

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

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SC Court of Appeals

Case No.: 2017-CP-42-02834
Appellate Case No. 2018-001443

Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes.....Respondent,

v.

Bank of America National Association.....Appellant.

RECORD ON APPEAL
VOLUME 2

MCGUIRE WOODS LLP
Robert A. Muckenfuss
201 N. Tryon Street, Suite 3000
Charlotte, NC 28202
T: (704) 434-2052
F: (704) 444-8707
rmuckenfuss@mcguirewoods.com

Elizabeth M.Z. Timmermans
434 Fayetteville St. Suite 2600
Raleigh, NC 27601
T: (919) 755-6576
F: (919) 755-6595
eztimmermans@mcguirewoods.com

Attorneys for Appellant

MIKE KELLY LAW GROUP, LLC
Brad D. Hewett
bhewett@mklawgroup.com
D. Michael Kelly
mkelly@mklawgroup.com
Jamie N. Smith
jsmith@mklawgroup.com
500 Taylor Street
Post Office Box 8113
Columbia, South Carolina 29202
T: (803) 726-0123
F: (803) 252-7145

Attorneys for Respondent

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T: (919) 755-6576
F: (919) 755-6595
eztimmermans@mcguirewoods.com

Attorneys for Appellant

MIKE KELLY LAW GROUP, LLC
Brad D. Hewett
bhewett@mklawgroup.com
D. Michael Kelly
mkelly@mklawgroup.com
Jamie N. Smith
jsmith@mklawgroup.com
500 Taylor Street
Post Office Box 8113
Columbia, South Carolina 29202
T: (803) 726-0123
F: (803) 252-7145

Attorneys for Respondent

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	)	
COUNTY OF SPARTANBURG	)	
	)	Civil Action No.: 2017-CP-42-02834
PHILLIP FRANCIS LUKE HUGHES, on	)	
behalf of the Estate of Jane K. Hughes,	)	
	)	
Plaintiff,	)	PLAINTIFF'S MEMORANDUM IN
	)	OPPOSITION OF DEFENDANT'S
vs.	)	MOTION TO DISMISS OR STAY
	)	PROCEEDINGS
BANK OF AMERICA NATIONAL	)	
ASSOCIATION,	)	
	)	
Defendant.	)	
	)	

INTRODUCTION

Plaintiff Phillip Francis Luke Hughes, as personal representative of the Estate of Jane K. Hughes, respectfully submits the following Memorandum in Opposition of Defendant Bank of America National Association's ("BANA") Motion to Dismiss or, in the Alternative, Stay Plaintiff's Complaint. Plaintiff has stated claims in his Complaint for which relief should be granted and, therefore, Plaintiff's case should not be dismissed.

STATEMENT OF FACTS

Plaintiff previously filed an action in this Court in 2015 based upon the same facts that establish his claim for relief in the current action, and Plaintiff incorporates those facts alleged in his current Complaint herein. Plaintiff's 2015 Complaint was filed as a putative class action law suit against BANA for violation of the Truth in Lending Act, Fraud, Fraudulent Concealment, Breach of Contract, and Breach of Contract Accompanied by Fraudulent Acts. Defendant BANA removed the action to federal court, and filed a motion to dismiss in lieu of an answer. Prior to the District Court's decision on the motion, Plaintiff stipulated to the dismissal, without prejudice, of all claims against BANA *except* breach of contract and violation of TILA. As such, Plaintiff's

claims of fraud, fraudulent concealment, and breach of contract accompanied by a fraudulent acts have neither been considered nor ruled upon by any court and, for the reasons set forth below, are properly brought before the South Carolina Court of Common Pleas.

STANDARD OF REVIEW

A court must deny a motion to dismiss if the plaintiff has stated facts sufficient to constitute a cause of action. S.C. R. Civ. P. 12(b)(6). In considering a motion to dismiss, the trial court must base its ruling solely upon the allegations set forth on the face of the complaint. *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 66-67, 651 S.E.2d 305, 307 (2007). The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). Therefore, a motion to dismiss must be denied if the facts alleged in the complaint, and the inferences that can be drawn therefrom, would entitle the plaintiff to relief under *any* theory. *Doe*, 375 S.C. at 66-67, 651 S.E.2d at 307 (emphasis added).

ARGUMENT

Defendant's motion asserts that Plaintiff's claims are barred by the statute of limitations and, due to the filing of a prior suit based upon the same facts as the current case, the doctrines of *res judicata* and collateral estoppel. In sum, Plaintiff denies that these doctrines apply to Plaintiff's fraud-based claims, which were voluntarily withdrawn from the district court proceedings in order to file them in state court, where Plaintiff seeks to petition for the reevaluation of state precedent pertaining to the survival of fraud claims in South Carolina. Because the District Court could not hear these claims pursuant to South Carolina Appellate Court Rule 244(a), *res judicata* is inapplicable. Likewise, the District Court did not touch upon the issues of whether Plaintiff's fraud-based claims are time-barred and, if so, whether the doctrine of equitable tolling would apply.

to preserve the same. Rather, the outcome-determinative issue in the District Court opinion was an issue of fact—that Jane Hughes failed to exercise due diligence to discovery wrongdoing. For the reasons below, that issue is neither dispositive nor particularly relevant to the Court’s considerations in the current matter.

I. Plaintiff’s Claims are Timely and are not Barred by the Doctrines of *Res Judicata* or Collateral Estoppel.

A. Res Judicata

Though Plaintiff’s claims in the current matter arise from the same set of facts on which he brought a previous action against BANA, the claims in the current action are not barred under the doctrine of *res judicata*.

Res judicata prohibits a party from bringing a claim against a second party when that claim has already been, or could have been, litigated. In order to establish that a claim should be barred by *res judicata*, BANA must show that the current claim involves 1) the same parties; 2) the same subject matter; and 3) an issue previously adjudicated in another suit. *Sealy v. Dodge*, 289 S.C. 543, 347 S.E.2d 504 (1986). Because Plaintiff’s fraud-based claims (fraud, breach of contract accompanied by a fraudulent act, and fraudulent concealment) were voluntarily dismissed without prejudice in the District Court proceeding, these claims were not previously adjudicated and thus do not meet the third element of *res judicata*.

While Plaintiff acknowledges that *res judicata* can potentially bar subsequent actions by the same party when the claims rise from the same transaction or occurrence that was a subject of a prior action, the fraud-based claims could *not* be included in the prior lawsuit after BANA removed the action to federal court, thus prompting Plaintiff to voluntarily dismiss those claims and refile them in state court. Particularly, had Plaintiff pursued those matters in the federal courts, the District Court would have had to dismiss Plaintiff’s fraud-based claims pursuant to South

Carolina's survival statute, S.C. Code Ann § 15-5-90, and the state court's interpretation thereof to exclude fraud. Plaintiff seeks reexamination of this interpretation for reasons set forth in Section II, *infra*, which can only be accomplished by pursuing the fraud-based claims in state court. *See Mattison v. Palmetto State Life Ins. Co.* 197 S.C. 256, 15 S.E.2d 117 (1941).

South Carolina Appellate Court Rule 244(a) only allows certification of questions to the South Carolina Supreme Court by the United States District Court on questions unanswered by controlling precedent. Because *Mattison* provides controlling precedent as to the survivability of fraud, Plaintiff could not—after BANA removed the prior action to federal court—challenge the validity of controlling precedent through that action and fully pursue his fraud-based claims. As such, those claims are not barred by the doctrine of *res judicata*, and Plaintiff filed this action in state court to pursue examination of its position in proper legal form.

Additionally, Plaintiff included an action under S.C. Code Ann. § 39-5-20, the South Carolina Unfair Trade Practices Act (SCUTPA). This claim, too, could not be included in the original action against BANA. Plaintiff initially filed a putative class action; SCUTPA actions, however, cannot be classed. S.C. Code Ann. § 39-5-140. Thus, Plaintiff—by bringing the former action on behalf of others similarly situated—could not bring a claim for SCUTPA in the initial suit.

B. Collateral Estoppel and Statute of Limitations

Likewise, the issues decided in the 2015 action against BANA are not precluded from being heard by this court pursuant to the doctrine of collateral estoppel. To successfully establish that collateral estoppel applies to this case, BANA must prove that the issue it claims is precluded was actually litigated and directly determined in the prior action, and that the matter or fact directly at issue was necessary to support the final judgment. *Nelson v. QHG of South Carolina, Inc. et al*,

354 S.C. 290, 306, 580 S.E.2d 171 (S.C. App. 2003). When determining whether the issues raised in the initial suit were actually litigated, the following: “whether privity exists, whether the doctrine is used offensively or defensively, and whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action.” *Id.*

The issue decided on by the United States District Court in dismissing Plaintiff’s claims in his 2015 law suit is whether the facts as pled in the complaint sufficiently established that Jane Hughes exercised due diligence to discover wrongful charges against her account, so as to warrant equitable tolling of the statute of limitations as to the claims of violation of TILA and breach of contract. The District Court decided that the claims brought by Plaintiff were time barred, and determined from the facts as plead did not warrant the invocation of the doctrine of equitable tolling of these remaining causes of action because Mrs. Hughes did not fail to discover the charges despite exercising due diligence.

The issues at hand here, though, were not decided by the District Court: 1) whether Plaintiff filed the fraud-based claims within the statute of limitations and, if not, 2) whether those claims are equitably tolled under South Carolina law. The statute of limitation for claims of fraud does not accrue until the complaining party has knowledge of fraud itself or knowledge of sufficient facts to put a party on inquiry. *See Burgess v. American Cancer Soc., South Carolina Div., Inc.*, 300 S.C. 182, 386 S.E.2d 798, 789 (S.C. App., 1989). Plaintiff asserts that, viewing the facts as alleged in the pleadings in the light most favorable to the Plaintiff, the statute of limitations began to run in March 2015 upon receiving a notice from BANA of charges to Jane Hughes’ account for an unselected, optional mortgage service. The discovery rule requires this Court to examine when Plaintiff’s cause of action accrued—an issue not examined by the District Court and a question of fact improperly decided at the pleadings stage. Thus, Plaintiff’s fraud-based claims are not

collaterally estopped.

C. Equitable Tolling

Moreover, Plaintiff asserts that even if the court finds that the statute of limitations for the fraud-based claims has expired, the claim was equitably tolled until March 2015 when Mrs. Hughes received a notice from BANA regarding the cancellation of a service that she expressly declined.

The issue of whether equitable tolling is applicable to Plaintiff's fraud-based claims and/or SCUTPA claim is not one that the District Court ruled on in its Order, and thus is not precluded from being heard by this Court. In fact, the dispositive issue ruled upon by the federal court was whether Jane Hughes exercised due diligence to discover wrongful charges against her. In deciding that Plaintiff's TILA and breach of contract claims were not equitably tolled, and thus barred by their respective statutes of limitation, the District Court, relying upon *Supermarket of Marlinton v. Meadow Gold Dairies*, applied a single federal test that allows for the application of equitable tolling where "(1) the party pleading the statute of limitations fraudulently concealed the facts that are the basis of the plaintiff's claims; (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." The District Court's opinion relied exclusively on this test to decide whether equitable tolling applied and opined that, because the facts did not satisfy the due diligence prong of the test, equitable tolling was not warranted. The District Court notably rendered no opinion as to whether state law would allow any of Plaintiff's claims to be equitably tolled.

South Carolina's stance on equitable tolling, however, is more lenient than that of the federal courts, and in order to determine whether Plaintiff's fraud based, state law claims are tolled, this Court must apply a wholly separate standard than that relied upon by the District Court. The

issue of due diligence is not a dispositive one in a state court evaluation of the application of the doctrine. In South Carolina, the parameters used by sister states and federal courts to decide on the doctrine's application "do not constitute an exclusive list of circumstances that justify the application of equitable tolling." *Hooper v. Ebenezer Sr. Services and Rehabilitation Center*, 386 S.C. 108, 113, 687 S.E.2d 29, 32 (S.C. 2009). Instead, equitable tolling may be applied where it is justified under all circumstances of a case, typically when a plaintiff does not file within the statute of limitations due to "an extraordinary event beyond his or her control"; this is a far broader consideration than that applied by the District Court. *Id.*

Rather than applying the tests for the application of equitable tolling adopted in other jurisdictions, our state holds that "[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations." *Id.* quoting 54 C.J.S. Limitations of Actions § 115 (2005). "Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." *Id.*, quoting *Rodriguez v. Superior Court*, 176 Cal. App. 4th 1461 (2009). "The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." *Id.*, quoting *Hausman v. Hausman*, 199 S.W.3d 38, 42 (Tex. App. 2006).

The allegations in the case at hand are that BANA—an international financial institution—deceived and defrauded a frail, elderly couple by surreptitiously charging them for a product they expressly declined. The charges against their account for these services continued after the death of John Hughes and while Jane Hughes suffered debilitating ailments, including dementia, vision

impairments resulting in surgery, heart problems resulting in surgery, and a broken hip that required hospitalization and extensive rehabilitative care. Surely, death and dementia constitute “extraordinary circumstances beyond [one’s] control” so as to justify equitable tolling under *Hooper*.

Additionally, the determination of when the statute of limitations began is properly reserved for a jury. “Whether a claimant knew or should have known that they had a cause of action is question for the jury.” *Johnston v. Bowen*, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (S.C. 1993). At this stage in the case, there is conflicting evidence as to when Ms. Hughes knew or should have known that a claim against Defendant existed. Thus, a jury should properly decide the issue.

D. Exceptions to Res Judicata and Collateral Estoppel

Should the Court ultimately determine that the doctrines of *res judicata* or collateral estoppel apply in this case, our courts have found that *res judicata* is not “an ‘ironclad’ bar to a later lawsuit.” *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408, 412 (2011) (citing *Garris v. Governing Bd. of the South Carolina Reinsurance Facility*, 333 S.C. 432, 449, 511 S.E.2d 48, 57 (1998)). Likewise, “[t]he doctrine of collateral estoppel should not be rigidly or mechanically applied. Thus, even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it.” *Carolina Renewal v. Dept. of Transp.*, 684 S.E.2d 779, 385 S.C. 550 (S.C. App., 2009).

South Carolina has adopted the Restatement (Second) of Judgements Sections 27, 28 and 29, which provide exceptions to the doctrines of *res judicata* and collateral estoppel. Specifically, Section 28 provides exceptions to *res judicata* where a new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by

factors relating to the allocation of jurisdiction between them; or there is a clear and convincing need for a new determination of the issue because of the adverse impact of the determination on the public interest or interests of persons not themselves party in the initial action; or because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. *Pye v. Aycock*, 325 S.C. 426, 437-30, 480 S.E.2d 455, 460-61 (S.C. App.1997).

Exceptions to the doctrine of collateral estoppel include those enumerated in Section 28 of the Restatement (Second) of Judgments as well as Section 29, which further provides relevant exclusions when the forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined; or, the issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based; or, other compelling circumstances make it appropriate that the party be permitted to relitigate the issue. *Beall v. Doe*, 281 S.C. 363 371, 315 S.E.2d 186, 190-191 (S.C. App. 1984).

Should the court find that either of these doctrines apply in this matter, relevant exceptions—adopted by South Carolina Courts—would allow for the matter to be heard in spite of *res judicata* or collateral estoppel. The case at hand pertains to a claim that could not be heard in the appropriate forum after BANA removed the case to federal court; reconsidering the issue in State Court allows for the reexamination of the issue of whether fraud should remain an exception of the South Carolina statute; and, for reasons set forth in Section II, *infra*, there exists a public need for this issue to be heard in state court.

As such—though Plaintiff maintains that his action is timely and is not subject to the doctrines of *res judicata* or collateral estoppel, even if either or both of these doctrines are applicable in this matter, Plaintiff's claim falls within the exceptions to these rules and should be heard by the State Court of Common Pleas.

II. Plaintiff's Claims for Relief Based on Elements of Fraud Should Survive the death of Jane Hughes.

Defendant argues that a cause of action for fraud does not survive under SC Code Ann. § 15-5-90, South Carolina's general survival statute, and Plaintiff's fraud-based claims should be dismissed. Plaintiff challenges this antiquated exception to the survival statute and, for the reasons set forth below, asks this court to reconsider precedent to better reflect the rights of persons in a modern society.

A. Scope of the South Carolina Survival Statute

i. *Mattison v. Palmetto State Life Ins. Co.*

South Carolina enacted legislation to allow for the survival of certain claims that were historically barred by the claimant's death. *Bennett v. Spartanburg Ry., Gas & Elec. Co.*, 97 S.C. 27, 81 S.E. 189, 189 (1914). South Carolina enacted the survival statute in 1905, which provided that "any and all injuries to the person or to personal property" survive the death of a party. *Id.* South Carolina's survival statute has remained intact, and the language essentially unchanged, from 1905 to present. The courts have relied and still rely upon early judicial interpretations of the statutory language and legislative intent in answering contemporary questions regarding the survivability of actions under the act.

South Carolina first addressed the question of whether fraud survives the death of a party under the survivability statute in *Mattison v. Palmetto State Life Ins. Co.* 197 S.C. 256, 15 S.E.2d 117 (1941). In *Mattison*, the estate brought an action against Palmetto State Life Insurance

Company for perpetrating a fraudulent scheme intended to cheat the deceased of his rights under an insurance contract. *Id.* The South Carolina Supreme Court granted certiorari to hear the case on several questions, the relevant question being whether the cause of action of fraud survived. *Id.*

In determining whether the fraud claim survived, the *Mattison* Court reviewed the survival statute to assess whether fraud fell within the scope of the statutory language. At that time, the applicable statute read:¹

Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to *personal property*, shall survive both to and against the personal or real representative (as the case may be) of the deceased persons, and the legal representatives of insolvent persons, and defunct or insolvent corporations, any law or rule to the contrary notwithstanding.

1932 Code § 419 (emphasis added).

The *Mattison* Court succinctly opined that fraud did not fall within the scope of the statutory language, and therefore the Legislature did not intend that claims of fraud survive death.

The *Mattison* Court further provided that:

It is readily seen that under the above quoted Section, there are but two instances wherein a cause of action survives: (1) For and in respect to any and all injuries and trespasses to and upon real estate, and (2) any and all injuries to the person or to *personal property*. And it is just as readily seen that respondent's second cause of action does not come within either of the instances where a cause of action survives.

Mattison at 256, 15 S.E.2d at 119 (original emphasis replaced).

Thus, while the *Mattison* court narrowly interpreted the survival statute, it failed to explain why fraud does not constitute injury to personal property. In fact, there is no discussion in *Mattison* regarding the elements of fraud or why pecuniary loss caused by fraud is not an injury to personal property. This omission is relevant because the money taken by BANA from Jane Hughes was

¹ The current survival statute is codified at S.C. Code Ann § 15-5-90, and the language is nearly identical to the 1932 Code with only some minor changes in punctuation.

personal property. Once Jane Hughes died, interest in her personal property, including her financial holdings, transferred to her Estate. Thus, *Mattison*'s principle that fraud does not survive the death of a party in South Carolina is internally inconsistent.

ii. *Fraud as an "exception" to the South Carolina Survival Statute*

Since *Mattison*, and contrary to its narrow view of survivability, the South Carolina Supreme Court has consistently *broadly* interpreted the survival statute. See, e.g., *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564, 564 S.E.2d 94, 97 (2002) ("[T]he statute's language is broad and ostensibly appears to include almost every conceivable cause of action."); *Layne v. Int'l Bhd. of Elec. Workers, (AFL-CIO), Local No. 382*, 271 S.C. 346, 352, 247 S.E.2d 346, 349 (1978) ("[I]t is the general rule that any cause of action which could have been brought by the deceased in his lifetime survives to his representative under the Survival Act."); *Brewer v. Graydon*, 233 S.C. 124, 128, 103 S.E.2d 767, 769 (1958) ("the Survival Statute must be liberally construed"). These later South Carolina opinions create a tension with *Mattison*'s holding fraud is an *exception* to the rule, as opposed to a *cause of action outside of the statute's scope*.

Despite this tension, the South Carolina Supreme Court has yet to revisit the *Mattison* rationale for the fraud "exception." Indeed, there has been no discussion by South Carolina courts since 1941 on why fraud should be excepted from the survival statute. Plaintiff, therefore, invites this Court to reexamine this question of survivability and to determine viability of the 1941 *Mattison* analysis in 2018.

B. Public Policy

i. *Clear evidence of mindset defeats policy reasons for exception*

Perhaps the only attempt at explanation for South Carolina's fraud exception comes from the Fourth Circuit opinion in *Faircloth v. Finesod*, 938 F.2d 513, 517 (4th Cir. 1991). The plaintiff in *Faircloth* challenged the fraud exception to the South Carolina survival statute as violating the

Equal Protection Clause, and the South Carolina District Court agreed. On appeal, the Fourth Circuit, applying a minimum scrutiny standard, supplied its “feasible attempt for [the] legislative distinction”:

[F]raud is a tort that requires a special quality of proof, and the states of mind of the victim (e.g., whether he knew the statement was false, relied upon it, and was justified in so relying) and the perpetrator are especially vital. . . . [A] legislature could rationally conclude that the difficulty and potential unfairness of proving the state of mind of a dead party to a fraudulent transaction justified excepting fraud from the survival statute.

Faircloth at 517.

Assuming that the rationale proffered by the Fourth Circuit in *Faircloth* is, in fact, the underlying basis for the common law fraud exclusion, as a matter of public policy, the common law exclusion should be overturned or, at the very least, excepted in those circumstances where the state of mind of the deceased party is readily identifiable, as in the current case, where Jane and John Hughes expressly declined, through an executed document, to enroll in a program offered by BANA. The instant case, where the policy supporting the exclusion is defeated, in consideration with the additional policy reasons set forth below, cries for a reevaluation of the fraud exclusion to the survival statute.

ii. Elderly fraud victims and public policy

Public policy should not enable the abuse of elderly and otherwise vulnerable citizens of South Carolina. Jane Hughes was 85 years old when Defendant began withdrawing the fraudulent, unauthorized charges from her account and suffered from dementia and vision impairments in the following years until her death. Studies show that such elderly persons are highly susceptible to being defrauded.

According to a 2015 study by True Link Financial, approximately 36.9% of American seniors are victims of financial abuse in any five-year span. *The True Link Report on Elder*

Financial Abuse 2015, TRUE LINK, January 2015 at 11 (<https://truelink-wordpress-assets.s3.amazonaws.com/wp-content/uploads/True-Link-Report-On-Elder-Financial-Abuse-012815.pdf>). Fraud and financial abuse costs our seniors an estimated total of \$36.48 billion annually. *Id.* Of this, approximately \$16.99 billion is lost to financial exploitation, which is defined as “when misleading or confusing language is used – *often combined with social pressure and tactics that take advantage of cognitive decline and memory loss* – to obtain a senior’s consent to take his or her money.” *Id.* at 1. Not surprisingly, the vulnerability of seniors to fraud is in part due to the loss of cognitive functions of these individuals. *Id.* at 19. True Link’s research shows that conditions such as dementia and Alzheimer’s disease increase vulnerability to fraud, and an individual with a below-average memory is 78% more likely to be a victim of fraud. *Id.*

Notably, as the financial exploitation is accomplished through deception that does not quite rise to a criminal level, only a civil remedy is available. *Id.* at 5. The reality is that the time to identify, investigate, report, and prosecute civil offenses now, unlike in 1941, often takes many years and exceeds the lifetime of the victims. The speed and complexity of today’s financial transactions, exacerbated by sophisticated technology, furthers fraud in ways not conceivable in 1941. Thus, the impact of the *Mattison* holding is now much more adverse to those most likely to fall victim to fraud than in 1941.

In sum, the public policy impact of South Carolina’s survivability statute is long overdue for review in light of electronic phishing, data mining, electronic databases, and targeted advertising, and Plaintiff asks this Court to initiate that reevaluation.

iii. Survivability of fraud in other jurisdictions.

Further supporting certification of the question is that the majority of states allow the survival of fraud claims. Indeed, South Carolina is one of only seven (7) states that do not allow

a fraud action to survive; the others being Alabama, Arkansas, Massachusetts, Texas, Vermont, and Wisconsin.

The general consensus among states that have offered policy considerations for the survival of fraud actions is that any action which lessens the value of an estate should survive, as the modern trend is to remove obstructions to the free transfer of property and rights and interests therein. *See, e.g., Jandera v. Lakefield Farmers' Union*, 150 Minn. 476, 479, 185 N.W. 656, 658 (1921); *Micheletti v. Moidel*, 94 Colo. 587, 591, 32 P.2d 266, 267 (1934); *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 154 Idaho 37, 41, 293 P.3d 661, 665 (2013).

In light of the policy considerations put forth by South Carolina's sister states regarding the impact of survivability on property rights, Plaintiff would urge this court to examine the question of whether excepting fraud from the South Carolina survival statute violates public policy.

CONCLUSION

Plaintiff sufficiently stated causes of actions and alleged adequate facts to obtain relief from Defendant. Moreover, Plaintiff's claims are not barred by the statute of limitations, nor the doctrines of collateral estoppel and *res judicata*. Under any reasonable reading of the Complaint and review of the facts available there are numerous substantive issues of disputed fact requiring that this matter proceed to discovery for a proper and fair resolution on a complete record. Finally, Plaintiff prays that the issue of whether the fraud is excluded from South Carolina's survival statute be reconsidered in light of the aforementioned factors. Plaintiff thus prays that this Court deny Defendant's motion and allow this action to proceed.

Respectfully Submitted,

MIKE KELLY LAW GROUP, LLC

BY: s/ Brad D. Hewett
Brad D. Hewett
SC Bar No. 77924
500 Taylor Street
Post Office Box 8113
Columbia, SC 29201
803/726-0123
bhewett@mklawgroup.com
Attorney for Plaintiff

Columbia, South Carolina
February 21, 2018

Certificate of Electronic Notification

Recipients

Robert Muckenfuss - Notification transmitted on 03-20-2018 08:37:09 AM.

Bradley Hewett - Notification transmitted on 03-20-2018 08:37:08 AM.

Elizabeth Timmermans - Notification transmitted on 03-20-2018 08:37:08 AM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2017CP4202834

Official File Stamp: 03-20-2018 08:37:03 AM

Court: CIRCUIT COURT

Common Pleas

Spartanburg

Case Caption: Phillip Francis Luke Hughes , plaintiff, et al VS

Bank Of America National Association

Document(s) Submitted: Order/Dismissal Order/Dismissal

Filed by or on behalf of: R. Keith Kelly

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Robert A. Muckenfuss for Bank Of America
National Association

Elizabeth Marion Zwickert Timmermans for Bank
Of America National Association

Bradley Davis Hewett for Phillip Francis Luke
Hughes

The following people have not been served electronically by the Court. Therefore, they must
be served by traditional means:

On Behalf Of The Estate Of Jane K. Hughes

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Court Judge

Case No.: 2017-CP-42-02834

Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes.....Appellant,

v.

Bank of America National Association.....Respondent.

NOTICE OF APPEAL

Pursuant to Rule 203 of the South Carolina Appellate Court Rules, Plaintiff Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes ("Appellant") hereby appeals the order of the Honorable R. Keith Kelly, dated March 19, 2018, granting the motion to dismiss on behalf of Respondent Bank of America National Association.

Copies of the order granting the motion to dismiss on behalf of Respondent are attached hereto and incorporated herein as Exhibit A.

Respectfully Submitted,

By:


Brad D. Hewett
bhewett@mklawgroup.com
S.C. Bar No. 77924
D. Michael Kelly
mkelly@mklawgroup.com
Jamie Smith
jsmith@mklawgroup.com
Mike Kelly Law Group, LLC
500 Taylor Street
Columbia, SC 29201
(803) 726-0123

Attorneys for Appellant

March 26, 2018

Other Counsel of Record:

Robert A. Muckenfuss, Esq.
Elizabeth M. Timmermans, Esq.
McGuire Woods, LLP
201 North Tryon Street, Suite 3000
Charlotte, NC 28202-2146
Telephone: 704.343.2052
Counsel for Defendants/Respondents

cc: The Honorable Hope Blackley

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

PHILLIP FRANCIS LUKE)

HUGHES, on behalf of the Estate of)
Jane K. Hughes,)

Plaintiff,)

Civil Action No.: 2017- CP-42-02834

vs.)

ORDER ON MOTION TO DISMISS

BANK OF AMERICA NATIONAL)
ASSOCIATION)

Defendant.)

This matter came before this Court for a hearing on the Motion to Dismiss filed by the Defendant, Bank of America, N.A. ("BANA"), on February 22, 2018. Present at the hearing were the following: Brad D. Hewett, Esquire, on behalf of the Plaintiff; and Robert Muckenfuss, Esquire and Elizabeth Timmermans, Esquire on behalf of BANA. Having heard arguments from counsel, and after careful consideration of the pleadings, motion, memoranda, and exhibits filed by the parties, this Court hereby grants BANA's Motion to Dismiss, with prejudice.

FACTS ALLEGED

Plaintiff's late parents opened a \$120,000 line of credit from BANA on June 13, 2006, secured by a mortgage on their Spartanburg, South Carolina home. (Compl. ¶ 7.) Plaintiff alleges that on that same day, BANA presented his parents with policy documentation concerning optional line protection coverage ("LPP"). (*Id.* ¶ 11.) The optional LPP would enable a borrower to cancel some or all of the monthly payments on the variable portion of a credit line due to events like disability, accidental death, or involuntary unemployment. (*Id.*) Plaintiff asserts that his parents declined to purchase LPP coverage when they received the

\$120,000 line of credit. (*Id.*) Plaintiff alleges that, despite his parents declining LPP coverage, “for several years,” BANA drafted a monthly charge of \$28.40 from his parents’ account for LPP coverage for his father. (*Id.* ¶ 23.)¹ Plaintiff’s father passed away in October 2008. (Compl. ¶ 27.) In or about March 2015, BANA notified Mrs. Hughes that it would stop charging for the LPP fee, and upon learning of Mr. Hughes’ death, refunded all LPP payments drawn on the Hughes’ account after October 2008. (Compl. ¶15, TAC ¶30). In June 2015, Mrs. Hughes also passed away. (Compl. ¶ 29.)

PROCEDURAL HISTORY

This is not Plaintiff’s first time suing BANA relating to the LPP product. In 2015, Plaintiff (on behalf of his mother’s estate) filed suit against BANA in this court and asserted almost identical factual allegations as those made in this matter, bringing claims of fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent acts, breach of duty of good faith and fair dealing, and a violation of the Truth in Lending Act (“TILA”). BANA removed the action to the United States District Court for the State of South Carolina, Spartanburg Division, Civil Action No. 7:15-cv-05083-MGL (the “2015 Federal Action”). After Plaintiff amended his complaint three times, BANA moved to dismiss Plaintiff’s

¹ As discussed herein, Plaintiff previously filed suit against BANA for the LPP product charges and contended in his prior lawsuit that the monthly charges began “on or about June 2006,” and that a \$28.40 fee was listed on his parents’ monthly account statements. (2015 Federal Action Third Am. Compl., Dkt. No. 23, Civil Action No. 7:15-cv-05083-MGL (“TAC”) ¶ 25.) In Plaintiff’s Response to BANA’s Motion to Dismiss the operative Complaint, Plaintiff incorporated the allegations made in his prior 2015 Federal Action TAC into this Complaint. (Pl. Opp. to Motion to Dismiss, pg. 1) This Court may take judicial notice of the allegations made in the TAC, and may consider those allegations without converting Defendant’s motion into a motion for summary judgment. *See Lucht v. Youngblood*, 266 S.C. 127, 134, 221 S.E.2d 854, 858 (S.C. 1976) (“Generally, the prior pleadings in an action may be received in evidence against the pleader.”); *see also Teilabs, Inc. v. Makor Issues & Right, Ltd.*, 531 U.S. 308, 322-323, 127 S. Ct. 2499, 2509 (S.C. 2007) (noting a court may take judicial notice of publicly-available court documents without converting a motion to dismiss into one for summary judgment.).

Third Amended Complaint. Prior to the District Court's ruling on the motion to dismiss, Plaintiff voluntarily dismissed his fraud-based claims (fraud, fraudulent concealment, and breach of contract accompanied by fraudulent acts). (2015 Federal Action, Dkt. No. 31.) On February 13, 2017, District Court Judge Mary Geiger Lewis granted BANA's motion to dismiss the remaining claims, holding that Plaintiff's breach of contract and TILA claims were time-barred and that equitable tolling did not apply to save the untimely claims. (2015 Federal Action, Dkt. No. 33 at 4.)

Plaintiff appealed the District Court Order to the Fourth Circuit Court of Appeals. On September 22, 2017, after a *de novo* review, the Fourth Circuit affirmed the trial court's order and held that Plaintiff's claims relating to the LPP product were time barred and not subject to equitable tolling. *Hughes, on behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n*, 697 F. App'x 191, 193 (4th Cir. 2017). Plaintiff petitioned the Supreme Court of the United States for a *writ of certiorari*. On January 22, 2018, the Supreme Court denied Plaintiff's writ. *Hughes, on Behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n*, No. 17-884, 2018 WL 491558, at *1 (U.S. Jan. 22, 2018).

While Plaintiff's appeal of the District Court's Order in the 2015 Federal Action was still pending before the Court of Appeals, Plaintiff filed this lawsuit (again in a representative capacity on behalf of his mother's estate). While Plaintiff again alleged that BANA improperly charged his parents for an unwanted LPP product, Plaintiff brought claims for fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), breach of fiduciary duty, and conversion. Plaintiff also asserts a statutory survival cause of action in an effort to enforce his six substantive causes of actions.

LEGAL CONCLUSIONS

The Court hereby grants BANA's Motion to Dismiss on the several grounds articulated by BANA in its motion to dismiss and during the hearing on its motion, namely that the claims are barred by the doctrine of *res judicata*. In addition to *res judicata*, Plaintiff's fraud-related claims are all barred as those claims did not survive the death of the Plaintiff's parents; the SCUTPA statute itself does not allow Plaintiff to bring a claim in a representative capacity; and all of Plaintiff's claims are barred by the applicable statutes of limitations.

A. THE DOCTRINE OF RES JUDICATA BARS PLAINTIFF'S CLAIMS.

Plaintiff's Complaint involves the same parties and is based on the same transaction, same occurrence, and same issues (BANA's allegedly wrongful charging of Plaintiff's parents for the LPP product) that were previously litigated and adjudicated by the District Court. Plaintiff's claims are therefore barred under the doctrine of *res judicata*.

"*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (S.C. 1999); *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 190-92, 417 S.E.2d 569, 571 (S.C. 1992). "Under the doctrine of *res judicata*, [a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Plum Creek*, 334 S.C. at 34, 512 S.E.2d at 109 (quoting *Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (S.C. 1987)); see also *id.* ("To establish *res judicata*, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit.").

Pursuant to the doctrine of *res judicata*, Plaintiff is barred from re-litigating his claims before this Court. First, in both this action and the 2015 Federal Action, Plaintiff sued Defendant BANA. Second, the subject matter of the two lawsuits is identical. Both lawsuits seek damages for the alleged injury resulting from BANA charging Plaintiff's parents for the LPP product in connection with a 2006 loan.

Finally, Plaintiff's claims relating to the LPP product were already adjudicated in the 2015 Federal Action. In the 2015 Federal Action, the District Court held that Plaintiff's claims were time-barred under a three year statute of limitations. Here, all of Plaintiff's claims have a statute of limitations period of three years. Thus, if Plaintiff's claims were time-barred in 2015, his 2017 claims before this Court are likewise barred.

The District Court and the Court of Appeals also considered the record and rejected Plaintiff's request to apply the scarcely used equitable tolling doctrine to save his claims. The District Court squarely held that "the charge for the mortgage insurance appeared on the Hughes' monthly checking account statements from 2006 to 2015. Thus any argument they failed to discover the purported wrongdoing by Defendant during this period of time, although they exercised due diligence, is bereft of any merit." (2015 Federal Action, Dkt. No. 23 at 4.) The Fourth Circuit reviewed the dismissal of the action, *de novo*, and affirmed the District Court's holding on equitable tolling:

Generally, parties "are entitled to equitable tolling only if they show that they have pursued their rights diligently and extraordinary circumstances prevented them from filing on time." *Raplee v. United States*, 842 F.3d 328, 333 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 2274 (2017). "[E]quitable tolling is reserved for those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result." *Id.* "[T]he use of equitable tolling must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes." *Lawrence v. Lynch*, 826 F.3d 198, 204 (4th Cir. 2016) (internal quotation marks omitted). Where a plaintiff has alleged fraudulent

concealment of his cause of action, equitable tolling requires a plaintiff to demonstrate that “(1) the party pleading the statute of limitations fraudulently concealed facts that are the basis of the plaintiff’s claim, and (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence.” *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995). With these standards in mind, we have reviewed the briefs and the record before us and conclude that the district court did not err in granting the motion to dismiss Appellants’ claims.

Hughes, on behalf of Estate of Hughes v. Bank of Am. Nat’l Ass’n, 697 F. App’x 191, 192-193 (4th Cir. 2017).

That Plaintiff’s causes of action in this suit are not identical to the causes of action in the 2015 Federal Action does not save his barred claims. All of Plaintiff’s claims were equally available, and within the scope and purview of suit at the time of the 2015 Federal Action. *See e.g. Sub-Zero Freezer Co.*, 308 S.C. at 192, 417 S.E.2d at 571 (“The claims were either litigated in the prior actions or could have been so litigated. Thus, the trial court properly held that Clarkson’s claims were barred by *res judicata* ...”). In fact, Plaintiff previously brought identical fraud-based claims against BANA in the 2015 Federal Action but subsequently dismissed them. Plaintiff is therefore barred from re-litigating previously dismissed claims and new claims based on the allegations already adjudicated in federal court.

B. PLAINTIFF’S FRAUD-RELATED CLAIMS AND SCUTPA CLAIM CANNOT BE BROUGHT BY AN ESTATE.

Plaintiff is barred from bringing fraud-related claims on behalf of his deceased mother under both the South Carolina’s survivability and SCUTPA statutes. *See* S.C. Code Ann. §§ 15-5-90, and 39-5-140. Although the survivability statute generally allows causes of action for personal injuries to survive the death of a person, the South Carolina Supreme Court has expressly ruled that fraud-related claims do not survive a person’s death. *Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 15 S.E.2d 117, 119 (S.C. 1941) (holding that a cause of action

for fraud did not survive the death of a person). The South Carolina Supreme Court affirmed that fraud claims do not survive death in 2002. In *Ferguson v. Charleston Lincoln Mercury, Inc.*, the South Carolina Supreme Court analyzed the survivability of fraud and fraudulent concealment-based allegations brought by a plaintiff's estate against a car dealership. The Court held:

South Carolina case law has continued to recognize a common law exception [to the survivability statute] regarding causes of action for fraud or deceit. . . . At the core of Mr. Ferguson's complaint was the allegation that CLM misled him into paying more for the car than he should have paid, and concealed the overcharge either through intentionally deceptive actions or through grossly negligent disclosure practices. Allegations of such fraud and deceit are exempted from the general survival statute and do not survive the plaintiff's death. Accordingly, we hold that Mr. Ferguson's cause of action did not survive his death.

Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563-64, 564 S.E.2d 94, 97-98 (S.C. 2002). More recently, in 2008, the South Carolina Court of Appeals reaffirmed this long-standing exception to the survivability of a fraud claim in *Brailsford v. Brailsford*. The court noted:

South Carolina . . . has long recognized several exceptions to the survivability of a claim, including an exception for fraud. . . . The fraud exception to survivability is not limited only to a cause of action titled "fraud." In *Ferguson*, our supreme court recognized that although Ferguson's cause of action arose under the "Dealer Act,"⁵ the essence of the Defendant's alleged conduct amounted to misleading Mr. Ferguson, and concealing overcharges by either intentional deception or gross negligence. The court held that because such actions fit within the ambit of fraudulent or deceptive conduct, it was insignificant what "label" the Plaintiff gave to such conduct.

Brailsford v. Brailsford, 380 S.C. 443, 449-450, 669 S.E.2d 342, 345 (S.C. Ct. App. 2008) (internal citations omitted). Accordingly, Plaintiff's claims for fraud, fraudulent concealment, and breach of contract with fraudulent intent are all barred.²

² In addition, because Plaintiff's SCUTPA claim is also based on fraud and fraudulent concealment, the SCUTPA claim is also barred by the common law application of the survivability statute. See e.g. *Davis v. Life Care Centers of Am., Inc. et al*, Case No. 02-CP-10-

Similarly, the plain language of the SCUTPA statute does not allow for a representative of an estate, like Plaintiff, to maintain an action under the Act. SCUTPA clearly states:

Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, *but not in a representative capacity*, to recover actual damages.

S.C. Code Ann. § 39-5-140 (emphasis added). It is clear that “an unfair trade practices claim may not be brought in a representative capacity.” *Wogan v. Kunze*, 366 S.C. 583, 609, 623 S.E.2d 107, 121 (S.C. Ct. App. 2005), *aff’d as modified*, 379 S.C. 581, 666 S.E.2d 901 (S.C. 2008). Accordingly, all of Plaintiff’s claims based on fraud and deceit – fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, and violation of the SCUTPA did not survive the death of Plaintiff’s parents and may not be brought on behalf of Mrs. Hughes’ estate.

C. PLAINTIFF’S CLAIMS ARE ALL TIME BARRED.

Statutory law and common law set a three-year statute of limitations period for each of Plaintiff’s claims: 1) fraud (*see* S.C. Code § 15-3-530(7)); (2) fraudulent concealment (*id.*); (3) breach of contract accompanied by a fraudulent act (*see* S.C. Code § 15-3-530(1)); (4) violation of the SCUTPA (*see* S.C. Code Ann. § 39-5-150); (5) breach of a fiduciary duty (*see Mazloom v. Mazloom*, 382 S.C. 307, 323, 675 S.E.2d 746, 755 (S.C. Ct. App. 2009) (“Generally, the statute of limitations is three years for actions for a breach of a fiduciary duty.”)); and (6) conversion (*see* S.C. Code Ann. §§ 15-3-530(4) and 15-3-530(5)).

