox"/> Plaintiff	<input type="checkbox"/> Defendant
		or <input type="checkbox"/> Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

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

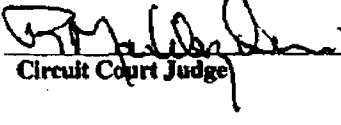
IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Defendant's Motion to Strike or Dismiss Third Party Complaint, filed on 4/7/16, is DENIED

ORDER INFORMATION

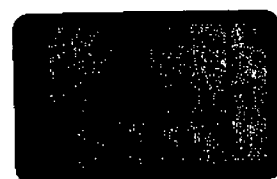
This order ends does not end the case.
 Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

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


2060
Judge Code
6/28/16
Date

For Clerk of Court Office Use Only



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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-08-3478

Harbor National Bank, et al

Anthony M. Whitfield, et al

FILED

RECORDED
 JUL 25 PM 1:33
 CLERK OF COURT
 BERKELEY COUNTY

16 JUN 30 PM 1:32

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	GLENN OF COURT, BERKELEY COUNTY, S.C.	Attorney for: <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
		<input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

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

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Defendant's Motion to Strike or Dismiss Third Party Complaint, filed on 4/11/16, is DENIED

ORDER INFORMATION

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

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

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

[Signature]
 Circuit Court Judge

2060 Judge Code

6/28/16 Date

For Clerk of Court Office Use Only



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

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)
)
BANK OF NORTH CAROLINA,)
)
Plaintiff,)

vs.)

ANTHONY M. WHITFIELD)
)
Defendant.)

ANTHONY M. WHITFIELD)
)
Counterclaim Plaintiff)

vs.)

BANK OF NORTH CAROLINA and)
DAVID SWANSON)
)
Counterclaim Defendants)

ANTHONY M. WHITFIELD)
)
Third-Party Plaintiff,)

vs.)

CINDY WHITFIELD)
)
Third-Party Defendant.)

IN THE COURT OF COMMON PLEAS
CASE NO. 2014-CP-18-1793

MOTION TO ALTER OR AMEND
JUDGMENT PURSUANT TO RULE
59(e)

2016 JUL 25 PM 1:34
RECORDED
CLERK OF COURT
DORCHESTER COUNTY

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Defendant, Anthony M. Whitfield, respectfully moves the Court to alter or amend the Order on Defendant David Swanson's Motion to Strike or Dismiss Mr. Anthony Whitfield's Counterclaims, which was filed in this matter on or about April 7, 2016, and heard on June 1, 2016. Anthony M. Whitfield through counsel received written notification of entry of the order on July 11, 2016. The Defendant believes the Court failed to rule on all arguments or issues that have been presented to the Court and states that there presently exists a judicial inconsistency between how these exact same issues have been disposed of in different counties.

Grounds for Motion

A party may file a motion to reconsider and alter or amend an order when it believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. See *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

Introduction and Argument

In 2007 and 2008, Plaintiff made nine loans to Mr. Whitfield, for nine different residential properties. The loans were for five year terms. Beginning in 2012, those loans began coming due. In 2012, Plaintiff initiated five (5) foreclosure lawsuits covering eight of those properties in Berkeley, Dorchester, and Charleston Counties. In March of 2014, another foreclosure lawsuit covering one of the

properties was filed in Dorchester County, bringing the total of six (6) foreclosure lawsuits covering nine (9) different properties. All of the properties were single family residential rental properties, except the Charleston County property which was purchased by Mr. Whitfield for his spouse at the time, Mrs. Cindy Whitfield, in order to meet his family court obligations in 2007.

In response to the foreclosure lawsuits, Mr. Whitfield counterclaimed in each of the lawsuits claiming, *inter-alia*, that Plaintiff made an agreement to renew all the loans for another five year term, breached that agreement, and caused him damages. Specifically, Mr. Whitfield met the president of the bank on June 21, 2012 where an agreement was made to renew all nine of Mr. Whitfield's loans for another five year term, at a reduced interest rate of 4.75%. After the meeting, the bank contacted the closing attorney and set up a closing for the following week, on June 28, 2012. Mr. Whitfield attended the closing for the renewal of all nine (9) loans on June 28, 2012, and the bank refused to close any of the nine (9) loans at the closing.

Plaintiff has denied that it made a contract to renew the loans, and has mainly defended Mr. Whitfield's claims that the bank breached an agreement to renew the loans on two grounds as enumerated in its various Replies: 1) that Mr. Whitfield's ex-wife Cindy Whitfield was required to sign a mortgage to her home in Charleston County in order to renew all of the loans in Charleston, Berkeley, and Dorchester County; or 2) that a title endorsement was necessary for the property in Charleston County to renew all of the loans in Charleston, Berkeley, and Dorchester County.

As part of the Plaintiff's "title endorsement" defense for the failure to renew the loans, Plaintiff claims it sought the advice of a real estate transactional attorney, Mr. David Swanson, who recommended that the bank should procure a title endorsement to the Charleston County property out of his hypothetical concern for an objection to the loan renewal by Cindy Whitfield (who lives in the Charleston County Property) on the grounds of an equitable subordination theory that has never been applied to a fee interest in real estate in South Carolina¹.

As alleged in Mr. Whitfield's Counterclaims², the bank has defended its actions in each Charleston, Berkeley, and Dorchester Counties by claiming it sought Mr. Swanson's advice in their decisions not to renew loans that cover properties in each Charleston, Berkeley, and Dorchester Counties. (See, e.g., Plaintiff's Reply filed March 24, 2016, ¶¶ 13, 32, 33, 35, 38, 39 and 41).

Because of newly discovered evidence (See Counterclaims filed on March 8, 2016, ¶¶ 55-72) that supports Mr. Whitfield's claim that the bank never received the advice it claims to have received and relied upon, Mr. Whitfield sued David Swanson for civil conspiracy and abuse of process.

David Swanson moved to dismiss in the Berkeley and Dorchester cases primarily travelling under Rule 12(b)(8) by arguing that all of the claims being made in all six lawsuits are the same. As stated above, Mr. Whitfield was sued six different times by the Plaintiff for foreclosure of nine different individual properties in each county. Each of the properties in Berkeley and Dorchester were separate,

¹ The undersigned is unaware that the theory has been successfully applied in any other state.

² David Swanson was made a party to the counterclaims as a "Counterclaim Defendant" pursuant to Rule 19 and 20, not a "Third Party Defendant" as claimed by Mr. Swanson in his motion to dismiss.

income producing properties³. Mr. Whitfield has already counterclaimed against the bank six different times that the bank made an agreement to renew the loans and he should never have been foreclosed upon. He has sought and will receive a jury trial in each action. Moreover, the bank has interposed its reliance upon the advice of David Swanson in each Charleston, Berkeley, and Dorchester Counties, including this matter.

In order to succeed on a Rule 12(b)(8) motion, the claims sought to be dismissed, "must be precisely or substantially the same in both proceedings In order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8)." Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 701 S.E. 39 (Ct. App. 2010)(emphasis added). As stated above, the claims against David Swanson are not "precisely or substantially the same" as they involve advice the bank is relying upon for foreclosure of six different income producing properties (six different subject matters). See also, Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 674 S.E.2d 524 (Ct. App. 2009) (Citing Indiana court with approval that the "subject matter" must be the same to prevail on Rule 12(b)(8) motion).

To allow the Plaintiff bank to interpose a defense that it relied upon Mr. David's Swanson's advice in the Berkeley and Dorchester cases and yet simultaneously disallow Mr. Whitfield the ability to claim that the advice was never given and was fabricated-- would be fundamentally unfair and a perversion of justice, to-wit, allowing one a litigant to make certain defenses, and deny another

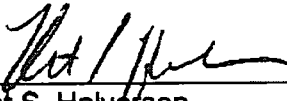
³ Plaintiff took possession of all of the properties through receivership proceedings early in the litigation. Mr. Whitfield is claiming separate damages for each income producing property that was confiscated without legal cause.

to make claims based upon those same set of facts. For these reasons, the motion to dismiss must be denied, and the claim should be allowed to proceed.

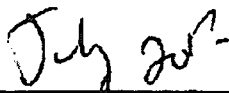
Finally, these exact same motions were filed by David Swanson in the Berkeley County cases 2012-CP-08-2618 and 2012-CP-08-3478 and were summarily denied by the Hon. Markley Dennis at the June 27, 2016 hearing. See attached Orders attached hereto as Exhibits "A" and "B". Obviously there presently exists a inter-county judicial inconsistency in the way the issues presented to the Court have been disposed of. For these reasons, Mr. Whitfield would respectfully request this Court reconsider its previous order dated July 7, 2016 of this matter and align its ruling to those in Berkeley County.

Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

By: 
Brent S. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com

Attorneys for Defendant

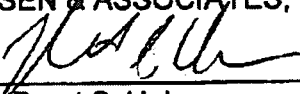

_____, 2016
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that I served the foregoing Motion to Alter or Amend upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to the parties and counsel's last known address on this 13th day of July, 2016.

HALVERSEN & ASSOCIATES, LLC

By: _____



Brent S. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com

Charleston, SC
July 13, 2016

2016 JUL 25 PM 1:34
RECORDED
CLERK OF COURT
DORCHESTER COUNTY

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-08-2618

Harbor National Bank, et al

Anthony M. Whitfield, et al

FILED
16 JUN 30 PM 1:32

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	CLERK OF COURT BERKELEY COUNTY, S.C.	Attorney for : <input type="checkbox"/> Plaintiff	<input type="checkbox"/> Defendant
		<input type="checkbox"/> Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

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

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Defendant's Motion to Strike or Dismiss Third Party Complaint, filed on 4/7/16, is DENIED

ORDER INFORMATION

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

CLERK OF COURT
BERKELEY COUNTY
JUL 25 PM 1:32

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

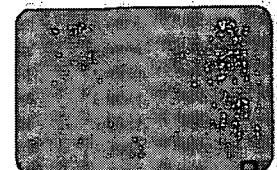
The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time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

[Signature]
Circuit Court Judge

2060
Judge Code

6/28/18
Date

For Clerk of Court Office Use Only



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

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-08-3478

FILED

Harbor National Bank, et al

Anthony M. Whitfield, et al

16 JUN 30 PM 1:32

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	L. J. BROWN CLERK OF COURT BERKELEY COUNTY, S.C.	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
		or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other

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

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Defendant's Motion to Strike or Dismiss Third Party Complaint, filed on 4/11/16, is DENIED

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

RECORDED
2816 JUN 25 PM 1:35
CLERK OF COURT
BERKELEY COUNTY

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

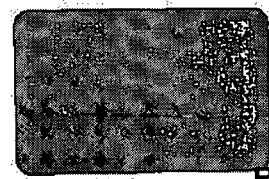
The judgment information above has been provided by the submitting party. Disputer concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time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

[Signature]
Circuit Court Judge

2060
Judge Code

6/28/16
Date

For Clerk of Court Office Use Only



1/25.00 REB ✓
JMB ✓

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF DORCHESTER)

Harbor National Bank
 Plaintiff

CASE NO.
2014-CP-18-1793

v.)

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

✓ Anthony M. Whitfield
 Defendant.

RECORDED
2016 JUL 25 PM 10:34
CHERYL [Signature]
CLERK OF COURT
DORCHESTER COUNTY

Plaintiff's Attorney: , Bar No. Address: Robert A. Bernstein, Esq. Bernstein & Bernstein, P.A. 5418-B Rivers Avenue N. Charleston, SC 29406-6129 phone: fax: e-mail: other:	Defendant's Attorney: Brent S. Halversen, Bar No. 76495 Address: Halversen & Associates, LLC 171 Church Street, Suite 330 Charleston, SC 29401 phone: (843) 284-5790 fax: e-mail: other:
---	---

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

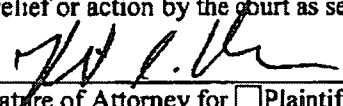
SECTION I: Hearing Information

Nature of Motion: Motion to Alter or Amend Judgement Pursuant to Rule 59(e)
 Estimated Time Needed: 20 minutes Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

Written motion attached
 Form Motion/Order

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


 Signature of Attorney for Plaintiff / Defendant

July 13, 2016
Date submitted

SECTION III: Motion Fee

PAID - AMOUNT: \$25.00

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

Name of Court Reporter:
 Other:

JUDGE'S SECTION

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

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

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

2015 JUN 25 PM 3:03

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER) CLERK OF COURT
DORCHESTER COUNTY) CASE NO. 2014-CP-18-358

HARBOR NATIONAL BANK,)
)
) Plaintiff,)

vs.)

✓ ANTHONY M. WHITFIELD)
)
) Defendant.)

**MOTION TO AMEND TO AMEND
ANSWER AND ADD NEW PARTIES,
CROSSCLAIM AND COUNTERCLAIMS**

TO: SETH WHITAKER AND BRIAN DUFFY, ATTORNEYS FOR PLAINTIFF

PLEASE TAKE NOTICE that the Defendant, Anthony M. Whitfield, by and through his undersigned attorney will, on the tenth (10th) day after service hereof at 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, move the Court at the Charleston County Court of Common Pleas, 100 Broad Street Charleston, S.C., for an order allowing Defendant to amend his Answer to add a Crossclaim, certain Counterclaims and a new party, David Swanson. Said Motion is made under Rules 13(f) and (h), 19 and 20 on the following grounds:

1. Defendant seeks permission to amend his Answer to add certain counterclaims in his Answer, as specifically provided for pursuant to Rule 13(f):

(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

South Carolina Rule of Civil Procedure 13(f).

2. Defendant also seeks permission to amend his Answer and a new party to his counterclaims other than those to the original action, Mr. David Swanson, as specifically provided for pursuant to Rule 13(h):

(h) Joinder of Additional Parties. Parties other than those to the original action may be made parties to a counterclaim or cross-claim in accordance with Rules 19 and 20.

South Carolina Rule of Civil Procedure 13(h).

3. Specifically with regard to joinder of persons, the law has set forth the following analysis, Rule 19(a)(1) states:

(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties.

South Carolina Rule of Civil Procedure 19(a)(1).

4. Mr. Whitfield also desires to amend his Answer to assert a crossclaim against co-defendant Cindy Whitfield for equitable indemnification pursuant to Rule 13(g).

5. The law strongly favors amendments and the court is encouraged to freely grant leave to amend. See Jarrell v. Seaboard Sys. R.R., 294 S.C. 183, 363 S.E.2d 398 (Ct. App. 1987).

6. In this case, complete relief cannot be accorded without joining Mr. David Swanson as a party as Mr. Whitfield seeks to add causes of action for civil conspiracy and abuse of process which requires Mr. David Swanson's presence and inclusion as a party in order to establish the cause(s) of action.

7. Counsel for Defendant certified that consultation with opposing counsel would serve no useful purpose, and therefore, it is necessary to ask the Court for permission to file an amended pleading by filing a motion and scheduling a hearing on the matter. **The additions of the new party David Swanson (and the new claims) is based upon newly discovered evidence. Such evidence was just discovered on June 10, 2015, though the evidence has been sought since last year.**

8. One of the main basis(s) of Plaintiff's defense of Mr. Whitfield's counterclaims is that the bank sought the advice of its counsel, Mr. David Swanson, and relied on his advice in deciding not to close Mr. Whitfield's renewals at the closing on June 28, 2012.

9. Harbor National Bank through its employee Mr. Scott Warren¹ claims to have relied upon the advice of their attorney, Mr. David Swanson, that a title endorsement was needed to renew the loan for the Black Rush Property. Mr. Warren never mentioned to Mr. Whitfield, before, during, or after the closing on June 28, 2012, that the bank had procured Mr. Swanson's advice that a title endorsement must be obtained in order to renew the Black Rush loan- nor that he was relying on Mr. Swanson's advice in refusing to close the loans. At his deposition on May 13, 2014, Mr. Swanson conceded that the Black Rush Property loan could have been renewed without such an endorsement. He also indicated that he was not told there were any other properties besides the Black

¹ It is not necessary to add Scott Warren as an individual defendant as Harbor National Bank is liable for its employees torts when the employee acts in the course and scope of their employment, even if the acts alleged exceed the bank's authority if the acts done were in furtherance of the master's business. See Crittenden v. Thompson-Walker Co., 288 S.C. 112, 115, 341 S.E.2d 385, 387 (Ct. App. 1986)

Rush Property that were being renewed. Mark Weeks, the closing attorney at the June 28, 2012 closing, stated that no title endorsement was necessary or required for the Black Rush Property and that he could have renewed any of the loans without an endorsement or Mrs. Cindy Whitfield's permission and/or authorization to renew the loans. Mr. David Swanson also conceded that his advice to procure a "title endorsement" was provided to Harbor National Bank without reviewing any documents, without performing any legal research, without providing any written opinion, and without charging the bank any money for the advice. In fact, there is not a single document at Mr. Swanson's law firm suggesting that the advice was ever given.

10. Although Mr. David Swanson has stated under oath that Mr. Scott Warren called him regarding the anticipated closing that was set to occur on June 28, 2012, telephone records received on June 10, 2015 confirm no calls were received from Mr. Scott Warren's cell phone or office number to Mr. David Swanson's cell phone or office number.

11. Additionally, the bank never raised a legal defense of the title endorsement or mortgage signature requirement until October, 2013 *after initially replying to Mr. Whitfield's counterclaims that an agreement was reached* with Mr. Whitfield to renew his loans, and never making any mention of the "title endorsement" or "mortgage signature" defenses. The bank admitted that it made an agreement to renew Mr. Whitfield's loan in its first Reply to his counterclaims filed with this Court on April 25, 2013. The bank subsequently changed its pleading on this matter and denied it made an agreement to renew

Mr. Whitfield's loans in its later filed Replies wherein it asserted the "title endorsement" and "mortgage signature defense".

12. Mr. David Swanson nor his law firm produced a single document, billing entry, opinion, email, letter, or record concerning the supposed advice, and, the telephone records show no calls were documented between the bank and the attorney when they claim it occurred—all of which constitutes evidence that the calls were never made, and the defense was fabricated after the fact in an attempt to manufacture a legal defense for the bank to avoid liability for Mr. Whitfield's counterclaims.

13. Because of such conduct, Mr. Whitfield desires to amend his Answer, Affirmative Defenses, and Counterclaims to add two new counterclaims for abuse of process and civil conspiracy against the bank, as well as add David Swanson as a named defendant to this matter.

14. The undersigned first sought discovery from Mr. Scott Warren's cell phone provider for telephone records via subpoena on August 26, 2014. The telephone records were received in September of 2014 which showed no calls placed were placed to Mr. Swanson's office line or cell phone.

15. The undersigned also requested telephone records of Mr. Scott Warren's office line via a Request for Production to the bank, which was served on September 12, 2014. The Plaintiff bank objected to the requested information, and the undersigned served a motion to compel with this Court on October 23, 2014. The motion was heard by the Hon. J.C. Nicholson, Jr. on January 23, 2015 and the Court ordered the bank to produce Mr. Scott Warren's office line

telephone records on March 19, 2015 (See Exhibit "A"). No records were produced by the bank in response to the Order, and on May 11, 2015 the Plaintiff informed the undersigned that the bank was not in possession of the requested telephone records and advised the undersigned to subpoena Harbor National Bank's telephone provider at the time in order to retrieve the records. On May 13, 2015 the undersigned caused to be issued and served a subpoena to Windstream Communications for the telephone records. The subpoena called for the records to be produced by May 29, 2015. To date, no responses have been received from Windstream Communications (See Exhibit "B").

16. The undersigned first sought discovery of Mr. Swanson's telephone records via subpoena to the Haynesworth Sinkler Boyd, P.A. firm (hereinafter, "HSB") on September 26, 2014 (Exhibit "C"). The subpoena requested production of the records by October 6, 2014. HSB requested multiple extensions (which were granted) and the undersigned was informed on November 7, 2014 that HSB did not possess the telephone records requested and to subpoena HSB's telephone provider at the time, AT&T. On November 11, 2014, the undersigned served a subpoena on AT&T requesting Mr. Swanson's office line telephone records from 2012. (See Exhibit "D" attached hereto).

17. The AT&T subpoena called for records to be produced by November 24, 2014. Upon information and belief, HSB caused to be issued a notice of intent to quash the subpoena to AT&T, which prevented the records from being released at the due date requested.