The relevant statutes of limitation began to run on Plaintiff’s claims when Mrs. Hughes could or should have known, using reasonable diligence, that a cause of action might exist. “The

3566, 2003 WL 25460625 (S.C. Ct. Comm. Pleas Mar. 28, 2003) (“SCUTPA does not survive the death of an alleged injured party.”).

exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.” *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (S.C. 1981). Because Plaintiff alleged that his parents started receiving payment deductions from their account, and notice of said deductions on each monthly statement, beginning in June 2006, the statute of limitations on their potential claims ran in June 2009.

This Court agrees with the findings by the District Court and the Court of Appeals in the 2015 Federal Action that equitable tolling does not apply in this case. Mrs. Hughes was given actual notice of the alleged improper charges by both monthly charges being deducted from her account and the monthly bank and/or home equity loan statements identifying those charges. Plaintiff specifically alleges that “BANA withdrew a monthly charge of \$28.40 from the Hughes’ BANA joint checking account beginning on or about June 2006” for his father’s LPP coverage. (TAC ¶ 25.) Plaintiff also states that the LPP fee appeared on his parents’ checking account statements. (Compl. ¶ 23.) The South Carolina Supreme Court has maintained that “equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use.” *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 117, 687 S.E.2d 29, 32 (S.C. 2009). “It has been observed that equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control.” *Id.* at 116. Here, because Plaintiff’s parents received actual monthly notice of the charges being deducted from their account from 2006 to 2015, Plaintiff’s allegations on the face

of the complaint make clear that nothing was hidden from him. Plaintiff also does not plead that BANA engaged in conduct that prevented his parents from filing suit during the appropriate time-period. Accordingly, the scarcely used doctrine of equitable tolling is not appropriate for this case.

CONCLUSION

For all of the above-stated reasons, this Court hereby GRANTS Bank of America, N.A.'s Motion to Dismiss the Plaintiff's Complaint with prejudice.

AND IT IS SO ORDERED.

ELECTRONIC SIGNATURE PAGE TO FOLLOW



Spartanburg Common Pleas

Case Caption: Phillip Francis Luke Hughes , plaintiff, et al VS Bank Of America National Association
Case Number: 2017CP4202834
Type: Order/Dismissal

It is so Ordered.

s/ R. Keith Kelly - 2165

Electronically signed on 2018-03-19 14:41:34 page 11 of 11

ELECTRONICALLY FILED - 2018 Mar 20 8:37 AM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4202834
ELECTRONICALLY FILED - 2018 Mar 27 11:46 AM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4202834

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

PHILLIP FRANCIS LUKE)

HUGHES, on behalf of the Estate of)
Jane K. Hughes,)

Plaintiff,)

Civil Action No.: 2017- CP-42-02834

vs.)

BANK OF AMERICA NATIONAL)
ASSOCIATION)**BANK OF AMERICA, N.A.'S MOTION**
FOR SANCTIONS

Defendant.)

COMES NOW Defendant Bank of America, N.A. (hereinafter "BANA"), by and through undersigned counsel, and hereby moves the Court to award sanctions against Plaintiff, Phillip Hughes on behalf of the Estate of Jane Hughes (hereinafter "Plaintiff") and his counsel Brad Hewett of the Mike Kelly Law Group, LLC ("Plaintiff's Counsel") pursuant to Rule 11 of the South Carolina Rules of Civil Procedure ("Rule 11") and the South Carolina Frivolous Civil Proceedings Sanctions Act ("FCPSA"), S.C. Code Ann. § 15-36-10, *et seq.*:

1. In 2015, Plaintiff filed suit against BANA in this Court (in a representative capacity on behalf of his mother's estate), and asserted almost identical factual allegations as those made in this matter: that BANA charged Plaintiff's parents for a voluntary insurance product despite them declining the product at loan origination (the "2015 Lawsuit"). Plaintiff brought claims of fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent acts, breach of duty of good faith and fair dealing, and a violation of the Truth in Lending Act ("TILA") in the 2015 Lawsuit.

2. BANA removed the 2015 Lawsuit to the United States District Court for the State of South Carolina, Spartanburg Division on December 30, 2015 (Civil Action No. 7:15-cv-05083-MGL). (2015 Lawsuit, Dkt. No. 1.)

3. After Plaintiff amended his complaint three times, BANA moved to dismiss his Third Amended Complaint on April 21, 2016. (*Id.*, Dkt. No. 25.) Plaintiff opposed BANA's motion on May 6, 2016, but he conceded that his breach of duty of good faith and fair dealing claim should be dismissed. (*Id.*, Dkt. No. 28.) BANA filed a reply in support of its motion to dismiss on May 26, 2016. (*Id.*, Dkt. No. 29.)

4. On June 28, 2016, BANA served Plaintiff with a proposed Rule 11 motion because his fraud-based claims (fraud, fraudulent concealment, and breach of contract accompanied by fraudulent acts) did not survive the deaths of Plaintiff's parents. (June 28, 2016 Transmission of Proposed Rule 11 Motion, attached hereto as Exhibit A to E. Timmermans Affidavit.)¹

5. On August 23, 2016, before BANA filed its proposed Rule 11 motion, Plaintiff voluntarily dismissed his fraud-based claims in the 2015 Lawsuit. (2015 Lawsuit, Dkt. No. 31.)

6. On February 13, 2017, Judge Mary Geiger Lewis dismissed the 2015 Lawsuit, holding that Plaintiff's claims were barred by the one year statute of limitations under TILA and the three year statute of limitations for the breach of contract claim. The court also held that the doctrine of equitable tolling did not apply to save Plaintiff's untimely claims. (*Id.*, Dkt. No. 33.)

7. On February 14, 2017, Plaintiff filed a notice of appeal to the Fourth Circuit Court of Appeals. *Hughes, on behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n*, 697 F. App'x 191, 193 (4th Cir. 2017).

¹ The proposed Rule 11 motion also sought sanctions against 2015 Lawsuit plaintiff Joanne Hafter relating to her forgery claims. Ms. Hafter is not a plaintiff in the current lawsuit.

8. On July 27, 2017, Plaintiff filed this lawsuit, again in a representative capacity on behalf of his mother's estate (the "2017 Lawsuit"). Plaintiff again alleged that BANA improperly charged his parents for an unwanted insurance product, bringing claims for fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), breach of fiduciary duty, and conversion. Plaintiff also asserted a statutory survival cause of action in an effort to enforce his six substantive causes of actions. (2017 Lawsuit, Compl.).

9. In his 2017 Lawsuit Complaint, Plaintiff omitted specific allegations relating to the timing of the insurance charges contained in his 2015 Lawsuit. (*Compare id. with* 2015 Lawsuit, Dkt. No: 23 ¶ 25 (alleging that the insurance product monthly charges began "on or about June 2006").)

10. On September 22, 2017, after a *de novo* review, the Fourth Circuit affirmed Judge Lewis's dismissal order in the 2015 Lawsuit and held that Plaintiff's claims relating to the insurance product were time barred and not subject to equitable tolling. *Hughes, on behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n*, 697 F. App'x 191, 193 (4th Cir. 2017).

11. On November 21, 2017, Plaintiff served BANA with the 2017 Lawsuit Complaint. (2017 Lawsuit, Jan. 29, 2018 Affidavit of Service.)

12. On December 11, 2017, Plaintiff petitioned the Supreme Court of the United States for a *writ of certiorari* after the Fourth Circuit affirmed dismissal of the 2015 Lawsuit.

13. On December 21, 2017, BANA filed a motion to dismiss the 2017 Lawsuit, arguing that *res judicata* barred Plaintiff's claims, that Plaintiff's claims were all time barred under the three year statute of limitations period, that Plaintiff's fraud-based claims did not survive the deaths

of his parents, and that the SCUTPA claims cannot be brought by a plaintiff in a representative capacity (“2017 Motion to Dismiss”).

14. On January 22, 2018, the Supreme Court of the United States denied Plaintiff’s writ petition relating to the 2015 Lawsuit. *Hughes, on Behalf of Estate of Hughes v. Bank of Am. Nat’l Ass’n*, No. 17-884, 2018 WL 491558, at *1 (U.S. Jan. 22, 2018).

15. On February 20, 2018, BANA filed a brief in support of the 2017 Motion to Dismiss.

16. On February 21, 2018, Plaintiff filed an opposition to BANA’s 2017 Motion to Dismiss. (“2017 Opposition”).

17. In the 2017 Opposition, Plaintiff admitted that he “previously filed an action in this Court in 2015 based upon the same facts that establish his claim for relief in the current action.” *Id.* at 1.

18. In his 2017 Opposition, Plaintiff also referred to the fraud exception to the survival statute as “antiquated” and asked the trial court to “reconsider precedent.” *Id.* at 10.

19. In his 2017 Opposition, Plaintiff represented to this court that “the South Carolina Supreme Court has yet to revisit the *Mattison* rationale for the fraud ‘exception,’ and that “there has been no discussion by South Carolina courts since 1941 on why fraud should be excepted from the survival statute.” *Id.* at 12 (citing *Mattison v. Palmetto State Life Ins. Co.*, 15 S.E.2d 117 (S.C. 1941)).

20. Contrary to Plaintiff’s representations in his 2017 Opposition, the South Carolina Supreme Court reaffirmed that fraud claims do not survive death in 2002. *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563-64, 564 S.E.2d 94, 97-98 (S.C. 2002). More recently, in 2008, the South Carolina Court of Appeals reaffirmed this longstanding exception to the

survivability of a fraud claim. *Brailsford v. Brailsford*, 380 S.C. 443, 449-450, 669 S.E.2d 342, 345 (S.C. Ct. App. 2008).

21. The Honorable Judge R. Keith Kelly heard oral argument on BANA's 2017 Motion to Dismiss on February 22, 2018.

22. During the oral argument, Plaintiff's Counsel stated on the record: "And I recognize there is controlling binding precedent on the primary issues in this case, which are the fraud based claims." (Feb. 22, 2018 Hearing Transcript at 10:14-17, attached hereto as Exhibit B to E. Timmermans Affidavit.) Plaintiff's Counsel also conceded that Hughes withdrew his fraud claims in the 2015 Federal Action, knowing they could not be maintained by the estate: "We could not go forward with [the fraud based claims], but upon realizing that there was a disallowance based in part on the *Ma[t]tison* case, we withdrew the claims." (*Id.* at 11:6-8.)

23. Plaintiff's Counsel continued: "I'm inclined to concede the point on the remaining stated four claims of the conversion and breach of fiduciary duty, that they may be barred by collateral estoppel and res judicata analysis. I would tend to perhaps agree, but the crux of this case is to challenge the state of the law on the fraud claims." (*Id.* at 12:1-6.)

24. Finally, Plaintiff's Counsel conceded: "So I think I would tend to agree that the conversion claim, breach of fiduciary claims are probably foreclosed and that we would forego those claims. As to [SCUTPA], if there is -- and I may have just missed this in the research. And it may be clear in the legislation. If there's a case on point where once you die, your unfair trade claim dies with you, I would again concede the point that there's controlling precedent. And this is being brought in a represented capacity obviously." (*Id.* at 17:12-21.)

25. On March 20, 2018, this Court entered an order dismissing Plaintiff's 2017 Lawsuit, finding that res judicata barred all of Plaintiff's claims, the relevant statutes of limitations

barred all of Plaintiff's claims, Plaintiff's fraud claims did not survive the deaths of his parents, and Plaintiff could not bring a SCUTPA claim in a representative capacity pursuant to S.C. Code Ann. § 39-5-140.

26. BANA now files this motion pursuant to Rule 11 and the FCPSA, S.C. Code Ann. § 15-36-10 et seq., seeking to recover from Hughes and Plaintiff's Counsel the costs and attorneys' fees associated with defending the 2017 State Action. *Russell v. Wachovia Bank, N.A.*, 633 S.E.2d 722, 729-70 (S.C. 2006) (affirming awards of sanctions under both Rule 11 and the FCPSA).

27. Rule 11 allows for the recovery of costs and fees for pleadings filed without good ground to support it: "If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee." S.C. R. Civ. P. 11(a); *see also Ex parte Bon Secours St. Francis Xavier Hosp., Inc.*, 713 S.E.2d 624, 628 (S.C. 2011) ("A trial court may impose sanctions on a party, a party's attorney, or both for filing a pleading, motion, or other paper to cause delay or when no good grounds exist to support the filing."); *id.* at 629 ("The award to the other party of its detailed, itemized costs and fees incurred as a result of the improper [conduct] plainly is allowed under the express language of Rule 11, SCRCP.")

28. Similarly, the FCPSA states that "An attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for: (a) filing a frivolous pleading, motion, or document if . . . (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good

faith or reasonable argument did not exist for the extension, modification, or reversal of existing law. S.C. Code Ann. § 15-36-10(A)(4)(a)(ii).

29. An attorney and party *shall* also be sanctioned under the FCPSA “if the court finds the attorney, party, or pro se litigant failed to comply with one of the following conditions: (a) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law. . . .” S.C. Code Ann. § 15-36-10(C)(1)(a).

30. Lawsuits where, like here, a plaintiff pursues claims barred both by res judicata and binding legal precedent are the exact sort of frivolous lawsuits warranting sanctions. *See, e.g., Holmes v. E. Cooper Cmty. Hosp. Inc.*, 408 S.C. 138 (S.C. 2014) (affirming trial court’s award of sanctions under FCPSA where plaintiff pursued claims that were barred both by collateral estoppel and binding legal precedent); *see Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm)*, 637 S.E.2d 316, 319 (S.C. Ct. App. 2006) (affirming award of sanctions after trial court granted defendant’s motion to dismiss on res judicata and insufficient service of process grounds).

31. BANA’s counsel has incurred over \$70,000.0 in cost and fees thus far obtaining dismissal of Plaintiff’s 2017 Lawsuit, including fees associated with briefing BANA’s Motion to Dismiss, preparing the hearing on BANA’s Motion to Dismiss, traveling to and attending the hearing on BANA’s Motion to Dismiss, drafting the proposed order granting BANA’s Motion to Dismiss, and drafting this Motion for Sanctions. BANA reserves the right to seek additional costs and fees associated with litigating this Motion for Sanctions and defending against Plaintiff’s baseless appeal filed on March 27, 2018, attached hereto as Exhibit 2. BANA’s counsel is happy to provide the court with documentary support for its costs and fees figures.

32. BANA has asked Plaintiff and Plaintiff's Counsel to pay its costs and fees associated with the 2017 Lawsuit, but Plaintiff and Plaintiff's Counsel have refused to pay BANA's costs. (March 21, 2018 Demand, attached hereto as Exhibit C to E. Timmermans Affidavit.)

33. This Motion will be further supported by the pleadings, the attached exhibits, a memorandum of law, oral argument, and any other evidence requested or permitted by this Court.

WHEREFORE, BANA prays, that the Court award sanctions against Hughes and Plaintiff's Counsel for the costs and attorneys' fees expended by BANA defending the 2017 State Action and such other relief as is just and reasonable.

This the 29th day of March 2018.

Respectfully submitted,

/s/Robert A. Muckenfuss

Robert A. Muckenfuss (S.C. Bar No. 13903)

McGUIREWOODS LLP

201 N. Tryon Street, Suite 3000

Charlotte, NC 28202

Telephone: (704) 343-2052

Fax: (704) 444-8707

RMuckenfuss@mcguirewoods.com

Elizabeth M.Z. Timmermans

(S.C. Bar No. 100288).

McGuireWoods LLP

434 Fayetteville St. Suite 2600

Raleigh, NC 27601

Telephone: (919) 755-6576

Eztimmermans@mcguirewoods.com

Attorneys for Defendant Bank of America, N.A.

CERTIFICATE OF SERVICE

I hereby certify that I have on this 29th day of March 2018, the foregoing **BANK OF AMERICA, N.A.'S MOTIONS FOR SANCTIONS** was electronically filed with the Clerk of the South Carolina Court using the E-Filing system, and has been served upon counsel by mailing a true and accurate copy with sufficient postage prepaid, and by electronic mail, to the following:

D. Michael Kelly, Esq.
Brad D. Hewett, Esq.
Jamie N. Smith, Esq.
MIKE KELLY LAW GROUP, LLC
500 Taylor Street
Post Office Box 8113
Columbia, SC 29201
mkelly@mklawgroup.com
bhewett@mklawgroup.com
jsmith@mklawgroup.com

Attorneys for Plaintiff

/s/ Robert A. Muckenfuss
Robert A. Muckenfuss

EXHIBIT 1

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

PHILLIP FRANCIS LUKE
HUGHES, on behalf of the Estate of
Jane K. Hughes,

Plaintiff,

Civil Action No.: 2017- CP-42-02834

vs.

BANK OF AMERICA NATIONAL
ASSOCIATION

Defendant.

**AFFIDAVIT OF ELIZABETH TIMMERMANS IN SUPPORT OF BANK OF
AMERICA, N.A.'S MOTION FOR SANCTIONS**

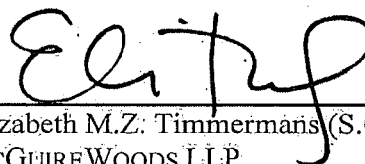
Elizabeth M.Z. Timmermans, being of full age, affirms:

1. I am an attorney with the law firm McGuireWoods LLP. I am over eighteen (18) years of age, and I have personal knowledge of the facts recited herein.
2. I represent Bank of America, N.A. ("Bank of America"). As counsel for Bank of America, I am familiar with all pleadings that have been filed as a part of this litigation. I make the declarations in support of Bank of America's Motion for Sanctions
3. Attached hereto as **Exhibit A** is the true and correct copy of the 2016 Transmission of Proposed Rule 11 Motion (exclusive of the exhibits attached to the Proposed Rule 11 Motions).
4. Attached hereto as **Exhibit B** is true and correct excerpts from the February 22, 2018 Motion to Dismiss Hearing Transcript.
5. Attached hereto as **Exhibit C** is a true and correct copy of the March 21, 2018 Demand email to Plaintiff's Counsel.

6. BANA's counsel has incurred over \$70,000.00 in costs and fees thus far obtaining dismissal of Plaintiff's 2017 Lawsuit, including fees associated with briefing BANA's Motion to Dismiss, preparing the hearing on BANA's Motion to Dismiss, traveling to and attending the hearing on BANA's Motion to Dismiss, drafting the proposed order granting BANA's Motion to Dismiss, and drafting this Motion for Sanctions. BANA reserves the right to seek additional costs and fees associated with litigating this Motion for Sanctions and defending against Plaintiff's baseless appeal filed on March 27, 2018. BANA's counsel is happy to provide the court with documentary support for its costs and fees figures.

I declare under penalty of perjury under the laws of the State of South Carolina that the foregoing is true and correct.

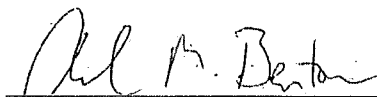
Dated: March 29, 2018



Elizabeth M.Z. Timmermans (S.C. Bar No. 100288)
 MCGUIREWOODS LLP
 434 Fayetteville Street, Suite 2600
 Raleigh, NC 27601
 Telephone: (919) 755-6576
eztimmermans@mcguirewoods.com

Attorney for Defendant Bank of America, N.A.

Sworn to and subscribed to
 before me this 29th day of
 March, 2018 in Wake County, North Carolina



Notary Public

Commission expires:
 11/27/2021

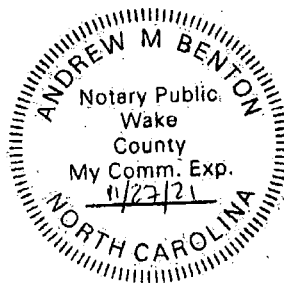


EXHIBIT A

From: Chapel, Susan <SChapel@mcguirewoods.com>
Sent: Tuesday, June 28, 2016 6:08 PM
To: bhewett@mklawgroup.com; mkelly@mklawgroup.com; jsmith@mklawgroup.com
Cc: Muckenfuss, Robert A.; Timmermans, Elizabeth M. Z.; Fratkin, Bryan A.
Subject: Phillip Hughes v. Bank of America - 7:15-cv-05083-MGL
Attachments: BANA - Ltr to Plaintiff re Rule 11 Motion.pdf; BANA's Rule 11 Motion For Sanctions.pdf; Exhibit A - Report of Examination.pdf

Dear Counsel:

Please see attached correspondence and attachments from Mr. Muckenfuss in the referenced matter.

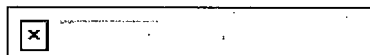
Thank you,

Susan Chapel

Practice Assistant
McGuireWoods LLP
434 Fayetteville Street
Suite 2600
Raleigh, NC 27601
T: +1 919.755.6686
F: +1 919.755.6591

schapel@mcguirewoods.com

VCard | www.mcguirewoods.com



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McGuireWoods LLP
201 North Tryon Street
Suite 3000
Charlotte, NC 28202-2146
Phone: 704.343.2000
Fax: 704.343.2300
www.mcguirewoods.com

Robert A. Muckenfuss
Direct: 704.343.2052

McGUIREWOODS

rmuckenfuss@mcguirewoods.com
Fax: 704.444.8070

June 28, 2016

VIA EMAIL and US MAIL

Brad D. Hewett
Mike Kelly Law Group, LLC
500 Taylor Street
P.O. Box 8113
Columbia, SC 29201

**Ré: *Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes,
Joanne Hafter, and all others similarly situated***
U.S. District Court for the District of South Carolina
Case No. 7:15-cv-05083-MGL

Dear Mr. Hewett:

We represent Bank of America, N.A. in the above-captioned case. After reviewing your Third Amended Complaint, we believe that you and your clients have violated Rule 11 of the Federal Rules of Civil Procedure. By this letter, we bring to your attention our plan to file a Motion for Rule 11 Sanctions, if you do not dismiss this case. Pursuant to Rule 11(c)(2), a copy of the Motion for Rule 11 Sanctions is attached hereto for your consideration.

We demand that you immediately dismiss your Third Amended Complaint against BANA with prejudice or we intend to pursue sanctions against your clients and your firm. If you do not withdraw the Complaint by July 19, 2016, we intend to file the attached Motion for Rule 11 Sanctions, and we will seek all attorneys' fees and costs incurred in defending the lawsuit and preparing the motion.

Very truly yours,


Robert A. Muckenfuss
by: 827

RAM/sc
Enclosure

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(Spartanburg Division)**

PHILLIP FRANCIS LUKE HUGHES, on behalf of
the ESTATE OF JANE K. HUGHES, JOANNE
HAFTER, and all others similarly situated,

Plaintiff,

v.

BANK OF AMERICA, N.A.

Defendant.

Case No. 7:15-cv-05083-MGL

BANK OF AMERICA, N.A.'S RULE 11 MOTION FOR SANCTIONS

Defendant Bank of America, N.A. ("BANA") files this Motion for Sanctions under Rule 11 of the Federal Rules of Civil Procedure against purported class representatives Plaintiffs Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes, and Joanne Hafter ("Plaintiffs") and against Plaintiffs' counsel. BANA seeks dismissal of this case with prejudice and reasonable attorneys' fees incurred in defending against this lawsuit. Through service of this motion, on June 28, 2016 via electronic mail and United States mail, BANA notified Plaintiffs' counsel that the Third Amended Complaint violated Rule 11(b)(2) and (3). As 21 days have passed without withdrawal and dismissal of the claims contained in the Third Amended Complaint, BANA seeks relief under Rule 11(c). Counsel for BANA affirms that, prior to filing this motion, it attempted to confer with opposing counsel pursuant to Local Rule 7.02 to resolve this matter, which was unsuccessful.

WHEREFORE, for the reasons stated herein, and those in the accompanying and incorporated Memorandum in Support, BANA respectfully requests that the Court (1) grant this motion, (2) dismiss the Third Amended Complaint with prejudice, (3) award monetary sanctions

against Plaintiff Ms. Hafter and Plaintiffs' counsel, (4) award reasonable attorneys' fees incurred in defending against this lawsuit, and (5) provide for such other relief as just and proper.

Dated: July __, 2016

Respectfully submitted,
BANK OF AMERICA, N.A.

By Counsel

Robert A. Muckenfuss, Esq.
Federal Bar # 7333
McGUIREWOODS LLP
201 North Tryon Street
Suite 3000
Charlotte, NC 28202-2146
(704) 343-2052 (Telephone)
(704) 444-8707 (Facsimile)
rmuckenfuss@mcguirewoods.com
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that on this ____ day of July, 2016, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the attorneys of record registered with the CM/ECF system. I further certify that a true and accurate copy of the foregoing was sent by U.S. Mail to the following:

D. Michael Kelly, Esq.
Brad D. Hewett, Esq.
Jamie N. Smith, Esq.
Mike Kelly Law Group, LLC
500 Taylor Street
Post Office Box 8113
Columbia, SC 29201
mkelly@mklawgroup.com
bhewett@mklawgroup.com
jsmith@mklawgroup.com

Attorneys for Plaintiff

Robert A. Muckenfuss

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(Spartanburg Division)**

PHILLIP FRANCIS LUKE HUGHES, on behalf of
the ESTATE OF JANE K. HUGHES, JOANNE
HAFTER, and all others similarly situated,

Plaintiff,

v.

BANK OF AMERICA, N.A.

Defendant.

Case No. 7:15-cv-05083-MGL

**BANK OF AMERICA, N.A.'S
BRIEF IN SUPPORT OF ITS RULE 11 MOTION FOR SANCTIONS**

In their Third Amended Complaint ("TAC"), two Plaintiffs assert six causes of action against Bank of America, N.A. ("BANA") despite Plaintiffs' knowledge that their factual contentions lack evidentiary support and that multiple of the causes of action are not warranted by existing law. Specifically, Plaintiff Hughes and his counsel continue to pursue fraud-based claims against BANA despite knowing that the claims expired upon the death of Mr. Hughes's parents, in violation of Rule 11(b)(2). Furthermore, in violation of Rule 11(b)(3), Plaintiff Hafter and her counsel continue to pursue allegations against BANA despite receiving Ms. Hafter's executed copies of the Line Protection Plan ("LPP") Confirmation Letter that demonstrate that her factual contentions have no evidentiary support.

Through this Motion, BANA seeks sanctions against Plaintiffs pursuant to Rule 11 in the form of dismissal of the TAC with prejudice, monetary sanctions against Plaintiffs' counsel for violation of Rule 11(b)(2), and monetary sanctions against Plaintiff Hafter and Plaintiffs' counsel for their violation of Rule 11(b)(3). Such sanctions are necessary to deter Plaintiffs and their

counsel from filing suit against BANA despite being aware of the frivolous nature of the causes of action and lack of evidentiary and legal support for their claims.

FACTUAL AND PROCEDURAL HISTORY

As set forth in further detail in BANA's Motion to Dismiss the TAC, Plaintiff Phillip Hughes, as personal representative of the estate of his mother, Jane Hughes, alleges that his late parents opened a \$120,000 line of credit from BANA on June 13, 2006, secured by a mortgage on their Spartanburg, South Carolina home. (TAC ¶ 8.) Hughes alleges that his parents declined the optional LPP that would enable a borrower to cancel some or all of the monthly payments on the variable portion of a credit line due to events like disability, accidental death, or involuntary unemployment. (*Id.* ¶¶ 10, 12.) Hughes alleges that "beginning on or about June 2006," BANA improperly charged his parents for LPP coverage. (*Id.* ¶¶ 15, 25.) Finally, Hughes alleges that his father died on October 22, 2008 and his mother died on June 3, 2015. (*Id.* ¶¶ 14, 32.)

On January 6, 2016, BANA filed its Motion to Dismiss the original Complaint, citing clear South Carolina Supreme Court precedent making clear that Plaintiff Hughes's fraud-based claims are not warranted by existing law. [Doc. No. 4-1 at 4-5 (citing South Carolina Supreme Court case law holding that fraud-based claims expire upon death).] After multiple amendments of Plaintiffs' allegations, BANA filed its Motion to Dismiss the TAC on April 21, 2016 again citing clear South Carolina Supreme Court precedent demonstrating that Plaintiff Hughes's fraud-based claims are not warranted by existing law. [Doc. No. 25-1 at 12-13.]

Plaintiffs' counsel concedes in Plaintiffs' opposition briefing that Plaintiff Hughes' fraud claims fail under existing law but apparently seeks certification of the question to the South Carolina Supreme Court. [Doc. No. 28 at 23-24.] In the next breath, however, counsel acknowledges that this issue is ineligible for certification as the South Carolina Supreme Court

has definitively and repeatedly ruled on the issue. [*Id.* at 23 n.1 (“Plaintiff acknowledges that SCACR 244(a) limits certification to those questions unanswered by controlling precedent.”).] Despite knowledge that Plaintiff Hughes has no legal basis for asserting fraud-based claims against BANA and no legal basis for certification of this issue, Plaintiff Hughes continues to maintain fraud-based causes of action in his TAC and seek consequential and punitive damages from BANA.

Similarly, Plaintiff Hafter alleges that in 2008 she obtained a \$30,000 home equity loan from BANA, secured by a mortgage on her home, and that she rejected any offer for LPP protection. (TAC ¶ 33.) On March 9, 2016, undersigned counsel for BANA provided Plaintiffs’ counsel with copies of Plaintiff Hafter’s executed LPP documents wherein Plaintiff Hafter specifically elected LPP coverage at her 2008 mortgage closing. [Doc. No. 18-2 (Hafter Affidavit) ¶ 5; Doc. No. 28-9 (Hafter MTD Affidavit).] In response, Ms. Hafter subsequently moved to further amend her allegations. [Doc. No. 18.] Plaintiff Hafter does not dispute the authenticity of the signature on the LPP documentation, (TAC ¶ 38; [Doc. No. 18-2 (Hafter Affidavit) ¶ 5; Doc. No. 28-9 (Hafter MTD Affidavit) ¶¶ 5–6]) but inexplicably continues to allege that “Ms. Hafter rejected any offer of a Line Protection Plan,” (TAC ¶ 33). Furthermore, a handwriting expert has confirmed what Plaintiff Hafter already admits—that the signature on the LPP Confirmation Letter matches her undisputed signatures. [Exhibit A.] Despite being presented with her LPP protection election, Plaintiff Hafter continues to pursue baseless causes of action against BANA for fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent acts, breach of duty of good faith and fair dealing, and violation of the Truth in Lending Act. (TAC, *passim*.)

LEGAL AUTHORITY

The “central purpose” of Rule 11 is to deter baseless filings like the TAC. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990). As a result, by filing and serving the TAC, Plaintiffs’ counsel certified that pursuant to Rule 11(b)(2), the claims and legal contentions in that pleading were “warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.” Fed. R. Civ. P. 11(b)(2). There can be no good faith, nonfrivolous argument for modifications to the law where the current law “overwhelmingly” favors one position. *See Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir. 1987). “Put differently, a legal position violates Rule 11 if it has absolutely no chance of success under the existing precedent.” *Cox v. Saunders (In re Sargent)*, 136 F.3d 349, 352 (4th Cir. 1998) (quotation and citation omitted).

Rule 11(b)(3) requires that the Plaintiffs’ “factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.” Fed. R. Civ. P. 11(b)(3). “Factual allegations fail to satisfy Rule 11(b)(3) when they are ‘unsupported by any information obtained prior to filing.’” *Morris v. Wachovia Sec., Inc.*, 448 F.3d 268, 277 (4th Cir. 2006) (quoting *Brubaker*, 943 F.2d at 1373); *see also Toney v. LaSalle Bank, N.A.*, 896 F. Supp. 2d 455, 464 (D.S.C. 2012) (“Reasonableness of a filing party’s actions under Fed. R. Civ. P. 11 involves an objective inquiry into the prefiling investigation.”).

“If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.” Fed. R. Civ. P. 11(c)(1).

Monetary sanctions may be imposed against an attorney violating Rule 11(b)(2) and an attorney or party violating Rule 11(b)(3). Fed. R. Civ. P. 11(c)(4)–(5).

ARGUMENT

A. Plaintiff Hughes' fraud and fraudulent concealment claims in the TAC violate Rule 11(b)(2) and this Court should dismiss his causes of action against BANA and order his counsel to pay monetary sanctions.

Plaintiff Hughes affirmatively alleges that his father passed away in 2008 and his mother passed away in 2015. (TAC ¶¶ 14, 32.) Plaintiff Hughes also asserts that BANA “made false and material representations” relating to LPP coverage (fraud) or “in the alternative, Defendant BANA intentionally concealed the material facts that it enrolled Plaintiffs in [the LPP],” (fraudulent concealment). (*Id.* ¶¶ 58–64.) Finally, Plaintiff Hughes claims that he is entitled to damages, including punitive damages, as a result. (*Id.* ¶¶ 62, 69.)

While the South Carolina survivability statute generally allows that “causes of action for injuries to a person survive the death of the person,” *Ferguson v. Charleston Lincoln Mercury, Inc.*, 564 S.E.2d 94, 97 (S.C. 2002) (citing S.C. Code § 15-5-90), “[the South Carolina Supreme Court] has created certain exceptions to the survivability statute,” *id.* (citation omitted). “South Carolina case law has continued to recognize a common law exception [to the survivability statute] regarding causes of action for fraud or deceit.” *Id.*; see also *Brailsford v. Brailsford*, 669 S.E.2d 342, 345 (S.C. Ct. App. 2008) (“South Carolina . . . has long recognized several exceptions to the survivability of a claim, including an exception for fraud.”). The *Brailsford* court also catalogued the 70-plus year history of South Carolina Supreme Court rejecting the survivability of fraud-based claims. 669 S.E.2d at 345 (citing *Ferguson*, 564 S.E.2d at 97; *Pamlico Bank & Trust Co. v. Prosser*, 193 S.E.2d 539, 540 (S.C. 1972); *Brewer v.*

Graydon, 103 S.E.2d 767, 769 (S.C. 1958); *Mattison v. Palmetto State Life Ins. Co.*, 15 S.E.2d 117 (S.C. 1941)).

Despite ample and longstanding precedent, BANA's multiple motions to dismiss highlighting the authorities above, and his acknowledgment that his parents are deceased, Hughes has not abandoned his fraud and fraudulent concealment claims. Instead, Plaintiff Hughes, through his counsel, asks this Court to certify the fraud survivability question to the South Carolina Supreme Court and demand that it consider the issue yet again. [Doc. No. 28 at 23-24.] Plaintiff Hughes acknowledges in a footnote, however, that Rule 244 of the South Carolina Appellate Court permits certification *only* when there is no controlling precedent in the decisions of the South Carolina Supreme Court. [*Id.* at 23 n.1.] Thus, Plaintiff Hughes and his counsel continue to pursue claims that they admit are unwarranted by existing law and that they acknowledge have absolutely no chance of success under the existing precedent. *In re Sargent*, 136 F.2d at 352. This Court is therefore justified in imposing sanctions consisting of dismissal of Plaintiff Hughes' lawsuit and monetary sanctions against Plaintiff Hughes' counsel. Fed. R. Civ. P. 11(b)(2).

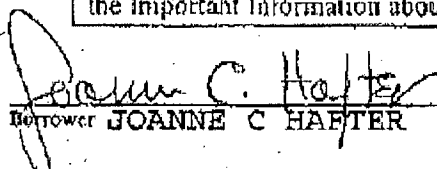
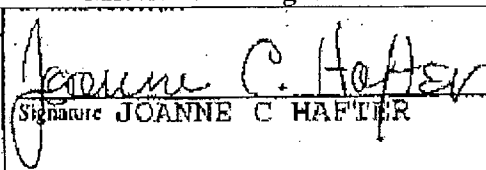
B. Plaintiff Hafter's causes of action against BANA in the TAC violate Rule 11(b)(3) and this Court should dismiss her causes of action against BANA and order both Plaintiff Hafter and her counsel to pay monetary sanctions.

According to the TAC, "[d]uring the closing of the Hafter Mortgage, Ms. Hafter rejected any offer of a Line Protection Plan or mortgage protection services and has never since authorized BANA to withdraw any funds for a Line Protection Plan or any other similar 'plan.'" (TAC ¶ 33.) A basic pre-suit investigation would have revealed that this allegation is inaccurate. Plaintiff Hafter and her counsel simply did not review, obtain, or request the LPP Confirmation Letter before making these baseless allegations against BANA. In short, in violation of Rule

11(b)(3), Plaintiff Hafter and her counsel made absolutely *no inquiry* into the veracity of Plaintiff Hafter's allegations stemming from a loan closing taking place in September 2008. *See Morris*, 448 F.3d at 277.

After receiving Plaintiffs' Amended Complaint that added Plaintiff Hafter, BANA voluntarily provided her executed LPP Confirmation Letter to Plaintiffs' counsel in an effort to obtain dismissal of Plaintiff Hafter's claims without unnecessary and expensive motions practice. [Doc. No. 18 at 2 n.1.] *Plaintiff does not dispute that the LPP Confirmation Letter contains her signature.* (TAC ¶ 38); [Doc. No. 18-2 (Hafter Affidavit) ¶ 5; Doc. No. 28-9 (Hafter MTD Affidavit) ¶¶ 5-6.]. However, despite BANA's good faith efforts and Plaintiff Hafter's acknowledgement that the LPP Confirmation Agreement contains her signature, Plaintiff Hafter continues to pursue her frivolous claims against BANA in violation of Rule 11(b)(3).

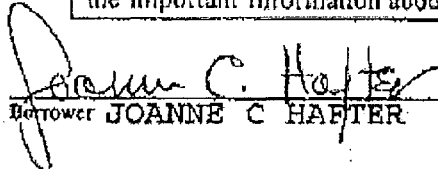
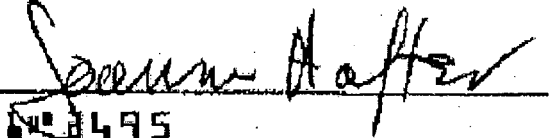
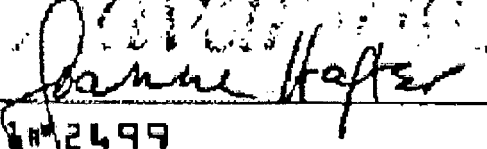
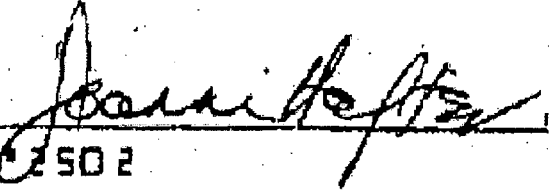
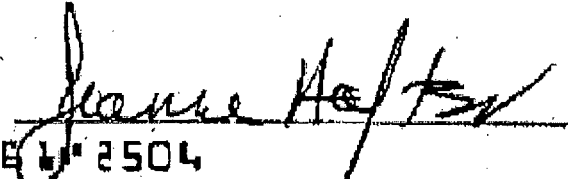
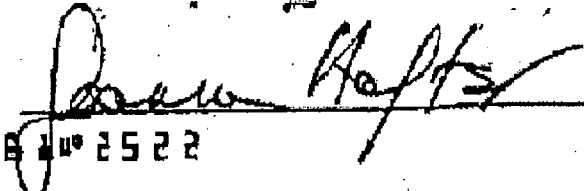
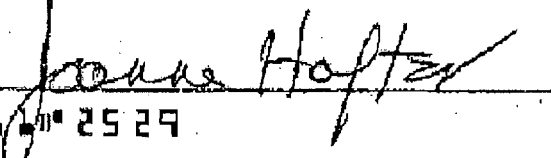
BANA has obtained a handwriting expert to confirm authorship of the signature on Plaintiff Hafter's LLP Confirmation Letter and that report is attached hereto. However, common authorship is apparent from a simple inspection of Hafter's other loan document signatures:

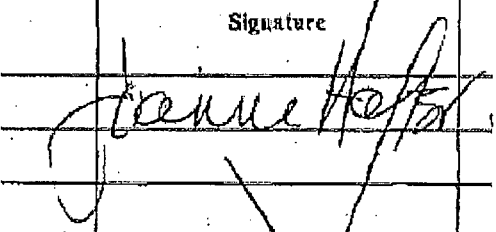
LPP Confirmation Letter	the Important Information about Bank of America  Borrower JOANNE C HAFTER Date 9-26-08
Loan Document Title	Ms. Hafter's Signature on Loan Document
Affiliated Business Arrangement Disclosure Statement	 Signature JOANNE C HAFTER Date 9-26-08
Notice of Insurance Requirements	 Borrower JOANNE C HAFTER Date 9-26-08

Payoff Letter	<u>Joanne C. Hafter</u> Borrower Signature
Choice of Attorney and Insurance Agent Notice	<u>Joanne C. Hafter</u> 9-26-08 Borrower JOANNE C HAFTER Date
Title Insurance Financial Interest Disclosure Form	<u>Joanne C. Hafter</u> 9-26-08 Applicant JOANNE C HAFTER Date
Acknowledgement of Receipt of Notice of Right to Cancel	<u>Joanne C. Hafter</u> JOANNE C HAFTER
Acknowledgement and Authorization	<u>Joanne C. Hafter</u> 9-26-08 Borrower JOANNE C HAFTER Date
HUD Settlement Statement	Buyer hereby acknowledges receipt of a completed copy of this statement & agrees to be a true copy Borrower <u>Joanne C. Hafter</u> JOANNE C. HAFTER
Mortgage	<u>Joanne C. Hafter</u> JOANNE C HAFTER

See Exhibit A, Signatures K1.1-K1.12 [Hafter Loan Documents].