18. On January 29, 2015 HSB served a motion to quash the subpoena for the telephone phone records to the law firm seeking David Swanson's office line telephone records on privilege and relevancy grounds. The motion was set for hearing on March 6, 2015. HSB and the undersigned were able to agree to modifying the previous subpoena to resolve the motion by limiting the subpoena to telephone numbers of the witnesses in this case. On March 3, 2015 the undersigned requested from Harbor National Bank any phone numbers the Harbor National Bank witnesses (including Mr. Scott Warren) would have used in 2012, and the bank, through counsel provided that information to the undersigned on March 5, 2015 (see emails attached hereto as Exhibit "E ")

19. On March 19, 2014 the Hon. J.C. Nicholson, Jr. entered the consent order (See Exhibit "F") on HSB's motion to quash which called for a new subpoena to be issued to AT&T which limited the scope of the subpoena for Mr. Swanson's telephone records solely to telephone numbers of those persons that were witnesses in this case, part of such request included the Harbor National Bank telephone numbers identified above that were provided by Harbor National Bank counsel.

20. On March 18, 2015 the undersigned caused to be issued a modified subpoena in the form that had been pre-approved by HSB in the March 19, 2015 Consent Order. The new, modified subpoena to AT&T called for telephone records to be produced by April 1, 2015. (See Exhibit "G"). On or about April 27, 2015, the undersigned received the AT&T telephone records from

Mr. David Swanson's office line, that revealed no call from Mr. Scott Warren's cell phone or office line to Mr. Swanson during the relevant period.

21. On the same day the undersigned received Mr. Swanson's office line telephone records (showing no calls to the bank at the relevant time frames. See Exhibit "H"), the undersigned requested HSB to provide the cell phone carrier and telephone number for Mr. Swanson's cell phone, or swear out an affidavit that the call was not placed at the relevant time frames. On May 1, 2015, HSB provided the undersigned Mr. David Swanson's cell phone provider and telephone number in response to the undersigned's request (See Exhibit "I"). On the same day, the undersigned caused to be issued and served a subpoena to Verizon Wireless for the Mr. David Swanson's cell phone records (See Exhibit "J"). The subpoena called for the records to be produced by May 15, 2015, however, the undersigned did not receive the subpoena response until June 10, 2015. The Verizon Wireless records for Mr. David Swanson's cell phone show no record of a call from Mr. Scott Warren's cell phone or office line during the relevant time frames (See Exhibit "K").

22. After receiving Mr. Swanson's cell phone records and office line which show no call from Mr. Warren during the relevant time frame, there is now absolutely no evidence of the call which Harbor National Bank claim was made and predicates its advice of counsel defense upon.

23. Because there is evidence that tends to prove that the advice was never given at the time the bank and Mr. Swanson claim it was made, Mr. Whitfield desires to amend his Answer and Counterclaims to assert causes of

action based upon civil conspiracy and abuse of process, because, if the finder of fact decides the advice was never given at the time the bank and Swanson claim it was made, it can also decide that the bank and David Swanson engaged in a scheme to fabricate a legal defense for the bank that was based on events that never happened. The law regarding what constitutes a civil conspiracy in South Carolina states:

Conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators and other circumstances. [citations omitted] Civil conspiracy is an act which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence; concert of action, amounting to a conspiracy, may be shown by circumstantial as well as direct evidence. [citations omitted]. And in order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise. Proof showing concert of action in the commission of the unlawful acts, from which the natural or reasonable inferences arise that the acts were in furtherance of the common design of the alleged conspirators, is sufficient; at least to establish a prima facie case of conspiracy. [citations omitted]

Island Car Wash, Inc. v. Norris, 292 S.C. 595, 601-02, 358 S.E.2d 150, 153 (Ct. App. 1987).

On the authority of Island Car Wash, Mr. Whitfield has stated a cause of action for civil conspiracy as he has proof the advice of counsel defense was based upon events that never occurred, and that a combination of persons (Scott Warren and David Swanson) was made, for the purpose of an unlawful objective.

As for abuse of process, the elements of abuse of process are "an ulterior purpose and a willful act in the use of the process not proper in the regular course of the proceeding. Whitfield Const. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 223, 525 S.E.2d 888, 897 (Ct. App. 1999). Mr. Whitfield has also stated a cause of action for abuse of process, because, if the allegations are true that no call was made at the time claimed, the sworn testimony by each Mr. Scott

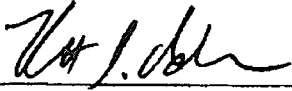
Warren and Mr. David Swanson was a misuse and perversion of legal process by fabricating a legal defense (advice of counsel) through the use of process towards an unlawful end.

24. A copy of the proposed amended pleading is attached hereto as Exhibit "L".

WHEREFORE, Defendant respectfully requests this Honorable Court grant its motion for leave to amend and issue any and all other relief deemed just and appropriate.

Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

By: 
Brent S. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com

Attorneys for Defendant

-and-

Andrew J. McCumber, Esquire

SLOTCHIVER & SLOTCHIVER, LLP
44 State Street
Charleston, SC 29401
Phone: (843) 577-6531
Facsimile: (843) 577-0261
andrew@slotchiverlaw.com
S.C. Bar No. 101559

Daniel S. Slotchiver, Esquire
SLOTCHIVER & SLOTCHIVER, LLP
44 State Street
Charleston, SC 29401
Phone: (843) 577-6531
Facsimile: (843) 577-0261
dan@slotchiverlaw.com
S.C. Bar No. 15129

Attorneys for Defendant

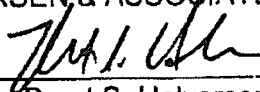
Charleston, SC
June 7, 2015

CERTIFICATE OF SERVICE

I certify that I served the foregoing Motion to Amend upon all parties of record by affixing same with proper postage placing same with the United States Postal Service addressed to the parties and counsel's last known address on this 25th day of June, 2015.

HALVERSEN & ASSOCIATES, LLC

By: _____



Brent S. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com

Charleston, SC
June 25, 2015

2015 JUN 25 PM 3:03
RICHMOND SECURITY

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

\$25.00 MB ✓
IN THE COURT OF COMMON PLEAS

Harbor National Bank
 Plaintiff

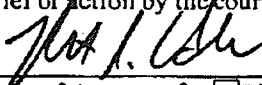
2015 JUN 25 PM 3:03

CASE NO.
2014-CP-18-358

✓ Anthony M. Whitfield
 Defendant.

v.)
CLERK OF COURT)
DORCHESTER COUNTY)

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: _____, Bar No. _____ Address: Robert A. Bernstein, Esq. Bernstein & Bernstein, P.A. 5418-B Rivers Avenue N. Charleston, SC 29406-6129 phone: _____ fax: _____ e-mail: _____ other: _____	Defendant's Attorney: Brent S. Halversen, Bar No. 76495 Address: Halversen & Associates, LLC 171 Church Street, Suite 330 Charleston, SC 29401 phone: (843) 284-5790 fax: _____ e-mail: _____ other: _____
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: Motion to Amend Answer and Add New Parties and Counterclaims Estimated Time Needed: _____ Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. <div style="display: flex; justify-content: space-between;"><div style="text-align: center;"> _____ Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant</div><div style="text-align: center;"><u>6/25/2015</u> Date submitted</div></div>	
SECTION III: Motion Fee	
<input checked="" type="checkbox"/> PAID - AMOUNT: \$25.00 <input type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ <input type="checkbox"/> Other: _____	
JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	_____ JUDGE _____ CODE: _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____	Date Filed: _____

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

RECORD

2015 JUN 25 PM 3:00

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER)
DORCHESTER)
CLERK OF COURT)
CASE NO. ~~2012-CP-18-2738~~

2014-CP-18-1792

HARBOR NATIONAL BANK,)
)
Plaintiff,)
)
vs.)
)
✓ ANTHONY M. WHITFIELD)
)
Defendant.)

**MOTION TO AMEND TO AMEND
ANSWER AND ADD NEW PARTIES,
CROSSCLAIM AND COUNTERCLAIMS**

TO: SETH WHITAKER AND BRIAN DUFFY, ATTORNEYS FOR PLAINTIFF

PLEASE TAKE NOTICE that the Defendant, Anthony M. Whitfield, by and through his undersigned attorney will, on the tenth (10th) day after service hereof at 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, move the Court at the Charleston County Court of Common Pleas, 100 Broad Street Charleston, S.C., for an order allowing Defendant to amend his Answer to add a Crossclaim, certain Counterclaims and a new party, David Swanson. Said Motion is made under Rules 13(f) and (h), 19 and 20 on the following grounds:

1. Defendant seeks permission to amend his Answer to add certain counterclaims in his Answer, as specifically provided for pursuant to Rule 13(f):

(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

South Carolina Rule of Civil Procedure 13(f).

2. Defendant also seeks permission to amend his Answer and a new party to his counterclaims other than those to the original action, Mr. David Swanson, as specifically provided for pursuant to Rule 13(h):

(h) Joinder of Additional Parties. Parties other than those to the original action may be made parties to a counterclaim or cross-claim in accordance with Rules 19 and 20.

South Carolina Rule of Civil Procedure 13(h).

3. Specifically with regard to joinder of persons, the law has set forth the following analysis, Rule 19(a)(1) states:

(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties.

South Carolina Rule of Civil Procedure 19(a)(1).

4. Mr. Whitfield also desires to amend his Answer to assert a crossclaim against co-defendant Cindy Whitfield for equitable indemnification, pursuant to Rule 13(g).

5. The law strongly favors amendments and the court is encouraged to freely grant leave to amend. See Jarrell v. Seaboard Sys. R.R., 294 S.C. 183, 363 S.E.2d 398 (Ct. App. 1987).

6. In this case, complete relief cannot be accorded without joining Mr. David Swanson as a party as Mr. Whitfield seeks to add causes of action for civil conspiracy and abuse of process which requires Mr. David Swanson's presence and inclusion as a party in order to establish the cause(s) of action.

7. Counsel for Defendant certified that consultation with opposing counsel would serve no useful purpose, and therefore, it is necessary to ask the Court for permission to file an amended pleading by filing a motion and scheduling a hearing on the matter. The additions of the new party David Swanson (and the new claims) is based upon newly discovered evidence. Such evidence was just discovered on June 10, 2015, though the evidence has been sought since last year.

8. One of the main basis(s) of Plaintiff's defense of Mr. Whitfield's counterclaims is that the bank sought the advice of its counsel, Mr. David Swanson, and relied on his advice in deciding not to close Mr. Whitfield's renewals at the closing on June 28, 2012.

9. Harbor National Bank through its employee Mr. Scott Warren¹ claims to have relied upon the advice of their attorney, Mr. David Swanson, that a title endorsement was needed to renew the loan for the Black Rush Property. Mr. Warren never mentioned to Mr. Whitfield, before, during, or after the closing on June 28, 2012, that the bank had procured Mr. Swanson's advice that a title endorsement must be obtained in order to renew the Black Rush loan- nor that he was relying on Mr. Swanson's advice in refusing to close the loans. At his deposition on May 13, 2014, Mr. Swanson conceded that the Black Rush Property loan could have been renewed without such an endorsement. He also indicated that he was not told there were any other properties besides the Black

¹ It is not necessary to add Scott Warren as an individual defendant as Harbor National Bank is liable for its employees torts when the employee acts in the course and scope of their employment, even if the acts alleged exceed the bank's authority if the acts done were in furtherance of the master's business. See Crittenden v. Thompson-Walker Co., 288 S.C. 112, 115, 341 S.E.2d 385, 387 (Ct. App. 1986)

Rush Property that were being renewed. Mark Weeks, the closing attorney at the June 28, 2012 closing, stated that no title endorsement was necessary or required for the Black Rush Property and that he could have renewed any of the loans without an endorsement or Mrs. Cindy Whitfield's permission and/or authorization to renew the loans. Mr. David Swanson also conceded that his advice to procure a "title endorsement" was provided to Harbor National Bank without reviewing any documents, without performing any legal research, without providing any written opinion, and without charging the bank any money for the advice. In fact, there is not a single document at Mr. Swanson's law firm suggesting that the advice was ever given.

10. Although Mr. David Swanson has stated under oath that Mr. Scott Warren called him regarding the anticipated closing that was set to occur on June 28, 2012, telephone records received on June 10, 2015 confirm no calls were received from Mr. Scott Warren's cell phone or office number to Mr. David Swanson's cell phone or office number.

11. Additionally, the bank never raised a legal defense of the title endorsement or mortgage signature requirement until October, 2013 *after initially replying to Mr. Whitfield's counterclaims that an agreement was reached* with Mr. Whitfield to renew his loans, and never making any mention of the "title endorsement" or "mortgage signature" defenses. The bank admitted that it made an agreement to renew Mr. Whitfield's loan in its first Reply to his counterclaims filed with this Court on April 25, 2013. The bank subsequently changed its pleading on this matter and denied it made an agreement to renew

Mr. Whitfield's loans in its later filed Replies wherein it asserted the "title endorsement" and "mortgage signature defense".

12. Mr. David Swanson nor his law firm produced a single document, billing entry, opinion, email, letter, or record concerning the supposed advice and, the telephone records show no calls were documented between the bank and the attorney when they claim it occurred—**all of which constitutes evidence that the calls were never made, and the defense was fabricated after the fact in an attempt to manufacture a legal defense for the bank to avoid liability for Mr. Whitfield's counterclaims.**

13. Because of such conduct, Mr. Whitfield desires to amend his Answer, Affirmative Defenses, and Counterclaims to add two new counterclaims for abuse of process and civil conspiracy against the bank, as well as add David Swanson as a named defendant to this matter.

14. The undersigned first sought discovery from Mr. Scott Warren's cell phone provider for telephone records via subpoena on August 26, 2014. The telephone records were received in September of 2014 which showed **no calls** placed were placed to Mr. Swanson's office line or cell phone.

15. The undersigned also requested telephone records of Mr. Scott Warren's office line via a Request for Production to the bank, which was served on September 12, 2014. The Plaintiff bank objected to the requested information and the undersigned served a motion to compel with this Court on October 23, 2014. The motion was heard by the Hon. J.C. Nicholson, Jr. on January 23, 2015 and the Court ordered the bank to produce Mr. Scott Warren's office line

telephone records on March 19, 2015 (See Exhibit "A"). No records were produced by the bank in response to the Order, and on May 11, 2015 the Plaintiff informed the undersigned that the bank was not in possession of the requested telephone records and advised the undersigned to subpoena Harbor National Bank's telephone provider at the time in order to retrieve the records. On May 13, 2015 the undersigned caused to be issued and served a subpoena to Windstream Communications for the telephone records. The subpoena called for the records to be produced by May 29, 2015. To date, no responses have been received from Windstream Communications (See Exhibit "B").

16. The undersigned first sought discovery of Mr. Swanson's telephone records via subpoena to the Haynesworth Sinkler Boyd, P.A. firm (hereinafter, "HSB") on September 26, 2014 (Exhibit "C"). The subpoena requested production of the records by October 6, 2014. HSB requested multiple extensions (which were granted) and the undersigned was informed on November 7, 2014 that HSB did not possess the telephone records requested and to subpoena HSB's telephone provider at the time, AT&T. On November 11, 2014, the undersigned served a subpoena on AT&T requesting Mr. Swanson's office line telephone records from 2012. (See Exhibit "D" attached hereto).

17. The AT&T subpoena called for records to be produced by November 24, 2014. Upon information and belief, HSB caused to be issued a notice of intent to quash the subpoena to AT&T, which prevented the records from being released at the due date requested.

18. On January 29, 2015 HSB served a motion to quash the subpoena for the telephone phone records to the law firm seeking David Swanson's office line telephone records on privilege and relevancy grounds. The motion was set for hearing on March 6, 2015. HSB and the undersigned were able to agree to modifying the previous subpoena to resolve the motion by limiting the subpoena to telephone numbers of the witnesses in this case. On March 3, 2015 the undersigned requested from Harbor National Bank any phone numbers the Harbor National Bank witnesses (including Mr. Scott Warren) would have used in 2012, and the bank, through counsel provided that information to the undersigned on March 5, 2015 (see emails attached hereto as Exhibit "E")

19. On March 19, 2014 the Hon. J.C. Nicholson, Jr. entered the consent order (See Exhibit "F") on HSB's motion to quash which called for a new subpoena to be issued to AT&T which limited the scope of the subpoena for Mr. Swanson's telephone records solely to telephone numbers of those persons that were witnesses in this case, part of such request included the Harbor National Bank telephone numbers identified above that were provided by Harbor National Bank counsel.

20. On March 18, 2015 the undersigned caused to be issued a modified subpoena in the form that had been pre-approved by HSB in the March 19, 2015 Consent Order. The new, modified subpoena to AT&T called for telephone records to be produced by April 1, 2015. (See Exhibit "G"). On or about April 27, 2015, the undersigned received the AT&T telephone records from

Mr. David Swanson's office line, that revealed no call from Mr. Scott Warren's cell phone or office line to Mr. Swanson during the relevant period.

21. On the same day the undersigned received Mr. Swanson's office line telephone records (showing no calls to the bank at the relevant time frames- See Exhibit "H"), the undersigned requested HSB to provide the cell phone carrier and telephone number for Mr. Swanson's cell phone, or swear out an affidavit that the call was not placed at the relevant time frames. On May 1, 2015, HSB provided the undersigned Mr. David Swanson's cell phone provider and telephone number in response to the undersigned's request (See Exhibit "I"). On the same day, the undersigned caused to be issued and served a subpoena to Verizon Wireless for the Mr. David Swanson's cell phone records (See Exhibit "J"). The subpoena called for the records to be produced by May 15, 2015, however, the undersigned did not receive the subpoena response until June 10, 2015. The Verizon Wireless records for Mr. David Swanson's cell phone show no record of a call from Mr. Scott Warren's cell phone or office line during the relevant time frames (See Exhibit "K").

22. After receiving Mr. Swanson's cell phone records and office line which show no call from Mr. Warren during the relevant time frame, there is now absolutely no evidence of the call which Harbor National Bank claim was made and predicates its advice of counsel defense upon.

23. Because there is evidence that tends to prove that the advice was never given at the time the bank and Mr. Swanson claim it was made, Mr. Whitfield desires to amend his Answer and Counterclaims to assert causes of

action based upon civil conspiracy and abuse of process, because, if the finder of fact decides the advice was never given at the time the bank and Swanson claim it was made, it can also decide that the bank and David Swanson engaged in a scheme to fabricate a legal defense for the bank that was based on events that never happened. The law regarding what constitutes a civil conspiracy in South Carolina states:

Conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators and other circumstances. [citations omitted] Civil conspiracy is an act which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence; concert of action, amounting to a conspiracy, may be shown by circumstantial as well as direct evidence. [citations omitted]. And in order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise. Proof showing concert of action in the commission of the unlawful acts, from which the natural or reasonable inferences arise that the acts were in furtherance of the common design of the alleged conspirators, is sufficient; at least to establish a prima facie case of conspiracy. [citations omitted]

Island Car Wash, Inc. v. Norris, 292 S.C. 595, 601-02, 358 S.E.2d 150, 153 (Ct. App. 1987).

On the authority of Island Car Wash, Mr. Whitfield has stated a cause of action for civil conspiracy as he has proof the advice of counsel defense was based upon events that never occurred, and that a combination of persons (Scott Warren and David Swanson) was made, for the purpose of an unlawful objective.

As for abuse of process, the elements of abuse of process are "an ulterior purpose and a willful act in the use of the process not proper in the regular course of the proceeding. Whitfield Const. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 223, 525 S.E.2d 888, 897 (Ct. App. 1999). Mr. Whitfield has also stated a cause of action for abuse of process, because, if the allegations are true that no call was made at the time claimed, the sworn testimony by each Mr. Scott

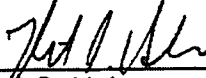
Warren and Mr. David Swanson was a misuse and perversion of legal process by fabricating a legal defense (advice of counsel) through the use of process towards an unlawful end.

24. A copy of the proposed amended pleading is attached hereto as Exhibit "L".

WHEREFORE, Defendant respectfully requests this Honorable Court grant its motion for leave to amend and issue any and all other relief deemed just and appropriate.

Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

By: 
Brent S. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com

Attorneys for Defendant

-and-

Andrew J. McCumber, Esquire

SLOTCHIVER & SLOTCHIVER, LLP
44 State Street
Charleston, SC 29401
Phone: (843) 577-6531
Facsimile: (843) 577-0261
andrew@slotchiverlaw.com
S.C. Bar No. 101559

&
Daniel S. Slotchiver, Esquire
SLOTCHIVER & SLOTCHIVER, LLP
44 State Street
Charleston, SC 29401
Phone: (843) 577-6531
Facsimile: (843) 577-0261
dan@slotchiverlaw.com
S.C. Bar No. 15129

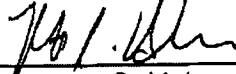
Attorneys for Defendant

Charleston, SC
June 15, 2015

CERTIFICATE OF SERVICE

I certify that I served the foregoing Motion to Amend upon all parties of record by affixing same with proper postage placing same with the United States Postal Service addressed to the parties and counsel's last known address on this 25 day of June, 2015.

HALVERSEN & ASSOCIATES, LLC

By: 
Brent S. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com

Charleston, SC
June 25, 2015

CLERK OF COURT
DORCHESTER COUNTY

2015 JUN 25 PM 3: 01

RECORDED

\$25.00 MB ✓

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS

Harbor National Bank
 Plaintiff

2015 JUN 25 PM 3:00

CASE NO. 2014-CP-18-1792
2012-CP-18-2738-

CLERK OF COURT
DORCHESTER COUNTY
MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

✓ Anthony M. Whitfield
 Defendant.

Plaintiff's Attorney: , Bar No. Address: Robert A. Bernstein, Esq. Bernstein & Bernstein, P.A. 5418-B Rivers Avenue N. Charleston, SC 29406-6129 phone: fax: e-mail: other:	Defendant's Attorney: Brent S. Halversen, Bar No. 76495 Address: Halversen & Associates, LLC 171 Church Street, Suite 330 Charleston, SC 29401 phone: (843) 284-5790 fax: e-mail: other:
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion: Motion to Amend Answer to Add New Parties and Counterclaims Estimated Time Needed: Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO	
SECTION II: Motion/Order Type <input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. <div style="display: flex; justify-content: space-between;"> <div> <u>Anthony M. Whitfield</u> Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant </div> <div> 6/25/2015 Date submitted </div> </div>	
SECTION III: Motion Fee <input checked="" type="checkbox"/> PAID - AMOUNT: \$25.00 <input type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other:	
JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	JUDGE: _____ CODE: _____ Date: _____
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____	

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

2015 JUN 25 PM 3:11

STATE OF SOUTH CAROLINA)
CLERK OF COURT)
COUNTY OF DORCHESTER)
WESTER COUNTY)

IN THE COURT OF COMMON PLEAS

CASE NO. ~~2012-CP-18-2119~~

2014-CP-18-1793

HARBOR NATIONAL BANK,)

Plaintiff,)

vs.)

✓ ANTHONY M. WHITFIELD)

Defendant.)

**MOTION TO AMEND TO AMEND
ANSWER AND ADD NEW PARTIES,
CROSSCLAIM AND COUNTERCLAIMS**

TO: SETH WHITAKER AND BRIAN DUFFY, ATTORNEYS FOR PLAINTIFF

PLEASE TAKE NOTICE that the Defendant, Anthony M. Whitfield, by and through his undersigned attorney will, on the tenth (10th) day after service hereof at 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, move the Court at the Charleston County Court of Common Pleas, 100 Broad Street Charleston, S.C., for an order allowing Defendant to amend his Answer to add a Crossclaim, certain Counterclaims and a new party, David Swanson. Said Motion is made under Rules 13(f) and (h), 19 and 20 on the following grounds:

1. Defendant seeks permission to amend his Answer to add certain counterclaims in his Answer, as specifically provided for pursuant to Rule 13(f):

(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

South Carolina Rule of Civil Procedure 13(f).

2. Defendant also seeks permission to amend his Answer and a new party to his counterclaims other than those to the original action, Mr. David Swanson, as specifically provided for pursuant to Rule 13(h):

(h) Joinder of Additional Parties. Parties other than those to the original action may be made parties to a counterclaim or cross-claim in accordance with Rules 19 and 20.

South Carolina Rule of Civil Procedure 13(h).

3. Specifically with regard to joinder of persons, the law has set forth the following analysis, Rule 19(a)(1) states:

(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties.

South Carolina Rule of Civil Procedure 19(a)(1).

4. Mr. Whitfield also desires to amend his Answer to assert a crossclaim against co-defendant Cindy Whitfield for equitable indemnification, pursuant to Rule 13(g).

5. The law strongly favors amendments and the court is encouraged to freely grant leave to amend. See Jarrell v. Seaboard Sys. R.R., 294 S.C. 183, 363 S.E.2d 398 (Ct. App. 1987).

6. In this case, complete relief cannot be accorded without joining Mr. David Swanson as a party as Mr. Whitfield seeks to add causes of action for civil conspiracy and abuse of process which requires Mr. David Swanson's presence and inclusion as a party in order to establish the cause(s) of action.

7. Counsel for Defendant certified that consultation with opposing counsel would serve no useful purpose, and therefore, it is necessary to ask the Court for permission to file an amended pleading by filing a motion and scheduling a hearing on the matter. **The additions of the new party David Swanson (and the new claims) is based upon newly discovered evidence. Such evidence was just discovered on June 10, 2015, though the evidence has been sought since last year.**

8. One of the main basis(s) of Plaintiff's defense of Mr. Whitfield's counterclaims is that the bank sought the advice of its counsel, Mr. David Swanson, and relied on his advice in deciding not to close Mr. Whitfield's renewals at the closing on June 28, 2012.

9. Harbor National Bank through its employee Mr. Scott Warren¹ claims to have relied upon the advice of their attorney, Mr. David Swanson, that a title endorsement was needed to renew the loan for the Black Rush Property. Mr. Warren never mentioned to Mr. Whitfield, before, during, or after the closing on June 28, 2012, that the bank had procured Mr. Swanson's advice that a title endorsement must be obtained in order to renew the Black Rush loan- nor that he was relying on Mr. Swanson's advice in refusing to close the loans. At his deposition on May 13, 2014, Mr. Swanson conceded that the Black Rush Property loan could have been renewed without such an endorsement. He also indicated that he was not told there were any other properties besides the Black

¹ It is not necessary to add Scott Warren as an individual defendant as Harbor National Bank is liable for its employees torts when the employee acts in the course and scope of their employment, even if the acts alleged exceed the bank's authority if the acts done were in furtherance of the master's business. See Crittenden v. Thompson-Walker Co., 288 S.C. 112, 115, 341 S.E.2d 385, 387 (Ct. App. 1986)

Rush Property that were being renewed. Mark Weeks, the closing attorney at the June 28, 2012 closing, stated that no title endorsement was necessary or required for the Black Rush Property and that he could have renewed any of the loans without an endorsement or Mrs. Cindy Whitfield's permission and/or authorization to renew the loans. Mr. David Swanson also conceded that his advice to procure a "title endorsement" was provided to Harbor National Bank without reviewing any documents, without performing any legal research, without providing any written opinion, and without charging the bank any money for the advice. In fact, there is not a single document at Mr. Swanson's law firm suggesting that the advice was ever given.

10. Although Mr. David Swanson has stated under oath that Mr. Scott Warren called him regarding the anticipated closing that was set to occur on June 28, 2012, telephone records received on June 10, 2015 confirm no calls were received from Mr. Scott Warren's cell phone or office number to Mr. David Swanson's cell phone or office number.

11. Additionally, the bank never raised a legal defense of the title endorsement or mortgage signature requirement until October, 2013 *after initially replying to Mr. Whitfield's counterclaims that an agreement was reached* with Mr. Whitfield to renew his loans, and never making any mention of the "title endorsement" or "mortgage signature" defenses. The bank admitted that it made an agreement to renew Mr. Whitfield's loan in its first Reply to his counterclaims filed with this Court on April 25, 2013. The bank subsequently changed its pleading on this matter and denied it made an agreement to renew

Mr. Whitfield's loans in its later filed Replies wherein it asserted the "title endorsement" and "mortgage signature defense".

12. Mr. David Swanson nor his law firm produced a single document, billing entry, opinion, email, letter, or record concerning the supposed advice, and, the telephone records show no calls were documented between the bank and the attorney when they claim it occurred—**all of which constitutes evidence that the calls were never made, and the defense was fabricated after the fact in an attempt to manufacture a legal defense for the bank to avoid liability for Mr. Whitfield's counterclaims.**

13. Because of such conduct, Mr. Whitfield desires to amend his Answer, Affirmative Defenses, and Counterclaims to add two new counterclaims for abuse of process and civil conspiracy against the bank, as well as add David Swanson as a named defendant to this matter.

14. The undersigned first sought discovery from Mr. Scott Warren's cell phone provider for telephone records via subpoena on August 26, 2014. The telephone records were received in September of 2014 which showed **no calls** placed were placed to Mr. Swanson's office line or cell phone.

15. The undersigned also requested telephone records of Mr. Scott Warren's office line via a Request for Production to the bank, which was served on September 12, 2014. The Plaintiff bank objected to the requested information and the undersigned served a motion to compel with this Court on October 23, 2014. The motion was heard by the Hon. J.C. Nicholson, Jr. on January 23, 2015 and the Court ordered the bank to produce Mr. Scott Warren's office line

telephone records on March 19, 2015 (See Exhibit "A"). No records were produced by the bank in response to the Order, and on May 11, 2015 the Plaintiff informed the undersigned that the bank was not in possession of the requested telephone records and advised the undersigned to subpoena Harbor National Bank's telephone provider at the time in order to retrieve the records. On May 13, 2015 the undersigned caused to be issued and served a subpoena to Windstream Communications for the telephone records. The subpoena called for the records to be produced by May 29, 2015. To date, no responses have been received from Windstream Communications (See Exhibit "B").

16. The undersigned first sought discovery of Mr. Swanson's telephone records via subpoena to the Haynesworth Sinkler Boyd, P.A. firm (hereinafter, "HSB") on September 26, 2014 (Exhibit "C"). The subpoena requested production of the records by October 6, 2014. HSB requested multiple extensions (which were granted) and the undersigned was informed on November 7, 2014 that HSB did not possess the telephone records requested and to subpoena HSB's telephone provider at the time, AT&T. On November 11, 2014, the undersigned served a subpoena on AT&T requesting Mr. Swanson's office line telephone records from 2012. (See Exhibit "D" attached hereto).

17. The AT&T subpoena called for records to be produced by November 24, 2014. Upon information and belief, HSB caused to be issued a notice of intent to quash the subpoena to AT&T, which prevented the records from being released at the due date requested.

18. On January 29, 2015 HSB served a motion to quash the subpoena for the telephone phone records to the law firm seeking David Swanson's office line telephone records on privilege and relevancy grounds. The motion was set for hearing on March 6, 2015. HSB and the undersigned were able to agree to modifying the previous subpoena to resolve the motion by limiting the subpoena to telephone numbers of the witnesses in this case. On March 3, 2015 the undersigned requested from Harbor National Bank any phone numbers the Harbor National Bank witnesses (including Mr. Scott Warren) would have used in 2012, and the bank, through counsel provided that information to the undersigned on March 5, 2015 (see emails attached hereto as Exhibit "E ")

19. On March 19, 2014 the Hon. J.C. Nicholson, Jr. entered the consent order (See Exhibit "F") on HSB's motion to quash which called for a new subpoena to be issued to AT&T which limited the scope of the subpoena for Mr. Swanson's telephone records solely to telephone numbers of those persons that were witnesses in this case, part of such request included the Harbor National Bank telephone numbers identified above that were provided by Harbor National Bank counsel.

20. On March 18, 2015 the undersigned caused to be issued a modified subpoena in the form that had been pre-approved by HSB in the March 19, 2015 Consent Order. The new, modified subpoena to AT&T called for telephone records to be produced by April 1, 2015. (See Exhibit "G"). On or about April 27, 2015, the undersigned received the AT&T telephone records from

Mr. David Swanson's office line, that revealed no call from Mr. Scott Warren's cell phone or office line to Mr. Swanson during the relevant period.

21. On the same day the undersigned received Mr. Swanson's office line telephone records (showing no calls to the bank at the relevant time frames- See Exhibit "H"), the undersigned requested HSB to provide the cell phone carrier and telephone number for Mr. Swanson's cell phone, or swear out an affidavit that the call was not placed at the relevant time frames. On May 1, 2015, HSB provided the undersigned Mr. David Swanson's cell phone provider and telephone number in response to the undersigned's request (See Exhibit "I"). On the same day, the undersigned caused to be issued and served a subpoena to Verizon Wireless for the Mr. David Swanson's cell phone records (See Exhibit "J"). The subpoena called for the records to be produced by May 15, 2015, however, the undersigned did not receive the subpoena response until June 10, 2015. The Verizon Wireless records for Mr. David Swanson's cell phone show no record of a call from Mr. Scott Warren's cell phone or office line during the relevant time frames (See Exhibit "K").

22. After receiving Mr. Swanson's cell phone records and office line which show no call from Mr. Warren during the relevant time frame, there is now absolutely no evidence of the call which Harbor National Bank claim was made and predicates its advice of counsel defense upon.

23. Because there is evidence that tends to prove that the advice was never given at the time the bank and Mr. Swanson claim it was made, Mr. Whitfield desires to amend his Answer and Counterclaims to assert causes of

action based upon civil conspiracy and abuse of process, because, if the finder of fact decides the advice was never given at the time the bank and Swanson claim it was made, it can also decide that the bank and David Swanson engaged in a scheme to fabricate a legal defense for the bank that was based on events that never happened. The law regarding what constitutes a civil conspiracy in South Carolina states:

Conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators and other circumstances. [citations omitted] Civil conspiracy is an act which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence; concert of action, amounting to a conspiracy, may be shown by circumstantial as well as direct evidence. [citations omitted]. And in order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise. Proof showing concert of action in the commission of the unlawful acts, from which the natural or reasonable inferences arise that the acts were in furtherance of the common design of the alleged conspirators, is sufficient; at least to establish a prima facie case of conspiracy. [citations omitted]

Island Car Wash, Inc. v. Norris, 292 S.C. 595, 601-02, 358 S.E.2d 150, 153 (Ct. App. 1987).

On the authority of Island Car Wash, Mr. Whitfield has stated a cause of action for civil conspiracy as he has proof the advice of counsel defense was based upon events that never occurred, and that a combination of persons (Scott Warren and David Swanson) was made, for the purpose of an unlawful objective.

As for abuse of process, the elements of abuse of process are "an ulterior purpose and a willful act in the use of the process not proper in the regular course of the proceeding. Whitfield Const. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 223, 525 S.E.2d 888, 897 (Ct. App. 1999). Mr. Whitfield has also stated a cause of action for abuse of process, because, if the allegations are true that no call was made at the time claimed, the sworn testimony by each Mr. Scott

Warren and Mr. David Swanson was a misuse and perversion of legal process by fabricating a legal defense (advice of counsel) through the use of process towards an unlawful end.

24. A copy of the proposed amended pleading is attached hereto as Exhibit "L".

WHEREFORE, Defendant respectfully requests this Honorable Court grant its motion for leave to amend and issue any and all other relief deemed just and appropriate.

Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

By: 
Brent S. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com

Attorneys for Defendant

-and-

Andrew J. McCumber, Esquire

SLOTCHIVER & SLOTCHIVER, LLP
44 State Street
Charleston, SC 29401
Phone: (843) 577-6531
Facsimile: (843) 577-0261
andrew@slotchiverlaw.com
S.C. Bar No. 101559

Daniel S. Slotchiver, Esquire
SLOTCHIVER & SLOTCHIVER, LLP
44 State Street
Charleston, SC 29401
Phone: (843) 577-6531
Facsimile: (843) 577-0261
dan@slotchiverlaw.com
S.C. Bar No. 15129

Attorneys for Defendant

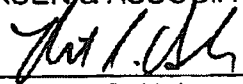
Charleston, SC
June 2, 2015

CERTIFICATE OF SERVICE

I certify that I served the foregoing Motion to Amend upon all parties of record by affixing same with proper postage placing same with the United States Postal Service addressed to the parties and counsel's last known address on this 25th day of June, 2015.

HALVERSEN & ASSOCIATES, LLC

By: _____



Brent S. Halversen
171 Church Street, Suite 330
Charleston, SC 29401
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com

Charleston, SC
June 25, 2015

RECORDED - RECORDED
2015 JUN 25 PM 3:29
CLERK OF COURT
DORCHESTER COUNTY

STATE OF SOUTH CAROLINA)

COUNTY OF DORCHESTER)

Harbor National Bank
 Plaintiff

2015 JUN 25 PM 8:11

IN THE COURT OF COMMON PLEAS

2014-CP-18-1793

CASE NO.
~~2012-CP-18-2119~~

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

CLERK OF COURT
DORCHESTER COUNTY

Anthony M. Whitfield
 Defendant.

1
25
RB

Plaintiff's Attorney: , Bar No. Address: Robert A. Bernstein, Esq. Bernstein & Bernstein, P.A. 5418-B Rivers Avenue N. Charleston, SC 29406-6129 phone: fax: e-mail: other:	Defendant's Attorney: Brent S. Halversen, Bar No. 76495 Address: Halversen & Associates, LLC 171 Church Street, Suite 330 Charleston, SC 29401 phone: (843) 284-5790 fax: e-mail: other:
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion: Motion to Amend Answer to Add New Parties and Counterclaim Estimated Time Needed: Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO	
SECTION II: Motion/Order Type <input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant Date submitted: 6/25/2015	
SECTION III: Motion Fee <input checked="" type="checkbox"/> PAID - AMOUNT: \$25.00 <input type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other:	
JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	JUDGE: _____ CODE: _____ Date: _____
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____	

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2014-CP-18-0358

Bank of North Carolina,
David Swanson, and Cindy
Whitfield

Respondents,

v.

✓ Anthony M. Whitfield,

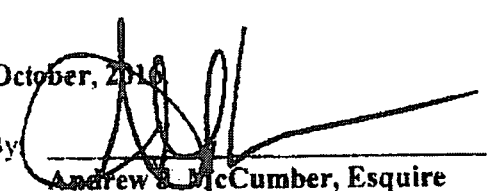
Appellant.

NOTICE OF APPEAL

Anthony M. Whitfield, the Defendant / Third Party Plaintiff in the above referenced action hereby notices all Counsel of Record their intent to Appeal the order of the Honorable Diane S. Goodstein dated July 15, 2016 and the subsequent Order denying Appellant's Rule 59(e) motion dated September 29, 2016. Appellant received written notice of entry of this order on October 3, 2016.

Respectfully submitted this 21st day of October, 2016

By


Andrew S. McCumber, Esquire
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, South Carolina 29401
(843) 577-0261

ATTORNEY FOR APPELLANT

Other Counsel of Record:
(Continued on the following page)

2016 OCT 26 PM 12:20
CLERK OF COURT
DORCHESTER COUNTY

Daniel S. Slotchiver, Esquire
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, South Carolina 29401
(843) 577-0261

ATTORNEY FOR APPELLANT

Brent Halversen, Esquire
Halversen & Associates
171 Church Street, Suite 330
Charleston, South Carolina 29401
(843) 284-5790

ATTORNEY FOR APPELLANT

David W. Overstreet, Esquire
Earhart Overstreet, LLC
Post Office Box No. 22528
Charleston, South Carolina 29413
(843) 972-9400

ATTORNEY FOR RESPONDENT DAVID SWANSON

Brian C. Duffy, Esquire
Thomas A. Limehouse, Jr., Esquire
Duffy & Young, LLC
96 Broad Street
Charleston, South Carolina 29401
(843) 720-2044

ATTORNEYS FOR RESPONDENT BANK OF NORTH CAROLINA

Paul B. Ferrara, III, Esquire
Ferrara Law Firm, PLLC
2300 Otranto Road
N. Charleston, South Carolina 29406
(843) 559-5511

ATTORNEY FOR RESPONDENT CINDY WHITFIELD

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

) IN THE COURT OF COMMON PLEAS
) IN THE FIRST JUDICIAL CIRCUIT
) CASE NO.: 2014-CP-18-0358

Bank of North Carolina,

Plaintiff,

vs.