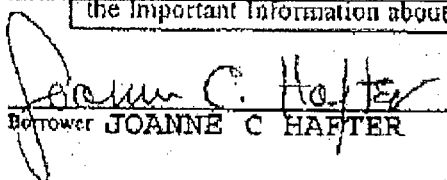
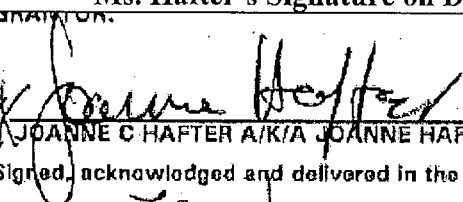
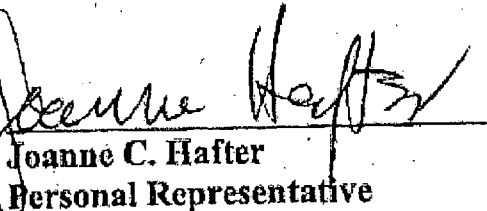
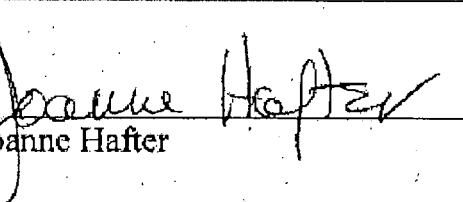
Ms. Hafter's signature on the LPP Confirmation Letter also matches documents associated with her checking account with Bank of America, N.A.:

LPP Confirmation Letter	the Important Information about Bank of America  Borrower JOANNE C HAFTER Date 9-26-08
Check Date	Ms. Hafter's Signature
12-19-2011	 E 1 2495
11-7-2012	 E 1 2499
2-1-2013	 E 1 2502
3-15-2013	 E 1 2504
2-25-2014	 E 1 2522
3-16-2015	 E 1 2529

Signature Card	Signature
	

See Exhibit A, Signatures K1.13–K1.42 [Hafter Checks and Signature Cards].

Finally, Plaintiff Hafter or her counsel could have electronically accessed the publicly-available Lexington County, South Carolina Register of Deeds database to compare the signature on the LPP Confirmation Letter with other documents¹:

LPP Confirmation Letter	 the Important Information about Bank of America Borrower JOANNE C HAFTER Date 9-26-08
Document Title	Ms. Hafter's Signature on Document
May 24, 2005 Mortgage for 324 White Falls Drive, Columbia, SC 29212	 JOANNE C HAFTER A/K/A JOANNE HAFTER Signed, acknowledged and delivered in the presence of:
July 15, 2005 Deed of Distribution	 Joanne C. Hafter Personal Representative
June 16, 2008 Power of Attorney	 Joanne Hafter

See Exhibit A, Signatures K1.1–K1.3 [Hafter Register of Deeds Documents].

¹ See <http://www.lex-co.sc.gov/online services/Pages/RODOnlineServices.aspx>.

Indeed, BANA's handwriting expert used these very signatures to confirm that they matched the author of the signature on the LPP Confirmation Letter. Before bringing this costly, frivolous litigation, however, Plaintiffs failed to determine if Plaintiff Hafter in fact elected LPP coverage. Upon receipt of the LPP Confirmation Letter from BANA, Plaintiffs and their counsel similarly failed to investigate the veracity of Plaintiff Hafter's allegations. In fact, Plaintiff Hafter and her counsel do not dispute that the signature on the LPP Confirmation Letter is Plaintiff Hafter's signature. Thus, even a basic investigation would have revealed that Plaintiff Hafter's claims were "unsupported by any information obtained prior to filing." *Morris*, 448 F.3d at 277. Given her election of LPP coverage, Plaintiff Hafter's claims are unsupported by the information obtained prior to filing her Complaint and prior to subsequent amendments, in violation of Rule 11(b)(3). *Morris v. Wachovia Sec., Inc.*, 448 F.3d 268, 277 (4th Cir. 2006). This Court is therefore justified in imposing sanctions consisting of dismissal of Plaintiff Hafter's lawsuit and monetary sanctions against both Plaintiff Hafter and her counsel.

CONCLUSION

Based on the meritless legal and factual allegations contained in the Third Amended Complaint, Bank of America, N.A. respectfully requests that this Court impose sanctions on Plaintiffs and their counsel, including the costs of defense of this action, dismissal of the TAC with prejudice, and such other relief as appropriate.

Dated: July __, 2016

Respectfully submitted,
BANK OF AMERICA, N.A.

By Counsel

Robert A. Muckenfuss, Esq.
Federal Bar # 7333
McGUIREWOODS LLP
201 North Tryon Street
Suite 3000
Charlotte, NC 28202-2146
(704) 343-2052 (Telephone)
(704) 444-8707 (Facsimile)
rmuckenfuss@mcguirewoods.com
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that on this ____ day of July, 2016, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the attorneys of record registered with the CM/ECF system. I further certify that a true and accurate copy of the foregoing was sent by U.S. Mail to the following:

D. Michael Kelly, Esq.
Brad D. Hewett, Esq.
Jamie N. Smith, Esq.
Mike Kelly Law Group, LLC
500 Taylor Street
Post Office Box 8113
Columbia, SC 29201
mkelly@mklawgroup.com
bhewett@mklawgroup.com
jsmith@mklawgroup.com

Attorneys for Plaintiff

Robert A. Muckenfuss

EXHIBIT B

1 STATE OF SOUTH CAROLINA) IN THE COURT OF
2) COMMON PLEAS
3 COUNTY OF SPARTANBURG) OF THE SEVENTH
4) JUDICIAL CIRCUIT
5)
6)
7 PHILLIP FRANCIS LUKE HUGHES,)
8 ON BEHALF OF THE ESTATE OF)
9 JANE K. HUGHES,)
10)
11 Plaintiff,) TRANSCRIPT OF RECORD
12) 2017-CP-42-02834
13 vs.)
14)
15 BANK OF AMERICA NATIONAL)
16 ASSOCIATION,)
17 Defendant.)
18)

February 22, 2018
Spartanburg, South Carolina

B E F O R E:

HONORABLE R. KEITH KELLY, Judge.

A P P E A R A N C E S:

BRADLEY DAVIS HEWITT, ESQUIRE
For Plaintiff

ROBERT A. MUCKENFUSS, ESQUIRE
For Defendant

ELIZABETH MARION ZWICKERT-TIMMERMANS, ESQUIRE
For Defendant

Julie A. Ashbrook,
Circuit Court Reporter
Seventh Judicial Circuit

1 those claims should be dismissed. And the fraud claim,
2 obviously, should be dismissed. They admit that in
3 terms of the prior precedent. And unless the Court has
4 any other questions, Your Honor.

5 THE COURT: No, sir, I think that's it.

6 Yes, sir.

7 MR. HEWITT: Your Honor, good morning.

8 THE COURT: Good morning.

9 MR. HEWITT: Brad Hewitt here for the estate of
10 Jane Hughes.

11 THE COURT: Yes, sir.

12 MR. HEWITT: And I'm certainly not one to recite
13 the full facts and procedural history, as the Court has
14 read the memorandums submitted to the court. And I
15 recognize there is controlling binding precedent on the
16 primary issues in this case, which are the fraud based
17 claims. That the lower court is handcuffed as to what
18 it can do based in part on a 1941 decision and does
19 state that those fraud claims when you die, die with
20 you.

21 There's a 2002 opinion as well. I think that's
22 the Ferguson case, which cited to Madison further for
23 the support that your fraud based claim simply cannot
24 continue on. We're one of seven states that hold that
25 fraud based claims die when the claimant dies.

1 And so I recognize this may be at this stage in
2 the proceeding an exercise of futility in terms of what
3 the Court can do on fraud based claims, but those claims
4 were not adjudicated at the federal level. Res judicata
5 nor collateral estoppel apply to forbid those claims
6 from going forward. We could not go forward with them,
7 but upon realizing that there was a disallowance based
8 in part on the Madison case, we withdrew the claims.

9 And they could not be certified back to the
10 Supreme Court by the Federal Court, so there was nothing
11 that the Federal Court could do, nor could we move
12 forward, so we withdrew them and chose in part the
13 proper course of action, which is to challenge the state
14 of the law through the Circuit Court and ultimately
15 through the appellate courts. That is the intention.

16 So I know where this case is going at this level
17 in terms of the fraudulent claims and we set forth the
18 policy reasons as to why we are endeavoring to do that.
19 I've committed to this family to see this case through.
20 You've seen through the procedural history where we have
21 unsuccessfully applied to the Fourth Circuit and the
22 United States Supreme Court to visit at least the TILA
23 claims and the breach of contract claims. But there was
24 no adjudication. There was no full and fair opportunity
25 to litigate the issues of fraud.

1 I'm inclined to concede the point on the
2 remaining stated four claims of the conversion and
3 breach of fiduciary duty, that they may be barred by
4 collateral estoppel and res judicata analysis. I would
5 tend to perhaps agree, but the crux of this case is to
6 challenge the state of the law on the fraud claims.

7 And so even if the Court -- and I don't mean to
8 try to make the Court's job any easier, as I understand
9 a dismissal is likely forthcoming. What my request
10 would be, Judge Kelly, is that an order of dismissal be
11 limited on the grounds that there is controlling
12 precedent in place that forbids the fraud based claims,
13 rather than founded on any statute of limitations
14 argument or collateral estoppel or res judicata
15 defenses. So I think that the order can be confined to
16 that ruling.

17 If the Court is so inclined to explore those
18 issues, I have made clear why we think they don't apply
19 in the memo, that they were not adjudicated. That there
20 were discovery inhibitions, procedural disadvantages.
21 That they were not fully and fairly explored. I think
22 that -- and I haven't seen much in the way of argument
23 that they were because they were withdrawn. There was
24 no discovery at those levels.

25 And so even beyond that, Judge, if you were

1 be founded on any statute of limitations, collateral
2 estoppel, res judicata type issues. For that matter,
3 the statute of limitations, according to this state
4 under *Johnston versus Bowing*, is an issue for the jury
5 to decide as to when the party knew or should have known
6 of the wrongdoing.

7 And so considering we're one of the few remaining
8 states that hold the way we do with fraud, any illusion
9 to this being sanctionable type conduct to me is far
10 fetched. You know, the way the law gets changed in
11 terms of common law is you challenge it.

12 So I think I would tend to agree that the
13 conversion claim, breach of fiduciary claims are
14 probably foreclosed and that we would forego those
15 claims. As to unfair trade, if there is -- and I may
16 have just missed this in the research. And it may be
17 clear in the legislation. If there's a case on point
18 where once you die, your unfair trade claim dies with
19 you, I would again concede the point that there's
20 controlling precedent. And this is being brought in a
21 represented capacity obviously.

22 And so the challenge in this case is to try to
23 change the stat of the law in South Carolina for fraud
24 based claims and this is the only way I know how to do
25 it. There was adjudication of these claims on the

EXHIBIT C

From: Brad Hewett <bhewett@mklawgroup.com>
Sent: Wednesday, March 21, 2018 3:39 PM
To: Muckenfuss, Robert A.
Cc: Timmermans, Elizabeth M. Z.
Subject: Re: Hughes

Suffice to say, we do not agree.

Sent from my iPhone

> On Mar 21, 2018, at 3:13 PM, Muckenfuss, Robert A. <RMuckenfuss@mcguirewoods.com> wrote:

>

> Brad,

>>

>> We are intending to file a motion for sanctions pursuant to SCRCP 11 and the South Carolina Frivolous Civil Proceedings Sanctions Act next week seeking attorneys' fees and costs associated with defending against the second Hughes matter. Should you agree to pay those costs and fees, we will not need to file the motion. Please advise whether you will agree to pay these fees and costs by Monday, 3/26.

>>

>> Robert

>>

>> McGuireWoods LLP

>>

>> _____

>> This e-mail from McGuireWoods may contain confidential or privileged information. If you are not the intended recipient, please advise by return e-mail and delete immediately without reading or forwarding to others.

EXHIBIT 2

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Court Judge

Case No.: 2017-CP-42-02834

Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes.....Appellant,
v.
Bank of America National Association.....Respondent.

NOTICE OF APPEAL

Pursuant to Rule 203 of the South Carolina Appellate Court Rules, Plaintiff Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes ("Appellant") hereby appeals the order of the Honorable R. Keith Kelly, dated March 19, 2018, granting the motion to dismiss on behalf of Respondent Bank of America National Association.

Copies of the order granting the motion to dismiss on behalf of Respondent are attached hereto and incorporated herein as Exhibit A.

Respectfully Submitted,

By: Brad D. Hewett
Brad D. Hewett
bhewett@mklawgroup.com
S.C. Bar No. 77924
D. Michael Kelly
mkelly@mklawgroup.com
Jamie Smith
jsmith@mklawgroup.com
Mike Kelly Law Group, LLC
500 Taylor Street
Columbia, SC 29201
(803) 726-0123

Attorneys for Appellant

March 26, 2018

Other Counsel of Record:

Robert A. Muckenfuss, Esq.
Elizabeth M. Timmermans, Esq.
McGuire Woods, LLP
201 North Tryon Street, Suite 3000
Charlotte, NC 28202-2146
Telephone: 704.343.2052
Counsel for Defendants/Respondents

cc: The Honorable Hope Blackley

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

PHILLIP FRANCIS LUKE)

HUGHES, on behalf of the Estate of)
Jane K. Hughes,)

Plaintiff,)

Civil Action No.: 2017- CP-42-02834

vs.)

BANK OF AMERICA NATIONAL)
ASSOCIATION)**BANK OF AMERICA, N.A.'S**
MEMORANDUM IN SUPPORT OF
MOTION FOR SANCTIONS

Defendant.)

After losing in federal court against defendant Bank of America, N.A. ("BANA") relating to charges associated with an insurance product, Plaintiff Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes ("Plaintiff") and his counsel Brad Hewett of the Mike Kelly Law Group, LLC ("Counsel"), sued BANA *again* in this lawsuit on nearly identical allegations, despite knowing the frivolous nature of their claims. This Court dismissed Plaintiff's complaint, holding that all of his claims are barred by the doctrine of *res judicata* and by the same three year statute of limitations previously applied by the federal court in the prior lawsuit. This Court also held that the fraud-based claims are barred by South Carolina's survival statute, claims that Plaintiff already brought in federal court and voluntarily dismissed after recognizing binding precedent barred his claims. Finally, this Court also held that Plaintiff's unfair trade practices claim is barred because the plain language of the statute does not allow such claims to be brought in a representative capacity. By proceeding with claims that they concede are barred on numerous grounds, Plaintiff and his Counsel violated Rule 11 of the South Carolina Rules of Civil Procedure ("Rule 11") and the South Carolina Frivolous Civil Proceedings Sanctions Act ("FCPSA"), S.C. Code Ann. § 15-

36-10, *et seq.* For these reasons, BANA seeks monetary sanctions against Plaintiff and Counsel to recover the costs of defending against Plaintiff's frivolous claims, yet again.

I. FACTS AND PROCEDURAL HISTORY

A. 2015: Plaintiff first pursues frivolous claims against BANA.

This is not Plaintiff's first time suing BANA relating to the insurance product at issue in this matter. In 2015, Plaintiff filed suit against BANA in this Court (in a representative capacity on behalf of his mother's estate), and asserted almost identical factual allegations as those made in this matter: that BANA charged Plaintiff's parents for a voluntary insurance product despite them declining the product at loan origination (the "2015 Lawsuit"). Plaintiff brought claims of fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent acts, breach of duty of good faith and fair dealing, and violation of the Truth in Lending Act ("TILA") in the 2015 Lawsuit. BANA removed the 2015 Lawsuit to the United States District Court for the State of South Carolina, Spartanburg Division on December 30, 2015 (Civil Action No. 7:15-cv-05083-MGL). (2015 Lawsuit, Dkt. No. 1.)

B. 2016: BANA moves to dismiss the 2015 Lawsuit and Plaintiff dismisses certain claims in response to Defendant's proposed Rule 11 Motion.

After Plaintiff amended his complaint three times, BANA moved to dismiss his Third Amended Complaint (the "TAC") on April 21, 2016. (*Id.*, Dkt. No. 25.) Plaintiff opposed BANA's motion on May 6, 2016, but he conceded that his breach of duty of good faith and fair dealing claim should be dismissed. (*Id.*, Dkt. No. 28.)

On June 28, 2016, BANA served Plaintiff and Counsel with a proposed Rule 11 motion because his fraud-based claims (fraud, fraudulent concealment, and breach of contract accompanied by fraudulent acts) did not survive the deaths of Plaintiff's parents. (*See* BANA's

Motion for Sanctions, Ex. 1, Affidavit of E. Timmermans ¶ 3.)¹ On August 23, 2016, before BANA filed its proposed Rule 11 motion, Plaintiff voluntarily dismissed his fraud-based claims in the 2015 Lawsuit. (2015 Lawsuit, Dkt. No. 31.)

C. 2017: Judge Lewis dismisses the 2015 Lawsuit and then Plaintiff quickly files the nearly identical 2017 Lawsuit in this Court.

On February 13, 2017, Judge Mary Geiger Lewis dismissed the 2015 Lawsuit, holding that Plaintiff's claims were barred by the one year statute of limitations under TILA and the three year statute of limitations for the breach of contract claim. The court also held that the doctrine of equitable tolling did not apply to save Plaintiff's untimely claims. (*Id.*, Dkt. No. 33.) On February 14, 2017, Plaintiff filed a notice of appeal to the Fourth Circuit Court of Appeals. *Hughes, on behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n*, 697 F. App'x 191, 193 (4th Cir. 2017).

On July 27, 2017, Plaintiff filed this lawsuit, again in a representative capacity on behalf of his mother's estate (the "2017 Lawsuit"). Plaintiff again alleged that BANA improperly charged his parents for the same unwanted insurance product, bringing claims for fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), breach of fiduciary duty, and conversion. Plaintiff also asserted a statutory survival cause of action in an effort to enforce his six substantive causes of actions. (2017 Lawsuit, Compl.) In his 2017 Lawsuit Complaint, Plaintiff omitted specific allegations relating to the timing of the insurance charges contained in his 2015 Lawsuit, presumably in an attempt to obscure the obvious statute of limitations issues the claims faced. (*Compare id. with* 2015 Lawsuit, Dkt. No. 23 ¶ 25) (alleging that the insurance product monthly charges began "on or about June 2006".)

¹ The proposed Rule 11 motion also sought sanctions against 2015 Lawsuit plaintiff Joanne Hafter relating to her forgery claims. Ms. Hafter is not a plaintiff in the current lawsuit.

On September 22, 2017, after a *de novo* review, the Fourth Circuit affirmed Judge Lewis's dismissal order in the 2015 Lawsuit and held that Plaintiff's claims relating to the insurance product were time-barred and not subject to equitable tolling. *Hughes, on behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n*, 697 F. App'x 191, 193 (4th Cir. 2017). Despite this decisive ruling by the Fourth Circuit, on November 21, 2017, Plaintiff served BANA with the 2017 Lawsuit Complaint. And subsequently, on December 11, 2017, Plaintiff petitioned the Supreme Court of the United States for a *writ of certiorari* with regard to dismissal of the 2015 Lawsuit. The Supreme Court of the United States denied Plaintiff's *writ* petition. *Hughes, on Behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n*, No. 17-884, 2018 WL 491558, at *1 (U.S. Jan. 22, 2018).

On December 21, 2017, BANA filed a motion to dismiss the 2017 Lawsuit, arguing that *res judicata* barred Plaintiff's claims, that Plaintiff's claims were all time barred under the three year statute of limitations period, that Plaintiff's fraud-based claims did not survive the deaths of his parents, and that the SCUTPA claims could not be brought by a plaintiff in a representative capacity ("2017 Motion to Dismiss").

D. 2018: This Court dismisses the 2017 Lawsuit.

On February 20, 2018, BANA filed its Memorandum in Support of the 2017 Motion to Dismiss, and on February 21, 2018, Plaintiff filed an opposition to BANA's 2017 Motion to Dismiss ("2017 Opposition"). In the 2017 Opposition, Plaintiff's Counsel admitted that he "previously filed an action in this Court in 2015 based upon the same facts that establish his claim for relief in the current action, and Plaintiff incorporate[d] those facts alleged in his current Complaint." (2017 Opposition at 1.) In the Opposition, Plaintiff and Counsel misrepresented the state of the black letter law barring Plaintiff's fraud-based claims when they argued that "the South Carolina Supreme Court has yet to revisit the *Mattison* rationale for the fraud exception." (*Id.* at

12) (referring to the *Mattison v. Palmetto State Life Ins. Co.*, 15 S.E.2d 117 (S.C. 1941) decision which acknowledged that fraud-based claims do not survive death). To the contrary, as set forth both in BANA's briefing in the 2015 Lawsuit and the 2017 Lawsuit, the South Carolina Supreme Court confirmed in 2002 that a fraud-based claim does not survive death in *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563-64, 564 S.E.2d 94, 97-98 (S.C. 2002) (and the South Carolina Court of Appeals reaffirmed the same in 2008 in *Brailsford v. Brailsford*, 380 S.C. 443, 449-450, 669 S.E.2d 342, 345 (S.C. Ct. App. 2008)). (See 2015 Lawsuit, Dkt. 25-1 at 12-13; 2015 Lawsuit, Dkt. 29 at 7-8; 2017 Motion to Dismiss Memorandum at 15-16).

On February 22, 2018, the Honorable Judge R. Keith Kelly heard oral argument on BANA's 2017 Motion to Dismiss. During that hearing, Plaintiff's counsel conceded that all of his claims were frivolous and that dismissal was "forthcoming" based on *res judicata* and *controlling precedent*:

I'm inclined to concede the point on the remaining stated four claims of the conversion and breach of fiduciary duty, that they may be barred by collateral estoppel and *res judicata* analysis. I would tend to perhaps agree, but the crux of this case is to challenge the state of the law on the fraud claims. And so even if the Court – and I don't mean to try to make the Court's job easier, as I understand a dismissal is likely forthcoming. What my request would be, Judge Kelly, is that an order of dismissal be limited on the grounds that there is controlling precedent in place that forbids the fraud based claims, rather than founded on any statute of limitations argument or collateral estoppel or *res judicata* defenses. So I think that the order can be confined to that ruling. . . . So I think I would tend to agree that the conversion claim, breach of fiduciary claims are probably foreclosed and that we would forego those claims.

(See Exhibit 1, Feb. 22, 2018 Hearing Transcript at 12:11-16, 17:12-15) (emphasis added.) Counsel also conceded: "And I recognize there is controlling binding precedent on the primary issues in this case, which are the fraud based claims." (*Id.* at 10:14-17) Counsel further admitted that Plaintiff had previously withdrawn his identical fraud claims in the 2015 Lawsuit, *knowing they could not be maintained by the estate*: "We could not go forward with [the fraud based claims],

but upon realizing that there was a disallowance based in part on the *Ma[t]t[ison]* case, we withdrew the claims.” (*Id.* at 11:6-8.) As to the SCUTPA claim, Counsel admitted he had not reviewed whether an estate could pursue a SCUTPA claim: “As to [SCUTPA], if there is – and I may have just missed this in the research. And it may be clear in the legislation. If there’s a case on point where once you die, your unfair trade claim dies with you, I would again concede the point that there’s controlling precedent. And this is being brought in a represented capacity obviously.” (*Id.* at 17:12-21.)

On March 20, 2018, Judge Kelly dismissed Plaintiff’s complaint holding that all claims were barred by *res judicata*, the same three year statute of limitations applied by the federal court in the 2015 Lawsuit barred all of Plaintiff’s claims in the 2017 Lawsuit, Plaintiff’s fraud claims did not survive the deaths of his parents, and that Plaintiff could not bring a SCUTPA claim in a representative capacity pursuant to S.C. Code Ann. § 39-5-140. (2017 Lawsuit, March 20, 2018 Order On Motion To Dismiss.) This Court acknowledged Plaintiff and Counsel’s clear knowledge of the identical nature of Plaintiff’s frivolous claims, and held:

Plaintiff’s Complaint involves the same parties and is based on the same transaction, same occurrence, and same issues (BANA’s allegedly wrongful charging of Plaintiff’s parents for the [line protection plan (“LPP”) insurance] product) that were previously litigated and adjudicated by the District Court. Plaintiff’s claims are therefore barred under the doctrine of *res judicata*. “*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties.” *Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (S.C. 1999); *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 190–92, 417 S.E.2d 569, 571 (S.C. 1992). “Under the doctrine of *res judicata*, [a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.”

Pursuant to the doctrine of *res judicata*, Plaintiff is barred from re-litigating his claims before this Court. First, in both this action and the 2015 Federal Action, Plaintiff sued Defendant BANA. Second, the subject matter of the two lawsuits is identical. Both lawsuits seek damages for the alleged injury resulting from BANA charging Plaintiff’s parents for the LPP product in connection with a 2006 loan.

Finally, Plaintiff's claims relating to the LPP product were already adjudicated in the 2015 Federal Action. In the 2015 Federal Action, the District Court held that Plaintiff's claims were time-barred under a three year statute of limitations. Here, all of Plaintiff's claims have a statute of limitations period of three years. Thus, if Plaintiff's claims were time-barred in 2015, his 2017 claims before this Court are likewise barred.

(2017 Lawsuit, March 20, 2018 Order On Motion To Dismiss at 4-5.)

This Court also applied the same three year statute of limitations as the federal court as another independent ground to dismiss Plaintiff's claims:

Statutory and common law set a three-year statute of limitations period for each of Plaintiff's claims Because Plaintiff alleged that his parents started receiving payment deductions from their account, and notice of said deductions on each monthly statement, beginning in June 2006, the statute of limitations on their potential claims ran in June 2009.

This Court agrees with the findings by the District Court and the Court of Appeals in the 2015 Federal Action that equitable tolling does not apply in this case. Mrs. Hughes was given actual notice of the alleged improper charges by both monthly charges being deducted from her account and the monthly bank and/or home equity loan statements identifying those charges. Plaintiff specifically alleges that "BANA withdrew a monthly charge of \$28.40 from the Hughes' BANA joint checking account beginning on or about June 2006" for his father's LPP coverage. (TAC ¶ 25.) Plaintiff also states that the LPP fee appeared on his parents' checking account statements. (Compl. ¶ 23.) The South Carolina Supreme Court has maintained that "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 117, 687 S.E.2d 29, 32 (S.C. 2009). "It has been observed that equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Id.* at 116. Here, because Plaintiff's parents received actual monthly notice of the charges being deducted from their account from 2006 to 2015, Plaintiff's allegations on the face of the complaint make clear that nothing was hidden from him.

(*Id.* at 8-10.)

After this Court's Dismissal Order was entered, on March 29, 2018, BANA filed its Motion for Sanctions pursuant to Rule 11 and the FCPSA. To date, BANA has incurred over \$70,000.00 worth of fees and costs expended in defense of the claims Plaintiff brought in the 2017 Lawsuit.

(See BANA's Motion for Sanctions, Ex. 1, Affidavit of E. Timmermans ¶ 31.)

On March 27, 2018, Plaintiff filed a notice of appeal with the South Carolina Court of Appeals, meaning BANA will continue to incur legal costs associated with Plaintiff's frivolous claims. (*See* Motion for Sanctions, Ex. 2, Plaintiff's Notice of Appeal)²

II. ARGUMENT

A. Rule 11 and the FCPSA Provide for Monetary Sanctions.

1. Rule 11 Standard

South Carolina's Rule 11 allows for the recovery of costs and fees for pleadings filed without good ground to support them:

Every pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. . . . If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, *or both*, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

S.C. R. Civ. P. 11(a) (emphasis added); *see also Ex parte Bon Secours St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 597, 713 S.E.2d 624, 628 (S.C. 2011) ("A trial court may impose sanctions on a party, a party's attorney, or both for filing a pleading, motion, or other paper to cause delay or when no good grounds exist to support the filing.")

Accordingly, under Rule 11(a), a party and/or the party's attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, for making frivolous arguments without proper investigation, or for filing a pleading in bad faith. *See, e.g., Ex parte Gregory*, 378 S.C. 430, 437–

² This court retains jurisdiction to consider BANA's Motion for Sanctions despite Plaintiff appealing this Court's order on BANA's Motion to Dismiss. *See* SCACR Rule 205; *see also Pee Dee Health Care v. Estate of Thompson*, 418 S.C. 557, 571, 795 S.E.2d 40, 48 (S.C. 2016) (rejecting argument that sanctions motion should not be filed until after conclusion of the appeal); *In re Beard*, 359 S.C. 351, 358, 597 S.E.2d 835, 838 (noting that "a motion for sanctions [under the FCPSA] must be filed within ten days of the notice of entry of judgment").

39, 663 S.E.2d 46, 50–51 (S.C. 2008) (“Under Rule 11(a), SCRPC, a party and/or the party’s attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments . . . [or] for filing a pleading, motion, or other paper in bad faith whether or not there is good ground to support it.”) “The sanction may include an order to pay the reasonable costs and attorney fees incurred by the party or parties defending against the frivolous action or action brought in bad faith, a reasonable fine to be paid to the court, or a directive of a nonmonetary nature designed to deter the party or the party’s attorney from bringing any future frivolous action or action in bad faith.” *Id.* at 437-38; *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990) (“Like the imposition of costs, attorney’s fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate.”)³

2. FCPSA Standard

Similarly, the FCPSA states that “[a]n attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for: (a) filing a frivolous pleading, motion, or document if . . . (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law. S.C. Code Ann. § 15-36-10(A)(4)(a)(ii). An attorney and party *shall* also be sanctioned under the

³ South Carolina’s Rule 11 is based upon the language of the pre-1983 Federal Rule 11, and thus federal law interpreting Rule 11 is relevant to this Court’s analysis. *Burns v. Universal Health Servs.*, 340 S.C. 509, 513, 532 S.E.2d 6, 9 (S.C. Ct. App. 2000); *see also* S.C. R. Civ. P. 11 Notes (“[South Carolina’s] Rule 11(a) is substantially the Federal Rule, with one addition, that the pleadings must be signed by the party or, if he has an attorney, by an attorney who practices in the State. Important as this change is, it is not as significant as the Rule itself, which eliminates the verification of pleadings and places on the lawyer who signs a pleading the duty of good faith in preparing the pleading. The lawyer may be disciplined if he violates this duty.”)

FCPSA if the court finds that: “(a) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law” or “(c) a reasonable attorney in the same circumstances would believe that the case or defense was frivolous as not reasonably founded in fact or was interposed merely for delay, or was merely brought for a purpose other than securing proper discovery, joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings are based.” S.C. Code Ann. § 15-36-10(C)(1)(a) and (c). Further, the South Carolina Supreme Court has held that “sanctions may be awarded under FCPSA regardless of whether or not the case has been tried to verdict so long as the trial court finds by a preponderance of the evidence that the party should be sanctioned under the terms of the Act.” *Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 153, 758 S.E.2d 483, 491 (S.C. 2014).

B. Plaintiff and Counsel Proceeding with the Duplicative 2017 Lawsuit Is Sanctionable.

This Court should sanction Plaintiff and his Counsel for actively (and repeatedly) pursuing claims barred by statutes of limitations, the doctrine of *res judicata*, the plain language South Carolina’s statutes, and binding legal precedent. Given the duplicative pleadings filed in this Court (and the district court), the omissions of facts in the pleadings, and Counsel’s own admissions and arguments at the February 2018 motion to dismiss hearing, there was no “good ground” to support any of Plaintiff’s allegations in the 2017 Complaint. There is more than a preponderance of evidence that Plaintiff and Plaintiff’s Counsel—yet again—advanced knowingly frivolous claims that had no chance of success given the facts, procedural history of the matter, and existing law.

1. Plaintiff and Counsel knew that the 2017 Lawsuit was barred by the statute of limitations and *res judicata*.

Where a Plaintiff or attorney pursues claims that they know to be time-barred, the claims are “groundless in law” and subject to Rule 11 sanctions. *Brubaker v. City of Richmond*, 943 F.2d 1363, 1372, 1385 (4th Cir. 1991) (“Where an attorney knows that a claim is time-barred and has no intention of seeking reversal of existing precedent, as here, he makes a claim groundless in law and is subject to Rule 11 sanctions.”) This is particularly true where a plaintiff’s prior efforts to pursue time barred claims were rejected by the federal court and subject to *res judicata*. Indeed, pursuing identical legal arguments that have already been rejected is itself an independent basis for sanctions. *Holmes v. E. Cooper Cmty. Hosp. Inc.*, 408 S.C. 138 (S.C. 2014) (“In our view, Judge Harrington was warranted in ordering sanctions [under the FCPSA] in this case, especially because Appellant, a licensed attorney, made identical legal arguments in the 2005 litigation and did not prevail on the merits.”); *Rutland v. Holler, Dennis, Corbett, Ormond & Garner*, 637 S.E.2d 316, 320 (S.C. Ct. App. 2006) (“A review of the record reveals that the lawsuit at issue alleged causes of action for the same complaint as the previous lawsuits, i.e., Rutland’s dissatisfaction with Corbett and his law firm. . . . In light of this unsuccessful procedural history, it is inconceivable that Rutland reasonably believed that his claims against Respondents were valid.”).

Plaintiff and Counsel knew that all of Plaintiff’s claims in this case were barred by the three year statute of limitations, which Judge Lewis and the Fourth Circuit had already applied to dismiss the 2015 Lawsuit. Unhappy with the outcome in federal court, they simply re-filed their dismissed allegations with this Court. Indeed, Plaintiff admitted that he “previously filed an action in this Court in 2015 based upon the same facts that establish his claim for relief” in the current action. (2017 Opposition at 1.) Thus, Plaintiff and Counsel already knew that Plaintiff’s claims were barred not only by the three year statute of limitations, but also by *res judicata*. In fact, Counsel admitted at the February 2018 motion to dismiss hearing that the claims were barred by *res*

judicata, and even volunteered to forego certain of the claims. (See Feb. 22, 2018 Hearing Transcript at 12:1-16, 17:12-15.)

At no point did Plaintiff or his Counsel even raise an argument for a change in the relevant law with regard to the statute of limitations or *res judicata*. Instead, Counsel merely asked the Court to dismiss certain of his frivolous claims on grounds other than *res judicata* or the statute of limitations to assist him with his appeal. (See Ex. 1, Transcript at 12:1-16, 16:23 - 17:2, 17:22-25). This Court declined and held that all of Plaintiff's claims were barred by *res judicata* and by the three year statute of limitations. (2017 Lawsuit, March 20, 2018 Order On Motion To Dismiss, at 4-6, 8-10). Because Plaintiff and his Counsel proceeded with claims that they knew to be time-barred and subject to *res judicata* based on prior rulings in the federal court (and that they appealed up to the Supreme Court of the United States), they should be sanctioned under Rule 11 and the FCPSA and pay BANA's costs for defending against the 2017 Lawsuit.

2. No good faith or reasonable argument exists for the extension, modification, or reversal of South Carolina's survival statute.

Even assuming that Plaintiff's fraud-based claims (fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, and SCUTPA) were not independently barred by the statute of limitations and *res judicata*, Plaintiff and Counsel have not established a good faith basis for the reversal of clear law barring these claims under South Carolina's survival statute. Plaintiff and Counsel concede that the fraud-based claims expired at the death of Plaintiff's parents based on "straight forward" South Carolina Supreme Court precedent from 2002 which analyzed and affirmed the fraud exception to the survival statute. (Feb. 22, 2018 Hearing Transcript at 16:3-10.) Specifically, during the oral argument on BANA's Motion to Dismiss, Counsel admitted:

And I recognize there is controlling binding precedent on the primary issues in this case, which are the fraud based claims. That the lower court is handcuffed as to what it can do based in part on a 1941 decision and does state that those fraud claims

when you die, die with you. There's a 2002 opinion as well. I think that's the *Ferguson* case, which cited to *Mat[t]ison* further for the support that your fraud based claim simply cannot continue on.

(*Id.* at 10:14-24.) Counsel also conceded that Plaintiff withdrew his fraud claims in the 2015 Federal Action (in response to BANA's Rule 11 Letter), knowing they could not be maintained by the estate, stating: "We could not go forward with [the fraud based claims], but upon realizing that there was a disallowance based in part on the *Mat[t]ison* case, we withdrew the claims." (*Id.* at 11:6-8.)⁴

In *Mattison*, the South Carolina Supreme Court analyzed the survival statute in detail, including analyzing the intent of the legislature in passing the 1932 version the statute that contains identical language to today's version. *Mattison v. Palmetto State Life Ins. Co.*, 15 S.E.2d 117 (S.C. 1941). The *Mattison* court noted that "[u]nder the common law there was no survival of actions in tort." *Id.* at 119. The Court determined that in creating the statute, the legislature only sought to create an exception to the common law and allow a cause of action to survive in two instances: "(1) For and in respect to any and all injuries and trespasses to and upon real estate, and (2) any and all injuries to the person or to personal property." *Id.* The Court concluded that "it is just as readily seen that respondent's second cause of action [for fraud and deceit] does not come within either of the instances where a cause of action survives" and dismissed those claims. *Id.*

The survival statute has since been renewed by the legislature without change three times in 1942, 1952, and 1962. See S.C. Code Ann. 15-5-90 Credits ("History: 1962 Code Section 10-209; 1952 Code Section 10-209; 1942 Code Section 419; 1932 Code Section 419; Civ. P. '22

⁴ Incredibly, in his Opposition briefing, Plaintiff represented to this Court that "the South Carolina Supreme Court has yet to revisit the *Mattison* rationale for the fraud 'exception,'" and that "there has been no discussion by South Carolina courts since 1941 on why fraud should be excepted from the survival statute." (Opposition at 12) (citing *Mattison v. Palmetto State Life Ins. Co.*, 15 S.E.2d 117 (S.C. 1941)). This representation was clearly false based on Counsel's own admissions at the motion to dismiss hearing.

Section 375; Civ. C. '12 Section 3963; Civ. C. '02 Section 2859; R.S. 2323; 1892 (21) 18; 1905 (24) 945.”) At no point did the legislature seek to expand the right of survival to include fraud-based claims. *See* S.C. Code Ann. 15-5-90 (allowing survival in only two situations: “Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative”) In 2002, the South Carolina Supreme Court affirmed that “South Carolina case law has continued to recognize a common law exception [to the survivability statute] regarding causes of action for fraud or deceit.” *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563-64, 564 S.E.2d 94, 97 (S.C. 2002) (also finding a fraud-based claim under SCUTPA to be “exempted from the general survival statute [and did] not survive the plaintiff’s death”); *see also Davis v. Life Care Centers of Am., Inc. et al*, Case No. 02-CP-10-3566, 2003 WL 25460625 (S.C. Ct. Comm. Pleas Mar. 28, 2003) (“SCUTPA does not survive the death of an alleged injured party.”).

More recently, in 2008, the South Carolina Court of Appeals again reaffirmed this longstanding exception to the survivability of a fraud claim. *Brailsford v. Brailsford*, 380 S.C. 443, 449-450, 669 S.E.2d 342, 345 (S.C. Ct. App. 2008) (“South Carolina . . . has long recognized several exceptions to the survivability of a claim, including an exception for fraud.”). The *Brailsford* court also catalogued the 70-plus year history of South Carolina Supreme Court rejecting the survivability of fraud-based claims. *See Brailsford*, 669 S.E.2d at 345 (citing *Ferguson*, 564 S.E.2d at 97; *Pamplico Bank & Trust Co. v. Prosser*, 193 S.E.2d 539, 540 (S.C. 1972); *Brewer v. Graydon*, 103 S.E.2d 767, 769 (S.C. 1958); *Mattison v. Palmetto State Life Ins. Co.*, 15 S.E.2d 117 (S.C. 1941)).

The history of South Carolina's survival statute and precedent analyzing that statute make clear that Plaintiff and Counsel have no good faith basis for seeking a modification of the statute. Indeed, that tort causes of action do not survive death was the rule and not the exception. The South Carolina legislature sought to allow two types of claims to be exceptions from the common law and has never sought to expand that exception to include fraud claims, despite numerous opportunities. The South Carolina courts do not have the power to rewrite the text of Section 15-5-90 to expand the statute to cover fraud-based claims. See S. C. Constitution, Art. I, §7. ("The power to suspend the laws shall be exercised *only* by the General Assembly or by its authority in particular cases expressly provided for by it.") Thus, Plaintiff cannot hope to use the court system to change the language of the survival statute in order to save his claims. Indeed, Counsel admitted during the March 2018 hearing that his arguments as to the fraud-based claims were "an exercise of futility" and that Plaintiff had previously dismissed these claims after acknowledging their futility. (Feb. 22, 2018 Hearing Transcript at 11:1-3.) ("And so I recognize this may be at this stage in the proceeding an exercise of futility in terms of what the Court can do on fraud based claims"); see also *id.* at 11:6-8 ("We could not go forward with [the fraud based claims in the 2015 Lawsuit], but upon realizing that there was a disallowance based in part on the *Mattison* case, we withdrew the claims."). This Court agreed that Plaintiff's fraud-based claims were futile and, after reviewing the *Mattison*, *Ferguson*, and *Brailsford* cases, held that "Plaintiff is barred from bringing fraud-related claims on behalf of his deceased mother under both the South Carolina's survivability and SCUTPA statutes." (2017 Lawsuit, March 20, 2018 Order On Motion To Dismiss, at 6).

A legal position is sanctionable if, like here, it "has absolutely no chance of success under the existing precedent." *Brubaker v. City of Richmond*, 943 F.2d 1363, 1372, 1373 (4th Cir. 1991).

(quoting *Cleveland Demolition Co. v. Azcon Scrap Corp.*, 827 F.2d 984, 988 (4th Cir. 1987)); see also *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir. 1987) (“We are left with the unavoidable conclusion that plaintiff’s counsel violated Rule 11 by filing the action below. The weight of existing law overwhelmingly favored the defendants, while the record appears devoid of any factual or legal investigation conducted by plaintiffs’ counsel as an effort to formulate an alternative argument in favor of his clients.”). Plaintiff’s filing of the 2017 Lawsuit despite knowing the frivolous nature of his fraud-based claims warrants sanctions on both Plaintiff and Counsel. See, e.g., *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 19, 633 S.E.2d 722, 728-729 (S.C. 2006) (“The trial court found that [Plaintiff] improperly continued the litigation of this case, even after she realized that the facts did not support her claims. Consequently, the court ordered [Plaintiff] to pay certain attorney’s fees and costs incurred from the point in the litigation that she should have realized the lawsuit was frivolous. We agree with the imposition of sanctions [pursuant to the FCPSA and Rule 11].”)