Anthony Whitfield and Cindy Whitfield,

Defendants,

Anthony Whitfield,

Third Party Plaintiff,

vs.

✓ David Swanson,

Third Party Defendant.

**ORDER GRANTING MOTION TO
DISMISS THIRD-PARTY COMPLAINT**

RECORDED
2015 JUL 15 AM 9:35
CLERK OF COURTY
DORCHESTER COUNTY

This matter comes before the Court on Third-Party Defendant David Swanson's motion to dismiss the Third-Party Complaint. A hearing was held on June 1, 2016. Counsel for Plaintiff Bank of North Carolina, Defendant/Third-Party Plaintiff Anthony Whitfield, and Third-Party Defendant David Swanson were present. For the reasons set forth herein, Third-Party Defendant's motion is granted.

Introduction

This lawsuit is one of six foreclosure actions filed by Bank of North Carolina against Anthony Whitfield. Three actions are pending in Dorchester County: Case Nos. 2014-CP-18-0358, 2014-CP-18-1792, and 2014-CP-18-1793; two are pending in Berkeley County: Case Nos. 2012-CP-08-2618, and 2012-CP-08-3478; and one is pending in Charleston County: Case No. 2012-CP-10-5887. In each of the six foreclosure actions, Defendant/Third Party Plaintiff has asserted

identical third-party claims against David Swanson alleging causes of action for abuse of process and civil conspiracy.

Third-Party Defendant David Swanson is an attorney at Haynsworth Sinkler Boyd, P.A. The third-party claims against him arise out of advice he gave the bank concerning the renewal of the loan on the property that is the subject of the Charleston County foreclosure action, which is referred to in the pleadings as the "Black Rush Property." Third Party Plaintiff alleges that Mr. Swanson never actually provided the advice to the bank, and that he and the bank lied about providing the advice in order to fabricate a defense to Third Party Plaintiff's counterclaims against the bank.

Third-Party Defendant Swanson has moved to dismiss in this action pursuant to Rules 12(b)(8), 12(f) and 14(a) of the South Carolina Rules of Civil Procedure on grounds that another action is pending between the same parties for the same claim, and that the claims against him are not the proper subject of third-party claims because they do not allege derivative liability.

Findings and Conclusions

Rule 12(b)(8) of the South Carolina Rules of Civil Procedure provides that a defendant may seek dismissal of an action when "another action is pending between the same parties for the same claim." In considering a motion to dismiss under Rule 12(b)(8), courts must consider both the identity of the parties and the identity of the claims. Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 701 S.E.2d 39 (Cl. App. 2010). In order to warrant dismissal pursuant to Rule 12(b)(8), "the claim must be precisely or substantially the same in both proceedings. . . ." Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 674 S.E.2d 524, 532 (Cl. App. 2009); *see also* Freemantle v. Preston, 398 S.C. 186, 728 S.E.2d 40, 45 (2012).

In support of this motion, Third-Party Defendant presented the Court with a copy of the pleadings in the related Charleston County action that is the subject of the Black Rush Property. The

Court finds that it is appropriate to take judicial notice of these pleadings in considering whether dismissal is warranted under Rule 12(h)(8), SCRPC.

Based on this Court's review of the pleadings in this action and the Charleston County action, the Court finds that the parties to the third-party claims are identical in both actions, and that the claims against David Swanson are substantially the same, if not identical, in both proceedings. Compare Def.'s Am. Answer and Third Party Compl., Dorchester Co. Case No. 2014-CP-18-0358, ¶¶ 55-72 with Def.'s Am. Answer and Third Party Compl., Charleston Co. Case No. 2012-CP-10-5887, ¶¶ 65-82. Accordingly, the Court finds that dismissal of the Third-Party Complaint in this action against David Swanson is warranted pursuant to Rule 12(b)(8), SCRPC.

Alternatively, Third-Party Defendant moves to dismiss the third-party claim pursuant to Rule 14(a) of the South Carolina Rules of Civil Procedure. Rule 14(a) permits a defendant to assert claims as a third-party plaintiff against a person who is not a party to the action, but only where the third party "*is or may be liable to him or all or part of the plaintiff's claim against him.*" (emphasis added). In other words, it is not whether the third-party claim is somehow related to the original action, but whether the defendant has a claim against a third party for all or part of the original claim that would shift liability for the original claim from the defendant to the third-party.

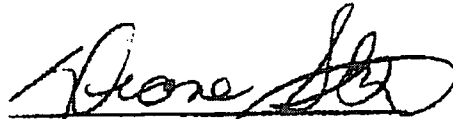
Here, the original action is a foreclosure action initiated by Bank of North Carolina against Anthony Whitfield. Regardless of whether the third-party claims are somehow related to the foreclosure action, Defendant's third-party claims for abuse of process and civil conspiracy do not seek to and cannot shift any liability he may have to the bank in the original foreclosure action to David Swanson. Accordingly, the Court finds that the claims in the Third-Party

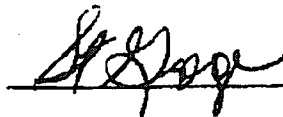
Complaint are not premised on derivative liability, and therefore the Third-Party Complaint should be dismissed pursuant to Rule 14(a), SCRPC.

Accordingly, Third-Part Defendant's motion to dismiss is GRANTED.

IT IS SO ORDERED.

This 7 day of July, 2016


Diane S. Goodstein
Circuit Court Judge

 South Carolina

FORM 4

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

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2014CP1800358

Bank of North Carolina
 Seth Warren Whitaker

Anthony M Whitfield
 Cindy Whitfield

BNC Bancorp
 David Swanson

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

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

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

ORDER INFORMATION

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

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Diane S. Goodstein
 Circuit Court Judge

2112
 Judge Code

7/15/2016
 Date

For Clerk of Court Office Use Only

This judgment was entered on 7/15/2016, and a copy mailed first class or placed in the appropriate attorney's box on 7/15/2016, to attorneys of record or to parties (when appearing pro se) as follows:

Robert Alan Bernstein PO Box 20519 Charleston, SC
29413-0519
Brian C Duffy/Seth Warren Whitaker 96 Broad Street
Charleston, SC 29401

Brent Souther Halversen 171 Church Street Suite 330
Charleston, SC 29401
Daniel Scott Slotchiver/Andrew Joseph McCumber 44
State Street Charleston, SC 29401-2810
Paul B. Ferrara III 2300 Otranto Rd. N. Charleston, SC
29406-9603
David W. Overstreet/Michael B. McCall/Steven Raymond
Kropski PO Box 22528 Charleston, SC 29413

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Cheryl Graham

Court Reporter

Cheryl Graham - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FORM 4

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

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2014CP1800358

Bank of North Carolina Seth Warren Whitaker	2016 SEP 23 PM 12:17	Anthony M Whitfield	BNC Bancorp
--	----------------------	---------------------	-------------

PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other:

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

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

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Diane S. Goodstein	2112	9/29/2016
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on 9/29/2016, and a copy mailed first class or placed in the appropriate attorney's box on 9/29/2016, to attorneys of record or to parties (when appearing pro se) as follows:

Robert Alan Bernstein PO Box 20519 Charleston, SC
29413-0519
Brian C Duffy/Stephen Jenkins Bell 96 Broad Street
Charleston, SC 29401
Seth Warren Whitaker 192 East Bay Street, Suite 200
Charleston, SC 29401

Brent Souther Halverson 171 Church Street Suite 330
Charleston, SC 29401
Daniel Scott Slotchiver/Andrew Joseph McCumber 44
State Street Charleston, SC 29401-2810

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Cheryl Graham

Court Reporter

Cheryl Graham - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

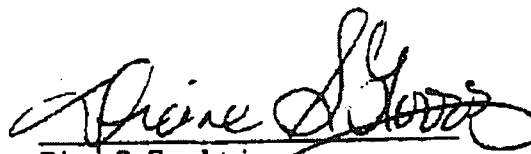
This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

the party believes the trial court misunderstood, failed to fully consider, or overlooked an argument or issue. Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772, 780 (2004).

The Court has again reviewed and considered the parties' arguments and submissions, the pleadings in this action and the related foreclosure actions, and the applicable law regarding the motion to dismiss. The Court finds that the order dated July 15, 2016 properly granted Third-Party Defendant Swanson's motion to dismiss. Accordingly, Defendant/Third-Party Plaintiff Whitfield's motion to reconsider is respectfully DENIED.

IT IS SO ORDERED.

This 14 day of September, 2016


Diane S. Goodstein
Circuit Court Judge

St. George, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2014-CP-18-0358

Bank of North Carolina, David
Swanson, and Cindy Whitfield

Respondents,

v.

Anthony M. Whitfield,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Respondents Bank of North Carolina, Cindy Whitfield, and David Swanson by depositing a copy of same in the United States Mail, postage prepaid, on October 21, 2016, addressed to their attorney of record, as follows:

David W. Overstreet, Esquire
Earhart Overstreet, LLC
Post Office Box No. 22528
Charleston, South Carolina 29413
(843) 972-9400

ATTORNEY FOR RESPONDENT DAVID SWANSON

Brian C. Duffy, Esquire
Thomas A. Limehouse, Jr., Esquire
Duffy & Young, LLC
96 Broad Street
Charleston, South Carolina 29401
(843) 720-2044

ATTORNEYS FOR RESPONDENT BANK OF NORTH CAROLINA

(Continued on the following page.)

2016 OCT 26 PM 12:20
RECORDED
CLERK OF COURT
DORCHESTER COUNTY

Paul B. Ferrara, III, Esquire
Ferrara Law Firm, PLLC
2300 Otranto Road
N. Charleston, South Carolina 29406
(843) 559-5511

ATTORNEY FOR RESPONDENT CINDY WHITFIELD

Respectfully submitted this 21st day of October, 2016.

By: 

Andrew J. McCumber, Esquire
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, South Carolina 29401
(843) 577-0261

ATTORNEY FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2014-CP-18-1792

2016 OCT 26 PM 12:22
CLERK OF COURT
DORCHESTER COUNTY

Bank of North Carolina,
David Swanson, and Cindy
Whitfield

Respondents,

v.

Anthony M. Whitfield,

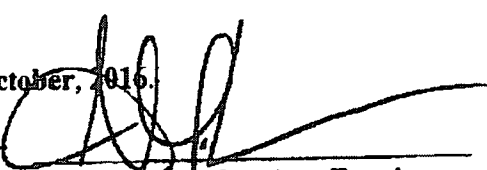
Appellant.

NOTICE OF APPEAL

Anthony M. Whitfield, the Defendant / Third Party Plaintiff in the above referenced action hereby notices all Counsel of Record their intent to Appeal the order of the Honorable Diane S. Goodstein dated July 15, 2016 and the subsequent Order denying Appellant's Rule 59(e) motion dated September 29, 2016. Appellant received written notice of entry of this order on October 3, 2016.

Respectfully submitted this 21st day of October, 2016.

By


Andrew J. McCumber, Esquire
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, South Carolina 29401
(843) 577-0261

ATTORNEY FOR APPELLANT

Other Counsel of Record:
(Continued on the following page)

Daniel S. Slotchiver, Esquire
Slotchiver & Slotchiver, L.P.
44 State Street
Charleston, South Carolina 29401
(843) 577-0261

ATTORNEY FOR APPELLANT

Brent Halversen, Esquire
Halversen & Associates
171 Church Street, Suite 330
Charleston, South Carolina 29401
(843) 284-5796

ATTORNEY FOR APPELLANT

David W. Overstreet, Esquire
Earhart Overstreet, LLC
Post Office Box No. 22528
Charleston, South Carolina 29413
(843) 972-9400

ATTORNEY FOR RESPONDENT DAVID SWANSON

Brian C. Duffy, Esquire
Thomas A. Limehouse, Jr., Esquire
Duffy & Young, LLC
96 Broad Street
Charleston, South Carolina 29401
(843) 720-2044

ATTORNEYS FOR RESPONDENT BANK OF NORTH CAROLINA

Paul B. Ferrara, III, Esquire
Ferrara Law Firm, PLLC
2300 Otranto Road
N. Charleston, South Carolina 29406
(843) 559-5511

ATTORNEY FOR RESPONDENT CINDY WHITFIELD

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

) IN THE COURT OF COMMON PLEAS
) IN THE FIRST JUDICIAL CIRCUIT
) CASE NO.: 2014-CP-18-1792

Bank of North Carolina,

Plaintiff,

vs.

Anthony Whitfield and Cindy Whitfield,

Defendants,

Anthony Whitfield,

Third Party Plaintiff,

vs.

✓ David Swanson,

Third Party Defendant.

**ORDER GRANTING MOTION TO
DISMISS THIRD-PARTY COMPLAINT**

2015 JUL 15 AM 9:35
CLERK OF COURT
DORCHESTER COUNTY
RECORDED

This matter comes before the Court on Third-Party Defendant David Swanson's motion to dismiss the Third-Party Complaint. A hearing was held on June 1, 2016. Counsel for Plaintiff Bank of North Carolina, Defendant/Third-Party Plaintiff Anthony Whitfield, and Third-Party Defendant David Swanson were present. For the reasons set forth herein, Third-Party Defendant's motion is granted.

Introduction

This lawsuit is one of six foreclosure actions filed by Bank of North Carolina against Anthony Whitfield. Three actions are pending in Dorchester County: Case Nos. 2014-CP-18-0358, 2014-CP-18-1792, and 2014-CP-18-1793; two are pending in Berkeley County: Case Nos. 2012-CP-08-2618, and 2012-CP-08-3478; and one is pending in Charleston County: Case No. 2012-CP-10-5887. In each of the six foreclosure actions, Defendant/Third Party Plaintiff has asserted

identical third-party claims against David Swanson alleging causes of action for abuse of process and civil conspiracy.

Third-Party Defendant David Swanson is an attorney at Haynsworth Sinkler Boyd, P.A. The third-party claims against him arise out of advice he gave the bank concerning the renewal of the loan on the property that is the subject of the Charleston County foreclosure action, which is referred to in the pleadings as the "Black Rush Property." Third Party Plaintiff alleges that Mr. Swanson never actually provided the advice to the bank, and that he and the bank lied about providing the advice in order to fabricate a defense to Third Party Plaintiff's counterclaims against the bank.

Third-Party Defendant Swanson has moved to dismiss in this action pursuant to Rules 12(b)(8), 12(f) and 14(a) of the South Carolina Rules of Civil Procedure on grounds that another action is pending between the same parties for the same claim, and that the claims against him are not the proper subject of third-party claims because they do not allege derivative liability.

Findings and Conclusions

Rule 12(b)(8) of the South Carolina Rules of Civil Procedure provides that a defendant may seek dismissal of an action when "another action is pending between the same parties for the same claim." In considering a motion to dismiss under Rule 12(b)(8), courts must consider both the identity of the parties and the identity of the claims. Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 701 S.E.2d 39 (Ct. App. 2010). In order to warrant dismissal pursuant to Rule 12(b)(8), "the claim must be precisely or substantially the same in both proceedings. . . ." Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 674 S.E.2d 524, 532 (Ct. App. 2009); *see also* Freemantle v. Preston, 398 S.C. 186, 728 S.E.2d 40, 45 (2012).

In support of this motion, Third-Party Defendant presented the Court with a copy of the pleadings in the related Charleston County action that is the subject of the Black Rush Property. The

Court finds that it is appropriate to take judicial notice of these pleadings in considering whether dismissal is warranted under Rule 12(b)(8), SCRCF.

Based on this Court's review of the pleadings in this action and the Charleston County action, the Court finds that the parties to the third-party claims are identical in both actions, and that the claims against David Swanson are substantially the same, if not identical, in both proceedings. Compare Def.'s Am. Answer and Third Party Compl., Dorchester Co. Case No. 2014-CP-18-1729, ¶¶ 55-72 with Def.'s Am. Answer and Third Party Compl., Charleston Co. Case No. 2012-CP-10-5887, ¶¶ 65-82. Accordingly, the Court finds that dismissal of the Third-Party Complaint in this action against David Swanson is warranted pursuant to Rule 12(b)(8), SCRCF.

Alternatively, Third-Party Defendant moves to dismiss the third-party claim pursuant to Rule 14(a) of the South Carolina Rules of Civil Procedure. Rule 14(a) permits a defendant to assert claims as a third-party plaintiff against a person who is not a party to the action, but only where the third party "*is or may be liable to him or all or part of the plaintiff's claim against him.*" (emphasis added). In other words, it is not whether the third-party claim is somehow related to the original action, but whether the defendant has a claim against a third party for all or part of the original claim that would shift liability for the original claim from the defendant to the third party.

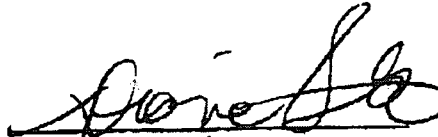
Here, the original action is a foreclosure action initiated by Bank of North Carolina against Anthony Whitfield. Regardless of whether the third-party claims are somehow related to the foreclosure action, Defendant's third-party claims for abuse of process and civil conspiracy do not seek to and cannot shift any liability he may have to the bank in the original foreclosure action to David Swanson. Accordingly, the Court finds that the claims in the Third-Party

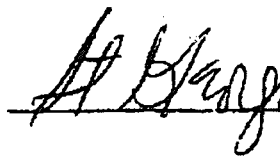
Complaint are not premised on derivative liability, and therefore the Third-Party Complaint should be dismissed pursuant to Rule 14(a), SCRCP.

Accordingly, Third-Part Defendant's motion to dismiss is GRANTED.

IT IS SO ORDERED.

This 7 day of July, 2016


Diane S. Goodstein
Circuit Court Judge

 South Carolina

FORM 4

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

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2014CP1801792

Bank of North Carolina Seth Warren Whitaker	Anthony M Whitfield	Anthony M Whitfield BNC Bancorp	Cindy Whitfield David Swanson
PLAINTIFF(S)		DEFENDANT(S)	

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

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other: _____

RECEIVED
 2015 JUL 15 AM 10:35
 CLERK OF DISTRICT COURT
 DORCHESTER COUNTY
 SOUTH CAROLINA

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

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

ORDER INFORMATION

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

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Diane S. Goodstein
 Circuit Court Judge

2112
 Judge Code

7/15/2016
 Date

For Clerk of Court Office Use Only

This judgment was entered on 7/15/2016, and a copy mailed first class or placed in the appropriate attorney's box on 7/15/2016, to attorneys of record or to parties (when appearing pro se) as follows:

Robert Alan Bernstein/P.O. Box 20519 Charleston, SC
29413-0519
Brian C Duffy/Seth Warren Whitaker/Thomas Ashley
Limehouse Jr. 96 Broad Street Charleston, SC 29401

Brent Souther Halversen 171 Church Street Suite 330
Charleston, SC 29401
Daniel Scott Slotchiver/Andrew Joseph McCumber 44
State Street Charleston, SC 29401-2810
Paul B. Ferrara III 2300 Otranto Rd. N. Charleston, SC
29406-9603
David W. Overstreet/Michael B. McCall/Steven Raymond
Kropski PO Box 22528 Charleston, SC 29413

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Cheryl Graham

Court Reporter

Cheryl Graham - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FORM 4

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

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2014CP1801792

Bank of North Carolina Seth Warren Whitaker	Anthony M Whitfield	Anthony M Whitfield	BNC Bancorp
--	---------------------	---------------------	-------------

PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other:

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

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

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Diane S. Goodstein	2112	9/29/2016
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

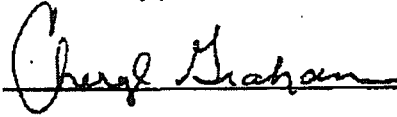
This judgment was entered on 9/29/2016, and a copy mailed first class or placed in the appropriate attorney's box on 9/29/2016, to attorneys of record or to parties (when appearing pro se) as follows:

Robert Alan Bernstein PO Box 20519 Charleston, SC
29413-0519
Brian C Duffy/Thomas Ashley Limehouse Jr. 96 Broad
Street Charleston, SC 29401
Seib Warren Whitaker 192 East Bay Street, Suite 200
Charleston, SC 29401

Brent Souther Halversen 171 Church Street Suite 330
Charleston, SC 29401
Daniel Scott Slotchiver/Andrew Joseph McCumber 44
State Street Charleston, SC 29401-2810

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Court Reporter

Cheryl Graham - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

) IN THE COURT OF COMMON PLEAS
) IN THE FIRST JUDICIAL CIRCUIT
) CASE NO.: 2014-CP-18-1792

Bank of North Carolina,

Plaintiff,

vs.