3. Plaintiff’s SCUTPA claim was also barred by the plain terms of the SCUTPA statute.

In addition to being frivolous based on *res judicata*, the statute of limitations, and the survival statute, Plaintiff’s SCUTPA claim is also frivolous for a *fourth* reason: the plain text of the statute bars claims brought in a representative capacity. As this Court noted in its Order on Motion to Dismiss:

The plain language of the SCUTPA statute does not allow for a representative of an estate, like Plaintiff, to maintain an action under the Act. SCUTPA clearly states:

Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action

individually, *but not in a representative capacity*, to recover actual damages.

S.C. Code Ann. § 39-5-140 (emphasis added). It is clear that “an unfair trade practices claim may not be brought in a representative capacity.” *Wogan v. Kunze*, 366 S.C. 583, 609, 623 S.E.2d 107, 121 (S.C. Ct. App. 2005), *aff’d as modified*, 379 S.C. 581, 666 S.E.2d 901 (S.C. 2008).

(2017 Lawsuit, March 20, 2018 Order On Motion To Dismiss, at 8). Thus, Plaintiff simply cannot pursue a SCUTPA claim against BANA in a representative capacity based on alleged injury to his parents.

Plaintiff’s defense to pursuing this frivolous SCUTPA claim despite this clear language is that his Counsel did not read the statute before suing BANA and seeking treble damages. Even after BANA briefed this issue in its 2017 Motion to Dismiss, Counsel still declared sanctionable ignorance at the hearing: “As to [SCUTPA], if there is – and I may have just missed this in the research. And it may be clear in the legislation. If there’s a case on point where once you die, your unfair trade claim dies with you, I would again concede the point that there’s controlling precedent. And this is being brought in a represented capacity obviously.” (See Feb. 22, 2018 Hearing Transcript at 17:12-21.)

Rule 11 mandates that “[t]he signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.” S.C. R. Civ. P. 11; *see Ex parte Gregory*, 378 S.C. at 437–39, 663 S.E.2d at 50–51 (S.C. 2008) (“[A]ppellant failed to properly investigate the matter prior to filing it, and that the action was frivolous.”); *Brubaker*, 943 F.2d at 1373 (“To be reasonable, the prefiling factual investigation must uncover some information to support the allegations in the complaint. A complaint containing allegations unsupported by any information obtained prior to filing violates the required

pre-filing factual investigation. That is, where there is no factual basis for a plaintiff's allegations, the complaint violates Rule 11's factual inquiry requirement. The pre-filing investigation must also uncover some basis in law to support the claims in the complaint."). Similarly, pursuant to the FCPSA, "a reasonable attorney in the same circumstances would believe that under the facts, [the SCUTPA claim] was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law." Here, simply reading the statute that Plaintiff proceeded under would have made clear to Plaintiff and Counsel that the SCUTPA claim was frivolous for yet another reason. As a result, Plaintiff and Counsel should be sanctioned pursuant to Rule 11 and the FCPSA.

C. BANA'S COSTS AND ATTORNEYS' FEES DEFENDING THIS ACTION SHOULD BE RECOVERED.

Rule 11 and the FCPSA both allow sanctions consisting of the reasonable costs and attorney's fees of the prevailing party. *See* S.C. Code Ann. § 15-36-10(G); *see Ex parte Bon Secours St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 600, 713 S.E. 2d 624, 629 (S.C. 2011) ("[T]he award to the other party of its detailed, itemized costs and fees incurred as a result of the improper [conduct] plainly is allowed under the express language of Rule 11, SCRCP); *Ex parte Gregory*, 378 S.C. 430, 437–38, (S.C. 2008); *Pee Dee Health Care, P.A. v. Estate of Thompson*, 418 S.C. 557, 567, 795 S.E.2d 40, 46 (S.C. Ct. App. 2016) ("The expenses opposing counsel incurs in combatting frivolous claims is an appropriate factor for a court to consider when determining whether to issue a monetary sanction."). BANA expended significant funds defending against the 2015 Lawsuit in federal court, where it prevailed on the merits. BANA has thus far expended over \$70,000.00 defending against this frivolous 2017 Lawsuit—prior to completing the briefing of this motion and briefing the appeal that Plaintiff has already filed. Plaintiff has refused to reimburse

BANA for its costs and fees. (See BANA's Motion for Sanctions, Ex. 1, Affidavit of E. Timmermans ¶¶ 5-6, 31.)

Here, BANA requests that this Court sanction Plaintiff and his Counsel for the improper conduct of filing a meritless Complaint unsupported by facts or existing law, on multiple grounds. BANA's counsel has incurred over \$70,000.00 in costs and fees thus far obtaining dismissal of Plaintiff's 2017 Lawsuit, including fees associated with briefing BANA's Motion to Dismiss, preparing the hearing on BANA's Motion to Dismiss, traveling to and attending the hearing on BANA's Motion to Dismiss, drafting the proposed order granting BANA's Motion to Dismiss, and drafting the Motion for Sanctions (but does not include the legal fees associated with briefing the motion). (See *id.* ¶ 31.)

III. CONCLUSION

Based on the meritless legal and factual allegations contained in the Complaint, Bank of America, N.A. respectfully requests that this Court impose sanctions on Plaintiff and Counsel for the costs and attorneys' fees expended to defend the 2017 State Action and such other relief as is just and reasonable.

This the 29th day of May 2018.

Respectfully submitted,

/s/Robert A. Muckenfuss

Robert A. Muckenfuss (S.C. Bar No. 13903)

McGUIREWOODS LLP

201 N. Tryon Street, Suite 3000

Charlotte, NC 28202

Telephone: (704) 343-2052

Fax: (704) 444-8707

RMuckenfuss@mcguirewoods.com

Elizabeth M.Z. Timmermans

(S.C. Bar No. 100288)

McGuireWoods LLP

434 Fayetteville St. Suite 2600

Raleigh, NC 27601

Telephone: (919) 755-6576

Eztimmermans@mcguirewoods.com

Attorneys for Defendant Bank of America, N.A.

CERTIFICATE OF SERVICE

I hereby certify that I have on this 29th day of May 2018, the foregoing BANK OF AMERICA, N.A.'S MEMORANDUM IN SUPPORT OF MOTIONS FOR SANCTIONS was electronically filed with the Clerk of the South Carolina Court using the E-Filing system, and has been served upon counsel by mailing a true and accurate copy with sufficient postage prepaid, and by electronic mail, to the following:

D. Michael Kelly, Esq.
Brad D. Hewett, Esq.
Jamie N. Smith, Esq.
MIKE KELLY LAW GROUP, LLC
500 Taylor Street
Post Office Box 8113
Columbia, SC 29201
mkelly@mklawgroup.com
bhewett@mklawgroup.com
jsmith@mklawgroup.com

Attorneys for Plaintiff

/s/ Robert A. Muckenfuss
Robert A. Muckenfuss

EXHIBIT 1

1 STATE OF SOUTH CAROLINA) IN THE COURT OF
 2) COMMON PLEAS
 3) OF THE SEVENTH
 4) JUDICIAL CIRCUIT
 5)
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 25)

PHILLIP FRANCIS LUKE HUGHES,
 ON BEHALF OF THE ESTATE OF
 JANE K. HUGHES,
 Plaintiff,
 vs.
 BANK OF AMERICA NATIONAL
 ASSOCIATION,
 Defendant.

TRANSCRIPT OF RECORD
 2017-CP-42-02834

February 22, 2018
 Spartanburg, South Carolina

B E F O R E:

HONORABLE R. KEITH KELLY, Judge.

A P P E A R A N C E S:

BRADLEY DAVIS HEWITT, ESQUIRE
 For Plaintiff

ROBERT A. MUCKENFUSS, ESQUIRE
 For Defendant

ELIZABETH MARION ZWICKERT-TIMMERMANS, ESQUIRE
 For Defendant

Julie A. Ashbrook,
 Circuit Court Reporter
 Seventh Judicial Circuit

I N D E X

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EXHIBITS

MARKED ENTERED

NO EXHIBITS PROFFERED

1 PHILLIP FRANCIS LUKE HUGHES VS. BANK OF AMERICA

2 THE COURT: Okay. The first matter is -- the
3 first matter is Phillip Francis Luke Hughes, the
4 Plaintiff, et al. versus Bank of America National
5 Association.

6 MR. HEWITT: Good morning, Your Honor.

7 MR. MUCKENFUSS: Good morning.

8 THE COURT: All right. I have read everything
9 that has been submitted.

10 MR. HEWITT: Thank you.

11 THE COURT: Yes, sir.

12 MR. MUCKENFUSS: Thank you, Your Honor. Robert
13 Muckenfuss and Elizabeth Zwickert-Timmermans for Bank of
14 America, Your Honor. This is our motion to dismiss.

15 I think the arguments in our motion are fairly
16 straight forward and I won't go through, Your Honor, I
17 know you've read the briefs. But essentially, this is
18 an identical case to a case that was filed previously in
19 2015 in state court, was removed to federal court. At
20 that time the federal court questioned jurisdiction.

21 I think in this case plaintiff's counsel doesn't
22 -- he admits it's an identical case in terms of the
23 facts and circumstances that are alleged. Essentially
24 it was a bank product line protection plans insurance.
25 And they were, in that case there was a punitive class

1 action that was asserted. That case ended up being
2 dismissed by Judge Lewis in federal court, essentially
3 pulling that the statute of limitations had run.

4 There were arguments about equitable tolling.
5 Judge Lewis rejected those arguments. That case was
6 appealed to the Fourth Circuit. The Fourth Circuit
7 issued a procuring opinion affirming Judge Lewis. Then
8 They sought it further to the U.S. Supreme Court and
9 that was denied.

10 In re-filing this case, it appears to survive res
11 judicata. And so I'm gonna break it down into two
12 pieces, Your Honor. There's the fraud claim, which I
13 think is a different issue. But first I just want to
14 deal with the res judicata issue. This is a classic
15 case of res judicata. No one disputes, the plaintiff
16 doesn't dispute that it's identical parties. It's the
17 same circumstances, facts that are alleged.

18 They're actually identical claims. They add, I
19 think added a couple of new claims out of the cause --
20 out of the case. One's breach of fiduciary duty. They
21 also reassert the fraud claim, but they still have a
22 breach of contract claim, breach of contract accompanied
23 by fraudulent inducement.

24 In terms of res judicata, it's the same claims.
25 It's claims they could have brought in the previous

1 case. And so for res judicata, as Your Honor I'm sure
2 is well aware, if there are, you know, the same or
3 similar facts and circumstances and those claims were
4 brought in the previous case or could have been brought
5 in the previous case under claim preclusion, they would
6 be barred in this case. They would also be barred under
7 an issue preclusion analysis.

8 So in the previous case Judge Lewis analyzed
9 equitable tolling of the statute of limitations. She
10 cited a South Carolina appellate case, a federal case,
11 in addition to Federal case law on the Fourth Circuit,
12 rejecting their equitable tolling argument, which was --
13 the argument was that there was a fraudulent concealment
14 of this charge for the line of protection plan.

15 Judge Lewis rejected that, stating that these
16 charges, you know, were on the statements from June of
17 2006 all the way up until it was refunded by the bank.
18 The Fourth Circuit affirmed that. So in terms of claim
19 preclusion and issue preclusion, all of those claims
20 asserted in this lawsuit would be barred and should be
21 dismissed.

22 Now, the fraud claim, it's somewhat
23 extraordinary, Your Honor, that -- so in the previous
24 case plaintiff's counsel realized that in South Carolina
25 fraud claims were an exception to the survivability

1 statute and, you know, claims that would survive death.)
2 And it's been the law in South Carolina since the 1940s
3 that claims that sounded fraud cannot be brought and yet
4 don't survive death..

5 Now, the plaintiff's counsel will voluntarily
6 dismiss that claim in the federal case acknowledging
7 that it's stated law in South Carolina. It appears what
8 they're trying to do, and to be honest, Your Honor, I
9 mean this lies close to a sanctionable type of
10 circumstance. We have not brought a motion for
11 sanctions, but plaintiff's counsel admits that he cannot
12 pursue a claim, a fraud claim. He justifies it by
13 simply stating that he is seeking to change the law to
14 have Supreme Court precedent overturned in South
15 Carolina.

16 That's, that's dangerous area. And, obviously I
17 think for, for plaintiff's counsel -- I think for
18 purposes of today in front of this Court, Your Honor,
19 from a constitutional standpoint for a trial court,
20 obviously you have no jurisdiction to overturn the prior
21 Supreme Court case.

22 And I would note in terms of the prior case law,
23 this is not just a 1941 case, the Madison case. This is
24 a 2002 Supreme Court case. So in 2002 the South
25 Carolina Supreme Court reaffirmed the rule in South

1 Carolina that fraud claims don't survive death. And in
2 2008 the Court of Appeals again affirmed the
3 long-standing rule in South Carolina that you can't
4 bring a fraud claim.

5 So I, honestly that claim has to be dismissed. I
6 think the plan for plaintiff's counsel is to appeal it
7 and try to argue in the Court of Appeals, ultimately the
8 Supreme Court that they should overturn prior precedent.
9 I think that's, that's an issue for the appellate courts
10 to deal with, not for the trial court. Now, for those
11 reasons the fraud claim should be dismissed, the other
12 claims should be dismissed in this case.

13 I would also finally, Your Honor, note for the
14 South Carolina Fair Trade Practices Act claim, again,
15 that, like the fraud claim, is clear in South Carolina.
16 And this is a statutory rule that you can't bring an
17 unfair trade practices claim in a representative
18 capacity. And that's in the statute. So the
19 plaintiff's counsel in that situation would have to, I
20 think, convince the general assembly to change the law.

21 So there are two causes of action in this case
22 that are clear on the face of -- and the Supreme Court
23 precedent in 2002 and also in the statute, that you
24 cannot bring those claims. In addition, the unfair
25 trade practices claim is based on fraud allegation, and

1 that would also be barred by the survivability exception
2 that we discussed before.

3 Attempts to distinguish the equitable tolling
4 issue, Your Honor, is a red herring. I think there's an
5 attempt by plaintiff's counsel to suggest that res
6 judicata shouldn't apply because the equitable tolling
7 analysis that Judge Lewis applied is different than what
8 is South Carolina court and that's absolutely not true.

9 If you look at the Fourth Circuit opinion, the
10 Fourth Circuit cites a number of cases that cite the
11 same type of standard South Carolina courts have
12 applied. In other words, you know, an extraordinary
13 circumstance acts that would prevent a plaintiff from
14 discovering. And I would note that the plaintiff
15 specifically alleged in the federal case that there was
16 fraudulent concealment and the Fourth Circuit noted
17 that.

18 So in a situation where they actually allege Bank
19 of America engaged in fraudulent concealment, they would
20 have to bring forth some evidence or some argument that
21 that was the case. They couldn't. Judge Lewis rejected
22 those arguments, and dismissed the case. So the Fourth
23 Circuit noted that. The standard in South Carolina is
24 no different.

25 So for that reason res judicata should apply,

1 those claims should be dismissed. And the fraud claim,
 2 obviously, should be dismissed. They admit that in
 3 terms of the prior precedent. And unless the Court has
 4 any other questions, Your Honor.

5 THE COURT: No, sir, I think that's it.

6 Yes, sir.

7 MR. HEWITT: Your Honor, good morning.

8 THE COURT: Good morning.

9 MR. HEWITT: Brad Hewitt here for the estate of
 10 Jane Hughes.

11 THE COURT: Yes, sir.

12 MR. HEWITT: And I'm certainly not one to recite
 13 the full facts and procedural history, as the Court has
 14 read the memorandums submitted to the court. And I
 15 recognize there is controlling binding precedent on the
 16 primary issues in this case, which are the fraud based
 17 claims. That the lower court is handcuffed as to what
 18 it can do based in part on a 1941 decision and does
 19 state that those fraud claims when you die, die with
 20 you.

21 There's a 2002 opinion as well. I think that's
 22 the Ferguson case, which cited to Madison further for
 23 the support that your fraud based claim simply cannot
 24 continue on. We're one of seven states that hold that
 25 fraud based claims die when the claimant dies.

1 And so I recognize this may be at this stage in
2 the proceeding an exercise of futility in terms of what
3 the Court can do on fraud based claims, but those claims
4 were not adjudicated at the federal level. Res judicata
5 nor collateral estoppel apply to forbid those claims
6 from going forward. We could not go forward with them,
7 but upon realizing that there was a disallowance based
8 in part on the Madison case, we withdrew the claims.

9 And they could not be certified back to the
10 Supreme Court by the Federal Court, so there was nothing
11 that the Federal Court could do, nor could we move
12 forward, so we withdrew them and chose in part the
13 proper course of action, which is to challenge the state
14 of the law through the Circuit Court and ultimately
15 through the appellate courts. That is the intention.

16 So I know where this case is going at this level
17 in terms of the fraudulent claims and we set forth the
18 policy reasons as to why we are endeavoring to do that.
19 I've committed to this family to see this case through.
20 You've seen through the procedural history where we have
21 unsuccessfully applied to the Fourth Circuit and the
22 United States Supreme Court to visit at least the TILA
23 claims and the breach of contract claims. But there was
24 no adjudication. There was no full and fair opportunity
25 to litigate the issues of fraud.

1 I'm inclined to concede the point on the
2 remaining stated four claims of the conversion and
3 breach of fiduciary duty, that they may be barred by
4 collateral estoppel and res judicata analysis. I would
5 tend to perhaps agree, but the crux of this case is to
6 challenge the state of the law on the fraud claims.

7 And so even if the Court -- and I don't mean to
8 try to make the Court's job any easier, as I understand
9 a dismissal is likely forthcoming. What my request
10 would be, Judge Kelly, is that an order of dismissal be
11 limited on the grounds that there is controlling
12 precedent in place that forbids the fraud based claims,
13 rather than founded on any statute of limitations
14 argument or collateral estoppel or res judicata
15 defenses. So I think that the order can be confined to
16 that ruling.

17 If the Court is so inclined to explore those
18 issues, I have made clear why we think they don't apply
19 in the memo, that they were not adjudicated. That there
20 were discovery inhibitions, procedural disadvantages.
21 That they were not fully and fairly explored. I think
22 that -- and I haven't seen much in the way of argument
23 that they were because they were withdrawn. There was
24 no discovery at those levels.

25 And so even beyond that, Judge, if you were

1 inclined to believe that res judicata and collateral
 2 estoppel may be in play, there are exceptions. The
 3 State has adopted the restatement of judgment. And
 4 provisions 27, 28 and 29 find that when you deal with
 5 interests of public policy and fundamental unfairness
 6 that the Court can refuse to apply collateral estoppel
 7 and res judicata.

8 And we've made clear through certain studies that
 9 we've cited about what is happening to senior citizens
 10 in this country in terms of exploitation and fraudulent
 11 schemes, that one in three -- over one in three senior
 12 citizens are subject to fraudulent exploitation and
 13 schemes. And the victims of that conduct -- and that
 14 it's costing the country over 36 billion dollars each
 15 year, that there are policy reasons in play. Not to
 16 mention, you have Jane and John Hughes, who were
 17 defrauded of several thousand dollars by Bank of
 18 America.

19 And just very quickly, although it's in the, the
 20 brief, the factual context for this entire case is a
 21 2006 transaction with Bank of America. Jane and John
 22 Hughes were 86 years old at the time. Owned their home
 23 outright and took out a line of credit with Bank of
 24 America. I don't know why. If they were sold a bill of
 25 goods or if they just needed money because they were

1 outliving their retirement. That's possible. They did
2 it.

3 And during that transaction, they were offered an
4 optional line of protection plan where if they died or
5 became disabled or unemployed, which they already were,
6 it might provide some assurance that they would not have
7 to make some of the monthly payments. They declined
8 that expressly. It's commemorated. They both signed
9 it, we don't want this product, we don't need this
10 product. They checked the box that we -- do not charge
11 us for it.

12 Soon after the closing, John Hughes died. And
13 Jane Hughes was diagnosed with dementia, a-typical
14 psychosis, cataracts, which required surgery and some
15 degree of blindness, renal insufficiency. She broke her
16 hip, went to a nursing home. Was noted to lack
17 decisional capacity. So she had a precipitous decline
18 in her mental condition and her physical condition.

19 She was unaware that she was ever being charged
20 by Bank of America. It was a \$28-a month charge. It
21 was buried in a nondescript, ambiguous line item charge
22 that didn't say anything about Bank of America. It was
23 an abbreviated insurance charge with some serial numbers
24 attached. She had no idea. She was in a nursing home,
25 in and out of hospitals.

1 What became known to the family was by way of a
2 letter from Bank of America in March of 2017, about
3 seven years after her husband had died, that we are
4 gonna stop charging you for this product, a product that
5 they had never signed up for. A family member got that
6 letter, did some due diligence, if you will, put two and
7 two together and quickly realized they had rejected it
8 and been absconded of several thousand dollars and then
9 came to see us and we filed suit shortly thereafter.

10 And so the Court knows the discovery rule in this
11 state for fraud is when they were aware of the
12 misconduct. And so for the purposes of the statute of
13 limitations argument, this case was timely filed. If
14 the Court were so inclined to find that it were not,
15 then that's where we go into a equitable estoppel
16 argument, that based on her condition she certainly had
17 no knowledge of the misconduct.

18 And what the Federal Court did, Judge Lewis, and
19 ultimately the Fourth Circuit, was they, they looked
20 into equitable estoppel. That was the, the thrust of
21 our argument. But they applied a federally created rule
22 that was more restrictive than what our court uses,
23 which is based in part on the Hooper case in 2009 which
24 looks at all the circumstances. There's no due
25 diligence requirement. And so it's to avoid technical

1 forfeitures and to allow trials on the merits. So it's
 2 a test, less restrictive.

3 And so I've said all that to say this, that I
 4 think that the decision for the Court is fairly straight
 5 forward on the fraud claims, and that we endeavor to
 6 change the law in this state, which has been a law,
 7 really a common law created since 1941 in a very
 8 different world when you didn't have to worry about
 9 certain types of identity theft, perhaps when people
 10 could trust their banks.

11 And as a relevant aside, I know these allegations
 12 made by the Hughes family are true. We've been
 13 approached by other families. It happened to me as a
 14 former Bank of America customer. Right about the same
 15 time, right when I get married and purchased my first
 16 house, we're financing through Bank of America and I
 17 found a few months after the closing I was getting
 18 charged for things I didn't sign up for.

19 Now, I had the physical and mental fortitude to
 20 address it with Bank of America right then and there.
 21 Ms. Hughes did not. And so that's the context as to why
 22 we're here.

23 And so I know what the Court decision will be in
 24 terms of the disposition. My hope is that it would be
 25 confined to controlling precedent and that it would not

1 be founded on any statute of limitations, collateral
2 estoppel, res judicata type issues. For that matter,
3 the statute of limitations, according to this state
4 under *Johnston versus Bowling*, is an issue for the jury
5 to decide as to when the party knew or should have known
6 of the wrongdoing.

7 And so considering we're one of the few remaining
8 states that hold the way we do with fraud, any illusion
9 to this being sanctionable type conduct to me is far
10 fetched. You know, the way the law gets changed in
11 terms of common law is you challenge it.

12 So I think I would tend to agree that the
13 conversion claim, breach of fiduciary claims are
14 probably foreclosed and that we would forego those
15 claims. As to unfair trade, if there is -- and I may
16 have just missed this in the research. And it may be
17 clear in the legislation. If there's a case on point
18 where once you die, your unfair trade claim dies with
19 you, I would again concede the point that there's
20 controlling precedent. And this is being brought in a
21 represented capacity obviously.

22 And so the challenge in this case is to try to
23 change the stat of the law in South Carolina for fraud
24 based claims and this is the only way I know how to do
25 it. There was adjudication of these claims on the

1 federal level, which is why we're here today.

2 So unless the Court has any questions, I do
3 appreciate your time.

4 THE COURT: No, I don't have any.

5 Anything?

6 MR. MUCKENFUSS: Very briefly, Your Honor. I
7 think it is appropriate for this Court to apply issue
8 preclusion in addition to the fact that there is no
9 claim in South Carolina for fraud post death. But it is
10 appropriate issue preclusion as to equitable estoppel
11 decision by the federal court would apply to all of
12 these claims.

13 That's different than claim preclusion, but the
14 federal court very specifically held that the plaintiffs
15 in this case, the plaintiffs in this case did not
16 exercise the due diligence that would be required. It's
17 cited in the South Carolina case that's on point for
18 that standard.

19 So there is not a different federal standard to
20 the standard that South Carolina courts will apply. So
21 we would ask that when the case is dismissed, that it's
22 dismissed on the fact that there's clear precedent,
23 obviously, you know, bringing these claims, in addition
24 to issue preclusion on the equitable estoppel, equitable
25 tolling argument that in addition -- that would be

1 applied to the fraud based claims, not just the non
2 fraud based claims. All of those claims would be
3 dismissed based on the fact that the court rejected the
4 equitable tolling argument by the plaintiffs. Thank
5 you, Your Honor.

6 THE COURT: Thank you. All right, gentlemen.
7 Watch your e-mail addresses and we'll get something to
8 you.

9 MR. MUCKENFUSS: Okay.

10 MR. HEWITT: Thank you, Your Honor.

11 MR. MUCKENFUSS: Thank you, Your Honor.

12 (Whereupon, hearing concluded at 9:19 a.m.)

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14 --- THIS ENDS REQUESTED TRANSCRIPT ---

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COURT REPORTER CERTIFICATE

I, the undersigned Julie A. Ashbrook, Court Reporter for the Seventh Judicial Circuit Court of the State of South Carolina, do hereby certify that to the best of my ability the foregoing is a true, accurate, and complete transcript of record of all the proceedings and evidence introduced in the hearing and/or trial of the captioned case, relative to appeal, in the Court of Common Pleas for Spartanburg County, South Carolina, on the 22nd day of February, 2018.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

s/Julie A Ashbrook
 Julie A. Ashbrook
 Circuit Court Reporter
 Seventh Judicial Circuit

Certificate of Electronic Notification

Recipients

Robert Muckenfuss - Notification transmitted on 05-29-2018 06:01:37 PM.

Bradley Hewett - Notification transmitted on 05-29-2018 06:01:37 PM.

Elizabeth Timmermans - Notification transmitted on 05-29-2018 06:01:37 PM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2017CP4202834

Official File Stamp: 05-29-2018 06:01:16 PM

Court: CIRCUIT COURT

Common Pleas

Spartanburg

Case Caption: Phillip Francis Luke Hughes , plaintiff, et al VS
Bank Of America National Association

Document(s) Submitted: Memo/Memo in Support

- Exhibit/Filing of Exhibits

Filed by or on behalf of: Robert A. Muckenfuss

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Robert A. Muckenfuss for Bank Of America
National Association

Elizabeth Marion Zwickert Timmermans for Bank
Of America National Association

Bradley Davis Hewett for Phillip Francis Luke
Hughes

The following people have not been served electronically by the Court. Therefore, they must
be served by traditional means:

On Behalf Of The Estate Of Jane K. Hughes

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	Civil Action No.: 2017-CP-42-02834
	)	
PHILLIP FRANCIS LUKE HUGHES, on	)	
behalf of the Estate of Jane K. Hughes,	)	
	)	PLAINTIFF'S MEMORANDUM IN
Plaintiff,	)	OPPOSITION OF DEFENDANT'S
	)	MOTION FOR SANCTIONS
vs.	)	
	)	
BANK OF AMERICA NATIONAL	)	
ASSOCIATION,	)	
	)	
Defendant.	)	
	)	

INTRODUCTION

Plaintiff Phillip Francis Luke Hughes, as personal representative of the Estate of Jane K. Hughes, respectfully submits the following Memorandum in Opposition of Defendant Bank of America National Association's ("BANA") Motion for Sanctions. The Court dismissed Plaintiff's underlying complaint pursuant to a motion to dismiss filed by BANA in lieu of an answer, and Plaintiff has since appealed that decision. Shortly after the Court granted Defendant's motion to dismiss, Defendant moved for sanctions under Rule 11, SCRCP and the South Carolina Frivolous Proceedings Sanctions Act. Because Plaintiff brought the action in good faith and presented reasonable grounds for modifying existing law, Defendant is not entitled to their requested attorney's fees and costs.

BANA's decision to seek sanctions against Plaintiff is audacious in light of Defendant's and defense counsel's own conduct throughout the course of this case and its sister District Court case. Defendant contends that Plaintiff engaged in sanctionable activity, a point that counsel for Defendant also raised during oral argument on BANA's motion to dismiss. Yet, a mere day before oral argument, defense counsel sent an unsolicited email to Plaintiff's counsel requesting a demand

in an attempt to settle the case. See, Ex. A, February 21, 2018 email from Robert Muckenfuss, Esq. Further, prior communications from opposing counsel contain repeated threats of Rule 11 sanctions and, in some instances, hostile and inappropriate remarks. See, Ex. B, March 11, 2016 email from Robert Muckenfuss, Esq; see also, Ex. A to Def. Mot. for Sanctions. All the while, BANA cannot, or refuses to, provide any documentation authorizing the account withdrawals that form the basis of this action, effectively conceding that it improperly withdrew charges account of an elderly couple.

BANA comes to this case with unclean hands, evidenced by its failure to provide any documentation that Mr. or Mrs. Hughes ever agreed to the charges, and when viewed in conjunction with BANA's payments of nearly \$58 billion in settlements and penalties for financial fraud as well as its liability in a recent South Carolina case for reprehensible conduct since defrauding the Hugheses. BANA's improper conduct in this State is nothing new, as the Court of Appeals upheld a sizeable punitive damages verdict against BANA in the years since it began defrauding Plaintiff, holding that BANA had engaged in reprehensible conduct sufficient to support the amount of punitive damages. See, *Cody P v. Bank of Am., N.A.*, 395 S.C. 611, 720 S.E.2d 473 (Ct. App. 2011) (holding that a \$1.5 million punitive damages award would act to deter BOA from reprehensible conduct and encourage the bank to better train its employees and implement more effective safeguards to protect customer's funds.)

BANA's decision to seek sanctions in this matter is even more ironic in light of its agreement to a \$16.65 billion settlement with the Department of Justice for financial fraud leading up to and during the financial crisis, including a \$5 billion penalty, just months before notifying the Hugheses that it was cancelling a product they had expressly declined. *Bank of America to Pay \$16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to*

and *During the Financial Crisis*, U.S. Dep't of Justice, Office of Public Affairs (August 21, 2014), <https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading>. In fact, Bank of America has paid nearly \$58 billion in fines, penalties, and restitution for financial misconduct since the 2008 financial crisis. John Schoen, *7 Years on from crisis, \$150 billion in bank fines and penalties*, CNBC (April 30, 2015), <https://www.cnbc.com/2015/04/30/7-years-on-from-crisis-150-billion-in-bank-fines-and-penalties.html>.

Now, Defendant seeks **\$70,000.00** in attorney's fees simply for filing an eight page motion to dismiss, arguing the motion, and preparing a proposed order. For the reasons set forth below, Plaintiff respectfully asks this court to deny Defendant's Motion for Sanctions.

STATEMENT OF FACTS

This case arose from fraudulent charges made by Defendant Bank of America National Association ("BANA") against the account of John and Jane Hughes beginning on or around June 2006. Defendant, between June 2006 and March 2015, illegally withdrew monies from the Hugheses' account for a mortgage insurance product that the couple expressly declined in writing at the loan closing. Each of Defendant's withdrawals was relatively small and the line-item descriptions of the transactions were opaque and did not identify the actual purpose of the charge. At the time the fraudulent transactions began, Mr. and Mrs. Hughes were 86 and 85 years old respectively.

John Hughes died in October 2008. Jane Hughes was then in poor health and after June 2006 suffered from, among other ailments, blindness and impaired cognition; she died June 3, 2015. Shortly before Mrs. Hughes passed away, BANA sent her a notice in March 2015 that the mortgage insurance plan was being cancelled, and she would no longer be charged for the product.

Defendant subsequently established that it had been charging the Hugheses' account for the declined mortgage insurance in John Hughes's name, although he had been deceased for over six years. Defendant refused to refund the money withdrawn between June 2006 and October 2008 or to provide any documentation that John Hughes ever elected to receive the insurance product.

Plaintiff Phillip Francis Luke Hughes filed the current survival action on behalf of the Estate of Jane K. Hughes on August 15, 2017, alleging fraud and other fraud-based causes of action. *See*, Ex. C, Pl.'s Compl. Plaintiff incorporates the facts of the complaint into the present memorandum.

Prior to initiating the present action, Plaintiff filed an action in the Spartanburg County Court of Common Pleas in 2015 based upon the facts and transaction that establish his claim for relief in the current action. Plaintiff's 2015 complaint was filed as a putative class action against BANA for violation of the Truth in Lending Act, Fraud, fraudulent concealment, breach of contract, and breach of contract accompanied by fraudulent Acts. BANA removed the 2015 action to federal court and filed a motion to dismiss in lieu of an answer. Before the District Court decided BANA's motion, Plaintiff stipulated to the dismissal, without prejudice, of all claims against BANA *except* breach of contract and violation of TILA. The District Court ultimately dismissed the breach of contract and TILA claims as untimely, and the Fourth Circuit Court of Appeals upheld that decision.

Plaintiff dismissed the fraud-based claims pending in the 2015 federal action and re-filed those claims¹ in his 2017 complaint because District Court lacked jurisdiction to decide a key issue related to those claims: whether existing precedent excluding fraud from the South Carolina

¹ The 2017 complaint also included claims for breach of fiduciary duty, conversion, and South Carolina Unfair Trade Practices, which were not included in the putative class action.

survival statute should be overturned. The question is one left to the State to decide under federal common law but, because South Carolina case law provides controlling precedent on the issue, the question could not be certified back to the South Carolina Supreme Court under Rule 244(a), SCACR.

On December 21, 2017, BANA moved to dismiss Plaintiff's 2017 complaint under the doctrines of *res judicata* and collateral estoppel, and the common law exception of fraud from S.C. Code Ann. § 15-5-90, South Carolina's survival statute. The Honorable R. Keith Kelly heard arguments by Appellant and Respondent on February 22, 2018, and subsequently granted Respondent's motion, finding the actions barred by *res judicata*, the statute of limitations, and S.C. Code Ann. § 15-5-90. On March 27, 2018, Plaintiff filed a timely Notice of Appeal, and currently appeals the Court's Order of Dismissal as it pertains to the question of the survivability of fraud and *res judicata* of Plaintiff's fraud-based claims. Two days later, Defendant moved for sanctions.

STANDARD OF REVIEW

Pursuant to Rule 11, SCRCP, the court, in its discretion, may award sanctions against a party and/or the party's attorney for filing a frivolous pleading, motion, or other paper making frivolous arguments; sanctions may also be appropriate where such filings are made in bad faith, even when there are good grounds to support the filing. *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008). The South Carolina Frivolous Civil Proceedings Sanctions Act further provides for the imposition of sanctions against a party and/or his attorney for frivolously filing papers or asserting arguments, as determined under a "reasonable attorney" standard. *Holmes v. East Cooper Community Hosp., Inc.*, 408 S.C. 138, 153, 758 S.E.2d 483, 491 (2014). Sanctions may be awarded under this section "so long as the trial court finds by a preponderance of the evidence" that a party or attorney should be sanctioned under the terms of the FCPSA. *Id.* The

provisions of the FCPSA do *not* apply, however, where an attorney establishes a basis to proceed with litigation, or to assert or controvert an issue therein, that is not frivolous, including a good faith argument for an extension, modification, or reversal of existing law. *Id.* (citing S.C. Code Ann. 15-36-10(J)).

Whether attorney's fees should be awarded under Rule 11, SCRCP, or under the FCPSA, is treated as a decision in equity. *Se. Site-Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 104, 713 S.E.2d 650, 653 (Ct. App. 2011). The trial court has discretion to award or deny sanctions under Rule 11 or the FCPSA, and will not be disturbed on appeal unless the conclusions reached by the lower court are without reasonable factual support. *Ex parte Gregory* at 438, 663 S.E.2d at 51.

ARGUMENT

Defendant BANA seeks an award of sanctions pursuant to Rule 11 and the FCPSA, including an exorbitant \$70,000.00 in attorney's fees and costs allegedly incurred for filing and arguing a motion to dismiss on the pleadings. Because Plaintiff filed the underlying action in good faith and with the support of a reasonable argument for a modification of existing common law, sanctions under these rules are not warranted. Indeed, awarding sanctions in this case would chill the reasonable pursuit of updated precedent and leave South Carolina case law permanently ossified. Moreover, even if this Court determines that Plaintiff and/or his counsel engaged in sanctionable conduct, an award of \$70,000.00 is unreasonable.

I. Neither Plaintiff nor Plaintiff's counsel acted in violation of any FCPSA provision and an imposition of sanctions thereunder is improper.

In order to impose sanctions against Plaintiff or his counsel under the FCPSA, the court must find, by a preponderance of the evidence, that the parties violated the FCPSA. *Holmes* at 152-153, 758 S.E.2d at 491. Defendant argues that, because the court ultimately determined that

Plaintiff's claims were barred by res judicata and binding legal precedent, the suit was frivolous and warrants sanctions. Def. Mot. for Sanctions, ¶ 30. In support, Defendant relied on a few, carefully selected facts crafted to create the impression that Plaintiff and his counsel filed a meritless lawsuit and that the parties knew the filing lacked merit. As set forth below, however, the picture painted by Defendant BANA is inaccurate. Indeed, viewing *all* of the facts relevant to the pending motion establishes that an imposition of sanctions against Plaintiff or his counsel is not warranted under a preponderance of the evidence.

a. Under the terms of the FCPSA, Plaintiff is not subject to court-imposed sanctions in the present case.

In its motion for sanctions, BANA cites to the FCPSA provisions codified at S.C. Code Ann. §§ 15-36-10(A)(4)(a)(ii) and 15-36-10(C)(1)(a), which both allow for sanctions in instances where “a reasonable attorney presented with the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law.” Def. Mot. for Sanctions, ¶¶ 28-29. Specifically, section 15-36-10(A)(4)(a)(ii) states that, where these circumstances are met, an attorney may be sanctioned under the Act. Section 15-36-10(C)(1)(a), on the other hand, provides that when a court finds the above circumstances to be satisfied, upon motion by a prevailing party, a non-prevailing party *shall* be sanctioned “[a]t the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by directed verdict, summary judgment, or judgment notwithstanding the verdict.”

As an initial matter, Plaintiff submits that because the underlying action was dismissed pursuant to a motion to dismiss filed by Defendant in lieu of an answer—not by verdict, directed verdict, summary judgment, or judgment notwithstanding the verdict—Defendant lacks standing

to seek sanctions under section 15-36-10(C)(1)(a). The Act's plain language clearly indicates when the provision applies, and omits actions concluded by a motion to dismiss. Due to the explicit language used in the statute, the omission must be construed as purposeful. *See Holmes* at 152-153, 758 S.E.2d at 491 ("When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning." (internal citations omitted)). Accordingly, the following analysis only addresses Defendant's motion for sanctions pursuant to S.C. Code Ann § 15-36-10(A)(4)(a)(ii). Unlike section 15-36-10(C)(1)(a), section 15-36-10(A)(4)(a)(ii) authorizes sanctions against an attorney or pro se litigant, but does not allow for sanctions against a party. *See*, S.C. Code Ann. § 15-36-10(A)(4)(a)(ii). Therefore Defendant's motion for sanctions against Phillip Hughes pursuant to the FCPSA is without legal basis.

b. Plaintiff's counsel asserted good faith, reasonable arguments in support of the underlying complaint and on appeal.

Defendant BANA's motion specifically seeks sanctions against Plaintiff and his counsel for asserting the fraud-based claims in the underlying action, arguing that "[l]awsuits where, like here, a plaintiff pursues claims barred both by res judicata and binding legal precedent are the exact sort of frivolous lawsuits warranting sanctions." Def. Mot. for Sanctions, ¶ 30. Contrary to this argument, however, Plaintiff and Plaintiff's counsel produced a sound argument, supported by extensive research, for the need to modify the fraud exception to the South Carolina survival statute, and set forth a well-supported, good faith and reasonable argument as to why res judicata does not bar the underlying claim from proceeding. *See*, Ex. D, Pl. Mem. in Opp'n of Def. Mot. to Dismiss. Both Plaintiff and his counsel stand behind the arguments asserted, to the extent that Plaintiff filed a Notice of Appeal challenging the Court's decision. *See*, Ex. E, Notice of Appeal.

Accordingly, Plaintiff has not violated S.C. Code Ann. § 15-36-10(A)(4)(a)(ii) or any other provision of the FCPSA.

i. *Argument for modifying the common law rule excepting fraud from S.C. Code Ann § 15-5-90*

Defendant suggests that, by filing the underlying complaint despite the common law rule that fraud does not survive death, Plaintiff and his counsel engaged in sanctionable activity. Def. Mot. for Sanctions, ¶¶ 22, 28-30. That simply is not the case, as evidenced by the language of the FCPSA. The provisions of the Act relied upon by Defendant anticipate challenges to existing precedent, and state that an attorney may be sanctioned when a reasonable attorney would believe that 1) his claim is not warranted under existing law; and 2) a good faith or reasonable argument did not exist for the *extension, modification, or reversal of existing law*. S.C. Code Ann. § 15-36-10(A)(4)(a)(ii). Plaintiff does not dispute that existing law bars fraud-based claims raised after a party's death. Plaintiff, however, raised a good faith, reasonable argument as to why the common law rule excepting fraud from the survival statute should be changed. *See*, Ex. D at 10-17. Plaintiff's argument is two-fold: 1) the exception is based upon a 1941 Supreme Court case, and the court has not since reconsidered the rationale supporting that decision; and 2) modern public policy considerations warrant reconsideration of the fraud exception. *Id.*

And at least a review of this hoary precedent is timely, if not overdue. The fraud exception to the survival statute stems from the South Carolina Supreme Court opinion in *Mattison v. Palmetto State Life Ins. Co.* 197 S.C. 256, 15 S.E.2d 117 (1941). The survival statute—both at the time of *Mattison* and today—provides that “any and all injuries to the person or to personal property” survive the death of a party. *Id.*; S.C. Code Ann § 15-5-90. The *Mattison* court held that fraud is neither an injury to the person nor to personal property, and thus does not survive under the language of the statute. *Id.* Although Defendant correctly argues that the Supreme Court

reaffirmed *Mattison* in 2002, as did the Court of Appeals in 2008, the cases *did not* revisit the rationale behind the *Mattison* decision. Rather, the cases Defendant cites to simply provide that fraud does not survive because *Mattison* created an exception to the statute. *See, Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564, 564 S.E.2d 94, 97 (2002) (citing to *Mattison* in holding that “South Carolina case law has continued to recognize a common law exception regarding causes of action for fraud”.); *see also, Brailsford v. Brailsford*, 380 S.C. 443, 449, 669 S.E.2d 342, 345 (S.C. App., 2008) (citing to *Mattison* in holding that “South Carolina . . . has long recognized several exceptions to the survivability of a claim, including an exception for fraud”).

Defendant’s motion suggests that the *Ferguson* and *Brailsford* opinions revisited the *Mattison* court’s rationale in support of the fraud exception. Def. Mot. for Sanctions, ¶¶ 19-20. These opinions, however, simply state that fraud *is* an exception to the survival statute; they do not articulate *why* fraud is an exception. The distinction is important because *Ferguson* states that fraud falls within the scope of the survival statute, but does not survive due to the *Mattison* exception. *Ferguson* at 563, 564 S.E.2d at 96 (“[t]he general survivability statute has a wide ambit that includes all causes of action not covered by specific exceptions”). *Mattison*, however, does not create an “exception” at all—it states that fraud falls outside the scope of the survival statute. *Mattison* at 256, 15 S.E.2d at 119 (deciding that fraud “does not come within either of the instances where a cause of action survives” under the statute). Looking closely at the two cases reveals a paradox in the *Ferguson* opinion: the *Ferguson* court opined that all causes of action—including fraud—fall within the scope of the survival statute, but reaffirmed *Mattison*’s holding that fraud does *not* fall within the scope of the survival statute. Plaintiff asserts that this inconsistency makes ripe for review the question of whether fraud falls within the scope of the survival statute and,

applying the more recent statutory interpretation set forth in *Ferguson*, fraud should survive under S.C. Code Ann § 15-5-90.

Plaintiff also presented public policy arguments in support of the modernization of the fraud exception to the survival statute. The most significant public policy consideration presented pertains to the susceptibility of elderly individuals to fraud. Ex. B at 13-14. Plaintiff offered the court data derived from recent studies showing that elderly people, like Jane and John Hughes, are a favorite target of fraudsters due to vulnerabilities caused, in part, by loss of cognitive functions. Id. at 14. Individuals with impaired cognition or a below-average memory are 78% more likely to be a victim of fraud, and approximately one in three American seniors fall victim to fraud in any five-year span. Id. at 13-14. This vulnerability is exacerbated by the speed and complexity of financial transactions and sophisticated technology not conceivable when *Mattison* was decided. In sum, Plaintiff challenged the fraud exception in the face of evidence that, as of 2015, fraud and financial exploitation cost America's seniors an estimated total of \$36.48 billion annually. Id. at 14.

Plaintiff takes the position that these facts become especially problematic when considered in conjunction with the South Carolina survival statute. South Carolina's seniors are losing enormous amounts of money to fraud, and the time that it takes to identify, investigate, report, and prosecute civil cases can take years and often exceeds the lifespan of the victims. The survival statute serves to prevent an estate from raising or continuing lawsuits against perpetrators of fraud upon the death of a victim, and many tactics used to defraud seniors do not rise to the level of criminal activity, leaving estates without legal recourse to hold perpetrators accountable. Id. at 14. Consequently, the statute creates an avenue for fraudsters to exploit seniors with little possibility of consequence which, in turn, arguably incentivizes fraudulent conduct.

The arguments presented by Plaintiff in support of the modification of the fraud exception to the survival statute were carefully considered and thoroughly explained. Not only are these good faith, reasonable arguments, they are persuasive even if ultimately rejected by the Supreme Court and, in part, form the basis of Plaintiff's appeal. Defendant's position that Plaintiff lacked a good faith or reasonable argument for modifying existing law is thus meritless, and rests on a contorted view of Plaintiff's position. In light of the foregoing, the by a preponderance of the evidence is *against* a finding that Plaintiff lacked a good faith or reasonable argument for changing existing precedent and so sanctions are not warranted under the FCPSA.

ii. *Argument against res judicata*

Defendant asked the court to penalize Plaintiff and his counsel under S.C. Code Ann. § 15-36-10(A)(4)(a)(ii) on the grounds that, in addition to being barred by existing law, the underlying claim is barred by *res judicata*. Plaintiff does not seek to change existing law surrounding the doctrine of *res judicata*, and he and his counsel filed the underlying complaint with the reasonable understanding and belief that the doctrine did not bar the claims asserted therein. A review of Plaintiff's Memorandum in Opposition of Defendant's Motion to Dismiss, and the transcript from the February 22, 2018 hearing on Defendant's Motion to Dismiss offer facts more than sufficient to support a finding that Plaintiff did not violate the FCPSA by filing the 2017 complaint. *See*, Ex. D at 3-10; Ex. F at 10-18.

The FCPSA provision under which Defendant seeks sanctions provides that the court may impose sanctions against an attorney for filing a pleading where "a reasonable attorney presented with the same circumstances would believe that under the facts, his claim or defense was *clearly* not warranted under existing law." S.C. Code Ann. § 15-36-10(A)(4)(a)(ii) (emphasis added). The Act does not hold a lawyer to a standard of brilliance in predicting the outcome of a case;

rather, it only requires a lawyer to be competent. *Se. Site Prep, LLC* at 104, 713 S.E.2d at 653. Plaintiff argues, and Defendant must agree, that a competent, reasonable attorney would not believe that the 2017 complaint was clearly not warranted under the doctrine of *res judicata*. During oral argument on Defendant's Motion to Dismiss, Defendant's own counsel Robert Muckenfuss prefaced his argument with an admission that "[i]n re-filing this case, it appears to survive *res judicata*. And so I'm gonna break it down into two pieces" Ex. F, Feb. 22, 2018 Hearing Transcript at 5: 10-12. This statement by defense counsel renders any subsequent argument that a reasonable attorney would believe Plaintiff's claim to be clearly not warranted under the doctrine of *res judicata* disingenuous.

Moreover, Plaintiff and Plaintiff's counsel had fair reason to believe that the court would not find the underlying complaint barred by claim preclusion. *Res judicata* prohibits a party from bringing a claim against a second party when that claim has already been, or could have been, litigated. In order to establish that a claim should be barred by *res judicata*, a party must show that the current claim involves 1) the same parties; 2) the same subject matter; and 3) an issue previously adjudicated in another suit. *Sealy v. Dodge*, 289 S.C. 543, 347 S.E.2d 504 (1986). Because Plaintiff's fraud-based claims were voluntarily dismissed without prejudice in the District Court proceeding prior to being re-filed in state court, these claims were not previously adjudicated and thus do not meet the third element of *res judicata*.

Moreover, while Plaintiff acknowledges that *res judicata* can also serve to bar "any issues which might have been raised in the former suit," the issue of whether fraud should continue to be exempted from the survival statute could *not* be adjudicated in the prior lawsuit. *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408, 414 (2011) (citing *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)). After Defendant removed the initial action to federal court,

the court exercised diversity jurisdiction over Plaintiff's state law claims which, pursuant to the *Erie* doctrine, must be decided under South Carolina substantive law. *See, Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Because *Mattison* is binding, substantive South Carolina law the federal court would be bound to by precedent to dismiss Plaintiff's claims of fraud. Furthermore, under South Carolina Appellate Court Rule 244(a), Plaintiff could not ask the District Court to certify the question of survivability back to the South Carolina Supreme Court, as the scope of certification extends only to questions of law for which there is no controlling precedent. *See* SCACR 244(a). Consequently, the District Court lacked any jurisdictional mechanism under which it might decide Plaintiff's challenge to the fraud exception to survivability. Thus, because the issue of survivability could not have been heard in the prior action, Plaintiff reasonably believed that the claims asserted in his 2017 complaint were not barred by the doctrine of *res judicata*.

In sum, Defendant's Motion for Sanctions lacks any discussion and offers no evidence to suggest that a reasonable attorney would believe that, in light of the facts and circumstances relevant to the issue of *res judicata*, Plaintiff's claims were clearly not warranted. On the contrary, counsel for Defendant previously admitted, on the record, that Plaintiff's 2017 complaint "seems to survive *res judicata*." Ex. F at 5: 10-12. Accordingly, there is no basis for sanctions under the FCPSA.

- c. This Court has already had the opportunity to consider Defendant's position and did not impose sanctions.

Finally, this Court was previously presented with the opportunity to consider the same conduct Defendant objects to herein and impose appropriate sanctions. Notably, the Court declined to award sanctions at that time, and it should do the same now.

The FCPSA allows the court, in its discretion, to initiate an action for sanctions under S.C. Code Ann. § 15-36-10(A)(4) absent any motion by a party. *See*, S.C. Code Ann. § 15-36-10(D) (specifying that the court or a party may propose sanctions under the Act). Before it filed the current Motion for Sanctions, counsel for Defendant raised the issues set forth in its motion to Judge Kelly at the February 22, 2018 hearing on Defendant's Motion to Dismiss. Ex. F at 7: 5-16. Attorney Robert Muckenfuss argued before the Court that, although Defendant had not moved for sanctions at that time, he believed that Plaintiff and his counsel entered "dangerous area" by re-filing the fraud claims in the 2017 complaint, and that the conduct came "close to a sanctionable type of circumstance." *Id.* Yet, Judge Kelly, who read both parties' briefs and heard oral argument on Defendant's motion and Plaintiff's rebuttal, declined to entertain counsel's accusations either at the hearing or in his Order of Dismissal. The fact that the Court did not take the initiative to sanction Plaintiff or otherwise reprimand him despite Defendant's argument indicates that Plaintiff's complaint did not, in fact, constitute a "sanctionable type of circumstance."

Now, Defendant once again proposes that Plaintiff and/or his counsel should be sanctioned for filing the 2017 complaint. Though the case was dismissed, the facts surrounding Plaintiff's decision to file the complaint remain unchanged. That the Court previously declined to sanction Plaintiff for the same filing creates a strong indication that the complaint did not violate the FCPSA. Accordingly, Plaintiff asks the court to deny Defendant's Motion for Sanctions.

II. Neither Plaintiff nor Plaintiff's counsel acted in violation of Rule 11, SCRCP and an imposition of sanctions thereunder is improper.

In addition to seeking sanctions under the FCPSA, Defendant moves this court for an award of sanctions pursuant to SCRCP Rule 11. Sanctions are available against a party under Rule 11 where a party files a frivolous pleading, motion, or other paper, or where a party files a pleading without good ground to support it. *Ex parte Gregory*, 378 S.C. at 437, 663 S.E.2d at 50; *Runyon*

v. *Wright*, 322 S.C. 15, 16, 471 S.E.2d 160, 161-162 (1996). The “criteria for Rule 11 sanctions are essentially the same as those for sanctions under the [FCPSA].” *In re Beard*, 359 S.C. 351, 360, 597 S.E.2d 835, 839 (Ct. App. 2004) (citing *The Father v. South Carolina Dep't of Soc. Servs.*, 345 S.C. 57, 72, 545 S.E.2d 523, 531 (Ct.App.2001)).

Plaintiff incorporates the arguments asserted in Section I, *infra*, herein, and maintains that neither Plaintiff nor Plaintiff’s counsel has engaged in conduct sanctionable under Rule 11. For the same reasons that sanctions are not warranted under the FCPSA, they are not warranted under Rule 11. Plaintiff and his counsel filed the 2017 complaint with good ground to support it and in good faith. Accordingly, Plaintiff respectfully asks this Court to deny Defendant’s Motion for Sanctions.

III. Defendant’s request for \$70,000.00 in attorney’s fees and costs is unreasonable.

Both Rule 11 and the FCPSA allow for an award of reasonable attorney’s fees and costs against parties found to have violated the respective rules. *See*, Rule 11, SCRCP; S.C. Code Ann. § 15-36-10(G)(1). In the present matter, Defendant seeks an award of \$70,000.00 in fees and costs incurred “briefing BANA’s Motion to Dismiss, preparing the hearing on BANA’s Motion to Dismiss, traveling to and attending the hearing on BANA’s Motion to Dismiss, drafting the proposed order granting BANA’s Motion to Dismiss, and drafting this Motion for Sanctions.” Def. Mot. for Sanctions, ¶ 31. BANA’s alleged amount of attorney’s fees and costs associated with filing two motions, and arguing one, is positively extortionate.

Should the Court decide to impose sanctions against Plaintiff and/or his counsel, Plaintiff would ask this Court to look to the context of the claim and relevant factors in determining an award of sanctions. *See*, S.C. Code Ann. § 15-36-10(E). This case was dismissed in its infancy, on a motion to dismiss filed by Defendant in lieu of an answer. The parties did not engage in

written discovery or take depositions, as the matter never graduated from the pleadings stage. Moreover, because the facts alleged in Plaintiff's 2017 complaint formed the basis of his 2015 complaint against BANA, Defendant and its counsel investigated and formed rebuttals to those allegations before Plaintiff ever filed the underlying action. Overall, the amount of work required of defense counsel to respond to Plaintiff's 2017 complaint does not support the alleged \$70,000.00 in attorney's fees and costs suggests otherwise. Defendant conveniently omitted documentary support for this figure, offering it only upon request by the Court and thereby depriving Plaintiff the opportunity to fully respond to its exorbitant request. Def. Mot. for Sanctions, ¶ 31. In light of these circumstances, and in the event the Court finds that sanctions are warranted, Plaintiff would respectfully ask this Court to impose a more appropriate penalty.

CONCLUSION

Defendant fails to offer evidence to support a finding that, by a preponderance of the evidence, filing Plaintiff's 2017 complaint constituted frivolous or sanctionable behavior. On the contrary, Plaintiff set forth well-supported, good faith grounds for filing the complaint and challenging existing precedent. Throughout the course of litigating the underlying case and its sister federal court case, Defendant has engaged in unsavory conduct in an effort to dispel Plaintiff's claims against it, and its Motion for Sanctions is yet another untenable ploy to accomplish just that. Plaintiff respectfully asks this Court to decline to penalize Plaintiff for reasonable conduct and to deny Defendant's Motion for Sanctions.

Respectfully Submitted,

MIKE KELLY LAW GROUP, LLC

By: s/ Brad D. Hewett

Brad D. Hewett
S.C. Bar No. 77924
bhewett@mklawgroup.com
D. Michael Kelly
mkelly@mklawgroup.com
500 Taylor Street
Post Office Box 8113
Columbia, South Carolina 29202
(803) 726-0123
(803) 252-7145
Attorneys for Plaintiff

May 30, 2018

Exhibit A

From: Muckenfuss, Robert A.
To: Brad Hewett
Subject: Hughes
Date: Wednesday, February 21, 2018 12:14:05 PM

Brad:

Prior to the hearing tomorrow, do you have a demand for settlement purposes? Just trying to see if we can resolve prior to the hearing.

Thanks,

R.

This e-mail from McGuireWoods may contain confidential or privileged information. If you are not the intended recipient, please advise by return e-mail and delete immediately without reading or forwarding to others.

Exhibit B

From: Muckenfuss, Robert A.
To: [Brad Hewett](#)
Subject: Re: Hughes v. BANA
Date: Friday, March 11, 2016 8:42:57 AM
Attachments: [image001.png](#)
[image003.png](#)
[image004.png](#)
[image004.png](#)
[image001.png](#)
[image001.png](#)
[image001.png](#)

When was the first time I "threatened" Rule 11? Trust me, I don't make threats and don't need to. It's fine if you want to play the "I'm a badass plaintiff's lawyer" routine. I see it all the time and I don't really care. Just send me the specific allegations and I'll let you know if my client consents.

On Mar 11, 2016, at 8:32 AM, Brad Hewett <bhewett@mklawgroup.com> wrote:

I will send you the proposed filing shortly.

This now the second time that you have threatened me with Rule 11 sanctions. In order to properly evaluate your threats, please specify what conduct you deem rises to the level of sanctions pursuant to Rule 11 in light of Ms. Hafter's position that she did not sign the documents so that we can address such issue in a civil manner.

As to your "warning," I investigated the issue and am comfortable that the signature was not put there by Ms. Hafter, but am pleased that you brought it to my attention. It appears that you are confusing your duty to your client with my duty to my client.



We're Here For The People Of South Carolina!

Brad Hewett
 Attorney
 500 Taylor Street, Ste 400, Columbia, SC 29201
 P.O. Box 8113, Columbia, SC 29202
 Office: 803.461.2154 Fax: 803.461.2173

<[image003.png](#)>



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From: Muckenfuss, Robert A. [mailto:RMuckenfuss@mcguirewoods.com]

Sent: Friday, March 11, 2016 8:08 AM

To: Brad Hewett <bhewett@mklawgroup.com>

Subject: Re: Hughes v. BANA

Plainly show me what your proposed amendment will be first. You generally state you're going to add additional allegations of fraud against the Bank but I want to see the allegations. You are in Rule 11 territory and so I want to see the specific allegations.

On Mar 11, 2016, at 8:04 AM, Brad Hewett <bhewett@mklawgroup.com> wrote:

Please plainly state whether you "consent" or "do not consent" to the Motion to Amend.

<image001.jpg>

Brad Hewett
Attorney
500 Taylor Street, Ste 400, Columbia, SC 29201
P.O. Box 8113, Columbia, SC 29202
Office: 803.461.2154 Fax: 803.461.2173

<image002.png> <image003.png>



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From: Muckenfuss, Robert A. [mailto:RMuckenfuss@mcguirewoods.com]

Sent: Thursday, March 10, 2016 8:07 PM

To: Brad Hewett <bhewett@mklawgroup.com>

Subject: Re: Hughes v. BANA

I gave you fair warning about this.

On Mar 10, 2016, at 4:23 PM, Brad Hewett <bhewett@mklawgroup.com> wrote:

Robert,

As we discussed, my client denies signing the agreement that you emailed to my office yesterday and will testify to that effect. Under these circumstances, we intend to amend the complaint to include further facts supporting our allegations of fraud. The remainder of the complaint will remain unchanged.

Please advise whether you can consent to the filing of a motion to amend the complaint as stated.

Thanks,

<[image001.jpg](#)>

Brad Hewett
Attorney
500 Taylor Street, Ste 400, Columbia, SC 29201
P.O. Box 8113, Columbia, SC 29202
Office: 803.461.2154 Fax: 803.461.2173

<[image002.png](#)> <[image003.png](#)>



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Exhibit C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	Civil Action No.: 2017-CP-42-_____
PHILLIP FRANCIS LUKE HUGHES, on	)	
behalf of the Estate of Jane K. Hughes,	)	
	)	
Plaintiff,	)	COMPLAINT
	)	(Jury Trial Demanded)
vs.	)	
	)	
BANK OF AMERICA NATIONAL	)	
ASSOCIATION,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff, on behalf of the Estate of Jane K. Hughes, would respectfully show unto the court as follows:

1. Plaintiff Phillip Hughes is the son of John P. Hughes, Sr. (Mr. Hughes) and Jane K. Hughes (Mrs. Hughes) and has standing to bring this claim after being appointed as Personal Representative of the Estate of Jane K. Hughes by the Spartanburg County Probate Court. Prior to her death, Mrs. Hughes was a citizen and resident of Spartanburg County, South Carolina.

2. Bank of America National Association ("BANA") is one of the world's largest financial institutions. Upon information and belief, BANA was at all times relevant to this Complaint a nationally-chartered bank, regulated by the Office of the Comptroller of the Currency, with its principal place of business in North Carolina.

3. That BANA, at all times relevant to this Complaint, was licensed to conduct business in the State of South Carolina and engaged in the business of providing financial services to consumers.

4. The parties to this action and the acts and omissions complained of herein are subject to the jurisdiction of this Court, and venue is proper. Moreover, this is a survival action brought pursuant to South Carolina Code Ann. § 15-5-90, et seq., for financial injuries and damages to Decedent Jane K. Hughes.

FACTUAL ALLEGATIONS

5. At all relevant times, BANA and its agents marketed a purportedly optional financial product promising “mortgage protection” to its clients, including its “Line Protection Plan” (“LPP”). LPP is essentially a specialized insurance limited to paying portions of a mortgage payment under specific conditions, such as unemployment, disability, or accidental death. Such plans are marketed, usually at the time of closing, as an *optional* protection. A “mortgage protection” plan is *not* “Private Mortgage Insurance” (widely referred to as “PMI”), which is *required* by lenders to protect a mortgagee in case of default by a mortgagor.

6. BANA, and other companies, market mortgage protection plans because they are profitable. This profitability resulted in such abuses of unsophisticated customers that Congress established explicit disclosure and authorization requirements to protect citizens from being duped into unknowingly paying for unwanted mortgage protection plans. *See, e.g.*, 15 U.S.C. §§ 1604, 1637(c)(5), 1639(l); 12 C.F.R. § 226.4.

7. On June 13, 2006, Mr. and Mrs. Hughes opened a line of credit from BANA in the amount of \$120,000.00, secured by a mortgage (“Mortgage”) on their Spartanburg County homestead. The line of credit is governed by a document entitled “Bank of America Maximizer Agreement and Disclosure Statement” (“Agreement”) signed by both borrowers on June 13, 2006.

8. At the same time, Mr. and Mrs. Hughes signed an acknowledgement and authorization (“Authorization”) which allowed BANA to automatically draft loan payments from

the Hughes's BANA bank account.

9. During the meeting to complete the Mortgage transaction, BANA presented Mr. and Mrs. Hughes with a document entitled "Optional Line Protection Plan Addendum ("Addendum")." As stated on the form, the "Line Protection Plan only provides protection on the variable portion of your credit line" and "This Product is Optional." If elected, the Line Protection Plan allowed the cancellation of all or some monthly loan payments in the event of disability, accidental death, or involuntary unemployment. At the time that BANA presented the plan to the Hughes, LPP offered six protection options, with the monthly fee ranging in cost from 4.5% to 13.5% of the minimum monthly payment on the borrowers' credit line.

10. The Agreement explicitly stated that the borrowers "must specifically request" the Line Protection Plan.

11. Mr. and Mrs. Hughes both signed a two-page document captioned "OPTIONAL LINE PROTECTION PLAN ADDENDUM ("ADDENDUM")" which stated that BANA provided them with information on the Line Protection Plan. The Hughes designated their election to decline the purportedly optional Line Protection Plan by clearly and conspicuously checking a box next to the "DECLINE to purchase any Protection on this Credit Line" option. See attached Exhibit A (OPTIONAL LINE PROTECTION PLAN ADDENDUM dated June 13, 2006).

12. In June 2006, Mr. Hughes was age 86. Mrs. Hughes was age 85 in June 2006 and underwent major heart surgery, suffered from dementia, and experienced vision impairments, including cataracts and eye surgery, from June 2006 until her death. Mrs. Hughes also suffered a broken hip after June 2006 that required hospitalization and extensive rehabilitation at White Oak Manor Nursing Home in Spartanburg, South Carolina. Mrs. Hughes was diagnosed with impaired cognition and mobility, atypical psychosis, confusion, blindness, renal insufficiency, heart failure,

and was noted to lack decisional capacity in the years subsequent to June 2006.

13. John P. Hughes died on October 22, 2008. Mr. Hughes left his estate to his wife Jane K. Hughes.

14. Over six years after Mr. Hughes's death, on or around March 17, 2015, BANA sent a boilerplate form cancellation notice addressed to the Mr. and Mrs. Hughes, informing them that "The Line Protection Plan would be cancelled on September 30, 2015," and that "You're no longer being charged for the Protection Plan as of April 1, 2015." The notice also indicated that John P. Hughes was a "protected" borrower.

15. Curiously, the BANA notice to the Hughes also stated that "Going forward, any payments that would have previously been applied to Protection Plan fees will be applied to other amounts owed as described in your loan documents, unless refunded to you. If we apply the payment to other amounts owed and you later determined that you mistakenly paid Protection Plan fees and prefer to have a refund of these amounts, please contact us at 1.866.731.4210."

16. Although Mr. and Mrs. Hughes never elected to purchase any "Protection Plan," BANA sent a second letter dated March 25, 2015, stating that Mr. Hughes had selected "6 month, Involuntary Unemployment, Disability, Accidental Death and Hospitalization" protection at a monthly rate of 9.5% of the Hughes' Minimum Monthly Payment. *See* attached Exhibit B.

17. In response to inquiry from Mrs. Hughes, BANA stated in a May 6, 2015 letter that "The Line Protection Plan (Plan) addendum for your Bank of America loan ending in 4699 is enclosed, per your request, and enclosed an eight-page document entitled "OPTIONAL LINE PROTECTION PLAN ADDENDUM ("ADDENDUM")." *See* attached Exhibit C.

18. The eight-page "ADDENDUM" provided by BANA in May 2015 is not the two-page "ADDENDUM" signed by Mr. and Mrs. Hughes in 2006, and does not contain or provide

for signatures or a place for election or rejection of the "protection."

19. In any event, BANA did not provide the eight-page addendum to Mr. or Mrs. Hughes before May 2015.

20. The Line Protection Plan premium did not appear on the mortgage finance charge disclosed to Mr. and Mrs. Hughes in 2006.

21. Before March 2015, BANA did not provide any statement, notice, or communication of any sort to Mrs. Hughes revealing that BANA believed that the Hughes's had elected any "Protection Plan" or that an amount was to or was being charged to them for such a plan.

22. To date, Plaintiff has been unable to locate, and BANA has been unable to provide, any documentation that Mr. or Mrs. Hughes ever elected or agreed to pay for any "Protective Plan" coverage of any sort.

23. Despite having declined to purchase the Line Protection Plan, BANA withdrew a monthly charge of \$28.40 from the Hughes's BANA joint checking account for several years. This charge was ambiguously listed as "Ad Insurance Des:XXXXXX4374 ID: 6 R# XXXXXXXX1070 Indn: Hughes Sr, John P Co ID:XXXXXX4660 Ppd" and appeared amid numerous other monthly charges.

24. All other charges from BANA or its subsidiaries appearing on the Hughes's bank statements during the relevant period were clearly designated as transactions with "Bank of America" or "BkofAmerica" and other insurance transactions were clearly identified with the name of the charging company (i.e., "Patrons Mutual," "Travelers Insur").

25. In addition, none of the numbers in the Line Protection Plan transaction description were related to the Hughes's BANA mortgage or line of credit.

26. As neither Mr. or Mrs. Hughes had elected Line Protection Plan coverage or had received any notice that BANA had issued such a plan to them, they were not expecting to be charged for any such service and they did not have any reason to expect that "Ad Insurance Des:XXXXXX4374 ID: R# XXXXXXXX1070 Indn: Hughes Sr, John P Co ID:XXXXXX4660 Ppd" was a BANA charge generally or a "Line Protection Plan" charge specifically until receiving the March 2015 BANA notices.

27. Upon receiving notice of Mr. Hughes's death, on May 6, 2015, BANA declined coverage under the Line Protection Plan on the grounds that "[t]he death was the result of disease or treatment of disease or any medical treatment (and/or was not for the treatment of an accidental injury)."

28. BANA refused and continues to refuse to refund the payments drawn during Mr. Hughes's lifetime.

29. On June 3, 2015, Jane K. Hughes passed away, and Plaintiff was subsequently named as personal representative of her estate.

AS A FIRST CAUSE OF ACTION
(Fraud)

30. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

31. Defendant BANA made the following false and material representations and engaged in the following fraudulent conduct, among others alleged herein:

- a. BANA, with knowledge of the falsity or reckless disregard for the truth of its representation, represented to Mr. and Mrs. Hughes that BANA would draft funds from their account solely for monthly loan payments; and
- b. Through its agreements with Mr. and Mrs. Hughes, BANA represented, with knowledge of the falsity or reckless disregard for the truth of its representation that

the Line Protection Plan was optional coverage that would only be added to the Hughes's credit line and home equity loan with their consent.

32. BANA made these representations to the Hughes's with the intent that they be induced to enter into the Agreement with BANA and sign the Authorization to grant BANA access to their account for purposes of drafting funds.

33. The Hughes's had no knowledge of the falsity of BANA's representations and had the right to rely on those representations. Mrs. Hughes used reasonable prudence and diligence by documenting in writing their decision to decline LPP coverage.

34. Decedent Jane Hughes relied on BANA's representations to her detriment, resulting in consequent and proximate injury in that BANA thereafter wrongly used its automatic drafting capability to improperly deduct payments from Hughes's financial account to pay for the Line Protection Plan without their knowledge and despite their rejection of that plan.

35. Due to the fraudulent nature of BANA's actions, BANA is liable for punitive damages. Decedent Jane Hughes and Plaintiff suffered pecuniary loss, actual damages, and consequential damages as a result of Defendant's fraudulent conduct.

FOR A SECOND CAUSE OF ACTION
(Fraudulent Concealment)

36. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

37. Pleading in the alternative, Defendant BANA intentionally concealed the material facts that it enrolled the Hughes's in the Line Protection Plan by not providing any notice to them of the enrollment.

38. Defendant BANA wrongly withdrew monthly payments for the Line Protection Plan from the Hughes's account under the confusing and non-descript transaction of "Ad Insurance

Des:XXXXXX4374 ID: R# XXXXXXXX1070 Indn:Hughes Sr, John P Co 14 ID:XXXXXX4660
Ppd" with the intention that the Hughes's not identify the true nature of the transaction.

39. Because the Hughes's entrusted BANA with authorization to draft monies from their account, and expressly reposed a trust in confidence in BANA with respect to automatic drafting transactions, BANA had a duty to disclose to Mr. and Mrs. Hughes that it unilaterally enrolled them in the Line Protection Program and that BANA was withdrawing payments which were not authorized by the borrowers.

40. Alternatively, BANA had a duty to disclose the withdrawals arising from the fiduciary relationship between the parties.

41. As a result of BANA's concealment, the Hughes's suffered monetary damages in the amount of the unauthorized payments which BANA surreptitiously withdrew from their account.

42. Due to the fraudulent nature of BANA's actions, BANA is liable for punitive damages. Decedent Jane Hughes and Plaintiff suffered pecuniary loss, actual damages, and consequential damages as a result of Defendant's fraudulent conduct.

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

43. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

44. BANA entered into a binding agreement with Mr. and Mrs. Hughes supported by good and valuable consideration which is represented by the Hughes Mortgage, the Agreement, the Authorization, and the Addendum collectively.

45. The Hughes's performed all obligations required of them under the Agreement or otherwise had the performance of any obligation excused.

46. Defendant BANA breached the agreement between it and the Hughes's by enrolling them in the Line Protection Plan without their express agreement, and without having them sign a separate addendum explicitly

47. BANA further breached the agreement by drafting Line Protection Plan payments from the Hughes's financial accounts, thereby exceeding its authority under the agreement between the parties, which is limited only to drafting loan payments.

48. In addition to breaching its contract with Mr. and Mrs. Hughes, BANA acted fraudulently by concealing that it enrolled the Hughes's in its Line Protection Plan without express permission and by drafting unauthorized payments for the product from the Hughes's bank account, which BANA concealed by listing the charge under an ambiguous description not readily identifiable as Life Protection Plan or BANA.

49. BANA had a fiduciary and contractual duty to disclose these facts to Mr. and Mrs. Hughes.

50. As a result of BANA's breach of contract accompanied by fraudulent concealment, Decedent Jane Hughes was damaged in that they unknowingly paid for a benefit that was expressly declined.

51. Due to the fraudulent nature of BANA's actions, BANA is liable for punitive damages, as well as actual and consequential damages Decedent Jane Hughes and Plaintiff suffered pecuniary loss, actual damages, and consequential damages as a result of Defendant's fraudulent conduct.

FOR A FOURTH CAUSE OF ACTION
(Violation of South Carolina Unfair Trade Practices Act)

52. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

53. Defendant's actions and/or omissions as described herein violate S.C. Code Ann. § 39-5-10, *et seq.*, which pertains to unfair methods of competition and unfair or deceptive acts or practices, in that Defendant enrolled the Hughes's in the Line Protection Plan without consent and withdrew unauthorized payments from the Hughes's account. Defendant concealed its actions, which were calculated to result in monetary gain for the Defendant at the expense of the Hughes's. Decedent Jane Hughes and Plaintiff thereby suffered an ascertainable loss as a result of the Defendants' actions in violation of the Act, as set forth herein.

54. Unfair methods of competition and unfair or deceptive acts or practices are declared unlawful in S.C. Code Ann. § 39-5-10, *et seq.*:

§ 39-5-20(a). **Unfair Trade Practices.** Unfair methods of competition and unfair or deceptive acts or practices in the conduct or any trade or commerce are hereby declared unlawful.

55. Defendant violated and continues to violate the SCUTPA by engaging in and proposing to engage in unfair trade practices by means of the following unlawful, unfair and fraudulent acts and practices:

- a. Knowingly and intentionally representing, with knowledge of its falsity, that BANA would draft funds from their account solely for monthly loan payments;
- b. Knowingly and intentionally representing that the Line Protection Plan was optional coverage that would only be added to the Hughes's credit line and home equity loan with their consent;
- c. Fraudulently drafting funds from the account for the Line Protection Plan without consent or authorization;

- d. Intentionally disguising the Line Protection Plan withdrawals with an innocuous and non-descript designation in an effort to further conceal the fraudulent withdrawals;
- e. Acting, using, or employing deception, fraud, false pretenses, false promises or misrepresentations and/ or concealed, suppressed or omitted material facts with the intent that customers rely upon such concealment, suppression, or omission, in connection with their authorization to BANA to draft automatic loan payments from BANA bank accounts.

56. The misrepresentations and omissions of the Defendant described herein were likely to deceive, induce, and mislead the Hughes's. BANA did in fact deceive, induce, and mislead the Hughes's.

57. The Defendant knew or should have known that the Hughes's would be deceived, induced, and misled.

58. BANA's actions and omissions as set forth herein evidence a lack of good faith, honesty in fact and observance of fair dealing and observance of fair dealing so as to constitute unconscionable commercial practices, in violation of the South Carolina unfair trade practices laws.

59. The Defendant acted willfully, knowingly, intentionally, unconscionably, illegally, unlawfully, and with reckless indifference when it committed the aforesaid acts of unfair and deceptive trade practices and/or consumer fraud.

60. As a result of the acts of the unfair and deceptive trade practices and/or consumer fraud described above, Decedent Jane Hughes and Plaintiff suffered actual, ascertainable loss for which the Defendant is liable.

61. The unlawful trade practices engaged in by BANA have an adverse impact on the public interest by reason of established procedures being utilized and thereby creating potential for repetition. Plaintiff requests actual damages, treble damages, punitive damages, costs and attorneys' fees under this cause of action.

FOR A FIFTH CAUSE OF ACTION
(Breach of Fiduciary Duty)

62. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

63. Defendant owed a fiduciary duty to the Hughes's to disclose that BANA was withdrawing funds for Line Protection Plan and to honor the Authorization.

64. BANA failed to notify the Hughes's, and instead withdrew monies from the Hughes's account which were neither authorized by nor disclosed to the Hughes's.

65. BANA knowingly withdrew these funds without authorization and intentionally withheld disclosure of same.

66. As a result of this breach by Defendant, Decedent Jane Hughes was damaged in that she unknowingly paid for a benefit that was expressly declined. Plaintiff has suffered pecuniary loss, actual damages, and consequential damages as a result of Defendant's breach of its fiduciary duty.

AS A SIXTH CAUSE OF ACTION
(Conversion)

67. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

68. By withdrawing funds from the Hughes's account for the Line Protection Plan, assumed the Hughes's money without authorization and exercised rights of ownership over the monies to the exclusion of the rights of the Hughes's.

69. BANA converted the Hughes's money in determinate sums.

70. As a result, Decedent Jane Hughes suffered actual damages in the amount of the money withdrawn from her account, without authorization, by BANA. Such improper and illegal withdrawals caused pecuniary loss and financial damage to Plaintiff, by reducing assets that otherwise would have been distributed to the heirs of Decedent Jane Hughes.

AS A SEVENTH CAUSE OF ACTION
(Survival Action)

71. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

72. Plaintiff, as Personal Representative of the Estate of Jane Hughes, brings this action pursuant to S.C. Code Ann. § 15-5-90 for the benefit of Decedent Jane Hughes's statutory beneficiaries and heirs.

73. As a result of the above described acts of Defendant, Decedent Jane Hughes suffered pecuniary loss, actual damages, and financial injuries. Defendant's conduct and illegal withdrawals reduced the value of Decedent's estate.

74. Plaintiff, as Personal Representative of Decedent Jane Hughes's Estate, is entitled to recovery for the financial injuries and damages caused by Defendant to Decedent Jane Hughes prior to her death. Plaintiff seeks actual and punitive damages under this cause of action.

JURY TRIAL DEMAND

75. Plaintiff hereby demands that all issues in this case triable before a jury be so tried.

WHEREFORE, Plaintiff prays for judgment against Defendant for actual damages, punitive damages, pre-judgment and post-judgment interest, treble damages, attorneys' fees, the costs of this action, and such other relief as this Court deems just and proper.

Respectfully Submitted,

MIKE KELLY LAW GROUP, LLC

BY: s/ Brad D. Hewett
D. Michael Kelly
Brad D. Hewett
Jamie N. Smith
500 Taylor Street
Post Office Box 8113
Columbia, SC 29201
803/726-0123
mkelly@mklawgroup.com
bhewett@mklawgroup.com
jsmith@mklawgroup.com
Attorneys for Plaintiff

Columbia, South Carolina
July 27, 2017

Exhibit D

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	Civil Action No.: 2017-CP-42-02834
PHILLIP FRANCIS LUKE HUGHES, on	)	
behalf of the Estate of Jane K. Hughes,	)	
	)	
Plaintiff,	)	PLAINTIFF'S MEMORANDUM IN
	)	OPPOSITION OF DEFENDANT'S
vs.	)	MOTION TO DISMISS OR STAY
	)	PROCEEDINGS
BANK OF AMERICA NATIONAL	)	
ASSOCIATION,	)	
	)	
Defendant.	)	
	)	

INTRODUCTION

Plaintiff Phillip Francis Luke Hughes, as personal representative of the Estate of Jane K. Hughes, respectfully submits the following Memorandum in Opposition of Defendant Bank of America National Association's ("BANA") Motion to Dismiss or, in the Alternative, Stay Plaintiff's Complaint. Plaintiff has stated claims in his Complaint for which relief should be granted and, therefore, Plaintiff's case should not be dismissed.

STATEMENT OF FACTS

Plaintiff previously filed an action in this Court in 2015 based upon the same facts that establish his claim for relief in the current action, and Plaintiff incorporates those facts alleged in his current Complaint herein. Plaintiff's 2015 Complaint was filed as a putative class action law suit against BANA for violation of the Truth in Lending Act, Fraud, Fraudulent Concealment, Breach of Contract, and Breach of Contract Accompanied by Fraudulent Acts. Defendant BANA removed the action to federal court, and filed a motion to dismiss in lieu of an answer. Prior to the District Court's decision on the motion, Plaintiff stipulated to the dismissal, without prejudice, of all claims against BANA *except* breach of contract and violation of TILA. As such, Plaintiff's

claims of fraud, fraudulent concealment, and breach of contract accompanied by a fraudulent acts have neither been considered nor ruled upon by any court and, for the reasons set forth below, are properly brought before the South Carolina Court of Common Pleas.

STANDARD OF REVIEW

A court must deny a motion to dismiss if the plaintiff has stated facts sufficient to constitute a cause of action. S.C. R. Civ. P. 12(b)(6). In considering a motion to dismiss, the trial court must base its ruling solely upon the allegations set forth on the face of the complaint. *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 66-67, 651 S.E.2d 305, 307 (2007). The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). Therefore, a motion to dismiss must be denied if the facts alleged in the complaint, and the inferences that can be drawn therefrom, would entitle the plaintiff to relief under *any* theory. *Doe*, 375 S.C. at 66-67, 651 S.E.2d at 307 (emphasis added).

ARGUMENT

Defendant's motion asserts that Plaintiff's claims are barred by the statute of limitations and, due to the filing of a prior suit based upon the same facts as the current case, the doctrines of *res judicata* and collateral estoppel. In sum, Plaintiff denies that these doctrines apply to Plaintiff's fraud-based claims, which were voluntarily withdrawn from the district court proceedings in order to file them in state court, where Plaintiff seeks to petition for the reevaluation of state precedent pertaining to the survival of fraud claims in South Carolina. Because the District Court could not hear these claims pursuant to South Carolina Appellate Court Rule 244(a), *res judicata* is inapplicable. Likewise, the District Court did not touch upon the issues of whether Plaintiff's fraud-based claims are time-barred and, if so, whether the doctrine of equitable tolling would apply

to preserve the same. Rather, the outcome-determinative issue in the District Court opinion was an issue of fact—that Jane Hughes failed to exercise due diligence to discovery wrongdoing. For the reasons below, that issue is neither dispositive nor particularly relevant to the Court's considerations in the current matter.

I. Plaintiff's Claims are Timely and are not Barred by the Doctrines of *Res Judicata* or Collateral Estoppel.

A. Res Judicata

Though Plaintiff's claims in the current matter arise from the same set of facts on which he brought a previous action against BANA, the claims in the current action are not barred under the doctrine of *res judicata*.

Res judicata prohibits a party from bringing a claim against a second party when that claim has already been, or could have been, litigated. In order to establish that a claim should be barred by *res judicata*, BANA must show that the current claim involves 1) the same parties; 2) the same subject matter; and 3) an issue previously adjudicated in another suit. *Sealy v. Dodge*, 289 S.C. 543, 347 S.E.2d 504 (1986). Because Plaintiff's fraud-based claims (fraud, breach of contract accompanied by a fraudulent act, and fraudulent concealment) were voluntarily dismissed without prejudice in the District Court proceeding, these claims were not previously adjudicated and thus do not meet the third element of *res judicata*.