Anthony Whitfield and Cindy Whitfield,

Defendants,

Anthony Whitfield,

Third Party Plaintiff,

vs.

David Swanson,

Third Party Defendant.

**ORDER DENYING
MOTION TO RECONSIDER**

SEP 29 PM 12:18

This matter comes before the Court on Defendant/Third-Party Plaintiff Anthony Whitfield's motion to reconsider filed on July 25, 2016 pursuant to Rule 59(e), SCRCF. Defendant/Third-Party Plaintiff Whitfield's motion to reconsider asks the Court to alter or amend its ruling in the order dated July 15, 2016, which granted Third-Party Defendant David Swanson's motion to dismiss. A hearing was held on August 26, 2016. Counsel for Plaintiff Bank of North Carolina, Defendant/Third-Party Plaintiff Anthony Whitfield, and Third-Party Defendant David Swanson were present.

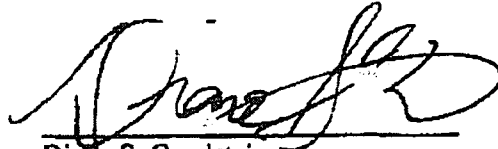
"The purpose of Rule 59(e), SCRCF, to alter or amend the judgment[,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505, 511 (2006) (quoting Arnold v. State, 309 S.C. 157, 420 S.E.2d 834, 842 (1992)). A party may request that a trial court reconsider its prior ruling where

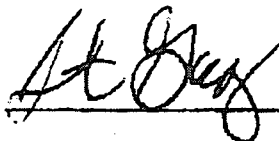
the party believes the trial court misunderstood, failed to fully consider, or overlooked an argument or issue. Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772, 780 (2004).

The Court has again reviewed and considered the parties' arguments and submissions, the pleadings in this action and the related foreclosure actions, and the applicable law regarding the motion to dismiss. The Court finds that the order dated July 15, 2016 properly granted Third-Party Defendant Swanson's motion to dismiss. Accordingly, Defendant/Third-Party Plaintiff Whitfield's motion to reconsider is respectfully DENIED.

IT IS SO ORDERED.

This 23 day of September, 2016


Diane S. Goodstein
Circuit Court Judge


_____, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2014-CP-18-1792

Bank of North Carolina, David
Swanson, and Cindy Whitfield

Respondents,

v.

Anthony M. Whitfield.

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Respondents Bank of North Carolina, Cindy Whitfield, and David Swanson by depositing a copy of same in the United States Mail, postage prepaid, on October 21, 2016, addressed to their attorney of record, as follows:

David W. Overstreet, Esquire
Earhart Overstreet, LLC
Post Office Box No. 22528
Charleston, South Carolina 29413
(843) 972-9400

ATTORNEY FOR RESPONDENT DAVID SWANSON

Brian C. Duffy, Esquire
Thomas A. Limehouse, Jr., Esquire
Duffy & Young, LLC
96 Broad Street
Charleston, South Carolina 29401
(843) 720-2044

ATTORNEYS FOR RESPONDENT BANK OF NORTH CAROLINA

(Continued on the following page.)

RECORDED
2016 OCT 26 PM 12:22
CLERK OF COURT
DORCHESTER COUNTY

Paul B. Ferrara, III, Esquire
Ferrara Law Firm, PLLC
2300 Otranto Road
N. Charleston, South Carolina 29406
(843) 559-5511

ATTORNEY FOR RESPONDENT CINDY WHITFIELD

Respectfully submitted this 21st day of October, 2016.

By: 

Andrew J. McCumber, Esquire
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, South Carolina 29401
(843) 577-0261

ATTORNEY FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2014-CP-18-1793

✓ Bank of North Carolina,
David Swanson, and Cindy
Whitfield

Respondents,

v.

Anthony M. Whitfield.

Appellant.

NOTICE OF APPEAL

Anthony M. Whitfield, the Defendant / Third Party Plaintiff in the above referenced action hereby notices all Counsel of Record their intent to Appeal the order of the Honorable Diane S. Goodstein dated July 15, 2016 and the subsequent Order denying Appellant's Rule 59(e) motion dated September 29, 2016. Appellant received written notice of entry of this order on October 3, 2016.

Respectfully submitted this 21st day of October, 2016

By: 

Andrew J. McCumber, Esquire
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, South Carolina 29401
(843) 577-0261

ATTORNEY FOR APPELLANT

Other Counsel of Record:
(Continued on the following page)

2016 OCT 26 PM 12:32
DORCHESTER COUNTY
CLERK OF COURT

Daniel S. Slotchiver, Esquire
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, South Carolina 29401
(843) 577-0261

ATTORNEY FOR APPELLANT

Brent Halversen, Esquire
Halversen & Associates
171 Church Street, Suite 330
Charleston, South Carolina 29401
(843) 284-5790

ATTORNEY FOR APPELLANT

David W. Overstreet, Esquire
Earhart Overstreet, LLC
Post Office Box No. 22528
Charleston, South Carolina 29413
(843) 972-9400

ATTORNEY FOR RESPONDENT DAVID SWANSON

Brian C. Duffy, Esquire
Thomas A. Limehouse, Jr., Esquire
Duffy & Young, LLC
96 Broad Street
Charleston, South Carolina 29401
(843) 720-2044

ATTORNEYS FOR RESPONDENT BANK OF NORTH CAROLINA

Paul B. Ferrara, III, Esquire
Ferrara Law Firm, PLLC
2300 Otranto Road
N. Charleston, South Carolina 29406
(843) 559-5511

ATTORNEY FOR RESPONDENT CINDY WHITFIELD

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

Bank of North Carolina,

Plaintiff,

vs.

Anthony Whitfield and Cindy Whitfield,

Defendants,

Anthony Whitfield,

Third Party Plaintiff,

vs.

✓ David Swanson,

Third Party Defendant.

) IN THE COURT OF COMMON PLEAS
) IN THE FIRST JUDICIAL CIRCUIT
) CASE NO.: 2014-CP-18-1793

**ORDER GRANTING MOTION TO
DISMISS THIRD-PARTY COMPLAINT**

2016 JUL 15 AM 9:34
RECORDED
CLERK OF COURT
DORCHESTER COUNTY

This matter comes before the Court on Third-Party Defendant David Swanson's motion to dismiss the Third-Party Complaint. A hearing was held on June 1, 2016. Counsel for Plaintiff Bank of North Carolina, Defendant/Third-Party Plaintiff Anthony Whitfield, and Third-Party Defendant David Swanson were present. For the reasons set forth herein, Third-Party Defendant's motion is granted.

Introduction

This lawsuit is one of six foreclosure actions filed by Bank of North Carolina against Anthony Whitfield. Three actions are pending in Dorchester County: Case Nos. 2014-CP-18-0358, 2014-CP-18-1792, and 2014-CP-18-1793; two are pending in Berkeley County: Case Nos. 2012-CP-08-2618, and 2012-CP-08-3478; and one is pending in Charleston County: Case No. 2012-CP-10-5887. In each of the six foreclosure actions, Defendant/Third Party Plaintiff has asserted

identical third-party claims against David Swanson alleging causes of action for abuse of process and civil conspiracy.

Third-Party Defendant David Swanson is an attorney at Haynsworth Sinkler Boyd, P.A. The third-party claims against him arise out of advice he gave the bank concerning the renewal of the loan on the property that is the subject of the Charleston County foreclosure action, which is referred to in the pleadings as the "Black Rush Property." Third Party Plaintiff alleges that Mr. Swanson never actually provided the advice to the bank, and that he and the bank lied about providing the advice in order to fabricate a defense to Third Party Plaintiff's counterclaims against the bank.

Third-Party Defendant Swanson has moved to dismiss in this action pursuant to Rules 12(b)(8), 12(f) and 14(a) of the South Carolina Rules of Civil Procedure on grounds that another action is pending between the same parties for the same claim, and that the claims against him are not the proper subject of third-party claims because they do not allege derivative liability.

Findings and Conclusions

Rule 12(b)(8) of the South Carolina Rules of Civil Procedure provides that a defendant may seek dismissal of an action when "another action is pending between the same parties for the same claim." In considering a motion to dismiss under Rule 12(b)(8), courts must consider both the identity of the parties and the identity of the claims. Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 701 S.E.2d 39 (Cl. App. 2010). In order to warrant dismissal pursuant to Rule 12(b)(8), "the claim must be precisely or substantially the same in both proceedings. . . ." Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 674 S.E.2d 524, 532 (Cl. App. 2009); *see also* Freemantle v. Preston, 398 S.C. 186, 728 S.E.2d 40, 45 (2012).

In support of this motion, Third-Party Defendant presented the Court with a copy of the pleadings in the related Charleston County action that is the subject of the Black Rush Property. The

Court finds that it is appropriate to take judicial notice of these pleadings in considering whether dismissal is warranted under Rule 12(b)(8), SCRPC.

Based on this Court's review of the pleadings in this action and the Charleston County action, the Court finds that the parties to the third-party claims are identical in both actions, and that the claims against David Swanson are substantially the same, if not identical, in both proceedings. Compare Def.'s Am. Answer and Third Party Compl., Dorchester Co. Case No. 2014-CP-18-1793, ¶¶ 55-72 with Def.'s Am. Answer and Third Party Compl., Charleston Co. Case No. 2012-CP-10-5887, ¶¶ 65-82. Accordingly, the Court finds that dismissal of the Third-Party Complaint in this action against David Swanson is warranted pursuant to Rule 12(b)(8), SCRPC.

Alternatively, Third-Party Defendant moves to dismiss the third-party claim pursuant to Rule 14(a) of the South Carolina Rules of Civil Procedure. Rule 14(a) permits a defendant to assert claims as a third-party plaintiff against a person who is not a party to the action, but only where the third party "*is or may be liable to him or all or part of the plaintiff's claim against him.*" (emphasis added). In other words, it is not whether the third-party claim is somehow related to the original action, but whether the defendant has a claim against a third party for all or part of the original claim that would shift liability for the original claim from the defendant to the third-party.

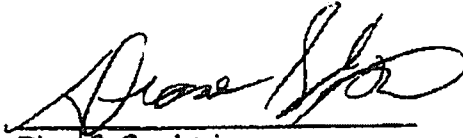
Here, the original action is a foreclosure action initiated by Bank of North Carolina against Anthony Whitfield. Regardless of whether the third-party claims are somehow related to the foreclosure action, Defendant's third-party claims for abuse of process and civil conspiracy do not seek to and cannot shift any liability he may have to the bank in the original foreclosure action to David Swanson. Accordingly, the Court finds that the claims in the Third-Party

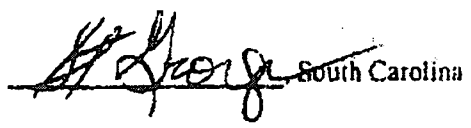
Complaint are not premised on derivative liability, and therefore the Third-Party Complaint should be dismissed pursuant to Rule 14(a), SCRPC.

Accordingly, Third-Part Defendant's motion to dismiss is GRANTED.

IT IS SO ORDERED.

This 7 day of July, 2016


Diane S. Goodstein
Circuit Court Judge


South Carolina

FORM 4

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

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2014CP1801793

Bank of North Carolina
 Seth Warren Whitaker

Anthony M Whitefield

Anthony M Whitefield
 BNC Bancorp

Ciady Whitefield
 David Swanson

PLAINTIFF(S)

DEFENDANT(S)

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

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy; Other: _____
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other: _____

2016 JUL 15 AM 9:34
 CLERK OF COURT
 DORCHESTER COUNTY

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

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

ORDER INFORMATION

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

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Diane S. Goodstein
 Circuit Court Judge

2112
 Judge Code

7/15/2016
 Date

For Clerk of Court Office Use Only

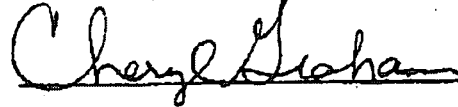
This judgment was entered on 7/15/2016, and a copy mailed first class or placed in the appropriate attorney's box on 7/15/2016, to attorneys of record or to parties (when appearing pro se) as follows:

Robert Alan Bernstein PO Box 20519 Charleston, SC
29413-0519
Brian C Duffy/Seth Warren Whitaker/Thomas Ashley
Limehouse Jr. 96 Broad Street Charleston, SC 29401

Brent Souther Halversen 171 Church Street Suite 330
Charleston, SC 29401
Daniel Scott Stotchever/Andrew Joseph McCumber 44
State Street Charleston, SC 29401-2810
David W. Overstreet/Michael B. McCall/Steven Raymond
Kropski PO Box 22528 Charleston, SC 29413

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Court Reporter

Cheryl Graham - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FORM 4

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

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2014CP1801793

Bank of North Carolina Seth Warren Whitaker	2016 SEP 29 PM 12:17	Anthony M Whitfield
--	----------------------	---------------------

PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

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

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

ORDER INFORMATION

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

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Diane S. Goodstein	2112	9/29/2016
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on 9/29/2016, and a copy mailed first class or placed in the appropriate attorney's box on 9/29/2016, to attorneys of record or to parties (when appearing pro se) as follows:

Robert Alan Bernstein PO Box 20519 Charleston, SC
29413-0519
Brian C Duffy/Thomas Ashley Limehouse Jr. 96 Broad
Street Charleston, SC 29401
Seth Warren Whitaker 192 East Bay Street, Suite 200
Charleston, SC 29401

Brent Souther Halversen 171 Church Street Suite 330
Charleston, SC 29401
Daniel Scott Slotchiver/Andrew Joseph McCumber 44
State Street Charleston, SC 29401-2810

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Cheryl Graham

Court Reporter

Cheryl Graham - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

Bank of North Carolina,

Plaintiff,

vs.

Anthony Whitfield and Cindy Whitfield,

Defendants,

Anthony Whitfield,

Third Party Plaintiff,

vs.

David Swanson,

Third Party Defendant.

) IN THE COURT OF COMMON PLEAS
) IN THE FIRST JUDICIAL CIRCUIT
) CASE NO.: 2014-CP-18-1793

**ORDER DENYING
MOTION TO RECONSIDER**

2016 SEP 29 PM 12:18

This matter comes before the Court on Defendant/Third-Party Plaintiff Anthony Whitfield's motion to reconsider filed on July 25, 2016 pursuant to Rule 59(e), SCRPC. Defendant/Third-Party Plaintiff Whitfield's motion to reconsider asks the Court to alter or amend its ruling in the order dated July 15, 2016, which granted Third-Party Defendant David Swanson's motion to dismiss. A hearing was held on August 26, 2016. Counsel for Plaintiff Bank of North Carolina, Defendant/Third-Party Plaintiff Anthony Whitfield, and Third-Party Defendant David Swanson were present.

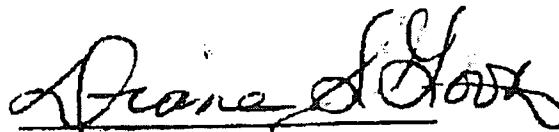
"The purpose of Rule 59(c), SCRPC, to alter or amend the judgment[,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505, 511 (2006) (quoting Arnold v. State, 309 S.C. 157, 420 S.E.2d 834, 842 (1992)). A party may request that a trial court reconsider its prior ruling where

the party believes the trial court misunderstood, failed to fully consider, or overlooked an argument or issue. Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772, 780 (2004).

The Court has again reviewed and considered the parties' arguments and submissions, the pleadings in this action and the related foreclosure actions, and the applicable law regarding the motion to dismiss. The Court finds that the order dated July 15, 2016 properly granted Third-Party Defendant Swanson's motion to dismiss. Accordingly, Defendant/Third-Party Plaintiff Whitfield's motion to reconsider is respectfully DENIED.

IT IS SO ORDERED.

This 23 day of September, 2016


Diane S. Goodstein
Circuit Court Judge


St. Gray, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2014-CP-18-1793

2016 OCT 26 PM 12:32
RECORDED
CLERK OF COURT
DORCHESTER COUNTY

Bank of North Carolina, David
Swanson, and Cindy Whitfield

Respondents,

Anthony M. Whitfield,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Respondents Bank of North Carolina, Cindy Whitfield, and David Swanson by depositing a copy of same in the United States Mail, postage prepaid, on October 21, 2016, addressed to their attorney of record, as follows:

David W. Overstreet, Esquire
Earhart Overstreet, LLC
Post Office Box No. 22528
Charleston, South Carolina 29417
(843) 972-9400

ATTORNEY FOR RESPONDENT DAVID SWANSON

Brinn C. Duffy, Esquire
Thomas A. Limehouse, Jr., Esquire
Duffy & Young, LLC
96 Broad Street
Charleston, South Carolina 29401
(843) 720-2044

ATTORNEYS FOR RESPONDENT BANK OF NORTH CAROLINA

(Continued on the following page)

Paul B. Ferrara, III, Esquire
Ferrara Law Firm, PLLC
2300 Orranto Road
N. Charleston, South Carolina 29406
(843) 559-5511

ATTORNEY FOR RESPONDENT CINDY WHITFIELD

Respectfully submitted this 21st day of October, 2016.

By: 

Andrew J. McCumber, Esquire
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, South Carolina 29401
(843) 577-0261

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA)	COURT OF COMMON PLEAS
)	FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER)	
)	
Bank of North Carolina, et)	
al.,)	CASE NO. 2014-CP-18-0358
)	2014-CP-18-1792
)	2014-CP-18-1793
)	
PLAINTIFFS,)	TRANSCRIPT OF RECORD
)	
VS.)	
)	
Anthony M. Whitfield, et al.,)	
)	
DEFENDANTS.)	
)	

August 25, 2016

St. George, South Carolina

B E F O R E:

The Honorable Diane S. Goodstein

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

David Overstreet, Esquire
For the Plaintiff

Brent S. Halversen, Esquire
For the Defense

Phyllis Norton, CVR-Master, Nationally Certified Verbatim Court Reporter
636 Long Point Road, Unit G, #74, Mt. Pleasant, South Carolina 29464
PNorton@sccourts.org

I N D E X

HEARING -- 03

EXHIBITS - None Proffered

CERTIFICATION OF TRANSCRIPT -- 19

If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

1 THE COURT: Yes, sir.

2 MR. HALVERSEN: Your Honor, Brent Halversen on
3 behalf of the defendant Anthony Whitfield. You may
4 recall this matter. We were here June 1st, 2016, on the
5 defendant David Swanson's motion to dismiss.

6 THE COURT: Right.

7 MR. HALVERSEN: And Your Honor granted that motion.
8 We filed this motion for reconsideration.

9 THE COURT: Okay.

10 MR. HALVERSEN: By way of background, Your Honor,
11 this is the lawsuit where the bank has foreclosed on nine
12 different pieces of property that are situated in
13 Charleston, Berkeley, and here in Dorchester County.

14 Mr. Whitfield, our client, has made counterclaims
15 that the bank made an agreement to renew those loans.

16 THE COURT: Right.

17 MR. HALVERSEN: And as part of the bank's defense
18 they have raised the advice of counsel defense that we
19 went to a certain real estate lawyer that gave us advice
20 as to whether or not we should do this deal. Okay, Your
21 Honor.

22 So as part of the bank's defense in their reply to
23 our counterclaims they have raised Mr. Swanson as an
24 issue here in Dorchester County and each of the other
25 individual counties.

1 We have found evidence that the advice never
2 happened, that there is nothing at the law firm that ever
3 said it happened.

4 And because of that we also subpoenaed phone records
5 to when this supposed advice happened; and we couldn't
6 find anything of it, Your Honor.

7 For that reason we amended all of the counterclaims
8 to assert causes of action against Mr. Swanson for abuse
9 of process and civil conspiracy.

10 And our allegation is that the advice, based on the
11 evidence we have, never happened, Your Honor. And so
12 that is something that a jury is going to consider at
13 some point in time.

14 The basis for their motion to dismiss was I believe
15 it was twofold. First, it was made on a 12(b)(8) ground
16 that the same claim is pending in each of the different
17 counties. And, Your Honor, what we want to inform you
18 today is it is the same claim because it is predicated on
19 different income producing properties in each of these
20 different counties.

21 The case law for a 12(b)(8) remedy is that in order
22 to succeed on a 12(b)(8) motion - this is quoted in our
23 motion - it must be precisely or substantially the same
24 in both proceedings in order to put a drastic remedy of
25 dismissal to be appropriate under 12(b)(8).

1 And, Your Honor, what we are submitting to the court
2 is that because the counterclaims are based on different
3 properties that are income producing they are inherently
4 different. There are different numbers for each one ---

5 THE COURT: Let me ask you this question then, Mr.
6 Halversen. Let's talk about that for a minute. And I
7 will tell you what my concern was. First of all, there
8 is a suit for malpractice; am I correct?

9 MR. HALVERSEN: No, Your Honor, because ---

10 THE COURT: Okay.

11 MR. HALVERSEN: --- the ---

12 THE COURT: Well, you can't tell me what the
13 counterclaim is about.

14 MR. HALVERSEN: The counterclaim is for abuse of
15 process and civil conspiracy.

16 THE COURT: Okay. Okay. And it is abuse of process
17 and civil conspiracy from what?

18 MR. HALVERSEN: For manufacturing a legal defense
19 that we have evidence that never occurred.

20 THE COURT: Right. Right. And are you alleging
21 damages?

22 MR. HALVERSEN: Yes, Your Honor.

23 THE COURT: And what are -- have you done that in
24 Charleston?

25 MR. HALVERSEN: We have alleged damages in each

1 county, Your Honor.

2 THE COURT: Okay. And ---

3 MR. HALVERSEN: Including ---

4 THE COURT: --- what do you believe those damages
5 are?

6 MR. HALVERSEN: Well, for instance, this county the
7 bank took over through receivership proceedings, the
8 properties here in Dorchester County; and so he has lost
9 the income from those properties. And that is just one
10 element of the damages.

11 THE COURT: Sure. Well, is that an element of
12 damage in Charleston, in the suit in Charleston?

13 MR. HALVERSEN: No, it is not.

14 THE COURT: Why?

15 MR. HALVERSEN: Because the property in Charleston
16 County is occupied by ---

17 THE COURT: Do you limit it ---

18 MR. HALVERSEN: It is not ---

19 THE COURT: Do you limit it like that? Do you in
20 the complaint -- or excuse me, in the counterclaim do you
21 limit it and say, Jury, if you find that these damages
22 are correct the damages that we are asking for just right
23 on this little property; or are you asking for damages
24 generally?

25 MR. HALVERSEN: I believe it is unspecified, Your

1 Honor.

2 THE COURT: I think so too.

3 MR. HALVERSEN: But if you feel that it needs to be
4 specified we can certainly amend the counterclaim to
5 specify.

6 THE COURT: That is your problem, because here is
7 what would happen to -- to Mr. Swanson. I can only
8 imagine that as you try your first case that you are not
9 going to just talk about that little property and go
10 whoop. You are going to talk about this as a conspiracy
11 that damaged your client not only here but in his
12 business here and here and here and here and ladies and
13 gentlemen of the jury I want you to understand what my
14 client has suffered fully. You are not just going to say
15 it is a little itty bit here; it in fact is more.

16 MR. HALVERSEN: We plan on limiting it to Dorchester
17 County to the damages here in Dorchester County, Your
18 Honor.

19 THE COURT: Well, that is not the way that your
20 pleading was drafted.

21 MR. HALVERSEN: I respectfully disagree. I do not
22 think it is -- it is -- it is -- that it is -- that it
23 has to be I have to state as a matter of pleading under
24 12(b)(8) motion that the damages are differentiated. But
25 as a matter of trial practice ---

1 THE COURT: Okay.

2 MR. HALVERSEN: --- we would be happy -- and I am
3 submitting to the court that the damages will be confined
4 to the damages that are particularized to the property
5 here in Dorchester County.

6 THE COURT: Okay.

7 MR. HALVERSEN: I would also like to say for the
8 record ---

9 THE COURT: Okay.

10 MR. HALVERSEN: --- the other portion of his -- Mr.
11 Swanson's ---

12 THE COURT: Sure.

13 MR. HALVERSEN: --- argument is that our claim was a
14 third-party claim. It was not a third-party claim. Mr.
15 Swanson was made a party to the counterclaims under 13(h)
16 to the conspiracy and abuse of process claims.

17 That is how -- that is how our pleading couched him
18 as a defendant. We never claimed he was a third-party
19 defendant. Mr. Swanson has stated he is a third-party
20 defendant. And he has made that conclusion on his own
21 unilaterally. But we never pled him as a third-party
22 defendant.

23 And finally the third point, Your Honor, ---

24 THE COURT: Okay.

25 MR. HALVERSEN: --- I want to raise to the court's

1 attention is that the same motion was also heard in
2 Berkeley County wherein Judge Dennis denied the motion to
3 dismiss:

4 So as it stands now there is a conflict of
5 authority, if you will, between the Berkeley County cases
6 and the Dorchester County cases.

7 Mr. Swanson's counsel, Mr. Overstreet, has filed --
8 also filed -- how we filed a motion to reconsider with
9 your court, he has also filed a motion to reconsider with
10 Judge Dennis in the Berkeley County case because that
11 ruling was adverse to him.

12 So as it presently stands there is a conflict among
13 the counsel.

14 THE COURT: Got it. Okay. All right.

15 Yes.

16 MR. OVERSTREET: Your Honor, David Overstreet. Very
17 briefly. You hit the nail on the head with regard to the
18 pleadings; all six of the complaints say the exact same
19 thing and plea for the exact same damages.

20 I think what Your Honor recognized the last time we
21 were here was that that could result in six different
22 verdicts from the same damages.

23 First of all, secondly, just briefly, as to the
24 judicial inconsistency issue. Although Your Honor has a
25 record and an order delineating the basis for her

1 opinions -- I have great respect for Judge Dennis, but
2 his was a Form 4; and he essentially said, well, David,
3 if you win the first one you can file a motion for
4 summary judgment on the other five on res judicata. So
5 he really didn't rule on our technical Rule 12 arguments,
6 and Your Honor did. And we do have a chance to address
7 those with him a couple of weeks.

8 So that is it. Thank you, Judge.

9 THE COURT: Thank you so much. All right. Very
10 well. I have -- and hint, my -- this really additionally
11 underscores my concern because -- because I think it
12 makes it ripe for inconsistency when you have got what is
13 the same claim as it is couched at this moment in six --
14 you know, in six different lawsuits that is ripe for
15 exactly what has happened, in my mind and in my view.

16 And the reason for that is when there is a -- the
17 counterclaim was brought and the counterclaim was brought
18 with regards to conspiracy the only way that could in my
19 mind survive is if it was very clear that it was somehow
20 isolated to the one particular piece of property. And I
21 don't believe nor did I believe that that was the way in
22 which the matter was couched.

23 And quite frankly I think it was couched
24 marvelously. I mean I think it was appropriately
25 couched, to be honest with you.

1 It just seems to me that -- that the -- while
2 certainly the counterclaim -- it has got to be one of two
3 ways. It has either got to be done in general terms --
4 and if it is done in general terms I think you bring it
5 once and you encompass -- you pick the -- which of these
6 different venues you chose to bring it in and then you
7 bring that counterclaim and you include in it just as you
8 have in general terms your damages. Or it somehow has to
9 be limited.

10 What would I do if it was limited? I don't know. I
11 only know what I have before me. What was before me was
12 a general counterclaim.

13 And as I would certainly look forward to trying the
14 case, given the manner and the means in which it was done
15 unless there was something which would have occurred that
16 has not occurred to this date, specifically if there
17 hadn't been other cases that had been tried, but if I am
18 trying the first case I am not going to keep a
19 counterclaim from presenting the damages in toto.

20 I just wouldn't do it because of the way that --
21 that it was drafted. I don't think it would be
22 appropriate and I would not be inclined to do that. So
23 that is the reason for the determination.

24 MR. HALVERSEN: May I, Your Honor?

25 THE COURT: Sure.

1 MR. HALVERSEN: A brief response. I would just
2 submit to the court that the counterclaims are
3 particularized to each property.

4 For example, in the 2014-CP-18-1792 case Paragraph
5 13 references in the counterclaims the specific
6 properties that are subject of the foreclosure action.
7 So I would just submit to the court and for the
8 record ---

9 THE COURT: Sure, but let's go look at it; okay.
10 And you say -- you -- in the Dorchester you want me to go
11 to Paragraph 13?

12 MR. HALVERSEN: Yes, Your Honor.

13 THE COURT: Okay. I am right there. Well

14 MR. HALVERSEN: I believe that was filed March
15 8th ---

16 THE COURT: Okay.

17 MR. HALVERSEN: --- if that helps.

18 THE COURT: Okay. I am getting closer.

19 (WHEREUPON, pause to retrieve document.)

20 THE COURT: You are just going to have to hold on a
21 second for me, okay?

22 MR. HALVERSEN: Sure.

23 (WHEREUPON, pause for clerk's assistance in retrieving
24 file and printing of document.)

25 THE COURT: Okay. So here it is. Paragraph 62.

1 These are the allegations: The sworn testimony by each
2 Mr. Scott Warren and add Mr. Sic - with the add - Mr.
3 David Swanson was a misuse and perversion of legal
4 process by fabricating a legal defense, paren, advice and
5 counsel, end paren, when one in fact had never been given
6 at the time claimed to have been given. The acts
7 described above and herein have caused damage to Mr.
8 Whitfield by incurring actual damages both mental and
9 pecuniary including by way of example only and without
10 limitation: loss of time, injury to property, and
11 financial standing, shame, mortification, mental anguish,
12 mental pain and suffering, emotional distress, loss of
13 enjoyment of life, injury to feelings, and overall
14 degradation of health -- or degrade -- degradation of
15 health, and was hindered from and will continue to be
16 hindered from attending to his usual duties and affairs
17 of life as a direct and proximate result of the aforesaid
18 conduct of Harbor National Bank in the exact amount of
19 actual, consequential, and special damages as to be
20 determined by a trier of fact.

21 Okay. I am good. Thank you, gentlemen.

22 MR. HALVERSEN: Is your -- is your motion made -- or
23 is the denial of the motion to dismiss -- or I'm sorry,
24 the ---

25 THE COURT: To alter and amend?

1 MR. HALVERSEN: I'm sorry. One last clarification.

2 THE COURT: Sure.

3 MR. HALVERSEN: For the motion to dismiss -- I
4 assume you are denying the motion to alter or amend,
5 correct?

6 THE COURT: You have got it.

7 MR. HALVERSEN: For the motion to dismiss is that
8 with prejudice or without prejudice?

9 THE COURT: The motion to dismiss Harbor National
10 Bank ---

11 MR. HALVERSEN: No, ---

12 THE COURT: I mean ---

13 MR. HALVERSEN: --- David Swanson.

14 THE COURT: I'm sorry.

15 MR. HALVERSEN: David Swanson, yes.

16 THE COURT: That is a good question. What did the
17 order say?

18 MR. HALVERSEN: Well, the reason I ask, Your Honor,
19 because if the court's concern is that the damages
20 alleged are not particularized enough to sufficiently
21 avoid a 12(b)(8) motion, such as what Mr. Overstreet has
22 brought before the court, if the court would allow leave
23 to amend we can certainly particularize the damages to
24 the Dorchester County's cases such that it wouldn't be
25 susceptible to a 12(b)(8) motion in the future.

1 THE COURT: I understand. Well, here is my concern.
2 Again, Mr. Halversen, here is the concern that I would
3 have. You might particularize it here, but if it is
4 generalized in the other counties it's -- it is
5 impossible for the court to put on blinders and say, oh,
6 okay, well, he has particularized it here in Dorchester
7 County so it doesn't -- that is good enough for
8 Dorchester County.

9 Because it obviously is the same language which has
10 been represented by both sides exists in all of the other
11 lawsuits then the answer is it must be with prejudice.

12 Because it is -- it is not appropriate that an
13 action such as this alleging these kinds of generalized
14 damages can be brought once. Okay?

15 MR. HALVERSEN: Thank you, Your Honor.

16 THE COURT: Great. Thank you.

17 MR. OVERSTREET: Your Honor, just for clarification;
18 your ruling is to all three motions to alter or amend;
19 correct?

20 THE COURT: Right. Yeah, it is.

21 MR. OVERSTREET: Thank you, Your Honor.

22 THE COURT: I have treated this as one. And, again,
23 the reason for that is it -- you know it is quite
24 remar- -- I don't even know how you could say that the
25 mental anguish and the loss of your ability to carry

1 forth in your life and the degradation of your health I
2 don't even understand how you could particularize it,
3 quite frankly.

4 So I think that the way that it is brought is --
5 while I think it -- there wasn't anything improper with
6 the way that it is brought; I just think -- and nor would
7 I make -- if you were trying this case in front of me I
8 would not make you particular, oh, well, this is how much
9 loss of enjoyment of life is a result of this one. I
10 don't think you can do that. I think that is
11 nonsensical.

12 It can be one of the abuse of process claims
13 brought. I would not limit, you see. But when it comes
14 to me and they are all of over -- the counterclaim is --
15 is around.

16 Is everybody understanding, however, that -- that I
17 don't want my ruling in any way, shape, or form to keep
18 you from being able to defend the fact that that is a
19 false -- your position that that is a false defense? Is
20 everybody okay about that?

21 MR. HALVERSEN: Yes, Your Honor.

22 THE COURT: Are you clear about that?

23 MR. OVERSTREET: I am not sure I understand, Your
24 Honor.

25 THE COURT: In other words, there is nothing in

1 this -- there is nothing in my ruling that is going to
2 keep you -- if you try this case in Dorchester to say
3 that defense -- that defense of my lawyer told me to do
4 it, you can certainly -- there is nothing to keep you
5 from telling this jury.

6 MR. HALVERSEN: It is the bank's defense. It is not
7 my defense.

8 THE COURT: But you -- there is nothing to keep you
9 from saying that is absolutely not correct, that is not
10 true.

11 MR. HALVERSEN: Well, we don't have -- we can't
12 allege those claims now predicated ---

13 THE COURT: Yeah, you can. You can't allege your
14 affirmative -- you cannot allege from affirmative relief
15 because of the general nature of that relief; but you can
16 certainly say to this jury that is not true, ladies and
17 gentlemen of the jury, that is not true.

18 MR. HALVERSEN: I understand ---

19 THE COURT: Do you see what I am saying?

20 MR. HALVERSEN: I understand what you are saying.

21 THE COURT: Okay. Thank you.

22 MR. OVERSTREET: Thank you, Your Honor.

23 THE COURT: You are going to draft me an order?

24 MR. OVERSTREET: Yes, ma'am.

25 THE COURT: Run it by counsel.

1 MR. OVERSTREET: Yes, ma'am.

2 THE COURT: Thank you. Thirty days?

3 MR. OVERSTREET: Yes, ma'am.

4 THE COURT: And if y'all need longer, let me know.

5 MR. OVERSTREET: Thank you.

6 THE COURT: Don't let me know. I take that back.

7 Please let my law clerk, George Smythe - I'm so sorry -

8 to George Smythe, my law clerk.

9 MR. OVERSTREET: Okay. I will get you an order.

10 Thanks.

11 THE COURT: Thank you. Thank you so much.

12 (WHEREUPON, the hearing concluded.)

(NOTE: Please contact the court reporter for additional copies or certified transcripts.)

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South Carolina, on August 25, 2016.

I do further certify that I am neither of kin, Counsel, nor interest to any party hereto.


PHYLLIS NORTON, CVR

Date: December 22, 2016

Certified Transcript Provided For: Slotchiver
Certification Reference #122216 Original

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 2 COUNTY OF DORCHESTER) CASE NO(s).: 2014-CP-18-0358;
) 2014-CP-18-1792; 2014-CP-18-1793
 3

4 Bank of North Carolina, et al)
)

5 PLAINTIFF(S))
)

6 v.)

TRANSCRIPT OF RECORD

7 Anthony M. Whitfield, et al)
)

8 DEFENDANT(S))
)

ORIGINAL

9

10

Wednesday, June 1, 2016

11

COMMENCING AT:

12

DORCHESTER COUNTY COURTHOUSE

13

ST. GEORGE, SOUTH CAROLINA

BEFORE THE HONORABLE DIANE SCHAFFER GOODSTEIN

14

APPEARANCES:

15

Thomas A. Limehouse, Jr., Esquire

16

Duffy & Young, LLC

17

96 Broad Street

Charleston, South Carolina 29401

For the Plaintiff, Bank of North Carolina

18

Daniel Scott Slotchiver, Esquire

19

Slotchiver & Slotchiver, LLP

44 State Street

20

Charleston, South Carolina 29401

Attorney for the Defendant, Anthony M. Whitfield

21

Brent Halversen, Esquire

22

Halversen & Associates, LLC

171 Church Street, Suite 330

23

Charleston, South Carolina 29401

Attorney for the Defendant, Anthony M. Whitfield

24

25

1 David W. Overstreet, Esquire
2 Earhart Overstreet, Attorneys at Law
3 Post Office Box 22528
4 Charleston, South Carolina 29413
5 Attorney for the Defendant, David Swanson

6 Heather R. Landry, CVR
7 Official Court Reporter
8 Post Office Box 251
9 Dorchester, SC 29437

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

Proceeding	4
Motions for Recusal	4
Motions to Dismiss	23
Reporter Certificate	39

EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>PAGE NO.</u>
------------	--------------------	-----------------

NO EXHIBITS INTRODUCED

Bank of North Carolina et al vs. Anthony M. Whitfield et al

1 (The proceeding began at 12:02 p.m.)

2 THE CLERK: Judge, the first three motions -- or six
3 motions. There's three motions to have you recused; three
4 motions to dismiss; and three sister cases of Bank of North
5 Carolina versus Anthony Whitfield.

6 THE COURT: Yes. Okay. Are all of the motions to
7 recuse the same?

8 MR. SLOTCHIVER: They are, Your Honor.

9 THE COURT: Okay. Well, let me see.

10 THE CLERK: Here's the littlest file.

11 THE COURT: Yeah, let hold that. I don't need the
12 other ones right now. If they are all the same, the motions
13 to recuse, let me look at those to get that first.

14 THE CLERK: And Judge, they have indicated that they
15 have waived their ten-day notice.

16 THE COURT: Okay.

17 (Brief pause in the proceeding.)

18 THE COURT: I see no affidavit as a part of the motion.
19 Is there no affidavit?

20 MR. SLOTCHIVER: There is no affidavit, Your Honor.

21 THE COURT: Why not? I'm looking for an affidavit from
22 Mr. Hartnett.

23 MR. SLOTCHIVER: From who?

24 THE COURT: Mr. Hartnett.

25 MR. SLOTCHIVER: There is no affidavit from

Original Transcript of Record

1 Mr. Hartnett.

2 THE COURT: Why is there not?

3 MR. SLOTCHIVER: Well, we represent Mr. Whitfield, and
4 he has raised his concerns because of the relationship
5 between Mr. Hartnett and Mr. Goodstein primarily.

6 THE COURT: And there's no affidavit. Do you see what
7 I'm saying?

8 MR. SLOTCHIVER: Well, Mr. Hartnett to some extent,
9 Your Honor, he is a -- he is part of the Harbor National
10 Bank.

11 THE COURT: Yes.

12 MR. SLOTCHIVER: So he is on the other side of the case
13 from where we stand.

14 THE COURT: So let me ask you this question. There are
15 an awful lot of very personal allegations, if you will, in
16 here. And so, I guess my question is I would expect to see
17 some sort of affidavit sworn to given these very personal
18 matters that are alleged in here. Do you know? For
19 instance, "further upon information believed the Honorable
20 Diane S. Goodstein and her spouse Arnold Goodstein are
21 long-standing friends Tommy Hartnett." I would love to know
22 on what you would base that.