While Plaintiff acknowledges that *res judicata* can potentially bar subsequent actions by the same party when the claims rise from the same transaction or occurrence that was a subject of a prior action, the fraud-based claims could *not* be included in the prior lawsuit after BANA removed the action to federal court, thus prompting Plaintiff to voluntarily dismiss those claims and refile them in state court. Particularly, had Plaintiff pursued those matters in the federal courts, the District Court would have had to dismiss Plaintiff's fraud-based claims pursuant to South

Carolina's survival statute, S.C. Code Ann § 15-5-90, and the state court's interpretation thereof to exclude fraud. Plaintiff seeks reexamination of this interpretation for reasons set forth in Section II, *infra*, which can only be accomplished by pursuing the fraud-based claims in state court. See *Mattison v. Palmetto State Life Ins. Co.* 197 S.C. 256, 15 S.E.2d 117 (1941).

South Carolina Appellate Court Rule 244(a) only allows certification of questions to the South Carolina Supreme Court by the United States District Court on questions unanswered by controlling precedent. Because *Mattison* provides controlling precedent as to the survivability of fraud, Plaintiff could not—after BANA removed the prior action to federal court—challenge the validity of controlling precedent through that action and fully pursue his fraud-based claims. As such, those claims are not barred by the doctrine of *res judicata*, and Plaintiff filed this action in state court to pursue examination of its position in proper legal form.

Additionally, Plaintiff included an action under S.C. Code Ann. § 39-5-20, the South Carolina Unfair Trade Practices Act (SCUTPA). This claim, too, could not be included in the original action against BANA. Plaintiff initially filed a putative class action; SCUTPA actions, however, cannot be classed. S.C. Code Ann. § 39-5-140. Thus, Plaintiff—by bringing the former action on behalf of others similarly situated—could not bring a claim for SCUTPA in the initial suit.

B. Collateral Estoppel and Statute of Limitations

Likewise, the issues decided in the 2015 action against BANA are not precluded from being heard by this court pursuant to the doctrine of collateral estoppel. To successfully establish that collateral estoppel applies to this case, BANA must prove that the issue it claims is precluded was actually litigated and directly determined in the prior action, and that the matter or fact directly at issue was necessary to support the final judgment. *Nelson v. QHG of South Carolina, Inc. et al*,

354 S.C. 290, 306, 580 S.E.2d 171 (S.C. App. 2003). When determining whether the issues raised in the initial suit were actually litigated, the following: “whether privity exists, whether the doctrine is used offensively or defensively, and whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action.” *Id.*

The issue decided on by the United States District Court in dismissing Plaintiff’s claims in his 2015 law suit is whether the facts as pled in the complaint sufficiently established that Jane Hughes exercised due diligence to discover wrongful charges against her account, so as to warrant equitable tolling of the statute of limitations as to the claims of violation of TILA and breach of contract. The District Court decided that the claims brought by Plaintiff were time barred, and determined from the facts as plead did not warrant the invocation of the doctrine of equitable tolling of these remaining causes of action because Mrs. Hughes did not fail to discover the charges despite exercising due diligence.

The issues at hand here, though, were not decided by the District Court: 1) whether Plaintiff filed the fraud-based claims within the statute of limitations and, if not, 2) whether those claims are equitably tolled under South Carolina law. The statute of limitation for claims of fraud does not accrue until the complaining party has knowledge of fraud itself or knowledge of sufficient facts to put a party on inquiry. *See Burgess v. American Cancer Soc., South Carolina Div., Inc.*, 300 S.C. 182, 386 S.E.2d 798, 789 (S.C. App., 1989). Plaintiff asserts that, viewing the facts as alleged in the pleadings in the light most favorable to the Plaintiff, the statute of limitations began to run in March 2015 upon receiving a notice from BANA of charges to Jane Hughes’ account for an unselected, optional mortgage service. The discovery rule requires this Court to examine when Plaintiff’s cause of action accrued—an issue not examined by the District Court and a question of fact improperly decided at the pleadings stage. Thus, Plaintiff’s fraud-based claims are not

collaterally estopped.

C. Equitable Tolling

Moreover, Plaintiff asserts that even if the court finds that the statute of limitations for the fraud-based claims has expired, the claim was equitably tolled until March 2015 when Mrs. Hughes received a notice from BANA regarding the cancellation of a service that she expressly declined.

The issue of whether equitable tolling is applicable to Plaintiff's fraud-based claims and/or SCUTPA claim is not one that the District Court ruled on in its Order, and thus is not precluded from being heard by this Court. In fact, the dispositive issue ruled upon by the federal court was whether Jane Hughes exercised due diligence to discover wrongful charges against her. In deciding that Plaintiff's TILA and breach of contract claims were not equitably tolled, and thus barred by their respective statutes of limitation, the District Court, relying upon *Supermarket of Marlinton v. Meadow Gold Dairies*, applied a single federal test that allows for the application of equitable tolling where "(1) the party pleading the statute of limitations fraudulently concealed the facts that are the basis of the plaintiff's claims; (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." The District Court's opinion relied exclusively on this test to decide whether equitable tolling applied and opined that, because the facts did not satisfy the due diligence prong of the test, equitable tolling was not warranted. The District Court notably rendered no opinion as to whether state law would allow any of Plaintiff's claims to be equitably tolled.

South Carolina's stance on equitable tolling, however, is more lenient than that of the federal courts, and in order to determine whether Plaintiff's fraud based, state law claims are tolled, this Court must apply a wholly separate standard than that relied upon by the District Court. The

issue of due diligence is not a dispositive one in a state court evaluation of the application of the doctrine. In South Carolina, the parameters used by sister states and federal courts to decide on the doctrine's application "do not constitute an exclusive list of circumstances that justify the application of equitable tolling." *Hooper v. Ebenezer Sr. Services and Rehabilitation Center*, 386 S.C. 108, 113, 687 S.E.2d 29, 32 (S.C. 2009). Instead, equitable tolling may be applied where it is justified under all circumstances of a case, typically when a plaintiff does not file within the statute of limitations due to "an extraordinary event beyond his or her control"; this is a far broader consideration than that applied by the District Court. *Id.*

Rather than applying the tests for the application of equitable tolling adopted in other jurisdictions, our state holds that "[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations." *Id.* quoting 54 C.J.S. Limitations of Actions § 115 (2005). "Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." *Id.*, quoting *Rodriguez v. Superior Court*, 176 Cal. App. 4th 1461 (2009). "The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." *Id.*, quoting *Hausman v. Hausman*, 199 S.W.3d 38, 42 (Tex. App. 2006).

The allegations in the case at hand are that BANA—an international financial institution—deceived and defrauded a frail, elderly couple by surreptitiously charging them for a product they expressly declined. The charges against their account for these services continued after the death of John Hughes and while Jane Hughes suffered debilitating ailments, including dementia, vision

impairments resulting in surgery, heart problems resulting in surgery, and a broken hip that required hospitalization and extensive rehabilitative care. Surely, death and dementia constitute “extraordinary circumstances beyond [one’s] control” so as to justify equitable tolling under *Hooper*.

Additionally, the determination of the when the statute of limitations began is properly reserved for a jury. “Whether a claimant knew or should have known that they had a cause of action is question for the jury.” *Johnston v. Bowen*, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (S.C. 1993). At this stage in the case, there is conflicting evidence as to when Ms. Hughes knew or should have known that a claim against Defendant existed. Thus, a jury should properly decide the issue.

D. Exceptions to Res Judicata and Collateral Estoppel

Should the Court ultimately determine that the doctrines of *res judicata* or collateral estoppel apply in this case, our courts have found that *res judicata* is not “an ‘ironclad’ bar to a later lawsuit.” *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408, 412 (2011) (citing *Garris v. Governing Bd. of the South Carolina Reinsurance Facility*, 333 S.C. 432, 449, 511 S.E.2d 48, 57 (1998)). Likewise, “[t]he doctrine of collateral estoppel should not be rigidly or mechanically applied. Thus, even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it.” *Carolina Renewal v. Dept. of Transp.*, 684 S.E.2d 779, 385 S.C. 550 (S.C. App., 2009).

South Carolina has adopted the Restatement (Second) of Judgements Sections 27, 28 and 29, which provide exceptions to the doctrines of *res judicata* and collateral estoppel. Specifically, Section 28 provides exceptions to *res judicata* where a new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by

factors relating to the allocation of jurisdiction between them; or there is a clear and convincing need for a new determination of the issue because of the adverse impact of the determination on the public interest or interests of persons not themselves party in the initial action; or because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. *Pye v. Aycock*, 325 S.C. 426, 437-30, 480 S.E.2d 455, 460-61 (S.C. App.1997).

Exceptions to the doctrine of collateral estoppel include those enumerated in Section 28 of the Restatement (Second) of Judgements as well as Section 29, which further provides relevant exclusions when the forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined; or, the issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based; or, other compelling circumstances make it appropriate that the party be permitted to relitigate the issue. *Beall v. Doe*, 281 S.C. 363 371, 315 S.E.2d 186, 190-191 (S.C. App. 1984).

Should the court find that either of these doctrines apply in this matter, relevant exceptions—adopted by South Carolina Courts—would allow for the matter to be heard in spite of *res judicata* or collateral estoppel. The case at hand pertains to a claim that could not be heard in the appropriate forum after BANA removed the case to federal court; reconsidering the issue in State Court allows for the reexamination of the issue of whether fraud should remain an exception of the South Carolina statute; and, for reasons set forth in Section II, *infra*, there exists a public need for this issue to be heard in state court.

As such—though Plaintiff maintains that his action is timely and is not subject to the doctrines of *res judicata* or collateral estoppel, even if either or both of these doctrines are applicable in this matter, Plaintiff's claim falls within the exceptions to these rules and should be heard by the State Court of Common Pleas.

II. Plaintiff's Claims for Relief Based on Elements of Fraud Should Survive the death of Jane Hughes.

Defendant argues that a cause of action for fraud does not survive under SC Code Ann. § 15-5-90, South Carolina's general survival statute, and Plaintiff's fraud-based claims should be dismissed. Plaintiff challenges this antiquated exception to the survival statute and, for the reasons set forth below, asks this court to reconsider precedent to better reflect the rights of persons in a modern society.

A. Scope of the South Carolina Survival Statute

i. *Mattison v. Palmetto State Life Ins. Co.*

South Carolina enacted legislation to allow for the survival of certain claims that were historically barred by the claimant's death. *Bennett v. Spartanburg Ry., Gas & Elec. Co.*, 97 S.C. 27, 81 S.E. 189, 189 (1914). South Carolina enacted the survival statute in 1905, which provided that "any and all injuries to the person or to personal property" survive the death of a party. *Id.* South Carolina's survival statute has remained intact, and the language essentially unchanged, from 1905 to present. The courts have relied and still rely upon early judicial interpretations of the statutory language and legislative intent in answering contemporary questions regarding the survivability of actions under the act.

South Carolina first addressed the question of whether fraud survives the death of a party under the survivability statute in *Mattison v. Palmetto State Life Ins. Co.* 197 S.C. 256, 15 S.E.2d 117 (1941). In *Mattison*, the estate brought an action against Palmetto State Life Insurance

Company for perpetrating a fraudulent scheme intended to cheat the deceased of his rights under an insurance contract. *Id.* The South Carolina Supreme Court granted certiorari to hear the case on several questions, the relevant question being whether the cause of action of fraud survived. *Id.*

In determining whether the fraud claim survived, the *Mattison* Court reviewed the survival statute to assess whether fraud fell within the scope of the statutory language. At that time, the applicable statute read:¹

Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to *personal property*, shall survive both to and against the personal or real representative (as the case may be) of the deceased persons, and the legal representatives of insolvent persons, and defunct or insolvent corporations, any law or rule to the contrary notwithstanding.

1932 Code § 419 (emphasis added).

The *Mattison* Court succinctly opined that fraud did not fall within the scope of the statutory language, and therefore the Legislature did not intend that claims of fraud survive death.

The *Mattison* Court further provided that:

It is readily seen that under the above quoted Section, there are but two instances wherein a cause of action survives: (1) For and in respect to any and all injuries and trespasses to and upon real estate, and (2) any and all injuries to the person or to *personal property*. And it is just as readily seen that respondent's second cause of action does not come within either of the instances where a cause of action survives.

Mattison at 256, 15 S.E.2d at 119 (original emphasis replaced).

Thus, while the *Mattison* court narrowly interpreted the survival statute, it failed to explain why fraud does not constitute injury to personal property. In fact, there is no discussion in *Mattison* regarding the elements of fraud or why pecuniary loss caused by fraud is not an injury to personal property. This omission is relevant because the money taken by BANA from Jane Hughes was

¹ The current survival statute is codified at S.C. Code Ann § 15-5-90, and the language is nearly identical to the 1932 Code with only some minor changes in punctuation.

personal property. Once Jane Hughes died, interest in her personal property, including her financial holdings, transferred to her Estate. Thus, *Mattison*'s principle that fraud does not survive the death of a party in South Carolina is internally inconsistent.

ii. *Fraud as an "exception" to the South Carolina Survival Statute*

Since *Mattison*, and contrary to its narrow view of survivability, the South Carolina Supreme Court has consistently *broadly* interpreted the survival statute. See, e.g., *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564, 564 S.E.2d 94, 97 (2002) ("[T]he statute's language is broad and ostensibly appears to include almost every conceivable cause of action."); *Layne v. Int'l Bhd. of Elec. Workers, (AFL-CIO), Local No. 382*, 271 S.C. 346, 352, 247 S.E.2d 346, 349 (1978) ("[I]t is the general rule that any cause of action which could have been brought by the deceased in his lifetime survives to his representative under the Survival Act."); *Brewer v. Graydon*, 233 S.C. 124, 128, 103 S.E.2d 767, 769 (1958) ("the Survival Statute must be liberally construed"). These later South Carolina opinions create a tension with *Mattison*'s holding fraud is an *exception* to the rule, as opposed to a *cause of action outside of the statute's scope*.

Despite this tension, the South Carolina Supreme Court has yet to revisit the *Mattison* rationale for the fraud "exception." Indeed, there has been no discussion by South Carolina courts since 1941 on why fraud should be excepted from the survival statute. Plaintiff, therefore, invites this Court to reexamine this question of survivability and to determine viability of the 1941 *Mattison* analysis in 2018.

B. Public Policy

i. *Clear evidence of mindset defeats policy reasons for exception*

Perhaps the only attempt at explanation for South Carolina's fraud exception comes from the Fourth Circuit opinion in *Faircloth v. Finesod*, 938 F.2d 513, 517 (4th Cir. 1991). The plaintiff in *Faircloth* challenged the fraud exception to the South Carolina survival statute as violating the

Equal Protection Clause, and the South Carolina District Court agreed. On appeal, the Fourth Circuit, applying a minimum scrutiny standard, supplied its “feasible attempt for [the] legislative distinction”:

[F]raud is a tort that requires a special quality of proof, and the states of mind of the victim (e.g., whether he knew the statement was false, relied upon it, and was justified in so relying) and the perpetrator are especially vital. . . . [A] legislature could rationally conclude that the difficulty and potential unfairness of proving the state of mind of a dead party to a fraudulent transaction justified excepting fraud from the survival statute.

Faircloth at 517.

Assuming that the rationale proffered by the Fourth Circuit in *Faircloth* is, in fact, the underlying basis for the common law fraud exclusion, as a matter of public policy, the common law exclusion should be overturned or, at the very least, excepted in those circumstances where the state of mind of the deceased party is readily identifiable, as in the current case, where Jane and John Hughes expressly declined, through an executed document, to enroll in a program offered by BANA. The instant case, where the policy supporting the exclusion is defeated, in consideration with the additional policy reasons set forth below, cries for a reevaluation of the fraud exclusion to the survival statute.

ii. Elderly fraud victims and public policy

Public policy should not enable the abuse of elderly and otherwise vulnerable citizens of South Carolina. Jane Hughes was 85 years old when Defendant began withdrawing the fraudulent, unauthorized charges from her account and suffered from dementia and vision impairments in the following years until her death. Studies show that such elderly persons are highly susceptible to being defrauded.

According to a 2015 study by True Link Financial, approximately 36.9% of American seniors are victims of financial abuse in any five-year span. *The True Link Report on Elder*

Financial Abuse 2015, TRUE LINK, January 2015 at 11 (<https://truelink-wordpress-assets.s3.amazonaws.com/wp-content/uploads/True-Link-Report-On-Elder-Financial-Abuse-012815.pdf>). Fraud and financial abuse costs our seniors an estimated total of \$36.48 billion annually. *Id.* Of this, approximately \$16.99 billion is lost to financial exploitation, which is defined as “when misleading or confusing language is used – *often combined with social pressure and tactics that take advantage of cognitive decline and memory loss* – to obtain a senior’s consent to take his or her money.” *Id.* at 1. Not surprisingly, the vulnerability of seniors to fraud is in part due to the loss of cognitive functions of these individuals. *Id.* at 19. True Link’s research shows that conditions such as dementia and Alzheimer’s disease increase vulnerability to fraud, and an individual with a below-average memory is 78% more likely to be a victim of fraud. *Id.*

Notably, as the financial exploitation is accomplished through deception that does not quite rise to a criminal level, only a civil remedy is available. *Id.* at 5. The reality is that the time to identify, investigate, report, and prosecute civil offenses now, unlike in 1941, often takes many years and exceeds the lifetime of the victims. The speed and complexity of today’s financial transactions, exacerbated by sophisticated technology, furthers fraud in ways not conceivable in 1941. Thus, the impact of the *Mattison* holding is now much more adverse to those most likely to fall victim to fraud than in 1941.

In sum, the public policy impact of South Carolina’s survivability statute is long overdue for review in light of electronic phishing, data mining, electronic databases, and targeted advertising, and Plaintiff asks this Court to initiate that reevaluation.

iii. Survivability of fraud in other jurisdictions

Further supporting certification of the question is that the majority of states allow the survival of fraud claims. Indeed, South Carolina is one of only seven (7) states that do not allow

a fraud action to survive; the others being Alabama, Arkansas, Massachusetts, Texas, Vermont, and Wisconsin.

The general consensus among states that have offered policy considerations for the survival of fraud actions is that any action which lessens the value of an estate should survive, as the modern trend is to remove obstructions to the free transfer of property and rights and interests therein. *See, e.g., Jandera v. Lakefield Farmers' Union*, 150 Minn. 476, 479, 185 N.W. 656, 658 (1921); *Micheletti v. Moidel*, 94 Colo. 587, 591, 32 P.2d 266, 267 (1934); *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 154 Idaho 37, 41, 293 P.3d 661, 665 (2013).

In light of the policy considerations put forth by South Carolina's sister states regarding the impact of survivability on property rights, Plaintiff would urge this court to examine the question of whether excepting fraud from the South Carolina survival statute violates public policy.

CONCLUSION

Plaintiff sufficiently stated causes of actions and alleged adequate facts to obtain relief from Defendant. Moreover, Plaintiff's claims are not barred by the statute of limitations, nor the doctrines of collateral estoppel and *res judicata*. Under any reasonable reading of the Complaint and review of the facts available there are numerous substantive issues of disputed fact requiring that this matter proceed to discovery for a proper and fair resolution on a complete record. Finally, Plaintiff prays that the issue of whether the fraud is excluded from South Carolina's survival statute be reconsidered in light of the aforementioned factors. Plaintiff thus prays that this Court deny Defendant's motion and allow this action to proceed.

Respectfully Submitted,

MIKE KELLY LAW GROUP, LLC

BY: s/ Brad D. Hewett

Brad D. Hewett

SC Bar No. 77924

500 Taylor Street

Post Office Box 8113

Columbia, SC 29201

803/726-0123

bhewett@mklawgroup.com

Attorney for Plaintiff

Columbia, South Carolina
February 21, 2018

Exhibit E

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Court Judge

Case No.: 2017-CP-42-02834

Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes.....Appellant,

v.

Bank of America National Association.....Respondent.

NOTICE OF APPEAL

Pursuant to Rule 203 of the South Carolina Appellate Court Rules, Plaintiff Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes ("Appellant") hereby appeals the order of the Honorable R. Keith Kelly, dated March 19, 2018, granting the motion to dismiss on behalf of Respondent Bank of America National Association.

Copies of the order granting the motion to dismiss on behalf of Respondent are attached hereto and incorporated herein as Exhibit A.

Respectfully Submitted,

By: 
Brad D. Hewett
bhewett@mklawgroup.com
S.C. Bar No. 77924
D. Michael Kelly
mkelly@mklawgroup.com
Jamie Smith
jsmith@mklawgroup.com
Mike Kelly Law Group, LLC
500 Taylor Street
Columbia, SC 29201
(803) 726-0123

Attorneys for Appellant

March 26, 2018

Other Counsel of Record:

Robert A. Muckenfuss, Esq.
Elizabeth M. Timmermans, Esq.
McGuire Woods, LLP
201 North Tryon Street, Suite 3000
Charlotte, NC 28202-2146
Telephone: 704.343.2052
Counsel for Defendants/Respondents

cc: The Honorable Hope Blackley

Exhibit F

1 STATE OF SOUTH CAROLINA) IN THE COURT OF
2) COMMON PLEAS
3 COUNTY OF SPARTANBURG) OF THE SEVENTH
4) JUDICIAL CIRCUIT
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PHILLIP FRANCIS LUKE HUGHES,
ON BEHALF OF THE ESTATE OF
JANE K. HUGHES,
Plaintiff,
vs.
BANK OF AMERICA NATIONAL
ASSOCIATION,
Defendant.

TRANSCRIPT OF RECORD
2017-CP-42-02834

February 22, 2018
Spartanburg, South Carolina

B E F O R E:

HONORABLE R. KEITH KELLY, Judge.

A P P E A R A N C E S:

BRADLEY DAVIS HEWITT, ESQUIRE
For Plaintiff

ROBERT A. MUCKENFUSS, ESQUIRE
For Defendant

ELIZABETH MARION ZWICKERT-TIMMERMANS, ESQUIRE
For Defendant

Julie A. Ashbrook,
Circuit Court Reporter
Seventh Judicial Circuit

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I N D E X

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EXHIBITS

MARKED

ENTERED

NO EXHIBITS PROFFERED

1 PHILLIP FRANCIS LUKE HUGHES VS. BANK OF AMERICA

2 THE COURT: Okay. The first matter is -- the
3 first matter is Phillip Francis Luke Hughes, the
4 Plaintiff, et al. versus Bank of America National
5 Association.

6 MR. HEWITT: Good morning, Your Honor.

7 MR. MUCKENFUSS: Good morning.

8 THE COURT: All right. I have read everything
9 that has been submitted.

10 MR. HEWITT: Thank you.

11 THE COURT: Yes, sir.

12 MR. MUCKENFUSS: Thank you, Your Honor. Robert
13 Muckenfuss and Elizabeth Zwickert-Timmermans for Bank of
14 America, Your Honor. This is our motion to dismiss.

15 I think the arguments in our motion are fairly
16 straight forward and I won't go through, Your Honor, I
17 know you've read the briefs. But essentially, this is
18 an identical case to a case that was filed previously in
19 2015 in state court, was removed to federal court. At
20 that time the federal court questioned jurisdiction.

21 I think in this case plaintiff's counsel doesn't
22 -- he admits it's an identical case in terms of the
23 facts and circumstances that are alleged. Essentially
24 it was a bank product line protection plans insurance.
25 And they were, in that case there was a punitive class

1 action that was asserted. That case ended up being
2 dismissed by Judge Lewis in federal court, essentially
3 pulling that the statute of limitations had run.

4 There were arguments about equitable tolling.
5 Judge Lewis rejected those arguments. That case was
6 appealed to the Fourth Circuit. The Fourth Circuit
7 issued a procuring opinion affirming Judge Lewis. Then
8 They sought it further to the U.S. Supreme Court and
9 that was denied.

10 In re-filing this case, it appears to survive res
11 judicata. And so I'm gonna break it down into two
12 pieces, Your Honor. There's the fraud claim, which I
13 think is a different issue. But first I just want to
14 deal with the res judicata issue. This is a classic
15 case of res judicata. No one disputes, the plaintiff
16 doesn't dispute that it's identical parties. It's the
17 same circumstances, facts that are alleged.

18 They're actually identical claims. They add, I
19 think added a couple of new claims out of the cause --
20 out of the case. One's breach of fiduciary duty. They
21 also reassert the fraud claim, but they still have a
22 breach of contract claim, breach of contract accompanied
23 by fraudulent inducement.

24 In terms of res judicata, it's the same claims.
25 It's claims they could have brought in the previous

1 case. And so for res judicata, as Your Honor I'm sure
2 is well aware, if there are, you know, the same or
3 similar facts and circumstances and those claims were
4 brought in the previous case or could have been brought
5 in the previous case under claim preclusion, they would
6 be barred in this case. They would also be barred under
7 an issue preclusion analysis.

8 So in the previous case Judge Lewis analyzed
9 equitable tolling of the statute of limitations. She
10 cited a South Carolina appellate case, a federal case,
11 in addition to Federal case law on the Fourth Circuit,
12 rejecting their equitable tolling argument, which was --
13 the argument was that there was a fraudulent concealment
14 of this charge for the line of protection plan.

15 Judge Lewis rejected that, stating that these
16 charges, you know, were on the statements from June of
17 2006 all the way up until it was refunded by the bank.
18 The Fourth Circuit affirmed that. So in terms of claim
19 preclusion and issue preclusion, all of those claims
20 asserted in this lawsuit would be barred and should be
21 dismissed.

22 Now, the fraud claim, it's somewhat
23 extraordinary, Your Honor, that -- so in the previous
24 case plaintiff's counsel realized that in South Carolina
25 fraud claims were an exception to the survivability

1 statute and, you know, claims that would survive death.
2 And it's been the law in South Carolina since the 1940s
3 that claims that sounded fraud cannot be brought and yet
4 don't survive death.

5 Now, the plaintiff's counsel will voluntarily
6 dismiss that claim in the federal case acknowledging
7 that it's stated law in South Carolina. It appears what
8 they're trying to do, and to be honest, Your Honor, I
9 mean this lies close to a sanctionable type of
10 circumstance. We have not brought a motion for
11 sanctions, but plaintiff's counsel admits that he cannot
12 pursue a claim, a fraud claim. He justifies it by
13 simply stating that he is seeking to change the law to
14 have Supreme Court precedent overturned in South
15 Carolina.

16 That's, that's dangerous area. And, obviously I
17 think for, for plaintiff's counsel -- I think for
18 purposes of today in front of this Court, Your Honor,
19 from a constitutional standpoint for a trial court,
20 obviously you have no jurisdiction to overturn the prior
21 Supreme Court case.

22 And I would note in terms of the prior case law,
23 this is not just a 1941 case, the Madison case. This is
24 a 2002 Supreme Court case. So in 2002 the South
25 Carolina Supreme Court reaffirmed the rule in South

1 Carolina that fraud claims don't survive death. And in
2 2008 the Court of Appeals again affirmed the
3 long-standing rule in South Carolina that you can't
4 bring a fraud claim.

5 So I, honestly that claim has to be dismissed. I
6 think the plan for plaintiff's counsel is to appeal it
7 and try to argue in the Court of Appeals, ultimately the
8 Supreme Court that they should overturn prior precedent.
9 I think that's, that's an issue for the appellate courts
10 to deal with, not for the trial court. Now, for those
11 reasons the fraud claim should be dismissed, the other
12 claims should be dismissed in this case.

13 I would also finally, Your Honor, note for the
14 South Carolina Fair Trade Practices Act claim, again,
15 that, like the fraud claim, is clear in South Carolina.
16 And this is a statutory rule that you can't bring an
17 unfair trade practices claim in a representative
18 capacity. And that's in the statute. So the
19 plaintiff's counsel in that situation would have to, I
20 think, convince the general assembly to change the law.

21 So there are two causes of action in this case
22 that are clear on the face of -- and the Supreme Court
23 precedent in 2002 and also in the statute, that you
24 cannot bring those claims. In addition, the unfair
25 trade practices claim is based on fraud allegation, and

1 that would also be barred by the survivability exception
2 that we discussed before.

3 Attempts to distinguish the equitable tolling
4 issue, Your Honor, is a red herring. I think there's an
5 attempt by plaintiff's counsel to suggest that res
6 judicata shouldn't apply because the equitable tolling
7 analysis that Judge Lewis applied is different than what
8 is South Carolina court and that's absolutely not true.

9 If you look at the Fourth Circuit opinion, the
10 Fourth Circuit cites a number of cases that cite the
11 same type of standard South Carolina courts have
12 applied. In other words, you know, an extraordinary
13 circumstance acts that would prevent a plaintiff from
14 discovering. And I would note that the plaintiff
15 specifically alleged in the federal case that there was
16 fraudulent concealment and the Fourth Circuit noted
17 that.

18 So in a situation where they actually allege Bank
19 of America engaged in fraudulent concealment, they would
20 have to bring forth some evidence or some argument that
21 that was the case. They couldn't. Judge Lewis rejected
22 those arguments and dismissed the case. So the Fourth
23 Circuit noted that. The standard in South Carolina is
24 no different.

25 So for that reason res judicata should apply,

1 those claims should be dismissed. And the fraud claim,
2 obviously, should be dismissed. They admit that in
3 terms of the prior precedent. And unless the Court has
4 any other questions, Your Honor.

5 THE COURT: No, sir, I think that's it.

6 Yes, sir.

7 MR. HEWITT: Your Honor, good morning.

8 THE COURT: Good morning.

9 MR. HEWITT: Brad Hewitt here for the estate of
10 Jane Hughes.

11 THE COURT: Yes, sir.

12 MR. HEWITT: And I'm certainly not one to recite
13 the full facts and procedural history, as the Court has
14 read the memorandums submitted to the court. And I
15 recognize there is controlling binding precedent on the
16 primary issues in this case, which are the fraud based
17 claims. That the lower court is handcuffed as to what
18 it can do based in part on a 1941 decision and does
19 state that those fraud claims when you die, die with
20 you.

21 There's a 2002 opinion as well. I think that's
22 the Ferguson case, which cited to Madison further for
23 the support that your fraud based claim simply cannot
24 continue on. We're one of seven states that hold that
25 fraud based claims die when the claimant dies.

1 And so I recognize this may be at this stage in
2 the proceeding an exercise of futility in terms of what
3 the Court can do on fraud based claims, but those claims
4 were not adjudicated at the federal level. Res judicata
5 nor collateral estoppel apply to forbid those claims
6 from going forward. We could not go forward with them,
7 but upon realizing that there was a disallowance based
8 in part on the Madison case, we withdrew the claims.

9 And they could not be certified back to the
10 Supreme Court by the Federal Court, so there was nothing
11 that the Federal Court could do, nor could we move
12 forward, so we withdrew them and chose in part the
13 proper course of action, which is to challenge the state
14 of the law through the Circuit Court and ultimately
15 through the appellate courts. That is the intention.

16 So I know where this case is going at this level
17 in terms of the fraudulent claims and we set forth the
18 policy reasons as to why we are endeavoring to do that.
19 I've committed to this family to see this case through.
20 You've seen through the procedural history where we have
21 unsuccessfully applied to the Fourth Circuit and the
22 United States Supreme Court to visit at least the TILA
23 claims and the breach of contract claims. But there was
24 no adjudication. There was no full and fair opportunity
25 to litigate the issues of fraud.

1 I'm inclined to concede the point on the
 2 remaining stated four claims of the conversion and
 3 breach of fiduciary duty, that they may be barred by
 4 collateral estoppel and res judicata analysis. I would
 5 tend to perhaps agree, but the crux of this case is to
 6 challenge the state of the law on the fraud claims.

7 And so even if the Court -- and I don't mean to
 8 try to make the Court's job any easier, as I understand
 9 a dismissal is likely forthcoming. What my request
 10 would be, Judge Kelly, is that an order of dismissal be
 11 limited on the grounds that there is controlling
 12 precedent in place that forbids the fraud based claims,
 13 rather than founded on any statute of limitations
 14 argument or collateral estoppel or res judicata
 15 defenses. So I think that the order can be confined to
 16 that ruling.

17 If the Court is so inclined to explore those
 18 issues, I have made clear why we think they don't apply
 19 in the memo, that they were not adjudicated. That there
 20 were discovery inhibitions, procedural disadvantages.
 21 That they were not fully and fairly explored. I think
 22 that -- and I haven't seen much in the way of argument
 23 that they were because they were withdrawn. There was
 24 no discovery at those levels.

25 And so even beyond that, Judge, if you were

1 inclined to believe that res judicata and collateral
2 estoppel may be in play, there are exceptions. The
3 State has adopted the restatement of judgment. And
4 provisions 27, 28 and 29 find that when you deal with
5 interests of public policy and fundamental unfairness
6 that the Court can refuse to apply collateral estoppel
7 and res judicata.

8 And we've made clear through certain studies that
9 we've cited about what is happening to senior citizens
10 in this country in terms of exploitation and fraudulent
11 schemes, that one in three -- over one in three senior
12 citizens are subject to fraudulent exploitation and
13 schemes. And the victims of that conduct -- and that
14 it's costing the country over 36 billion dollars each
15 year, that there are policy reasons in play. Not to
16 mention, you have Jane and John Hughes, who were
17 defrauded of several thousand dollars by Bank of
18 America.

19 And just very quickly, although it's in the, the
20 brief, the factual context for this entire case is a
21 2006 transaction with Bank of America. Jane and John
22 Hughes were 86 years old at the time. Owned their home
23 outright and took out a line of credit with Bank of
24 America. I don't know why. If they were sold a bill of
25 goods or if they just needed money because they were

1 outliving their retirement. That's possible. They did
2 it.

3 And during that transaction, they were offered an
4 optional line of protection plan where if they died or
5 became disabled or unemployed, which they already were,
6 it might provide some assurance that they would not have
7 to make some of the monthly payments. They declined
8 that expressly. It's commemorated. They both signed
9 it, we don't want this product, we don't need this
10 product. They checked the box that we -- do not charge
11 us for it.

12 Soon after the closing, John Hughes died. And
13 Jane Hughes was diagnosed with dementia, a-typical
14 psychosis, cataracts, which required surgery and some
15 degree of blindness, renal insufficiency. She broke her
16 hip, went to a nursing home. Was noted to lack
17 decisional capacity. So she had a precipitous decline
18 in her mental condition and her physical condition.

19 She was unaware that she was ever being charged
20 by Bank of America. It was a \$28-a month charge. It
21 was buried in a nondescript, ambiguous line item charge
22 that didn't say anything about Bank of America. It was
23 an abbreviated insurance charge with some serial numbers
24 attached. She had no idea. She was in a nursing home,
25 in and out of hospitals.

1 What became known to the family was by way of a
2 letter from Bank of America in March of 2017, about
3 seven years after her husband had died, that we are
4 gonna stop charging you for this product, a product that
5 they had never signed up for. A family member got that
6 letter, did some due diligence, if you will, put two and
7 two together and quickly realized they had rejected it
8 and been absconded of several thousand dollars and then
9 came to see us and we filed suit shortly thereafter.

10 And so the Court knows the discovery rule in this
11 state for fraud is when they were aware of the
12 misconduct. And so for the purposes of the statute of
13 limitations argument, this case was timely filed. If
14 the Court were so inclined to find that it were not,
15 then that's where we go into a equitable estoppel
16 argument, that based on her condition she certainly had
17 no knowledge of the misconduct.

18 And what the Federal Court did, Judge Lewis, and
19 ultimately the Fourth Circuit, was they, they looked
20 into equitable estoppel. That was the, the thrust of
21 our argument. But they applied a federally created rule
22 that was more restrictive than what our court uses,
23 which is based in part on the Hooper case in 2009 which
24 looks at all the circumstances. There's no due
25 diligence requirement. And so it's to avoid technical

1 forfeitures and to allow trials on the merits. So it's
2 a test, less restrictive.

3 And so I've said all that to say this, that I
4 think that the decision for the Court is fairly straight
5 forward on the fraud claims, and that we endeavor to
6 change the law in this state, which has been a law,
7 really a common law created since 1941 in a very
8 different world when you didn't have to worry about
9 certain types of identity theft, perhaps when people
10 could trust their banks.

11 And as a relevant aside, I know these allegations
12 made by the Hughes family are true. We've been
13 approached by other families. It happened to me as a
14 former Bank of America customer. Right about the same
15 time, right when I get married and purchased my first
16 house, we're financing through Bank of America and I
17 found a few months after the closing I was getting
18 charged for things I didn't sign up for.

19 Now, I had the physical and mental fortitude to
20 address it with Bank of America right then and there.
21 Ms. Hughes did not. And so that's the context as to why
22 we're here.

23 And so I know what the Court decision will be in
24 terms of the disposition. My hope is that it would be
25 confined to controlling precedent and that it would not

1 be founded on any statute of limitations, collateral
2 estoppel, res judicata type issues. For that matter,
3 the statute of limitations, according to this state
4 under *Johnston versus Bowing*, is an issue for the jury
5 to decide as to when the party knew or should have known
6 of the wrongdoing.

7 And so considering we're one of the few remaining
8 states that hold the way we do with fraud, any illusion
9 to this being sanctionable type conduct to me is far
10 fetched. You know, the way the law gets changed in
11 terms of common law is you challenge it.

12 So I think I would tend to agree that the
13 conversion claim, breach of fiduciary claims are
14 probably foreclosed and that we would forego those
15 claims. As to unfair trade, if there is -- and I may
16 have just missed this in the research. And it may be
17 clear in the legislation. If there's a case on point
18 where once you die, your unfair trade claim dies with
19 you, I would again concede the point that there's
20 controlling precedent. And this is being brought in a
21 represented capacity obviously.

22 And so the challenge in this case is to try to
23 change the stat of the law in South Carolina for fraud
24 based claims and this is the only way I know how to do
25 it. There was adjudication of these claims on the

1 federal level, which is why we're here today.

2 So unless the Court has any questions, I do
3 appreciate your time.

4 THE COURT: No, I don't have any.

5 Anything?

6 MR. MUCKENFUSS: Very briefly, Your Honor. I
7 think it is appropriate for this Court to apply issue
8 preclusion in addition to the fact that there is no
9 claim in South Carolina for fraud post death. But it is
10 appropriate issue preclusion as to equitable estoppel
11 decision by the federal court would apply to all of
12 these claims.

13 That's different than claim preclusion, but the
14 federal court very specifically held that the plaintiffs
15 in this case, the plaintiffs in this case did not
16 exercise the due diligence that would be required. It's
17 cited in the South Carolina case that's on point for
18 that standard.

19 So there is not a different federal standard to
20 the standard that South Carolina courts will apply. So
21 we would ask that when the case is dismissed, that it's
22 dismissed on the fact that there's clear precedent,
23 obviously, you know, bringing these claims, in addition
24 to issue preclusion on the equitable estoppel, equitable
25 tolling argument that in addition -- that would be

1 applied to the fraud based claims, not just the non
2 fraud based claims. All of those claims would be
3 dismissed based on the fact that the court rejected the
4 equitable tolling argument by the plaintiffs. Thank
5 you, Your Honor.

6 THE COURT: Thank you. All right, gentlemen.
7 Watch your e-mail addresses and we'll get something to
8 you.

9 MR. MUCKENFUSS: Okay.

10 MR. HEWITT: Thank you, Your Honor.

11 MR. MUCKENFUSS: Thank you, Your Honor.

12 (Whereupon, hearing concluded at 9:19 a.m.)

13

14 --- THIS ENDS REQUESTED TRANSCRIPT ---

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COURT REPORTER CERTIFICATE

I, the undersigned Julie A. Ashbrook, Court Reporter for the Seventh Judicial Circuit Court of the State of South Carolina, do hereby certify that to the best of my ability the foregoing is a true, accurate, and complete transcript of record of all the proceedings and evidence introduced in the hearing and/or trial of the captioned case, relative to appeal, in the Court of Common Pleas for Spartanburg County, South Carolina, on the 22nd day of February, 2018.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

s/Julie A Ashbrook
Julie A. Ashbrook
Circuit Court Reporter
Seventh Judicial Circuit

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

PHILLIP FRANCIS LUKE)

HUGHES, on behalf of the Estate of)
Jane K. Hughes,)

Plaintiff,)

vs.)

BANK OF AMERICA NATIONAL)
ASSOCIATION)

Defendant.)

Civil Action No.: 2017- CP-42-02834

NOTICE OF SUPPLEMENTAL EXHIBITS
IN SUPPORT OF BANK OF AMERICA,
N.A.'S MOTION FOR SANCTIONS

Defendant Bank of America, N.A. ("BANA"), by and through its undersigned counsel, hereby gives notice of filing supplemental exhibits in further support of its Motion for Sanctions requesting this court to award sanctions against Plaintiff, Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes ("Plaintiff") and his counsel Brad Hewett of the Mike Kelly Law Group, LLP ("Plaintiff's Counsel") pursuant to Rule 11 of the South Carolina Rules of Civil Procedure and the South Carolina Frivolous Civil Proceedings Act, S.C. Code Ann. §15-36-10, *et seq.* Attached as Exhibit 1 is a true and correct copy of the Initial Brief of Appellant, filed in the State of South Carolina Court of Appeals yesterday, on May 29, 2018, wherein Plaintiff is appealing this Court's March 20, 2018 Order of Dismissal which dismissed his Complaint in its entirety. Additionally, attached as Exhibit 2 is a Supplemental Affidavit of Elizabeth Timmermans, which includes a more detailed summary of the fees and costs BANA has incurred in defending against Plaintiff's frivolous lawsuit.

Dated this 30th day of May, 2018.

Respectfully submitted,

/s/ Robert A. Muckenfuss
Robert A. Muckenfuss
(S.C. Bar No. 13903)
MCGUIREWOODS LLP
201 N. Tryon Street, Suite 3000
Charlotte, NC 28202
Telephone: (704) 343-2052
Fax: (704) 444-8707
RMuckenfuss@mcguirewoods.com

Elizabeth M.Z. Timmermans
(S.C. Bar No. 100288)
MCGUIREWOODS LLP
434 Fayetteville St. Suite 2600
Raleigh, NC 27601
Telephone: (919) 755-6576
Eztimmermans@mcguirewoods.com

Attorneys for Defendant Bank of America, N.A.