23 MR. SLOTCHIVER: And that's the only -- I believe
24 that's the only impersonal item.

25 THE COURT: Well, there are other things that -- there

1 are other allegations in here that are interesting. It says
2 that Mr. Hartnett's responsibilities and powers as a member
3 of the Charleston County Aviation Authority's Board -- and I
4 think he was on there for a couple of years ---

5 MR. SLOTCHIVER: Yes.

6 THE COURT: --- a committee which ultimately decided to
7 award the judge's spouse a contract.

8 MR. SLOTCHIVER: That was taken right out of the Post
9 and Courier.

10 THE COURT: With the Aviation Authority?

11 MR. SLOTCHIVER: Yes.

12 THE COURT: He had a contract?

13 MR. SLOTCHIVER: According to the Post and Courier,
14 Your Honor.

15 THE COURT: So you were very careful to put footnotes
16 from my quotes from Judicial Merit Selection Commission.
17 Why not a footnote for the Post and Courier if that's where
18 you're taking your information? Because I thought maybe he
19 had a -- I was so excited he had a contract. I was
20 thrilled. I thought maybe I missed something. He doesn't
21 have a contract. I wish he did.

22 MR. SLOTCHIVER: I understand.

23 THE COURT: But he doesn't have a contract.

24 MR. SLOTCHIVER: I'll be happy to get a copy of it,
25 Your Honor. It's ---

1 THE COURT: I wish he did have a -- you know what I
2 mean.

3 MR. SLOTCHIVER: I do understand.

4 THE COURT: He has the same -- I mean, he can be
5 discharged just as you can be discharged.

6 MR. SLOTCHIVER: I understand. I understand.

7 THE COURT: He represents them and certainly has
8 enjoyed a relationship with the Aviation Authority for many
9 years. I wish he did have that contract though. And maybe
10 one day he will; but in any event.

11 MR. SLOTCHIVER: And I ---

12 THE COURT: So ---

13 MR. SLOTCHIVER: Sorry.

14 THE COURT: I've read it. I would really thought maybe
15 you would have, just given the nature of it -- he was a
16 member of -- no question for a couple of years, Mr. Hartnett
17 was a member of the Aviation Authority Board. It is a board
18 made up of, I think, ten or eleven folks. And you're right,
19 they employ him as a board; they do. They are his -- and
20 as a matter, of course, I do not hear matters involving
21 folks that are currently on that board for obvious reasons.
22 But it has not been my practice to recuse myself when people
23 are no longer members of that board, you know, unless there
24 are other things that are involved. But you tell me that
25 Mr. Hartnett is a member of the Board of Directors of Harbor

1 National Bank?

2 MR. SLOTCHIVER: That is correct.

3 THE COURT: Okay.

4 MR. SLOTCHIVER: Well, Harbor National Bank is now
5 changed and it has been sold to the Bank of North Carolina.
6 And the underlaying ---

7 THE COURT: Okay. Are you still member of the Board of
8 Directors?

9 MR. SLOTCHIVER: No, he is not. But he was an owner of
10 Harbor National Bank. And because of the lawsuit, if
11 successful in the lawsuit, the proceeds will come and I
12 believe they will affect Mr. Hartnett personally. And
13 that's the basis. As Your Honor knows the -- it doesn't
14 require -- and for the motion for recusal, it doesn't say
15 that we must prove -- because nobody could ever prove and
16 nobody today is alleging we can prove -- it's more the
17 appearance of impropriety. And the reason we took ---

18 THE COURT: And what that is is what would a reasonable
19 person with knowing the facts and circumstances, what would
20 a reasonable person think? And so, you know, I guess that's
21 why -- I guess my question is would a reasonable person,
22 knowing the facts and circumstances, would a person think
23 because Tommy Hartnett served on the Aviation Authority
24 Board for a couple of years, as I understand it -- I don't
25 know how long he served. And no question, my husband

1 represented and has; no question he negotiated the contracts
2 with Boeing; no question that those things existed. But
3 there are a lot of things in here that are so interesting to
4 me.

5 MR. SLOTCHIVER: One of the things that we looked at,
6 Your Honor, was going back to the senate days.

7 THE COURT: What now?

8 MR. SLOTCHIVER: As I understand it from historical
9 records that I, once again, did not bring an affidavit for,
10 but ---

11 THE COURT: Right.

12 MR. SLOTCHIVER: --- they both, Mr. Hartnett and Mr.
13 Goodstein, where in the Senate at the same time. I believe
14 Mr. Goodstein from '75 to '80, and Mr. Hartnett from '73 to
15 '81. And all that Mr. Whitfield is asking, Your Honor, is
16 in light of the many factors that have come up between the
17 two along the way, he's asking that somebody else get the
18 case. That's all he's asking for; nothing more. And he
19 just wants -- this is a complicated case. It deals with a
20 bank that has a lot of Charleston connections to it. And he
21 is concerned and he wants to make sure that when it's heard,
22 it's heard from somebody that doesn't have any connections
23 whatsoever. And because of the many connections that he
24 sees between Mr. Goodstein and Mr. Hartnett, he has asked
25 that we raise this issue to Your Honor.

1 THE COURT: Sure.

2 MR. SLOTCHIVER: And we've done our best to lay out
3 some of the factors that we see as relevant as to why we
4 believe it that it would get that standard.

5 THE COURT: Well, here's what is interesting. Did you
6 know that it is error of law to recuse when you shouldn't
7 recuse? Did you know that as well?

8 MR. SLOTCHIVER: I'm sorry?

9 THE COURT: It is error, it is error, to recuse when
10 you should not recuse. It's always a difficult matter when
11 the issues are raised because it's error not to recuse when
12 you should recuse; and it is error to recuse when you should
13 not recuse. Both are error. Both obviously lie within the
14 discretion of the Court.

15 I guess what I find interesting is this, there are an
16 awful a lot of allegations raised in this matter. I don't
17 mind telling you, based on what I know, there's just not
18 truth involved. And that concerns me, you see. For
19 example, "Mr. Hartnett and Mr. Goodstein share an extensive
20 professional and personal history." I would love to know
21 what in the world you base that on. You say that 1971 and
22 1974 they were in the House of Representatives. But do you
23 even know if they were in the same party and what their
24 relationship was? Were they friend or foe in the Senate?
25 Were they friend or foe? Do you even know that?

1 MR. SLOTCHIVER: Well, unfortunately, we can't
2 ascertain some of those information without taking
3 depositions to ascertain it. We can look at public records
4 to see they served together. And based on that, we made the
5 allegation. But you're right, Your Honor, it's subject to
6 how you want to interpret it. But I believe it's a correct
7 statement they served together. It's public record, and
8 they were on the Aviation Board together. Mr. Goodstein
9 worked for the Aviation Board while Mr. Hartnett was on it.
10 The public records show, or the newspaper articles we've
11 been able to pull because we're limited to what we could
12 find, does show that he was -- Mr. Hartnett was part and
13 parcel awarded the contract. I understand you've questioned
14 the term contract.

15 THE COURT: Doesn't have a contract.

16 MR. SLOTCHIVER: I understand.

17 THE COURT: He doesn't have a contract. You see -- and
18 you present these things without an affidavit or a footnote.
19 And then, of course, you say we're long-standing friends of
20 Tommy Hartnett. I never -- long-standing friends you would
21 think, like, visit in each other's homes. That certainly
22 doesn't occur. I've never been in his home; he's never been
23 in my home to my knowledge. I normally know who's been in
24 my home. I've lived in this particular home since 1988. So
25 I've been there for a long time.

1 MR. SLOTCHIVER: I do not profess to know who's been in
2 your home, Your Honor. We're just raising ---

3 THE COURT: Now, long-standing friends typically visit
4 in each other's home, though. Don't you think?
5 Long-standing friends you call us.

6 MR. SLOTCHIVER: I would say it depends on the
7 relationship.

8 THE COURT: Yes. All right. I'll hear from the other
9 side. Yes?

10 MR. OVERSTREET: Your Honor, David Overstreet. I
11 represent David Swanson who is a partner at Haynesworth
12 Sinkler and has been named as the third-party in this case.
13 They're my three motions to dismiss that are pending today.
14 We certainly don't see any connection. We certainly don't
15 support the request for your recusal. We would like for you
16 to say on this case, Judge. And just as a side note, it was
17 referenced earlier, but Harbor National Bank is actually not
18 even plaintiff anymore. It has been substituted for a
19 different bank, Bank of North Carolina for which the
20 individual we're talking about, Mr. Hartnett, is not
21 connected at all. So the connection is even more tenuous.
22 So that would be our position, Judge.

23 THE COURT: But they say that he's going to make a
24 bunch of money if you win; maybe.

25 MR. OVERSTREET: That's the very first I've heard of

1 this.

2 THE COURT: Well, that's what he says.

3 MR. OVERSTREET: I mean, my understanding from reading
4 the motion is that he was on the board of ---

5 THE COURT: Said he was on the board of the plaintiff.
6 And because he was on the board of the plaintiff and he was
7 on the board of the Aviation Authority, that there should be
8 a recusal. That now has morphed into, "Well, he's not on
9 the board of the plaintiff anymore, but he's going to make a
10 whole bunch of money."

11 MR. OVERSTREET: And I don't believe that's in the
12 motion.

13 THE COURT: Maybe.

14 MR. OVERSTREET: Nor is there any basis for that. And
15 I think that's the first I've heard that.

16 THE COURT: And there are no affidavits.

17 MR. OVERSTREET: Correct, Your Honor.

18 THE COURT: There's no proof.

19 MR. OVERSTREET: And I think Mr. Limehouse is here for
20 the bank, for Duffy and Young as well.

21 MR. LIMEHOUSE: Your Honor, if I may speak briefly. As
22 I said, Thomas Limehouse on behalf of Bank of North
23 Carolina. I just wanted to confirm as it's been referenced
24 previously that Harbor National Bank merged with Bank of
25 North Carolina in 2014; no longer a party to this case or

1 any of the three cases for which we are here today. So Mr.
2 Hartnett is not on the Board of Directors of Bank of North
3 Carolina. Again, like Mr. Overstreet said, the first I've
4 heard of any allegations that Mr. Hartnett stands to gain a
5 great sum of money. So I cannot confirm that. And again,
6 the first I've heard of it. Just wanted to confirm, that's
7 all.

8 MR. SLOTCHIVER: And Your Honor, just so I may very
9 briefly. These are my client's concerns. If you would
10 like, I'd be happy to put him on the stand to address them
11 with the Court. But we feel obligated to put the concerns
12 on the record when he raises them. He has raised those
13 issues, and he has asked to be heard on those issues. And
14 he's here today. If you would like to hear from him, he'd
15 be happy to testify to it. But they're just concerns and
16 that's why we filed the motion.

17 THE COURT: Well -- yes, sir. Well, this is the
18 history of this motion to recuse as I understand the motion
19 in reality. It was filed. It was then withdrawn, and then
20 it was refiled.

21 MR. SLOTCHIVER: It was, Your Honor. The reason ---

22 THE COURT: Yeah. Let me stop you for a moment.

23 MR. SLOTCHIVER: Sure.

24 THE COURT: When it was originally filed, there was a
25 different plaintiff. The plaintiff was Harbor National,

1 yes? When the motion to recuse was originally filed ---

2 MR. SLOTCHIVER: Technical, yes.

3 THE COURT: Yes?

4 MR. SLOTCHIVER: Technically, yes.

5 THE COURT: Okay. What does that mean, "technically,
6 yes"?

7 MR. SLOTCHIVER: Well, it means that when the trial
8 goes forward, all of the actions between Tony Whitfield were
9 with Harbor National Bank. The fact that Harbor National
10 Bank has now been purchased by Bank of North Carolina
11 doesn't change the fact that it was Harbor National Bank who
12 did the actions which resulted in the damage that my client
13 has sustained.

14 THE COURT: Okay. All right.

15 MR. SLOTCHIVER: The reason it was withdrawn is because
16 there are cases pending in Berkeley County, Charleston
17 County, and Dorchester County. It was agreed upon that the
18 matter would be heard in Charleston County first. There was
19 no reason to go forward with the motion; it was withdrawn
20 without prejudice. And then because of the amendments to
21 lawsuit that resulted in Mr. Swanson being named as a party,
22 which is a matter that you may hear later today, because of
23 the amendments, it was scheduled to be heard on motion to
24 dismiss. When the motion to dismiss was scheduled in front
25 of Your Honor, we refiled the motion for recusal because it

1 brought it back ripe again. There was no reason to hear it
2 if it didn't make a difference. That's why.

3 THE COURT: I gotcha. I gotcha. But there was a
4 different plaintiff, yes?

5 MR. SLOTCHIVER: No.

6 THE COURT: No, it was -- okay. So when the motion to
7 recuse was first filed, the plaintiff was Bank of North
8 Carolina?

9 MR. SLOTCHIVER: Well, it's morphed.

10 THE COURT: No, sir. You have a plaintiff or -- it's
11 like being pregnant or not being pregnant. You either have
12 a plaintiff or you don't have a plaintiff.

13 MR. HALVERSEN: I think I can address this in the terms
14 of the substitution order that it was ---

15 THE COURT: And you represent? You are who?

16 MR. HALVERSEN: My name is Brent Halversen, and I also
17 represented Mr. Whitfield.

18 THE COURT: Okay.

19 MR. HALVERSEN: And the order speaks for itself. And
20 it should be in the case file, and I'm sure the bank could
21 also testify or talk about it. But the order states that
22 it's not -- the substitution has no effect on any of the
23 claims or defenses that are raised in the lawsuit. It's
24 just simply because there was a corporate, you know,
25 purchase or merger or whatever the transaction was.

1 THE COURT: Right. Right.

2 MR. HALVERSEN: But it was to not affect -- and it's
3 clear; it says that. And we specifically wanted that
4 language in that order.

5 THE COURT: Right.

6 MR. HALVERSEN: That it was going to not affect any of
7 the claims or defenses in the lawsuit. And the fact that
8 there was some kind of substitution of the plaintiff would
9 work no kind of substantive change in the lawsuit.

10 THE COURT: Right.

11 MR. HALVERSEN: That's all I wanted to bring to your
12 attention.

13 THE COURT: Are there counterclaims?

14 MR. HALVERSEN: Or the bank's claims as well. Because
15 it started off as a foreclosure where there were claims of
16 foreclosure. And then there were counterclaims to the
17 foreclosure. And we're all on the same page. We don't want
18 this corporate merger to have any effect on the fact that
19 there were relationships, pre-existing relationships,
20 between Mr. Whitfield and Harbor National Bank ---

21 THE COURT: Okay.

22 MR. HALVERSEN: --- to be in anyway misconstrued or
23 disturbed by the fact that there was now somebody else that
24 owned the bank.

25 THE COURT: Sure. Which was great warning on you all's

1 part.

2 MR. HALVERSEN: I did the appropriate thing by doing
3 that.

4 THE COURT: No question about that. But apparently, in
5 other words, it wasn't a stock purchase. They didn't go buy
6 the assets of, they being Bank North Carolina, obviously
7 didn't just go buy the assets of Harbor National and leave
8 the liabilities with Harbor National. What they did is they
9 assumed both the assets as well as the liabilities. Fair to
10 say, Mr. Limehouse?

11 MR. LIMEHOUSE: That's my understanding, Judge.

12 THE COURT: Okay. So what ends up happening is, is
13 that the true plaintiff and the true defendant at this
14 point, if there's a counterclaim, obviously is the Bank of
15 North Carolina, yes?

16 MR. LIMEHOUSE: Yes, Your Honor. It's a true ---

17 THE COURT: All right. And so the -- if the Bank of
18 North Carolina is the plaintiff and the recipient of
19 counterclaims, somebody tell me why Tommy Hartnett who used
20 to be on the board of Harbor National, why that recuses this
21 court? Because again, you know, the easiest thing for me is
22 to say peace out; I'm out. I'm back in chambers. I'll
23 handle the next few things I got; I'm out of here. That's
24 the easiest thing. The problem for me, though, gets to be
25 is that I make this determination now and you go up on

1 appeal, and somebody -- you don't hear any -- you should do
2 that. So it goes up on appeal. And I shouldn't have
3 recused myself because Tommy Hartnett has nothing to do with
4 the plaintiff at this point.

5 MR. LIMEHOUSE: Your Honor ---

6 THE COURT: Let me finish, and then you'll respond.
7 And it gets reversed for that. Then think of the trouble I
8 put folks, which is why I'm still hanging with it. I mean,
9 the easiest of things if I don't want adjudication, get out;
10 it's easy. The problem is, is it can be error. Yes?

11 MR. HALVERSEN: Thank you. Sorry. Our client has
12 brought this to our attention. He feels that there was a
13 connection. In his perception, that there was a perception
14 -- that his perception is that there was a more than casual
15 connection between Mr. Goodstein and Mr. Hartnett. And so
16 we are raising it to your attention. And obviously you will
17 make your decision, and we're fine with whatever decision
18 you are going to rule on.

19 THE COURT: Okay.

20 MR. HALVERSEN: We are just raising it because it's
21 been raised to us.

22 THE COURT: Okay. I understand. Well, let me just
23 share with you all, it would be helpful in the future when
24 you raise a motion that has allegations in it, you probably
25 want to have an affidavit. That would be really, really

1 helpful. And particularly, when you have something like
2 this particular instance where the alleged relationship
3 doesn't even exist anymore. So even if there was concern
4 when Mr. Hartnett was on the board of Harbor National, and
5 he's no longer on the board of Harbor National, and the
6 liabilities as well as the assets have been assumed by a
7 whole different entity, goodness gracious, where that really
8 gets to be tenuous. I think it would be error.

9 Let me just say that Arnold Goodstein is my spouse, I'm
10 happy to report. And he is the attorney for the Charleston
11 County Aviation Authority. He does do all of the -- other
12 than bond work, he does the legal work for the Aviation
13 Authority. I like to think he does a good job. Tommy
14 Hartnett for a limited period of time based on -- in
15 comparison to other members of the Aviation Authority, he
16 was there -- I don't know how long he was there; a couple of
17 years, three years. I really don't know. And y'all say he
18 was there until June of 2014. That sounds about right,
19 which is a couple of years ago.

20 And let me share with you that he does have -- again, I
21 wish he did have a contract. Maybe he will. Every once in
22 a while they'll talk about allowing him to have a contract.
23 But that has not come to fruition; he doesn't have a contact
24 contract. He is retained just as you lawyers are. Let's
25 see; and I'm on to paragraph seven.

1 I don't remember -- well, by 2014, the Boeing deal was
2 very much done. And, again, I don't remember when he went
3 on. And I don't know how involved. I have no information.
4 An affidavit, again, would've been helpful. But I certainly
5 don't know how much involvement Mr. Hartnett had in the
6 Boeing transaction. Arnold had a lot to do with it. I just
7 simply have no knowledge about how much Mr. Hartnett did.
8 He may have had some; may have had a lot. I don't know.

9 Arnold maintains an attorney-client privilege with the
10 Board. He certainly does not have any kind of
11 attorney-client relationship with Mr. Hartnett; now or has
12 he ever had, to my knowledge, an attorney-client privilege
13 with Mr. Hartnett. We certainly never represented him. I
14 do not agree with paragraph nine. I know they don't have an
15 extensive professional and personal history. They are
16 acquaintances. They served together in the legislature.
17 But they certainly don't have an extensive history, either
18 professional or personal.

19 We are not long-standing friends. Mr. Hartnett has
20 appeared before me in court. He's never been in my home to
21 my knowledge. And the only reason I say that is that we've
22 had events in that house since 1988. I don't know if he's
23 popped in before if we had some political function. I doubt
24 it. I may have remembered it. I think I would've
25 remembered it; I don't. I quite frankly don't know his

1 wife's name. So if we're friends, and long-standing
2 friends, why wouldn't I? And I simply don't -- I don't know
3 his wife's name. I certainly don't know how many children
4 he has; don't know their names. So we do not have a
5 long-standing friendship.

6 I don't how you can have an appearance -- I don't know
7 how I can have an appearance of impropriety or bias or why
8 this would ever be appropriate for me to recuse myself
9 because Mr. Hartnett is on the board of a bank that has been
10 purchased now by Bank of North Carolina, which now has all
11 of the assets and liabilities of that entity. And that I am
12 told and represented as an officer of the Court, I'm quite
13 satisfied that Mr. Limehouse is being candid with the Court
14 that he has no relationship whatsoever with the Bank of
15 North Carolina in terms of any sort of board membership or
16 ---

17 MR. LIMEHOUSE: That's correct, Your Honor. I can't
18 speak to the extent of any relationship whatsoever. But I
19 can confirm that he is not presently on the board of
20 directors.

21 THE COURT: He's not a board member. He doesn't govern
22 the bank.

23 MR. LIMEHOUSE: Yes, Your Honor.

24 THE COURT: Got it. You probably hope he's got a lot
25 of money in the bank. But you hope everybody's got a lot of

1 money in that bank, right? Because you represent them, you
2 would like them to be able to pay your fee.

3 Okay. So I don't have any financial and social
4 involvement. My husband doesn't have any financial or
5 social involvement with Mr. Hartnett. And I simply -- under
6 these circumstances, a recusal would be inappropriate.
7 Thank you. I deny the motion. Now, I understand you all
8 have some other motions which may take a little while, yes?

9 MR. OVERSTREET: Your Honor, it's three identical
10 motions to dismiss. I really don't think they'll take very
11 long. It's Pretty simple.

12 THE COURT: Okay. Very well. Okay, I'm listening to
13 you.

14 MR. OVERSTREET: Thank you, Your Honor. Again, David
15 Overstreet; represent David Swanson. Your Honor, the
16 correct caption is actually a part of my three motions.
17 There is an incorrect caption in the courthouse file.
18 Essentially, Mr. Swanson has been pulled into these
19 pre-existing foreclosure cases and is now a third-party
20 defendant.

21 THE COURT: Okay. Not the firm but Mr. Swanson
22 individually?

23 MR. LIMEHOUSE: Yes, ma'am.

24 THE COURT: Okay. All right.

25 MR. LIMEHOUSE: But he does still work for the law

1 firm. He is a partner with the firm and that is who hired
2 me. But I am his lawyer individually for purposes of this
3 case.

4 THE COURT: Okay.

5 MR. LIMEHOUSE: We have three motions to dismiss
6 pending in case numbers 1793, 358, and 1792. They are
7 identical motions to dismiss. The plaintiff's -- excuse me
8 -- Whitfield's third-party complaints against him.

9 THE COURT: Okay. I need to have that file.

10 DEF ATTNY: And, Judge, I have extra copies of our
11 motions too if that would . . .

12 THE COURT: All right.

13 MR. OVERSTREET: Briefly, Your Honor, the background of
14 this is that there are series of foreclosure actions in
15 Charleston, Dorchester, and Berkeley counties. Essentially,
16 Mr. Whitfield had a number of properties that were financed
17 originally by Harbor National Bank. And then they got to a
18 point and the bank did not renew those loans. Then that led
19 to these foreclosure actions, and the bank and Mr. Whitfield
20 had been fighting ever since.

21 We just recently got brought in. Mr. Swanson, that is,
22 is a third-party defendant to six different suites. Mind
23 you, to be clear, Mr. Swanson's only involvement is acting
24 as an isolated capacity for the bank at various points in
25 time. He never represented Mr. Whitfield in any capacity

1 whatsoever.

2 Essentially the factual allegations are that he gave
3 some advice to the bank. And that the bank relied upon that
4 advice; didn't renew these loans. And now they're saying
5 that part of that is Mr. Swanson's fault. The kind of next
6 step that it's grown into is that Mr. Swanson and the bank,
7 according to the plaintiffs, we're in cahoots together and
8 arranged this whole scenario, conspired to make this whole
9 thing up, and that Mr. Swanson actually never did give the
10 advice. And that is why the loans were never renewed and it
11 caused these foreclosures. So, essentially, Mr. Swanson has
12 been deposed in one of the other cases; testified that he
13 did have the call, he did make a recommendation. But he's
14 been named in these six suits with the allegation this is
15 abuse of process and it's civil conspiracy. And he as a
16 35-year lawyer at Haynesworth who just won best real estate
17 lawyer of the year conspired with the bank to not renew
18 Mr. Whitfield's loans. And that's why we're here.

19 We filed our motion to dismiss. It's pretty much a
20 12(b)(8) motion and this is why. There are six lawsuits.
21 There is identical language in all six lawsuits requesting
22 the same damages in all six suits in the six different cases
23 pending in three different counties. Under 12(b)(8) when
24 you have a similar action with the same parties and it's the
25 same claims seeking the same damages, you can't move

1 forward. And the case should be dismissed because it's not
2 particular of any set of damages or any particular set of
3 facts. Were these cases to go forward, he could recover six
4 times for the same damages.

5 And, Your Honor, I actually have a copy of the main
6 case, the original case, the Charleston County pleading. If
7 it pleases the Court, I will hand it up. And Your Honor can
8 see, although the pagination is not the exact same, the
9 language is the exact same throughout this case and all of
10 the other cases filed. So my argument essentially is a --
11 it's a Rule 12(f), it's a 14(a). But it's essentially a
12 12(b)(8) argument that you can't sue a guy you already have
13 a case against with the same allegations with the same
14 parties alleging the same damages. These cases should be
15 dismissed on their face. And I'm happy to hand this up for
16 Your Honor.

17 THE COURT: And I anticipate that I'm going to hear it,
18 is because it involves different pieces of property.

19 MR. OVERSTREET: I anticipate you may hear that too,
20 Your Honor. The problem is that's not alleged in any of the
21 pleadings.

22 THE COURT: Okay.

23 MR. OVERSTREET: There's no specific tie to any of the
24 particular properties. This was a -- frankly, Judge, what
25 appears to me to be a scorched-earth approach. I'm going to

1 pull in a lawyer who never represented me into these six
2 cases and make his law firm go hire a lawyer and defend him.
3 And he probably can't get out of it. So we'll just pull him
4 along for the ride. And it's inappropriate. And
5 procedurally, it shouldn't go forward. Thank you.

6 THE COURT: Okay. I'll look at it.

7 MR. OVERSTREET: Yes, ma'am.

8 THE COURT: It all behooves to make that
9 representation. Thank you. Yes, sir?

10 MR. HALVERSEN: Yes, Judge Goodstein, my name is Brent
11 Halversen. I represent Mr. Whitfield.

12 THE COURT: Yes.

13 MR. HALVERSEN: Mr. Overstreet has not importantly
14 moved for 12(b)(6) motion stating we haven't stated a cause
15 of action. He is claiming essentially that you can't make
16 this same claim here as you're making in the Charleston
17 case. By way of background, Your Honor, what happened was
18 there were these loans that came due. The counterclaims
19 that are gavelman (ph) of his complaint are that he made a
20 deal to renew to these loans with the bank. And that they
21 -- he went to a closing table and they pulled the rug out
22 from under him. And they claim, one of the corner pieces of
23 their defense, is they went to Mr. David Swanson to get this
24 advice as to why they shouldn't close.

25 The banks moved for a summary judgment, I think it was

1 a couple of years ago; that was denied. But since then, we
2 deposed Mr. Swanson as a witness in those cases. We learned
3 there's no documentation of any advice. There's no anything
4 at the law firm; we subpoenaed the law firm for anything.
5 They said we don't have a single document. This was a
6 multimillion dollar transaction. And he claims that he gave
7 this ---

8 THE COURT: Who is he? Be careful with the he's.

9 MR. HALVERSEN: I'm sorry. For the record, Mr. Swanson
10 claims that he got a call from the bank for advice. And the
11 bank said yes, we made this call right before the closing to
12 give this advice which they relied on. The bank has come
13 out and said we are relying on our counsel. They have
14 asserted the advice of counsel defense. We went ahead and
15 subpoenaed Mr. Swanson's phone records, his office line and
16 his cell phone line. We made very clear to Mr. Overstreet
17 at the beginning. Of course, we didn't find the phone call.
18 That's why we moved to allege the complaint to state that
19 the call never happened. And if the advice was never given
20 as they claim it was, we believe that's something the jury
21 can consider under an abusive process for a civil conspiracy
22 claim. That the bank and the lawyer manufactured this
23 defense after-the-fact to defend them from this claim that
24 there was a renewal of the loans. Okay, Your Honor.

25 So that is the claim. And the advice of counsel

1 defense is raised by the bank. The bank has brought
2 Mr. Swanson into this mess; not us. They've raised it as a
3 defense. We went to him; he told us this information.
4 We're merely finding out, corroborating, trying to figure
5 out did this really happened. And the evidence we have is
6 why we moved to amend our complaint. In Charleston County,
7 the motion was granted and we brought him in as a defendant.
8 They have sued him six different times in all of these
9 outside counties. They have also in your court, Your Honor,
10 previously brought up Mr. Swanson in the advice of counsel
11 defense. If you look at their answers, the bank's answers
12 to our counterclaims, in the paragraph 13, they say that a
13 condition for renewing this was his wife sign a mortgage or
14 a title endorsement be obtained. And further into the --
15 when the bank answered our counterclaims they said these
16 counterclaims, abusive process and civil conspiracy, they
17 said, they admit, the bank has testified that they sought
18 and received advice in connection with the closing.

19 All of their answers in these three cases have raised
20 Mr. Swanson as a defense to Mr. Whitfield's claims. They
21 have argued in this court; filed a memorandum in the
22 predecessor case that was before it was Rule (40)(j) in the
23 2012-CP-18-2119 case filed June 23, 2014, on page three,
24 quote, "on the advice of his counsel, David Swanson, Harbor
25 refused to close without a title endorsement." In the

1 summary judgment hearing before Judge Dickson, which he
2 denied the plaintiff's motion for summary judgment, on page
3 31 and 32, they were advised by their counsel David Swanson.

4 So they have brought him into Dorchester County. It's
5 not just not an issue with Charleston County. They haven't
6 moved to dismiss in Charleston County. They've answered
7 those claims. We haven't even had a chance to depose him on
8 our claim. So, Your Honor, we believe we've made -- we've
9 stated a cause of action. If we deposed him and the bank
10 says, you know, we'll withdraw the advice of counsel defense
11 in Dorchester County, we'd consider withdrawing our claims
12 in Dorchester County against Mr. Swanson. But, Your Honor,
13 at this stage what Mr. Overstreet is really doing is arguing
14 a motion for summary judgment. It's not appropriate. These
15 are plainly issues of fact. We stated a cause of action,
16 Your Honor. And the bottom line is it's not appropriate to
17 dismiss these claims on the basis that there's a lawsuit
18 somewhere else because they have raised this defense here in
19 this court, Your Honor.

20 MR. OVERSTREET: Briefly, Your Honor?

21 THE COURT: Yeah.

22 MR. OVERSTREET: We're not asking the Court to consider
23 anything outside of the pleadings. We're asking the Court
24 just to look at the four corners of this complaint for our
25 motion, and the present complaints, these three cases, and

1 then what I've just handed up to Your Honor. It's the same
2 allegations with the same parties over the same claims with
3 the same damages. I'm not saying -- my position is not that
4 they can't raise the claims; my position is you can't do it
5 six times. You can do it once. That's why 12(b)(8) is
6 there. You can't make repetitive claims for the same damage
7 with the same parties over the same issues. I'm not raising
8 this argument in Charleston County.

9 THE COURT: Let me ask this question. Maybe I can
10 understand a little bit better. The Charleston cases
11 involve generalized allegations or -- I guess it would be
12 counterclaims if they started as foreclosures?

13 MR. OVERSTREET: That is correct, Your Honor. They are
14 counterclaims.

15 THE COURT: So they're more generalized. It's like
16 they did things in an improper manner.

17 MR. OVERSTREET: No, they're all the exact same. The
18 allegations and all the complaints are the exact same. And
19 they talk about one piece of property called this Black Rush
20 property; and that's the Charleston County property. But
21 they say that was the straw that broke the camel's back that
22 affected all of these other loans. But You can literally
23 cut and paste all of the allegations, all of the damages,
24 everything, from each of the six complaints. And that's why
25 I'm saying you just can't do that six different times and

1 have the exact same complaint. Otherwise, he would be able
2 to get a jury to award him the damages six different times.
3 And that's why we have 12(b)(8).

4 THE COURT: I understand that. Can you focus on that
5 for me?

6 MR. HALVERSEN: Your Honor, they have sued
7 Mr. Whitfield six different times.

8 MR. OVERSTREET: The bank.

9 MR. HALVERSEN: In each -- yes, the bank has sued Mr.
10 Whitfield six different times. And the bank has raised ---

11 THE COURT: Let me stop you on that.

12 MR. HALVERSEN: Yes, Your Honor.

13 THE COURT: Six different -- is it the same lawsuit or
14 is it six different pieces of property?

15 MR. HALVERSEN: They're the six different pieces.
16 Actually, it's more than -- it's nine total pieces of
17 properties.

18 THE COURT: Okay. But the lawsuits in the three
19 counties do not mirror each other? In other words, each
20 county involves the properties in that county and the
21 foreclosures that are associated with those properties?

22 MR. HALVERSEN: That's right. That's right, Your
23 Honor.

24 THE COURT: Well, that would be appropriate. And then
25 there are counterclaims, yes?

1 MR. HALVERSEN: Right. Yes. And the counterclaims are
2 that we had a deal to renew here in Dorchester County. This
3 property, I had a deal to renew this loan. And you didn't
4 renew it and you breached. If there is some kind of ---

5 THE COURT: That's the counterclaim against the bank.
6 Got it.

7 MR. HALVERSEN: Yes, Your Honor.

8 THE COURT: All right. Now let's shift to Mr. Swanson.

9 MR. HALVERSEN: Right.

10 THE COURT: Because what Mr. Overstreet is telling me
11 is that what -- the suit against Mr. Swanson, it
12 differentiates between -- because there is one conversation
13 and that conversation involved advice to the bank. And on
14 that basis, there are allegations that there are damages
15 due. But that suit doesn't differentiate; it is the same in
16 each of the three counties. In other words, let's say that
17 -- in the Charleston action against Mr. Swanson, there's a
18 calculation that because of that act, because of that act
19 ---

20 MR. HALVERSEN: Right.

21 THE COURT: --- that the damages are a million dollars,
22 okay.

23 MR. HALVERSEN: Right.

24 THE COURT: And that allegation has been repeated in
25 three different counties. And yet these lawsuits are all

1 the same alleging one event, one giving of advice that
2 manifested damages of a million dollars. But yet that has
3 been brought in three different counties so that if that
4 lawsuit was allowed to continue in three different counties
5 while the damages, the total damages, have been alleged say
6 in Charleston County first, then if that lawsuit is allowed
7 to proceed in the other counties there will be \$3 million
8 which ---

9 MR. HALVERSEN: I understand the Court's concern.

10 THE COURT: You understand?

11 MR. HALVERSEN: I understand.

12 THE COURT: That's what I understand his argument is.

13 MR. HALVERSEN: I understand. And those are issues,
14 which in Charleston County he can file some kind of motion
15 and say they can't claim damages for what the renewal did
16 for his Dorchester property. They can claim here in
17 Charleston what the damages are for Charleston. Or if they
18 want to make it so it's specific on the damages side, Your
19 Honor ---

20 THE COURT: Well, not if Mr. -- No, not if Mr. Swanson
21 lives in Charleston County. Mr. Swanson lives in Charleston
22 County then the action against Mr. Swanson has to be brought
23 in Charleston County. If Mr. Swanson doesn't live in
24 Dorchester County, then you don't sue Mr. Swanson in
25 Dorchester County; you sue Mr. Swanson in Charleston County.

1 See what I'm saying? That's two different ---

2 MR. HALVERSEN: We're alleging a tort happened. We're
3 alleging a tort -- we are alleging that Mr. Swanson
4 committed a tort as it related to a transaction that is
5 here.

6 THE COURT: But you sue a defendant where the defendant
7 resides. Right? Why don't you sue ---

8 MR. HALVERSEN: I think that's a venue ---

9 THE COURT: Yeah, right.

10 MR. HALVERSEN: As a matter of venue, we can. But they
11 have started this action here. And we can choose who are
12 defendant is. I don't think they've raised any
13 jurisdictional arguments as to why we can't sue him in
14 Dorchester County as a matter of venue. I think what they
15 are trying to claim is, you know, you have all of these
16 multiplicity of suits that all sound the same, and you're
17 doing the same thing in these different counties.

18 THE COURT: Right.

19 MR. HALVERSEN: But, Your Honor, it is the bank that
20 has brought Mr. Swanson in and substantiates our claim that
21 there was a connection to ---

22 THE COURT: I get that. I get that. I don't know why
23 we're having -- where the failure to communicate is
24 happening. I get that.

25 MR. HALVERSEN: Okay.

1 THE COURT: But what he is -- I want you to tell me why
2 he's wrong. What he has said is that your action is
3 identical in all three counties, okay. But you're not
4 separating them out to the properties in those different
5 counties. Because remember, I asked him after his argument,
6 I said I can anticipate, Mr. Overstreet, that I'm going to
7 be told in a moment well the reason that the action is being
8 brought in the different counties is because it touches and
9 concerns those properties in the county, that that's why.

10 MR. HALVERSEN: Right.

11 THE COURT: And you didn't tell me that in your
12 response. What you said was, "Well, they raised this
13 defense. And so because they raised this defense, we can
14 just sue him because they raised this defense."

15 MR. HALVERSEN: It's the reason why there is a renewal
16 that didn't happen in this county, Your Honor. That's the
17 reason why. It's because they said in Dorchester too, we
18 went to Mr. Swanson -- the bank is saying this. In
19 Dorchester County, we went to Mr. Swanson and that is the
20 reason why we didn't renew Dorchester County. So how can we
21 not allege him as part of the problem of why these loans
22 didn't get renewed when Mr. Swanson was involved in the
23 transaction here pursuant to what the bank is saying. It's
24 in the pleadings. I'm not going outside of the four corners
25 of the complaint either. I'm going inside the pleadings.

1 This is in the pleadings, Your Honor.

2 THE COURT: Okay.

3 MR. HALVERSEN: Each case number delineates what each
4 property that it pertains to.

5 THE COURT: Okay. All right. I got it. Proposed
6 orders, please.

7 MR. OVERSTREET: Thank you, Your Honor.

8 THE COURT: Thirty days. Thank you. Anything else?
9 That's it?

10 MR. LIMEHOUSE: That is it.

11 THE COURT: All right. Very well. You're going to
12 have to do two for me, please.

13 MR. OVERSTREET: Yes, ma'am. You mean three?

14 THE COURT: Four.

15 MR. OVERSTREET: Three for the three cases you mean?

16 THE COURT: Six. Because you got the recusal.

17 MR. OVERSTREET: Okay. Right.

18 THE COURT: And then you got the other one.

19 MR. OVERSTREET: Right.

20 THE COURT: And you have no problem with the
21 representations that you made on behalf of the bank be
22 included in the order, right?

23 MR. LIMEHOUSE: That's correct, Your Honor.

24 MR. OVERSTREET: Three pending cases and the recusal,
25 so it would be four orders, right?

1 THE COURT: No. There's a recusal motion in each.

2 MR. OVERSTREET: Six.

3 THE COURT: You are going to be quite busy.

4 MR. OVERSTREET: Sorry. Sorry, six. Yes, ma'am.

5 THE COURT: You are going to be quite busy.

6 MR. HALVERSEN: Your Honor, you would also like us to

7 prepare a proposed order as well?

8 THE COURT: You only have three; he has six.

9 MR. HALVERSEN: Okay. I'm with you.

10 THE COURT: Thank you, gentlemen, so much.

11 MR. OVERSTREET: Thank you, Your Honor.

12 * * * * *

13 (The proceeding concluded at 12:53)

14

15

16

17

18

19

20

21

22

23

24

25

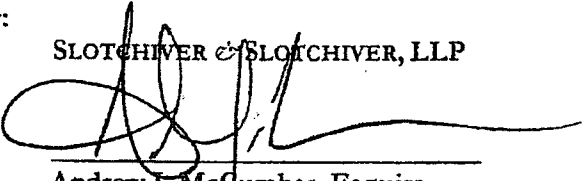
RECEIVED
MAR 21 2018
SC Court of Appeals

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted this 28th day of FEBRUARY, 2018.

By:


SLOTCHIVER & SLOTCHIVER, LLP

Andrew J. McCumber, Esquire
Daniel S. Slotchiver, Esquire
44 State Street
Charleston, South Carolina 29401
Telephone: (843) 577-6531

eh

HALVERSEN & ASSOCIATES, LLC

Brent S. Halversen, Esquire
171 Church Street, Suite 330
Charleston, South Carolina 29401
Telephone: (843) 284-5790

COUNSEL FOR THE APPELLANT

Charleston, South Carolina