CERTIFICATE OF SERVICE

I hereby certify that I have on this 30th day of May, 2018, the foregoing BANK OF AMERICA, N.A.'S NOTICE OF SUPPLEMENTAL EXHIBITS was electronically filed with the Clerk of the South Carolina Court using the E-Filing system, and has been served upon counsel by mailing a true and accurate copy with sufficient postage prepaid, and by electronic mail, to the following:

D. Michael Kelly, Esq.
Brad D. Hewett, Esq.
Jamie N. Smith, Esq.
MIKE KELLY LAW GROUP, LLC
500 Taylor Street Post Office Box 8113
Columbia, SC 29201
mkelly@mklawgroup.com
bhewett@mklawgroup.com
jsmith@mklawgroup.com

Attorneys for Plaintiff

/s/ Robert A. Muckenfuss
Robert A. Muckenfuss

Exhibit 1

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No.: 2017-CP-42-02834

Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes Appellant,

v.

Bank of America National Association Respondent.

INITIAL BRIEF OF APPELLANT

MIKE KELLY LAW GROUP, LLC
Brad D. Hewett
bhewett@mklawgroup.com
D. Michael Kelly
mkelly@mklawgroup.com
Jamie N. Smith
jsmith@mklawgroup.com
500 Taylor Street
Post Office Box 8113
Columbia, South Carolina 29202
(803) 726-0123
(803) 252-7145
Attorneys for Appellant

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THIS COURT SHOULD ABOLISH THE COMMON LAW RULE EXCEPTING FRAUD-BASED ACTIONS FROM SOUTH CAROLINA'S SURVIVAL STATUTE.
- II. WHETHER THE DOCTRINE OF RES JUDICATA BARS A STATE COURT ACTION CHALLENGING EXISTING PRECEDENT WHEN CLAIMS RELATED TO THAT ACTION WERE ADJUDICATED IN A FEDERAL COURT WHICH LACKED THE JURISDICTION TO CERTIFY ISSUES OF STATE PRECEDENT OR CHANGE CONTROLLING STATE LAW.
- III. WHETHER THE LOWER COURT ERRED IN CONCLUDING THAT APPELLANT'S CLAIMS ARE TIME-BARRED.

STATEMENT OF THE CASE

This case arose from fraudulent charges made by of Bank of America National Association ("BANA") against the account of John and Jane Hughes. Appellant Phillip Francis Luke Hughes filed the current survival action on behalf of the Estate of Jane K. Hughes on August 15, 2017, alleging fraud and other fraud-based causes of action. On December 21, 2017, BANA filed a Motion to Dismiss pursuant to SCRCP Rule 12(b)(6).

Prior to initiating the present action, Appellant filed an action in the Spartanburg County Court of Common Pleas in 2015 based upon the same transactions and occurrences that establish his claim for relief in the current action. Appellant's 2015 Complaint was filed as a putative class action law suit against BANA for violation of the Truth in Lending Act, fraud, fraudulent concealment, breach of contract, and breach of contract accompanied by fraudulent acts. BANA removed the 2015 action to federal court, and filed a motion to dismiss in lieu of an answer. Before the District Court decided BANA's motion, Hughes stipulated to the dismissal, without prejudice,

of all claims against BANA *except* breach of contract and violation of TILA. The District Court ultimately dismissed the breach of contract and TILA claims as untimely, and the Fourth Circuit Court of Appeals upheld that decision.

Appellant dismissed the fraud-based claims pending in the 2015 federal action and re-filed those claims in his 2017 Complaint because the District Court lacked jurisdiction to decide a key issue related to those claims: whether existing precedent excluding fraud from the South Carolina survival statute should be overturned. The question is one left to the State to decide but, because case law provides controlling precedent on the issue, the question could not be certified back to the South Carolina Supreme Court under Rule 244(a), SCACR. (See, February 22, 2018 Hearing Tr. at 11:1-25)

Respondent moved to dismiss Appellant's 2017 Complaint under the doctrines of *res judicata* and collateral estoppel, and the common law exception of fraud from S.C. Code Ann. § 15-5-90 (1976), South Carolina's survival statute. The Honorable R. Keith Kelly heard arguments by Appellant and Respondent on February 22, 2018 and subsequently granted Respondent's motion, finding the actions barred by *res judicata*, the statute of limitations, and S.C. Code Ann. § 15-5-90. Order of March 20, 2018. Appellant filed a timely Notice of Appeal on March 27, 2018 pursuant to Rule 201, SCACR, challenging the lower court's dismissal of the fraud-based claims alleged in Appellant's 2017 Complaint. See, Notice of Appeal. On March 29, 2018, Respondent filed a Motion for Sanctions against counsel for Appellant, seeking more than \$70,000.00 in attorneys' fees for the filing of the 2017 Complaint, which resulted in a dismissal prior to any discovery and after a single hearing.

STATEMENT OF THE FACTS

On June 13, 2006, Mr. and Mrs. Hughes opened a line of credit from BANA in the amount of \$120,000.00, secured by a mortgage ("Mortgage") on their Spartanburg County homestead. The line of credit is governed by a document entitled "Bank of America Maximizer Agreement and Disclosure Statement" ("Agreement") signed by both borrowers on June 13, 2006. Compl. ¶ 7. At the same time, Mr. and Mrs. Hughes signed an acknowledgement and authorization ("Authorization") which allowed BANA to automatically draft loan payments from the Hughes's BANA bank account. Compl. ¶ 8.

During the meeting to complete the Mortgage transaction, BANA presented Mr. and Mrs. Hughes with a document entitled "Optional Line Protection Plan Addendum ("Addendum")." As stated on the form, the "Line Protection Plan only provides protection on the variable portion of your credit line" and "This Product is Optional." If elected, the Line Protection Plan allowed the cancellation of all or some monthly loan payments in the event of disability, accidental death, or involuntary unemployment. The Agreement explicitly stated that the borrowers "must specifically request" the Line Protection Plan. Compl. ¶ 10. Mr. and Mrs. Hughes both signed a two-page document captioned "OPTIONAL LINE PROTECTION PLAN ADDENDUM ("ADDENDUM")" which stated that BANA provided them with information on the Line Protection Plan. Jane and John Hughes designated their election to decline the purportedly optional Line Protection Plan by clearly and conspicuously checking a box next to the "DECLINE to purchase any Protection on this Credit Line" option. Compl. ¶ 11.

In June 2006, John Hughes was age 86. Compl. ¶ 12. He died on October 22, 2008, and left his estate to his wife, Jane K. Hughes. Compl. ¶ 13. Mrs. Hughes was age 85 in June 2006 and underwent major heart surgery, suffered from dementia, and experienced vision impairments,

including cataracts and eye surgery, from June 2006 until her death. Mrs. Hughes also suffered a broken hip after June 2006 that required hospitalization and extensive rehabilitation at White Oak Manor Nursing Home in Spartanburg, South Carolina. Mrs. Hughes was diagnosed with impaired cognition and mobility, atypical psychosis, confusion, blindness, renal insufficiency, heart failure, and was noted to lack decisional capacity in the years subsequent to June 2006. Compl. ¶ 12.

Over six years after Mr. Hughes's death, on or around March 17, 2015, BANA sent a boilerplate form cancellation notice addressed to Mr. and Mrs. Hughes, informing them that "The Line Protection Plan would be cancelled on September 30, 2015," and that "You're no longer being charged for the Protection Plan as of April 1, 2015." The notice also indicated that John P. Hughes was a "protected" borrower. Compl. ¶ 15. Although Mr. and Mrs. Hughes never elected to purchase any "Protection Plan," BANA sent a second letter dated March 25, 2015, stating that John Hughes had selected "6 month, Involuntary Unemployment, Disability, Accidental Death and Hospitalization" protection at a monthly rate of 9.5% of the Hughes' Minimum Monthly Payment. Compl. ¶ 17.

In response to inquiry from a family member of Mrs. Hughes, BANA stated in a May 6, 2015 letter that "The Line Protection Plan (Plan) addendum for your Bank of America loan ending in 4699 is enclosed, per your request, and enclosed an eight-page document entitled "OPTIONAL LINE PROTECTION PLAN ADDENDUM ("ADDENDUM")." Compl. ¶ 18. The eight-page "ADDENDUM" provided by BANA in May 2015 is not the two page "ADDENDUM" signed by Mr. and Mrs. Hughes in 2006, and does not contain or provide for signatures or a place for election or rejection of the "protection." Compl. ¶ 18. In any event, BANA did not provide the eight-page addendum to Mr. or Mrs. Hughes before May 2015, nor did the Line Protection Plan premium

appear on the mortgage finance charge disclosed to Mr. and Mrs. Hughes in 2006. Compl. ¶ 19, 20.

Before March 2015, BANA did not provide any statement, notice, or communication of any sort to Mrs. Hughes revealing that BANA believed that the Hughes's had elected any "Protection Plan" or that an amount was being charged to them for such a plan. Compl. ¶ 21. To date, BANA has been unable to provide any documentation that Mr. or Mrs. Hughes ever elected or agreed to pay for any "Protective Plan" coverage of any sort. Compl. ¶ 22.

However, despite having declined to purchase the Line Protection Plan, BANA withdrew a monthly charge of \$28.40 from the Hughes's BANA joint checking account for several years. This charge was ambiguously listed as "Ad Insurance Des:XXXXXX4374 ID: 6 R# XXXXXXXX1070 Indn:Hughes Sr, John P Co ID:XXXXXX4660 Ppd" and appeared amid numerous other monthly charges. Compl. ¶ 23. Notably, all other charges from BANA or its subsidiaries appearing on the Hughes's bank statements during the relevant period were clearly designated as transactions with "Bank of America" or "BkofAmerica" and other insurance transactions were clearly identified with the name of the charging company (i.e., "Patrons Mutual," "Travelers Insur"). Compl. ¶ 24. None of the numbers in the Line Protection Plan transaction description were related to the Hughes's BANA mortgage or line of credit. Compl. ¶ 25.

As neither Mr. nor Mrs. Hughes had elected Line Protection Plan coverage or had received any notice that BANA had issued such a plan to them, they were not expecting to be charged for any such service and they did not have any reason to expect that "Ad Insurance Des:XXXXXX4374 ID: R# XXXXXXXX1070 Indn:Hughes Sr, John P Co ID:XXXXXX4660 Ppd" was a BANA charge generally or a "Line Protection Plan" charge specifically until receiving the March 2015 BANA notices. Compl. ¶ 26. Upon receiving notice of Mr. Hughes's death, on

May 6, 2015, BANA declined coverage under the Line Protection Plan on the grounds that “[t]he death was the result of disease or treatment of disease or any medical treatment (and/or was not for the treatment of an accidental injury).” Compl. ¶ 27. BANA refused to refund the payments drawn during Mr. Hughes’s lifetime and has been unable to produce any documentation supporting that Mr. Hughes elected to enroll in the Line Protection Plan. Compl. ¶ 22, 28.

On June 3, 2015, Jane K. Hughes passed away, and Appellant was subsequently named as personal representative of her estate. Compl. ¶ 29. Appellant filed a prior action in this Court in 2015 based upon the facts and transaction set forth above. The 2015 Complaint was filed as a putative class action law suit against BANA for violation of the Truth in Lending Act, fraud, fraudulent concealment, breach of contract, and breach of contract accompanied by fraudulent acts. BANA removed the action to federal court under federal question and diversity jurisdiction, and filed a motion to dismiss in lieu of an answer. Prior to the District Court’s decision on the motion, Appellant stipulated to the dismissal, without prejudice, of all claims against BANA *except* breach of contract and violation of TILA. Appellant refiled his fraud-based claims in state court due to the District Court’s lack of jurisdiction to hear a key issue essential to those claims, and to allow this Court to revisit the survivability of fraud claims in South Carolina.

STANDARD OF REVIEW

This is an appeal, made pursuant to Rule 201, SCACR, from an Order of Dismissal issued by the lower court based on the trial judge’s grant of Respondent BANA’s Rule 12(b)(6) Motion to Dismiss.

“On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court.” Brouwer v. Sisters of Charity Providence Hosps., 409 S.C. 514, 519, 763 S.E.2d 200, 202 (2014) (citing Rydde v. Morris, 381 S.C. 643,

646, 675 S.E.2d 431, 433 (2009)). “That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.” *Id.* Furthermore, the court should not dismiss a complaint merely because the court doubts that the plaintiff will prevail in the action. *Spence v. Spence*, 368 S.C. 106, 116-117, 628 S.E.2d 869, 874 (2006).

ARGUMENT

I. THIS COURT SHOULD ABOLISH THE COMMON LAW RULE EXCEPTING FRAUD-BASED ACTIONS FROM SOUTH CAROLINA’S SURVIVAL STATUTE.

The South Carolina survival statute allows for the survival of *any and all* injuries to the person or personal property. The trial court dismissed Appellant’s fraud-based claims, in part, based upon a court-created exception to the South Carolina survival statute which excludes fraud as a surviving cause of action. Appellant challenges this antiquated and arbitrary exception to the survival statute and, for the reasons set forth below, asks this court to reconsider precedent to better reflect the rights of persons in a modern society.

A. Scope of the South Carolina Survival Statute

i. *Mattison v. Palmetto State Life Ins. Co.*

South Carolina’s survival statute provides that “[c]auses of action for and in respect to any and all injuries and trespasses to and upon real estate and *any and all* injuries to the person or to personal property” shall survive the death of a party, whether the claim is on behalf of or against the deceased, “. . . any law or rule to the contrary notwithstanding.” S.C. Code Ann. § 15-5-90 (1976) (emphasis supplied). The statute, enacted in 1905, allows for the survival of certain claims that were historically barred by a claimant’s death. *Bennett v. Spartanburg Ry., Gas & Elec. Co.*, 97 S.C. 27, 81 S.E. 189, 189 (1914). South Carolina’s survival statute has remained intact, and

the language essentially unchanged, from 1905 to present. The courts have relied and still rely upon early judicial interpretations of the statutory language and legislative intent in answering contemporary questions regarding the survivability of actions under the act.

South Carolina first addressed the question of whether fraud survives the death of a party under the survivability statute in Mattison v. Palmetto State Life Ins. Co., 197 S.C. 256, 15 S.E.2d 117 (1941). In Mattison, the estate brought an action against Palmetto State Life Insurance Company for perpetrating a fraudulent scheme intended to cheat the deceased of his rights under an insurance contract. Id. The South Carolina Supreme Court granted certiorari to hear the case on several questions, the relevant question being whether the cause of action of fraud survived. Id.

In determining whether the fraud claim survived, the Mattison Court reviewed the survival statute to assess whether fraud fell within the scope of the statutory language. At that time, the applicable statute read:¹

Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to *personal property*, shall survive both to and against the personal or real representative (as the case may be) of the deceased persons, and the legal representatives of insolvent persons, and defunct or insolvent corporations, any law or rule to the contrary notwithstanding.

1932 Code § 419 (emphasis added).

The Mattison Court succinctly opined that fraud did not fall within the scope of the statutory language, and therefore the Legislature did not intend that claims of fraud survive death.

The Mattison Court further provided that:

It is readily seen that under the above quoted Section, there are but two instances wherein a cause of action survives: (1) For and in respect to any and all injuries and trespasses to and upon real estate, and (2) any and all injuries to the person or to *personal property*.

¹ The current survival statute is codified at S.C. Code Ann § 15-5-90, and the language is nearly identical to the 1932 Code with only some minor changes in punctuation.

And it is just as readily seen that respondent's second cause of action does not come within either of the instances where a cause of action survives.

Mattison at 256, 15 S.E.2d at 119 (original emphasis replaced).

While the Mattison court asserted that the survival statute must be liberally interpreted, the court failed to do exactly that. Instead, the court narrowly interpreted the statute and, in doing so, failed to explain why fraud does not constitute injury to personal property. In fact, there is no discussion in Mattison regarding the elements of fraud or why pecuniary loss caused by fraud is not an injury to personal property. This omission is relevant because the money taken by BANA from Jane Hughes was personal property.² Once Jane Hughes died, interest in her personal property, including her financial holdings, transferred to her Estate. Thus, Mattison's principle that fraud does not survive the death of a party in South Carolina is internally inconsistent.

ii. Fraud as an "exception" to the South Carolina Survival Statute

Since Mattison, and contrary to its narrow view of survivability, the South Carolina Supreme Court has consistently *broadly* interpreted the survival statute. See, e.g., Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 564, 564 S.E.2d 94, 97 (2002) ("[T]he statute's language is broad and ostensibly appears to include almost every conceivable cause of action."); Layne v. Int'l Bhd. of Elec. Workers, (AFL-CIO), Local No. 382, 271 S.C. 346, 352, 247 S.E.2d 346, 349 (1978) ("[I]t is the general rule that any cause of action which could have been brought by the deceased in his lifetime survives to his representative under the Survival Act."); Brewer v. Graydon, 233 S.C. 124, 128, 103 S.E.2d 767, 769 (1958) ("the Survival Statute must be liberally construed"). These later South Carolina opinions create a tension with Mattison's holding—that fraud falls outside the scope of the statute—by implying that fraud ostensibly falls within the

² S.C. Code Ann. § 15-1-40 (1976) provides that "[t]he words 'personal property,' as used in this Title, include *money*, goods, chattels, things in action and evidences of debt." (emphasis added).

purview of the survival statute, and would survive but for the *exception* created by Mattison. See Ferguson at 564, 564 S.E.2d at 96 (“The general survivability statute has a wide ambit that includes all causes of action not covered by specific exceptions.”); Brailsford v. Brailsford, 380 S.C. 443, 449, 669 S.E.2d 342, 345 (S.C. App., 2008) (Upholding a dismissal of a fraud-based action upon “[a]pplying this State’s longstanding exception to the survivability statute for fraud.”); Layne Workers at 352, 247 S.E.2d at 349 (Identifying fraud as an “exception” to the general rule of survivability).

A review of the interpretation of the survival statute by South Carolina courts, as it pertains to fraud, reveals decades of precedent founded in error. The most recent South Carolina Supreme Court opinion relying upon the Mattison-created exception, Ferguson, strongly implies that fraud falls within the scope of the survival statute, but is excluded as a result of the Mattison opinion. See Ferguson at 564, 564 S.E.2d at 96. The Mattison opinion, however, states in no uncertain terms that fraud “does not come within either of the instances where a cause of action survives” under the statute. Mattison at 256, 15 S.E.2d at 119. Bizarrely, Mattison serves as the foundation upon which the Ferguson opinion rests, yet the language of the Ferguson opinion directly contradicts that of Mattison.

Whether a cause of action for fraud is a common law exception to the survivability statute or whether it falls outside the scope of the statute’s language is an important distinction. The survival statute, currently and when Mattison was decided, expressly provides that causes of action that fall within the scope of the statute survive, “any law or rule to the contrary notwithstanding.” Id.; S.C. Code Ann § 15-5-90 (1976). Over the years, the Mattison court’s interpretation of the survival statute as not extending to actions of fraud has evolved into a common law rule excepting

fraud. The result of that evolution is a “law or rule to the contrary” that is untenable under the plain language of the survival statute.

Despite this irreconcilable disconnect, the South Carolina Supreme Court has yet to revisit the Mattison rationale for the fraud “exception.” Indeed, there has been no discussion by South Carolina courts since 1941 on *why* fraud should be excepted from the survival statute; rather, opinions simply offer that fraud *is* excepted based upon the Mattison opinion. Appellant, therefore, invites this Court to reexamine this question of survivability and to determine viability of the 1941 Mattison analysis in 2018.

B. Public Policy

i. Clear evidence of mindset defeats policy reasons for exception.

Perhaps the only attempt at explanation for South Carolina’s fraud exception comes from the Fourth Circuit opinion in Faircloth v. Finesod, 938 F.2d 513, 517 (4th Cir. 1991). The plaintiff in Faircloth challenged the fraud exception to the South Carolina survival statute as violating the Equal Protection Clause, and the South Carolina District Court agreed. On appeal, the Fourth Circuit, applying a minimum scrutiny standard, supplied its “feasible attempt for [the] legislative distinction”:

[F]raud is a tort that requires a special quality of proof, and the states of mind of the victim (e.g., whether he knew the statement was false, relied upon it, and was justified in so relying) and the perpetrator are especially vital. . . . [A] legislature could rationally conclude that the difficulty and potential unfairness of proving the state of mind of a dead party to a fraudulent transaction justified excepting fraud from the survival statute.

Faircloth at 517.

Assuming that the rationale proffered by the Fourth Circuit in Faircloth is, in fact, the underlying basis for the common law fraud exclusion, as a matter of public policy, the common law exclusion should be overturned or, at the very least, excepted in those circumstances where

the state of mind of the deceased party is readily identifiable, as in the current case, where Jane and John Hughes expressly declined, through an executed document, to enroll in a program offered by BANA. The instant case, where the policy supporting the exclusion is defeated, in consideration with the additional policy reasons set forth below, cries for a reevaluation of the fraud exclusion to the survival statute.

ii. Elderly fraud victims and public policy.

Public policy should not enable the abuse of elderly and otherwise vulnerable citizens of South Carolina. Jane Hughes was 85 years old when Defendant began withdrawing the fraudulent, unauthorized charges from her account and suffered from dementia and vision impairments in the following years until her death. Studies show that elderly persons, like Jane Hughes, are highly susceptible to being defrauded.

According to a 2015 study by True Link Financial, approximately 36.9% of American seniors are victims of financial abuse in any five-year span. *The True Link Report on Elder Financial Abuse 2015*, TRUE LINK, January 2015 at 11 (<https://truelink-wordpress-assets.s3.amazonaws.com/wp-content/uploads/True-Link-Report-On-Elder-Financial-Abuse-012815.pdf>). Fraud and financial abuse costs our seniors an estimated total of \$36.48 billion annually. *Id.* Of this, approximately \$16.99 billion is lost to financial exploitation, which is defined as “when misleading or confusing language is used – *often combined with social pressure and tactics that take advantage of cognitive decline and memory loss* – to obtain a senior’s consent to take his or her money.” *Id.* at 1. Not surprisingly, the vulnerability of seniors to fraud is in part due to the loss of cognitive functions of these individuals. *Id.* at 19. True Link’s research shows that conditions such as dementia and Alzheimer’s disease increase vulnerability to fraud, and an individual with a below-average memory is 78% more likely to be a victim of fraud. *Id.*

Notably, as much financial exploitation is accomplished through deception that does not quite rise to a criminal level, only a civil remedy is available. *Id.* at 5. The reality is that the time to identify, investigate, report, and prosecute civil offenses now, unlike in 1941, often takes many years and exceeds the lifetime of the victims. The speed and complexity of today's financial transactions, exacerbated by sophisticated technology, furthers fraud in ways not conceivable in 1941. Thus, the impact of the Mattison holding is now much more adverse to those most likely to fall victim to fraud than in 1941.

In sum, the public policy impact of South Carolina's survivability statute is long overdue for review in light of electronic phishing, data mining, electronic databases, and targeted advertising, and Appellant asks this Court to initiate that reevaluation.

iii. Survivability of fraud in other jurisdictions.

Further supporting the issue at hand is that the majority of states allow the survival of fraud claims. Indeed, South Carolina is one of only seven (7) states that do not allow a fraud action to survive; the others being Alabama, Arkansas, Massachusetts, Texas, Vermont, and Wisconsin.

The general consensus among states that have offered policy considerations for the survival of fraud actions is that any action which lessens the value of an estate should survive, as the modern trend is to remove obstructions to the free transfer of property and rights and interests therein. *See, e.g., Jandera v. Lakefield Farmers' Union*, 150 Minn. 476, 479, 185 N.W. 656, 658 (1921); *Micheletti v. Moidel*, 94 Colo. 587, 591, 32 P.2d 266, 267 (1934); *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 154 Idaho 37, 41, 293 P.3d 661, 665 (2013).

In light of the policy considerations put forth by South Carolina's sister states regarding the impact of survivability on property rights, Appellant would urge this court to examine the question of whether excepting fraud from the South Carolina survival statute violates public policy.

II. THE DOCTRINE OF RES JUDICATA DOES NOT BAR A STATE COURT ACTION CHALLENGING EXISTING PRECEDENT WHEN CLAIMS RELATED TO THAT ACTION WERE ADJUDICATED IN A FEDERAL COURT LACKING THE JURISDICTION TO CERTIFY ISSUES OF STATE PRECEDENT OR CHANGE CONTROLLING STATE LAW.

Appellant does not dispute the lower court's determination that the present action is based upon the same transaction and occurrence as matters previously adjudicated by the District Court. However, because the District Court lacked jurisdiction to either overturn Mattison or certify the question of whether fraud survives to the South Carolina Supreme Court, the fraud-based claims presented in the current action are not barred under the doctrine of *res judicata*.

Res judicata prohibits a party from bringing a claim against a second party when that claim has already been, or could have been, litigated. In order to establish that a claim should be barred by *res judicata*, Respondent must show that the current claim involves 1) the same parties; 2) the same subject matter; and 3) an issue previously adjudicated in another suit. Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986). Because Appellant's fraud-based claims (fraud, breach of contract accompanied by a fraudulent act, and fraudulent concealment) were voluntarily dismissed without prejudice in the District Court proceeding, these claims were not previously adjudicated and thus do not meet the third element of *res judicata*.

Appellant acknowledges that *res judicata* can also serve to bar "any issues which might have been raised in the former suit." Judy v. Judy, 393 S.C. 160, 712 S.E.2d 408, 414 (2011) (citing Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)). However, the issue of whether fraud should continue to be exempted from the survival statute could not be adjudicated in the prior lawsuit. Respondent removed the action to federal court based on federal question jurisdiction over the TILA claim, and diversity jurisdiction over Appellant's state law remaining claims. Under the Erie doctrine, the District Court must apply South Carolina

substantive law in deciding state law issues. See, Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). Due to the existing South Carolina precedent surrounding the issue of the survivability of fraud, the federal court would be required to apply that precedent and dismiss Appellant's claims of fraud. Likewise, under Rule 244(a), SCACR, the District Court could not certify the question of survivability back to the South Carolina Supreme Court, as the scope of certification extends only to questions of law for which there is no controlling precedent. See, Rule 244(a), SCACR.

Consequently, the District Court lacked any jurisdictional mechanism under which it might decide Appellant's challenge to the fraud exception to survivability. Requiring Appellant to pursue his fraud-based claims in the federal court, therefore, would inevitably lead to dismissal of the claims pursuant to S.C. Code Ann § 15-5-90, and the state court's interpretation thereof, to exclude fraud without the opportunity to have a central issue decided in this case. Appellant seeks reexamination of this interpretation for reasons set forth in Section I, *infra*, which can only be accomplished by pursuing the fraud-based claims in state court. Because the issue of survivability could not have been raised in the prior proceeding in any meaningful capacity, Appellant's fraud-based claims are not barred by the doctrine of *res judicata*.

South Carolina takes the position that "*res judicata* is not 'an 'ironclad' bar to a later lawsuit." Judy at 167, 712 S.E.2d at 412. Likewise, South Carolina has adopted the Restatement (Second) of Judgments Section 28, which provides exceptions to circumstances in which *res judicata* typically would apply. Specifically, Section 28 outlines factors under which a new determination of an issue is warranted, including differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or there is a clear and convincing need for a new determination of the issue because of the adverse impact of the determination on the public interest or interests of persons not themselves

party in the initial action; or because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. Pye v. Aycock, 325 S.C. 426, 437-38, 480 S.E.2d 455, 460-61 (S.C. App.1997).

The circumstances of the current action, even if barred by traditional principles of *res judicata*, survive under Section 28 of the Restatement (Second) of Judgments. As set forth in the survivability argument, *infra*, the issue of the survivability of fraud is one that directly impacts public interest as well as persons not party to the initial action. Appellant, in fact, originally sought to pursue the initial lawsuit as a class action so as to protect the interests of similarly situated parties. Appellant additionally did not have adequate opportunity to fully adjudicate the issue of the survivability of fraud in the initial action, because the District Court was not the proper forum for deciding that issue. Notably, Section 28 specifically addresses the fact that state and federal courts may retain exclusive jurisdiction over particular issues and provides direction in instances where an initial case is heard in federal court, and a subsequent action is heard in state court. See, Restatement (Second) of Judgments § 28 (1982), cmt. e.

Accordingly, the doctrine of *res judicata* does not bar the lower court from hearing Appellant's fraud-based claims, as the issues brought before the court through those claims were neither ruled upon by the District Court, nor could they have been. As such, Appellant respectfully asks this Court to reverse the lower court's finding that *res judicata* acts to bar the fraud-based claims set forth in Appellant's 2017 complaint.

III. THE LOWER COURT ERRED IN CONCLUDING THAT APPELLANT'S CLAIMS ARE TIME-BARRED.

Finally, the lower court, in error, opined that Appellant's fraud-based claims are barred by the statute of limitations and that equitable tolling did not apply to Jane Hughes. A review of the Order on Motion to Dismiss demonstrates the lower court's failure to view the facts as set forth in the complaint, or derive inferences therefrom, in the light most favorable to the non-moving party. Accordingly, Appellant asks this court to review the matter, *de novo*, and apply the appropriate standard of review in finding that Appellant's claims are not time-barred.

A. Statute of Limitations

In its discussion of the issue of whether Appellant's claims are barred by frauds three-year statute of limitations, the lower court relied upon a single fact within the complaint—that the alleged deductions from the bank account of Jane and John Hughes began in June 2006. Order of March 20, 2018 at 9. In essence, the trial court determined that a single deduction from a bank account, without considering any additional facts alleged in the complaint, constitutes sufficient notice to put Mr. and Mrs. Hughes on notice of an invasion of their rights. *Id.* The court did *not* consider—in rendering a decision regarding the statute of limitations, in its statement of facts alleged, or at any point in its written opinion—facts alleged in the complaint which tend to negate the lower court's finding of fact, including:

- As of June 2006, Jane Hughes was 85 years old and John Hughes was 86 years old. (Compl. ¶ 12).
- Mrs. Hughes, from June 2006 until her death, underwent major heart surgery, suffered from dementia, and experienced vision impairments and cataracts; which ultimately required surgery. Mrs. Hughes additionally suffered a broken hip that required hospitalization and extensive rehabilitation, and was diagnosed with impaired cognition and mobility, atypical psychosis, confusion, blindness, renal insufficiency, and heart failure, and she was noted to lack decisional capacity in the years leading up to her death. (Compl. ¶ 12).

- The Line Protection Plan premium did not appear on the mortgage finance charge disclosed to Mr. and Mrs. Hughes in 2006. (Compl. ¶ 20). In fact, before March 2015, BANA did not provide any statement, notice, or communication of any sort to Mrs. Hughes revealing that BANA believed that the Hughes's had elected any "Protection Plan" or that an amount was to or was being charged to them for such a plan. (Compl. ¶ 21).
- The charges surreptitiously made to the Hughes account by Respondent were ambiguously listed and appeared amid numerous other monthly charges. (Compl. ¶ 23). All other charges from BANA or its subsidiaries appearing on the Hughes's bank statements during the relevant period were clearly designated as transactions with "Bank of America" or "BkofAmerica" and other insurance transactions were clearly identified with the name of the charging company. (Compl. ¶ 24).

The statute of limitation for claims of fraud does not accrue until the complaining party has knowledge of fraud itself or knowledge of sufficient facts to put a party on inquiry. See, Burgess v. American Cancer Soc., South Carolina Div., Inc., 300 S.C. 182, 386 S.E.2d 798, 789 (S.C. App., 1989). The discovery rule requires this Court to examine when Appellant's cause of action accrued; this issue of fact was improperly examined by the lower court and decided at the pleadings stage. Appellant asserts that, viewing the facts as alleged in the pleadings in the light most favorable to the non-moving party, the statute of limitations began to run in March 2015 upon receiving a notice from BANA of charges to Jane Hughes' account for an unselected, optional mortgage service. Accordingly, the trial court erred in determining that Appellant's fraud-based causes of action began to accrue in June 2006.

B. Equitable Tolling

Even if the lower court properly determined that Appellant's claims are barred by the statute of limitations, it erred in finding that equitable tolling does not apply in this case. Viewing the facts and drawing all inferences in the light most favorable to the Appellant, the statute of limitations should be equitably tolled until March 2015 when Mrs. Hughes received a notice from BANA regarding the cancellation of a service that she expressly declined.

First, the lower court's Order suggests that, under the doctrine of *res judicata*, Appellant is barred from asserting the doctrine of equitable tolling in relation to its fraud-based claims brought in state court, because the District Court determined that other claims raised by Appellant in a prior suit were not tolled under the federal application of the doctrine. Order of March 20, 2018 at 5. As set forth in Section II, *infra*, *res judicata* does not bar Appellant from bringing his fraud-based claims in state court. Likewise, *res judicata* does not prevent Appellant from asserting that, based on South Carolina's standard of application of the doctrine of equitable tolling, Appellant's claims should be equitably tolled. The District Court never ruled on any issue pertaining to Appellant's fraud-based claims; it certainly did not determine whether, under state law, equitable tolling would serve to toll the statute of limitations on those fraud-based claims.

Nor does the issue of whether Appellant's fraud-based claims should be equitably tolled constitute an action that could have been litigated before the District Court. Because those claims, under existing precedent, do not survive death, Appellant lacked standing to raise an equitable tolling argument before the District Court as it might pertain to the claims of fraud. In order for Appellant to seek a determination on the issue of equitable tolling, the Court must first revisit the issue of the survivability of fraud, and find in Appellant's favor. Because the District Court could not make a determination on the survivability issue, the lower court erred in finding that District Court's Order nonetheless serves as an adjudication of the issue of whether Appellant's fraud-based claims are time-barred.

Moreover, the federal standard applied by the District Court in determining whether Appellant's breach of contract and TILA causes of action should be equitably tolled is not the standard applied by South Carolina Courts. The District Court applied a single federal test that allows for the application of equitable tolling where "(1) the party pleading the statute of

limitations fraudulently concealed the facts that are the basis of the plaintiff's claims; (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." Order of February 13, 2017 at 4. South Carolina's stance on equitable tolling, however, is more lenient than that of the federal courts and, in order to determine whether Appellant's fraud-based state law claims are tolled, the lower court should have—but did not—review the facts of this case under that more lenient standard.

In South Carolina, the parameters used by sister states and federal courts to decide on the doctrine's application "do not constitute an exclusive list of circumstances that justify the application of equitable tolling." Hooper v. Ebenezer Sr. Services and Rehabilitation Center, 386 S.C. 108, 113, 687 S.E.2d 29, 32 (S.C. 2009). Instead, equitable tolling may be applied where it is justified under all circumstances of a case, typically when a plaintiff does not file within the statute of limitations due to "an extraordinary event beyond his or her control." *Id.* Rather than applying the tests for the application of equitable tolling adopted in other jurisdictions, our state holds that "[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations." *Id.*, quoting 54 C.J.S. Limitations of Actions § 115 (2005). "Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." *Id.*, quoting Rodriguez v. Superior Court, 176 Cal. App. 4th 1461 (2009). "The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." *Id.*, quoting Hausman v. Hausman, 199 S.W.3d 38, 42 (Tex. App. 2006).

Although the lower court cited to the "extraordinary circumstances" language in the

Hooper opinion, it went on to summarily find that “because Plaintiff’s parents received actual monthly notice of the charges being deducted from their account from 2006 to 2015, Plaintiff’s allegations on the face of the complaint make clear that nothing was hidden from him. Plaintiff also does not plead that BANA engaged in conduct that prevented his parents from filing suit during the appropriate time period. Accordingly, the scarcely used doctrine of equitable tolling is not appropriate for this case.” Order of March 20, 2018 at 9-10.

The assertions in the order below that “nothing was hidden” from John and Jane Hughes, that Appellant did not plead that BANA engaged in any conduct that prohibited John or Jane Hughes from filing suit, and that the charges were not hidden, demonstrate the lower court’s failure to view all of the facts alleged in the complaint. The allegations in the case at hand are that BANA—an international financial institution—deceived and defrauded a frail, elderly couple by surreptitiously charging them for a product they expressly declined. The charges against their account for these services continued after the death of John Hughes and while Jane Hughes suffered debilitating ailments, including dementia, vision impairments resulting in surgery, heart problems resulting in surgery, and a broken hip that required hospitalization and extensive rehabilitative care. BANA withdrew these charges even though the couple expressly denied the Line Protection Plan service, failed to report the charges on the couple’s finance statement (as required under the Truth in Lending Act), and withdrew the monthly fee “under the confusing and non-descript transaction . . . with the intention that the Hughes’ not identify the true nature of the transaction.” Compl. ¶ 38. Surely, death and dementia, constitute “extraordinary circumstances beyond [one’s] control” so as to justify equitable tolling under Hooper; this is especially so when viewed in combination with Respondent’s surreptitious, illegal activities and position as a fiduciary.

The trial court, by failing to take into account any of the facts favorable to Appellant in its determination of the equitable tolling issue, concluded that, as a matter-of-fact, Jane Hughes was put on notice of the charges against her account by Respondent. Order of March 20, 2018 at 9. Not only does the lower court's order fail to apply the appropriate standard of review and improperly determine an issue of fact for the jury, it furthers the agenda of those seeking to perpetrate fraud against the elderly. As discussed in Section I(B), *infra*, elderly individuals are highly susceptible to fraud, in part due to their inevitable cognitive decline. The lower court's finding that equitable tolling is not warranted where an elderly victim, suffering from dementia and impaired vision, fails to notice a nominal and non-descript monthly draft on her bank statement, essentially offers potential fraudsters not only another reason to target those most in need of the state's protection, but also a viable method of doing so without penalty.

CONCLUSION

In sum, Appellant has raised timely claims for fraud in a forum appropriate to address the issue of whether fraud-based claims should survive under South Carolina's survival statute, codified at S.C. Code Ann § 15-5-90. The lower court erred by finding that Appellant's claims are barred by the statute of limitations and the doctrine of *res judicata*, and further erred by failing to apply the appropriate standard of review and consequently refusing to apply equitable tolling in extraordinary circumstances. Finally, though the lower court's determination that fraud does not survive death follows South Carolina's existing precedent, Appellant urges this Court to reconsider the exception in light of public policy concerns arising since the 1941 Mattison opinion.

Respectfully Submitted,

MIKE KELLY LAW GROUP, LLC

By:



Brad D. Hewett

bhewett@mklawgroup.com

D. Michael Kelly

mkelly@mklawgroup.com

Jamie N. Smith

jsmith@mklawgroup.com

500 Taylor Street

Post Office Box 8113

Columbia, South Carolina 29202

(803) 726-0123

(803) 252-7145

Attorneys for Appellant

May 29, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
MAY 29 2018
SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No.: 2017-CP-42-02834

Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes.....Appellant,

v.

Bank of America National Association.....Respondents.

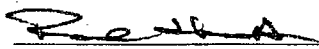
PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant upon counsel of record for the Respondent by causing them to be deposited in the United States Mail, postage prepaid, on May 29, 2018, addressed to Robert A. Muckenfuss, 201 N. Tryon Street, Suite 3000, Charlotte, NC 28202 and Elizabeth M.Z. Timmermans, 434 Fayetteville St. Suite 2600, Raleigh, NC 27601.

May 29, 2018

MIKE KELLY LAW GROUP, LLC

By:



Brad D. Hewett

bhewett@mklawgroup.com

D. Michael Kelly

mkelly@mklawgroup.com

Jamie N. Smith

jsmith@mklawgroup.com

500 Taylor Street

Post Office Box 8113

Columbia, South Carolina 29202

(803) 726-0123

(803) 252-7145

Attorneys for Appellant

Exhibit 2

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

PHILLIP FRANCIS LUKE)
HUGHES, on behalf of the Estate of)
Jane K. Hughes,)

Plaintiff,)

vs.)

BANK OF AMERICA NATIONAL)
ASSOCIATION)

Defendant.)

Civil Action No.: 2017- CP-42-02834

SUPPLEMENTAL AFFIDAVIT OF ELIZABETH TIMMERMANS

I, Elizabeth Timmermans, declare under penalty of perjury as follows:

1. I am over eighteen (18) years of age, a resident of North Carolina, have personal knowledge of the facts recited herein, and I am competent to give this Declaration.
2. I am a member of McGuireWoods LLP and counsel for Defendant Bank of America, N.A. ("Bank of America"). I am an attorney of record in the above-captioned case, and, as such, I am familiar with all pleadings that have been filed as a part of this litigation, and I am fully familiar with the facts set forth below.
3. I submit this Supplemental Affidavit in further support of Bank of America's Motion for Sanctions, and request for Bank of America's recovery of its attorneys' fees incurred due to Plaintiff's frivolous lawsuit.
4. According to firm billing records, McGuireWoods LLP has billed Bank of America \$76,556.02 in costs and legal fees through April 30, 2018 with regard to defending Bank of

America in the 2017 Lawsuit. This amount includes fees associated with analyzing the Complaint, briefing Bank of America's Motion to Dismiss, preparing for the hearing on Bank of America's Motion to Dismiss, traveling to and attending the hearing on Bank of America's Motion to Dismiss, drafting the proposed order granting Bank of America's Motion to Dismiss, and drafting the Motion for Sanctions.

5. Bank of America reserves the right to seek additional costs and fees associated with the briefing, traveling for, and arguing the Motion for Sanctions and defending against Plaintiff's baseless appeal filed on March 27, 2018.

6. According to firm billing records, the following attorneys and paralegals devoted the billable time indicated below, through May 1, 2018, to defend against the 2017 Lawsuit and in seeking sanctions:

<u>Name, Position</u>	<u>Billable Hours Worked</u>	<u>Rate(s)</u>
Bryan Fratkin, Partner	17.4	\$598.00
Robert Muckenfuss, Partner	4.9	\$554.00 and \$582.00
Tanisha Reed, Counsel	124.2	\$418.00
Elizabeth Timmermans, Partner	33.6	\$357.00
Antoine Robinson, Paralegal	23.2	\$201.00

7. According to firm billing records, Robert Muckenfuss, an attorney and the supervising partner on this case, devoted at least 4.9 hours of his billable time to defend against Plaintiff's frivolous claims at rates of \$554.00 per hour prior to February 1, 2018 and \$582.00 per hour after February 1, 2018 during the course of working on this matter.

8. According to firm billing records, Bryan Fratkin, an attorney and partner who provided services in this action, devoted at least 17.4 hours of his billable time to defend against

Plaintiff's frivolous claims at a rate of \$598.00 per hour during the course of working on this matter.

9. According to firm billing records, Tanisha Reed, an attorney and counsel who provided services in this action, devoted at least 124.2 hours of her billable time to defend against Plaintiff's frivolous claims at a rate of \$418.00 per hour during the course of working on this matter.

10. According to firm billing records, Elizabeth Timmermans an attorney and partner who provided services in this action, devoted at least 33.6 hours of her billable time to defend against Plaintiff's frivolous claim at a rate of \$357.00 per hour during the course of working on this matter.

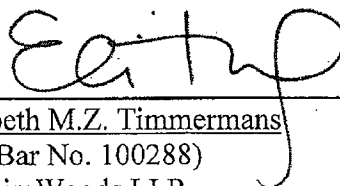
11. According to firm billing records, Antoine Robinson, a paralegal who provided services in this action, devoted at least 23.2 hours of his billable time to assist in the defense against Plaintiff's frivolous claims at a rate of \$201.00 per hour during the course of working on this matter.

12. The total hourly fees incurred through end of April 2018 is \$81,789.00. In addition there are \$458.13 in costs billed for this matter for travel expenses and court costs. In total, the fees and costs incurred defending against this baseless suit is \$82,247.13. However, the amount billed to Bank of America for this time period was \$76,556.02.

13. It is my opinion that the rates charged by McGuire Woods LLP and ultimately billed to Bank of America, as listed above, are reasonable for lawyers and paralegals of similar experience in Charlotte, North Carolina.

I declare under penalty of perjury under the laws of the State of South Carolina that the foregoing is true and correct.

Dated: May 29, 2018

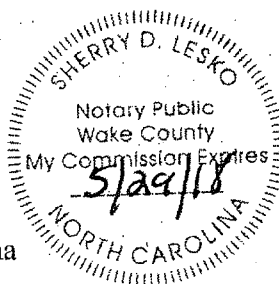


Elizabeth M.Z. Timmermans
(S.C. Bar No. 100288)
McGuireWoods LLP
434 Fayetteville St. Suite 2600
Raleigh, NC 27601
Telephone: (919) 755-6576
Eztimmermans@mcguirewoods.com

Attorney for Defendant Bank of America, N.A.

State of North Carolina
County of Wake

Sworn to and subscribed to
before me on this 29th day of
May, 2018 in Wake County, North Carolina



Sherry D. Lesko
Notary Public

Commission Expires: 5/29/18

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

Grace Gilchrist Knie, Circuit Court Judge

Case No.: 2017-CP-42-02834

Bank of American National Association Appellant,

v.

Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes Respondent.

NOTICE OF APPEAL

Pursuant to Rule 203 of the South Carolina Appellate Court Rules, Defendant Bank of America National Association (“Appellant” or “BANA”), hereby appeals the Order of the Honorable Grace Gilchrist Knie, dated July 3, 2018, denying the Appellant’s Motion for Sanctions against Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes.¹

A copy of the order denying Appellant’s Motion for Sanctions is attached hereto and incorporated herein as Exhibit A.

¹ On March 27, 2018, Hughes filed a notice of appeal with this Court, appealing the trial court’s dismissal of his case against BANA based on grounds of *res judicata*, statute of limitations, and long-standing precedent. *Hughes v. Bank of America Nat’l Assoc.*, Appellate Case No: 2018-000568 (S.C. Ct. App. Mar. 27, 2018). That appeal involves the same parties in the same underlying case, and that appeal has been fully briefed at this time.

Respectfully submitted, August 1, 2018

MCGUIREWOODS LLP

By: /s/ Robert A. Muckenfuss
Robert A. Muckenfuss
(S.C. Bar No. 13903)
McGuireWoods LLP
201 N. Tryon Street, Suite 3000
Charlotte, NC 28202
T: (704) 434-2052
rmuckenfuss@mcguirewoods.com

Elizabeth M.Z. Timmermans
(S.C. Bar No. 100288)
McGuireWoods LLP
434 Fayetteville St. Suite 2600
Raleigh, NC 27601
T: (919) 755-6576
eztimmermans@mcguirewoods.com

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

Grace Gilchrist Knie, Circuit Court Judge

Case No.: 2017-CP-42-02834

Bank of American National Association Appellant,

v.

Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal upon counsel of record for the Respondent causing it to be deposited in the United States Mail, postage prepaid, on August 1, 2018, addressed to Brad D. Hewett and D. Michael Kelly, 500 Taylor Street, Post Office Box 8113, Columbia, South Carolina 29202.

August 1, 2018

MCGUIREWOODS LLP

By: */s/Robert A. Muckenfuss*
Robert A. Muckenfuss
(S.C. Bar No. 13903)
McGuireWoods LLP
201 N. Tryon Street, Suite 3000
Charlotte, NC 28202
T: (704) 434-2052
rmuckenfuss@mcguirewoods.com

Elizabeth M.Z. Timmermans
(S.C. Bar No. 100288)
McGuireWoods LLP
434 Fayetteville St. Suite 2600
Raleigh, NC 27601
T: (919) 755-6576
eztimmermans@mcguirewoods.com

Attorneys for Appellant

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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) COURT OF COMMON PLEAS NONJURY

3
4 PHILLIP FRANCIS LUKE HUGHES, ON BEHALF)
5 OF THE ESTATE OF JANE K. HUGHES,) TRANSCRIPT
6 PLAINTIFF,) OF
7 VS.) RECORD
8 BANK OF AMERICA NATIONAL ASSOCIATION,) 2017-CP-42-2834
9 DEFENDANT.)

10 June 1st, 2018
11 Spartanburg, South Carolina
12
13

14 B E F O R E:

15 THE HONORABLE GRACE GILCHRIST KNIE, Judge.
16

17 A P P E A R A N C E S:

18 MIKE KELLY and BRADLEY DAVIS HEWETT
19 ESQ.
Attorneys for the Plaintiff

20 ROBERT A. MUCKENFUSS and ELIZABETH MARION ZWICKERT
21 TIMMERMANS
22 ESQ.
Attorneys for the Defendant

23
24 PAMELA E. GREEN
25 Circuit Court Reporter
Seventh Judicial Circuit

I N D E X O F W I T N E S S E S

(WHEREUPON, there were no exhibits marked or testimony
taken during this hearing.)

1 P R O C E E D I N G S

2
3 THE COURT: So, I will call the case. There are,
4 apparently, four matters on the docket for this morning.

5 The first is Civil Action Number 2017-CP-42-2834 is, is
6 Phillip Francis Luke Hughes, et al, versus Bank of America.

7 MR. HEWETT: Good morning, Your Honor.

8 THE COURT: Good morning.

9 MR. MUCKENFUSS: Good morning.

10 MS. TIMMERMANS: Good morning, Your Honor.

11 THE COURT: Good morning.

12 And if you-all identify yourselves for the record when
13 you're called upon to make argument, and, traditionally, I
14 don't limit you on time, but I will note that this is
15 scheduled for 30 minutes.

16 Okay. And so the, the moving party is Bank of America.
17 Is that correct?

18 MS. TIMMERMANS: Yes, Your Honor.

19 THE COURT: Okay. And so, what I will do then is I
20 will let Bank of America's counsel make their arguments. I
21 will then let the Plaintiff's counsel make their arguments,
22 and then I will let Bank of America respond to anything new
23 that may have been brought up.

24 (Pause.)

25 THE COURT: All right. So, let me pull up this case.

1 (Pause.)

2 THE COURT: Okay. I see that the motion was filed on
3 March the 29th, and then there have been additional
4 filings this week, Memorandum in Support, Memorandum in
5 Opposition. I just want to make sure that both sides have
6 received the other's filings.

7 MR. HEWETT: Yes, Your Honor.

8 MS. TIMMERMANS: Yes, Your Honor.

9 THE COURT: Okay. All right.

10 (Pause.)

11 THE COURT: Okay. Counsel, I'm happy to hear from you.

12 MS. TIMMERMANS: Good morning, Your Honor.

13 I'm Elizabeth Timmermans with McGuirewoods. This is my
14 colleague, Robert Muckenfuss. Also with McGuirewoods.
15 We're here on behalf of Defendant, Bank of America, this
16 morning.

17 And as Your Honor notes, we're here on Bank of
18 America's Motion for Sanctions under Rule 11, and under the
19 South Carolina Frivolous Civil Proceedings Sanctions Act
20 seeking to recover fees and costs relating to a lawsuit that
21 was recently dismissed by this Court on multiple grounds
22 including the fact that a -- an identical lawsuit had been
23 filed and dismissed in 2015 involving identical allegations,
24 parties, et cetera.

25 There's no question, under the standard here, Your

1 Honor, that Counsel's conduct and Plaintiff's Counsel is
2 sanctionable. Under the Rule 11 and the Frivolous
3 Proceeding Act Standard, the, the Plaintiff and Counsel may
4 be sanctioned where the claims are not warranted by existing
5 law, and there's no good faith basis for a reversal or
6 modification of existing law.

7 Counsel has conceded -- Plaintiff and Counsel have
8 conceded that none of their claims are warranted by existing
9 law. There's six claims at issue in this litigation that
10 I'll get into, Your Honor. None of them are warranted by
11 existing law.

12 The issue for Your Honor this morning is whether three
13 out of those six have a good faith basis for modification or
14 reversal under existing law. They concede that the other
15 three do not have a good faith basis. And, honestly, Your
16 Honor, at this point, we are three years into this case.
17 We've won two Motions to Dismiss. My client had expended
18 significant fees and counsel has conceded that all six
19 claims are barred under existing law. So, if there's --
20 sanctions are not recoverable here, I'm not sure what the
21 case would look like where sanctions could be recovered to
22 be frank.

23 I'll give Your Honor a brief history, procedural
24 history, of the case. I know that we've briefed that in our
25 various filings, but, with the Court's indulgence, I'll walk

1 through some of the relevant procedural history here.

2 In 2015, Plaintiff filed an identical lawsuit in this
3 Court on behalf of his mother's estate. So, he's bringing
4 this lawsuit in 2015 and the current lawsuit in a
5 representative capacity on behalf of his deceased parents.

6 He claims that, in connection with a 2006 loan, Bank of
7 America, without his Plaintiff -- his parent's permission,
8 signed him up for a voluntary insurance product in 2006, and
9 that charges relating to that product showed up on their
10 bank statements every month from 2006 to 2015. In the
11 complaints, in 2015, and the complaint here, Plaintiff
12 concedes that those charges were in the monthly bank
13 statements every single month for about \$28.00.

14 They also concede that, in 2015, Ms. Hughes reached
15 out, prior to her passing, to Bank of America. Informs them
16 that Mr. Hughes had passed away back in 2008. And so, Bank
17 of America refunded all of the payments after his death.

18 So, this lawsuit, and the prior lawsuit, deal with a
19 very small period of charges from 2006 through 2008. And,
20 in the prior 2015 lawsuit that was filed in this Court,
21 Plaintiff brought claims for the Truth in Lending Act, TILA,
22 breach of contract, breach of duty of good faith and fair
23 dealing, and three fraud claims, breach of contract
24 accompanied by fraud, fraud, and fraudulent concealment.

25 Bank of America removed the lawsuit to Federal Court,

1 and Plaintiff then amended his complaint three times. So,
2 he got four chances in this Court and in Federal Court to
3 plead claims that could survive. Bank of America briefed
4 three separate Motions to Dismiss, and, in each one, Bank of
5 America moved, under Statute of Limitations grounds, one
6 year for TILA, three for the state claims, and that all the
7 fraud claims were barred under South Carolina Survival Act
8 Statute due to his parent's death. Under South Carolina
9 precedent and the statute, those claims did not survive his
10 parent's death.

11 After briefing the last Motion to Dismiss, Bank of
12 America sent Counsel and served Plaintiff with a proposed
13 Rule 11 motion as to the fraud claims since it was clear,
14 under the statute and precedent in this Court, multiple
15 Supreme Court opinions, that the fraud claims were barred.
16 As a result of that Rule 11 Motion, Counsel dismissed the
17 claims, and actually acknowledged, in the Federal Court
18 dismissal, that the claims were barred under South Carolina
19 Law.

20 In 2017, Judge Lewis, across the street, dismissed
21 Plaintiff's complaint in its entirety finding that Statute
22 of Limitations barred the claims, and equitable tolling
23 didn't apply because the Plaintiffs had established no due
24 diligence by his parents since the charges showed up in
25 monthly bank statements.

1 Plaintiff, the next day, appealed to the Fourth
2 Circuit, which affirmed the dismissal, after de novo review
3 on Statute of Limitations and equitable tolling, and then
4 Plaintiffs sought review by the Supreme Court of the United
5 States in December, 2017, but his Writ Petition was denied.

6 During his Federal Court appeal, after filing the
7 Fourth Circuit appeal, but prior to the Fourth Circuit
8 opinion, Plaintiff filed an identical lawsuit in this case,
9 the same allegations, the same insurance product relating to
10 the same issues that were pending in the 2015 case, and had
11 been dismissed by the Lower Court. Plaintiff brought claims
12 for breach of fiduciary duty, conversion, Unfair Trade
13 Practices Act violations, and then he repled the same fraud
14 claims that he dismissed after receiving the Rule 11 Motion
15 in Federal Court, fraud, fraudulent concealment, breach of
16 contract accompanied by fraud.

17 Plaintiff and his Counsel absolutely knew that these
18 claims were barred by -- on various grounds, and conceded as
19 much at the Motion to Dismiss hearing before Judge Kelly in
20 this Court a few months ago. He, I believe, used the exact
21 words, exercise in futility, and Judge Kelly agreed.

22 On March 20th, Judge Kelly dismissed all six claims
23 on multiple grounds. He held that all six claims were
24 barred by res judicata based on the Federal action, the 2015
25 lawsuit, all six claims were barred by the three year

1 Statute of Limitations, and equitable tolling did not apply.
2 for the reasons set forth by the Federal Court, and that the
3 fraud based claims, the three fraud claims and the Unfair
4 Trade Practices claim, which was based on fraud allegations,
5 did not survive the death of Plaintiff's parents under the
6 Survivability Statute and long standing precedent in South
7 Carolina.

8 Finally, Judge Kelly held that the Unfair Trade
9 Practices claim was barred for a fourth independent reason.
10 Under the clear terms of the statute, it can't be brought in
11 a representative capacity, and Plaintiff is here on behalf
12 of his mother's estate, and conceded at the hearing that he
13 was proceeding in a representative capacity.

14 On March 27th, the Plaintiff appealed. Importantly,
15 they only appealed as to the three fraud claims. They
16 concealed (sic) that the three other claims, Unfair Trade
17 Practices, breach of fiduciary duty, and conversion, should
18 not be appealed, that there was no basis for trying to
19 appeal that. And, on March 29th, Bank of America filed this
20 Motion for Sanctions based on Plaintiff trying to proceed
21 multiple times on futile grounds.

22 Again, Your Honor, what Plaintiff has to establish for
23 you today is that there's a good faith basis for modifying
24 existing law in South Carolina because they concede that all
25 claims are barred for various reasons. As, as I noted,

1 three out of the six claims in this lawsuit, Unfair Trade
2 Practices, breach of fiduciary duty, and conversion, there's
3 no dispute. Plaintiff does not address them in opposition
4 to Bank of America's Sanction Motion. The only time they
5 show up is in a footnote admitting that he pled those
6 claims.

7 So, right there, Your Honor, we have a concession that
8 sanctions should be awarded on three out of the six claims,
9 and Your Honor is able to go claim by claim and award
10 sanctions on each claim. So, three have been established.

11 Plaintiff's counsel also conceded, at the Motion to
12 Dismiss hearing, that the conversion and breach of fiduciary
13 duty claims were barred by res judicata. They're quotes
14 that set forth that yes, he acknowledges it and would
15 withdraw the claims and not proceed on them anymore based on
16 clear res judicata.

17 In the Holmes case before the Supreme Court, with an
18 opinion by Judge Toal in 2015 -- 2014 made clear that where
19 a party proceeds on claims that are clearly barred by res
20 judicata, that is sanctionable conduct. Furthermore,
21 Plaintiff's Counsel admitted at the hearing that he hadn't
22 read the Unfair Trade Practices Statute despite moving under
23 that claim and seeking treble damages against Bank of
24 America, and, on the clear face of the statute, it states
25 that no claims may be brought in a representative capacity,

1 and Plaintiff's Counsel admitted at the hearing that, even
2 as of the date of the hearing, he'd not read the statute,
3 and didn't know what the case law was on that. And the
4 Brubaker Court, the Fourth Circuit, the Brubaker Court
5 found -- held that where a cursory review of a statute would
6 put you on notice as to the viability of your claims, and
7 you failed to do that, Plaintiff and Counsel can be
8 sanctioned for that.

9 Finally, Plaintiff's Counsel and Plaintiff do not
10 dispute that those key claims are barred under the Statute
11 of Limitations, which the Federal Court already analyzed in
12 2015. Of course, when you refile claims under the same
13 Statute of Limitations in 2017, a good faith -- you do not
14 have a good faith basis that those claims would survive
15 independently of the res judicata analysis.

16 Also, the appeal, as I noted, filed on March 27th,
17 ignores these three claims, the Unfair Trade Practices,
18 breach of fiduciary duty, and conversion claims, and the
19 Rustand (phonetic) Court, I'm sorry, the Rutland course --
20 Court, in 2006, the Court of Appeals noted that it was a
21 factor where a claim was not appealed or an appeal was
22 withdrawn, it was evidence that there was no good faith
23 basis to proceed with those claims and the conduct was
24 sanctionable.

25 So, on those three claims, Your Honor, we would, we

1 would note that there is no dispute that the conduct is
2 sanctionable. Opposing Counsel does not dispute it in the
3 opposition. He ignores those three claims entirely, and
4 focuses only on the three fraud claims.

5 Now, as to those three fraud claims, Your Honor, Judge
6 Kelly dismissed those on three separate grounds, res
7 judicata, Statute of Limitations, and fraud survivability
8 under the, under the current Survival Act. And I would note
9 that, again, they don't address Statute of Limitations at
10 all in their opposition. They focus on res judicata and the
11 fraud -- the Survival Act Statute. They ignore the Statute
12 of Limitations issue entirely. And, for that reason, their
13 conduct, again, is sanctionable. They're conceding that.

14 Now, they do try to argue this -- there's a good faith
15 basis for overturning the law on the fraud survivability
16 issue. They set forth that the law, in their mind, the
17 Survivability Act and 70 years of precedent analyzing that
18 act are "antiquated" or "founded in error."

19 So, without citation to any case law, Plaintiff's
20 Counsel's contending that he and his client can avoid
21 sanctions despite knowing the futility of the claims because
22 they believe that the General Assembly, the South Carolina
23 Supreme Court, on numerous occasions, South Carolina Court
24 of Appeals, had, frankly, been getting it wrong for seven
25 years.

1 The history of the fraud Survivability Act, however,
2 establishes that Plaintiff could not argue the good faith
3 basis that he has a basis to modify the law, and that the
4 lawsuit is -- a lawsuit is a proper mechanism to that.

5 Just to give Your Honor a, a brief history of the
6 statute and why that flies in the face of his good faith
7 argument, before 1932, all tort claims expired at death
8 under common law. So, there's no exception. No claims
9 survive. In 1932, the General Assembly passed Survival Act
10 allowing exception to the common law in two cases, injuries
11 to real estate, and injuries to person and personal
12 property. In 1941, the Supreme Court held that that
13 exception did not extend to fraud in the Madison case, which
14 counsel acknowledges is out there and is binding precedent
15 on this Court.

16 In 1942, 1952, and 1962 the General Assembly renewed
17 the Survival Act without modification. So, it declined to
18 extend that exception further.

19 In 2002, Judge Toal and the Supreme Court, in Ferguson
20 opinion, affirmed the Survivability Rule and that it doesn't
21 apply to the fraud claims. They expire at death. And then,
22 in 2008, the Brailsford Court, the Supreme, I'm sorry, the
23 Court of Appeals did a detailed analysis of the history
24 relating to the Survival Act and why fraud based claims do
25 not survive.

1 Plaintiff acknowledges all of this. He concedes it.
2 He admitted in his Motion to Dismiss briefing at the hearing
3 and in his opposition briefing that there is decades of
4 precedent. He just claims that it's error, and that conduct
5 is sanctionable because a reasonable attorney would know
6 that this 70 years of analyzing a statute is binding
7 precedent that there's no good faith -- there's no good
8 faith basis for modification.

9 Furthermore, coming to Court to rewrite a statute is
10 not the proper avenue. The Constitution -- South Carolina's
11 Constitution clearly says you can't do that. He needs to go
12 to the General Assembly and lobby and try to get the statute
13 changed to expand the exception to cover fraud because,
14 again, the, the default is nothing survives. The General
15 Assembly made a very limited exception for certain sort --
16 sorts of Court claims, not including fraud, which is clear
17 from the law.

18 And then briefly, Your Honor, opposing Counsel and
19 Plaintiff claimed that they are not trying to rewrite the
20 Res Judicata Statute or Res Judicata Law. They just don't
21 think it applies to them.

22 The clear law in South Carolina is that a claim is
23 barred under res judicata where the same parties, same
24 transaction, or occurrence are at issue, and there's been an
25 adjudication. This Court has already determined that res

1 judicata applies to the fraud claims.

2 Plaintiff is now trying to argue that because he
3 believes the fraud claims could not have been brought in
4 Federal Court that res judicata does not apply. However,
5 Plaintiff did bring the claims in Federal Court. He brought
6 all three fraud claims in Federal Court, and the law's
7 crystal clear that, where any claim is brought or could have
8 been brought, res judicata applies and you don't get another
9 bite at the apple.

10 In addition to Plaintiff bringing the three fraud
11 claims in the prior action, he also argues for a new res
12 judicata law where, when a State Law claim is so clearly
13 barred, is so clearly barred, that the Federal Court can not
14 certify it to the Supreme Court under South Carolina's
15 Appellate Rules, that res judicata can not apply to those,
16 those State Law claims. Plaintiff cites no authority for
17 that and there is none. That would be a rewrite of the res
18 judicata law, and would have an absurd holding in that res
19 juda (sic) could never apply where there is a Federal Court
20 ruling on State Law issues.

21 Your Honor, just a few more items to address. I will
22 note that, in an effort to distract the Court from the
23 standard here, which is whether there's a good faith basis
24 to modify controlling law, they, they lash out a bit at what
25 they perceive as to be Bank of America's bad conduct.

1 relating to trying to settle this case. In addition to a
2 violation of Rule 408, I would set forth that Bank of
3 America trying to work with opposing counsel, after already
4 being through two years of litigation on identical lawsuits,
5 shows a level of reasonableness that weighs in favor of Bank
6 of America and against opposing counsel where they also show
7 that they didn't even bother responding to any efforts.

8 I'll also note that Counsel claims that because Judge
9 Kelly did not sua sponte issue sanctions at the Motion to
10 Dismiss hearing, that that is somehow binding on Your Honor.
11 Of course, there was no sanctions motion pending at that
12 time, and there is no duty or obligation for Judge Kelly to
13 sua sponte note that he's awarding sanctions at a Motions to
14 Dismiss hearing. My colleague, Robert, Mr. Muckenfuss, who
15 argued at that hearing, noted that we believed the conduct
16 was sanctionable, but that we had not filed a motion yet.

17 The last point, Your Honor, opposing counsel takes
18 issue with the amount of fees that we've set forth, and I've
19 submitted two affidavits relating to fees, the hours, the
20 rights, et cetera, and I will note this case was filed in
21 July, 2017. We received notice of it very quickly. We
22 started analyzing and researching, briefing the pending
23 appeal, and the impact on the new case. We briefed a
24 detailed Motion to Dismiss. We argued that Motion to
25 Dismiss. We prepared a proposed order per Judge's -- Judge

1 Kelly's instructions. We prepared a Motion for Sanctions.

2 I understand that opposing Counsel's position is this
3 should of been easy for us to brief cause they already sued
4 us on the exact same issues. I would represent that I don't
5 think that argument weighs in his favor as to the sanctions.
6 And, to the extent Your Honor believes that the, the
7 requested fees are high, every Court whose analyzed the fees
8 in other cases has gone ahead and fashioned whatever order
9 the Court deems to be reasonable. So, that would not be a
10 bar. That could be something that Your Honor could modify
11 if found to be unreasonable, which we would represent, based
12 on the significant work we've done, is very reasonable for
13 the work we've had to do.

14 Your Honor, if you have any other -- any questions, I'm
15 happy to answer them. Otherwise, I will, I will rest at
16 this time.

17 THE COURT: What is the amount that you're asking for
18 in attorney fees and costs?

19 I saw a figure of \$70,000. That was just a loose
20 figure in the memorandum, and then I'm looking for your
21 specific affidavit of fees and costs right now, but I can
22 not find that filing.

23 MS. TIMMERMAN: Yes, Your Honor. On May 30th---

24 THE COURT: There were several filings on May 30th.

25 MS. TIMMERMAN: Yes, we filed, at 2:55PM, a Notice of

1 Supplemental Exhibits, and we attached Plaintiff's appellate
2 brief we'd just gotten, and my affidavit of costs, and I
3 am -- pull that number for you. It's Exhibit 2 to that
4 filing, Your Honor, again at 2:55PM.

5 THE COURT: I see that.

6 okay.

7 MS. TIMMERMANS: And it is for \$76,556, Your Honor, and
8 we are, of course, are happy to submit any other information
9 that might be of assistance to the Court on the fees, rates,
10 the work done, et cetera.

11 THE COURT: All right. Thank you, ma'am.

12 MS. TIMMERMANS: Thank you.

13 Yes, sir.

14 MR. KELLY: Your Honor, I'm Mike Kelly, attorney for
15 Mr. Hughes. I'm here along with Brad Hewett. I'm the owner
16 of Mike Kelly Law Group, and the reason I'm here today is
17 because my firm's reputation is on the line.

18 My understanding is if you sanction, sanction us, that
19 that, as a matter of form, will be reported to Office of
20 Disciplinary Counsel. And so I thought it was im --
21 certainly important enough, after 40 years of practicing the
22 law, serving as President of the South Carolina Bar, having
23 offices in three cities -- I've been in five locations
24 different this week. So, just because I'm 66 years old
25 doesn't mean I'm slowing down. So, I thought it was

1 important.

2 The way this case began is Luke Hughes is a long time
3 friend of mine. Luke Hughes is a Spartanburg boy. His
4 parents lived up here. Luke got a job, after Law School, at
5 Nelson Mullins Riley & Scarborough, where he worked
6 ironically, with who -- with Ann Kelly, who had then become
7 my wife ten years until she passed away. Luke left Nelson
8 Mullins, went down to Myrtle Beach, and we remained in
9 touch, and he refers us cases of consumer nature,
10 occasionally high end personal injury cases, things of that
11 nature. Luke is kind of a general practitioner.

12 Luke is very well thought of in the Horry County Bar,
13 has a long and distinguished career as a lawyer, and so he
14 called me and told me about, when his mother passed or what
15 his mother -- before she passed. He found out that Bank of
16 America had been charging them this money monthly without
17 them knowing it for years and years and years.

18 I find it ironic and a little bit, a little bit over
19 the top that they're trying to sanction Luke Hughes and Mike
20 Kelly when they're the ones that initiated the wrong doing.

21 We originally filed the action in Federal Court. I did
22 not stay involved day-to-day because that's not really what
23 I do at the firm there. The Director of Litigation, Brad
24 Hewett, has been with me 11 years. He and I said let's file
25 something because this is atrocious what they've done to the

1 Hughes family. And so I put the ball in Brad's Court.

2 So, I looked at it, believed this case had merit. Brad
3 looked at it and believed it had merit. Doug Rosinski, who
4 works of counsel with our firm on bigger cases, we certainly
5 thought this was a case of great merit. That's the third
6 lawyer, reasonable attorney, and then Jamie Smith, who wrote
7 this brief, is an attorney who worked heavily on this case
8 both on a Federal side and the State side. So, we have five
9 lawyers there that think that our positions have merit.

10 If you -- if the Court needs me to, I can -- think I
11 can get a hundred more affidavits, if not 500 more
12 affidavits, that we were reasonable in our approach to this
13 case. I think Bank of America is a wrongdoer, and yet
14 they're trying to take \$70,000 from me.

15 I told you how the case began. It's been vigorously
16 fought. We believe, as our brief says, that we really think
17 it's time for the fraud exception to be revisited as so
18 eloquently written in our brief, which I'm sure Your Honor
19 has read. Fraud of the elderly and overreaching is of
20 mammoth proportions. We'd liked the opportunity to have the
21 Court of Appeals and/or the Supreme Court to ultimately
22 overturn that non-exception to fraud.

23 We think this is a fraud case all day long. I've been
24 doing things like this for a long, long time. When Ken
25 Suggs and Mike Kelly were practicing law together, we got

1 rid of contributory negligence, and we think it's time to
2 get rid of this fraud not surviving someone's death.

3 we voluntarily withdrew the fraud claim, which we
4 thought was our strongest claim in Federal Court, knowing
5 that we would need a Court to overturn previous precedent,
6 and we think the time is right to do that. Suppose you
7 sanction me, Your Honor, and then our Courts of Appeals --
8 our case is successful, which I'm hoping and praying it is,
9 and I've been sanctioned for this.

10 Back in the Greentree class action for attorney
11 preference violations, which went to the United States
12 Supreme Court twice, it took us 12 years. We were
13 threatened with sanctions constantly, and we ended up -- the
14 case settled, it was consumer fraud, for 32 million dollars.

15 I don't know where this case is going, but we obviously
16 have had our challenges. But we still believe, as much as
17 we did on day one, that this case has merit.

18 We do think a change in the law is warranted, and
19 several times opposing counsel referenced the fact that this
20 is a legislative determination. I would respectfully
21 disagree. We're in this posture because the Madison case
22 needs to be overturned for two, two, three subsequent cases
23 that have been commented on and never was analyzed. It's
24 time for reanalysis of this doctrine, which we think is
25 archaic, anticonsumer, and just plain ain't right.

1 Finally, I'll stand on my brief that \$70,000 to file a
2 Motion to Dismiss, to argue a motion in 15 minutes, prepare
3 an order, is not \$70,000 worth of legal work, and at least
4 not in my world.

5 THE COURT: Okay. Anything else before I hear from
6 Bank of America once again?

7 MR. HEWETT: Not at this time, Your Honor.

8 THE COURT: Okay. Thank you.

9 Yes, ma'am.

10 MS. TIMMERMANS: Your Honor, very briefly.

11 Our issue is not that Counsel and Plaintiffs pursued
12 the 2015 action that they believed have merit. That's not
13 our issue here.. We disagreed with them and we've ultimately
14 prevailed on the Motion to Dismiss.

15 Our issue is that, based on res judicata, a ruling on
16 Statute of Limitations, and very clear fraud statute, and
17 the South Carolina Unfair Trade Practices Act Statute, they
18 proceeded with a 2017 case on identical claims knowing that
19 it was, in their own words, an exercise in futility, and
20 I -- we're not saying that Plaintiff can't bring claims.
21 There -- they have an opportunity to bring claims outside of
22 the fraud. They're not left with nothing.

23 Their breach of contract, conversion claims, et cetera,
24 they could of brought if they brought them in a timely
25 manner in the 2015 lawsuit. So, the fraud survivability

1 issue does not leave them without any recourse, but it does
2 require them to bring the other claims within the relevant
3 Statute of Limitations.

4 Counsel also noted the contributory negligence versus
5 comparatory (sic) negligence issue, and I would put forth,
6 Your Honor, that that is a very different issue. That is a
7 common law construct.

8 Here we're dealing with a statute that is creating an
9 exception to common law, and controlling precedent analyzing
10 the Legislature's intent with that statute. Those are two
11 very different issues. And to the extent they want to
12 modify the Legislative -- the statute, they need to go to
13 the General Assembly and lobby, lobby their legislator to do
14 that. This courtroom is not the proper place for that under
15 the Constitution.

16 And I would just note, Your Honor, that, again, this
17 Court may award sanctions both to Plaintiff and to
18 Plaintiff's counsel, and, again, this is nothing to do with
19 the 2015 action that -- just their decision to refile a
20 futile case again in 2017.

21 Thank you, Your Honor.

22 THE COURT: Thank you.

23 Anything else?

24 MR. HEWETT: Nothing that's not already in our brief,
25 Your Honor.

1 THE COURT: Okay. well, thank you both, both sides for
2 your efficiency and professionalism. I can tell that
3 you-all have put so much work into this on both sides, and I
4 am taking this under advisement. You will receive
5 instructions from me, from my assistant, Ms. Searcy, and it
6 may be -- I try to take things in the order that I've heard
7 them for the week, and it wasn't your fault that you came in
8 on a Friday, but, hopefully, I will get the instructions out
9 to you within the next 15 to 20 days.

10 Thank you-all.

11 MR. HEWETT: Thank you, Your Honor.

12 THE COURT: Nice to see you all.

13 MR. KELLY: Thank you, Your Honor.

14 MS. TIMMERMANS: Thank you, Your Honor.

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17 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Spartanburg County, South Carolina, on the 1st day of June, 2018.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

July 11th, 2018

PAMELA E. GREEN, Court Reporter

1 STATE OF SOUTH CAROLINA) IN THE COURT OF
 2) COMMON PLEAS
 3 COUNTY OF SPARTANBURG) OF THE SEVENTH
 4) JUDICIAL CIRCUIT
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PHILLIP FRANCIS LUKE HUGHES,
 ON BEHALF OF THE ESTATE OF
 JANE K. HUGHES,
 Plaintiff,
 vs.
 BANK OF AMERICA NATIONAL
 ASSOCIATION,
 Defendant.

TRANSCRIPT OF RECORD
 2017-CP-42-02834

February 22, 2018
 Spartanburg, South Carolina

B E F O R E:

HONORABLE R. KEITH KELLY, Judge.

A P P E A R A N C E S:

BRADLEY DAVIS HEWITT, ESQUIRE
 For Plaintiff

ROBERT A. MUCKENFUSS, ESQUIRE
 For Defendant

ELIZABETH MARION ZWICKERT-TIMMERMAN, ESQUIRE
 For Defendant

Julie A. Ashbrook,
 Circuit Court Reporter
 Seventh Judicial Circuit

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EXHIBITS

MARKEDENTERED

NO EXHIBITS PROFFERED

1 PHILLIP FRANCIS LUKE HUGHES VS. BANK OF AMERICA

2 THE COURT: Okay. The first matter is -- the
3 first matter is Phillip Francis Luke Hughes, the
4 Plaintiff, et al. versus Bank of America National
5 Association.

6 MR. HEWITT: Good morning, Your Honor.

7 MR. MUCKENFUSS: Good morning.

8 THE COURT: All right. I have read everything
9 that has been submitted.

10 MR. HEWITT: Thank you.

11 THE COURT: Yes, sir.

12 MR. MUCKENFUSS: Thank you, Your Honor. Robert
13 Muckenfuss and Elizabeth Zwickert-Timmermans for Bank of
14 America, Your Honor. This is our motion to dismiss.

15 I think the arguments in our motion are fairly
16 straight forward and I won't go through, Your Honor, I
17 know you've read the briefs. But essentially, this is
18 an identical case to a case that was filed previously in
19 2015 in state court, was removed to federal court. At
20 that time the federal court questioned jurisdiction.

21 I think in this case plaintiff's counsel doesn't
22 -- he admits it's an identical case in terms of the
23 facts and circumstances that are alleged. Essentially
24 it was a bank product line protection plans insurance.
25 And they were, in that case there was a punitive class

1 action that was asserted. That case ended up being
2 dismissed by Judge Lewis in federal court, essentially
3 pulling that the statute of limitations had run.

4 There were arguments about equitable tolling.
5 Judge Lewis rejected those arguments. That case was
6 appealed to the Fourth Circuit. The Fourth Circuit
7 issued a procuring opinion affirming Judge Lewis. Then
8 They sought it further to the U.S. Supreme Court and
9 that was denied.

10 In re-filing this case, it appears to survive res
11 judicata. And so I'm gonna break it down into two
12 pieces, Your Honor. There's the fraud claim, which I
13 think is a different issue. But first I just want to
14 deal with the res judicata issue. This is a classic
15 case of res judicata. No one disputes, the plaintiff
16 doesn't dispute that it's identical parties. It's the
17 same circumstances, facts that are alleged.

18 They're actually identical claims. They add, I
19 think added a couple of new claims out of the cause --
20 out of the case. One's breach of fiduciary duty. They
21 also reassert the fraud claim, but they still have a
22 breach of contract claim, breach of contract accompanied
23 by fraudulent inducement.

24 In terms of res judicata, it's the same claims.
25 It's claims they could have brought in the previous

1 case. And so for res judicata, as Your Honor I'm sure
2 is well aware, if there are, you know, the same or
3 similar facts and circumstances and those claims were
4 brought in the previous case or could have been brought
5 in the previous case under claim preclusion, they would
6 be barred in this case. They would also be barred under
7 an issue preclusion analysis.

8 So in the previous case Judge Lewis analyzed
9 equitable tolling of the statute of limitations. She
10 cited a South Carolina appellate case, a federal case,
11 in addition to Federal case law on the Fourth Circuit,
12 rejecting their equitable tolling argument, which was --
13 the argument was that there was a fraudulent concealment
14 of this charge for the line of protection plan.

15 Judge Lewis rejected that, stating that these
16 charges, you know, were on the statements from June of
17 2006 all the way up until it was refunded by the bank.
18 The Fourth Circuit affirmed that. So in terms of claim
19 preclusion and issue preclusion, all of those claims
20 asserted in this lawsuit would be barred and should be
21 dismissed.

22 Now, the fraud claim, it's somewhat
23 extraordinary, Your Honor, that -- so in the previous
24 case plaintiff's counsel realized that in South Carolina
25 fraud claims were an exception to the survivability

1 statute and, you know, claims that would survive death.
2 And it's been the law in South Carolina since the 1940s
3 that claims that sounded fraud cannot be brought and yet
4 don't survive death.

5 Now, the plaintiff's counsel will voluntarily
6 dismiss that claim in the federal case acknowledging
7 that it's stated law in South Carolina. It appears what
8 they're trying to do, and to be honest, Your Honor, I
9 mean this lies close to a sanctionable type of
10 circumstance. We have not brought a motion for
11 sanctions, but plaintiff's counsel admits that he cannot
12 pursue a claim, a fraud claim. He justifies it by
13 simply stating that he is seeking to change the law to
14 have Supreme Court precedent overturned in South
15 Carolina.

16 That's, that's dangerous area. And, obviously I
17 think for, for plaintiff's counsel -- I think for
18 purposes of today in front of this Court, Your Honor,
19 from a constitutional standpoint for a trial court,
20 obviously you have no jurisdiction to overturn the prior
21 Supreme Court case.

22 And I would note in terms of the prior case law,
23 this is not just a 1941 case, the Madison case. This is
24 a 2002 Supreme Court case. So in 2002 the South
25 Carolina Supreme Court reaffirmed the rule in South

1 Carolina that fraud claims don't survive death. And in
2 2008 the Court of Appeals again affirmed the
3 long-standing rule in South Carolina that you can't
4 bring a fraud claim.

5 So I, honestly that claim has to be dismissed. I
6 think the plan for plaintiff's counsel is to appeal it
7 and try to argue in the Court of Appeals, ultimately the
8 Supreme Court that they should overturn prior precedent.
9 I think that's, that's an issue for the appellate courts
10 to deal with, not for the trial court. Now, for those
11 reasons the fraud claim should be dismissed, the other
12 claims should be dismissed in this case.

13 I would also finally, Your Honor, note for the
14 South Carolina Fair Trade Practices Act claim, again,
15 that, like the fraud claim, is clear in South Carolina.
16 And this is a statutory rule that you can't bring an
17 unfair trade practices claim in a representative
18 capacity. And that's in the statute. So the
19 plaintiff's counsel in that situation would have to, I
20 think, convince the general assembly to change the law.

21 So there are two causes of action in this case
22 that are clear on the face of -- and the Supreme Court
23 precedent in 2002 and also in the statute, that you
24 cannot bring those claims. In addition, the unfair
25 trade practices claim is based on fraud allegation, and

1 that would also be barred by the survivability exception
2 that we discussed before.

3 Attempts to distinguish the equitable tolling
4 issue, Your Honor, is a red herring. I think there's an
5 attempt by plaintiff's counsel to suggest that res
6 judicata shouldn't apply because the equitable tolling
7 analysis that Judge Lewis applied is different than what
8 is South Carolina court and that's absolutely not true.

9 If you look at the Fourth Circuit opinion, the
10 Fourth Circuit cites a number of cases that cite the
11 same type of standard South Carolina courts have
12 applied. In other words, you know, an extraordinary
13 circumstance acts that would prevent a plaintiff from
14 discovering. And I would note that the plaintiff
15 specifically alleged in the federal case that there was
16 fraudulent concealment and the Fourth Circuit noted
17 that.

18 So in a situation where they actually allege Bank
19 of America engaged in fraudulent concealment, they would
20 have to bring forth some evidence or some argument that
21 that was the case. They couldn't. Judge Lewis rejected
22 those arguments and dismissed the case. So the Fourth
23 Circuit noted that. The standard in South Carolina is
24 no different.

25 So for that reason res judicata should apply,

1 those claims should be dismissed. And the fraud claim,
2 obviously, should be dismissed. They admit that in
3 terms of the prior precedent. And unless the Court has
4 any other questions, Your Honor.

5 THE COURT: No, sir, I think that's it.

6 Yes, sir.

7 MR. HEWITT: Your Honor, good morning.

8 THE COURT: Good morning.

9 MR. HEWITT: Brad Hewitt here for the estate of
10 Jane Hughes.

11 THE COURT: Yes, sir.

12 MR. HEWITT: And I'm certainly not one to recite
13 the full facts and procedural history, as the Court has
14 read the memorandums submitted to the court. And I
15 recognize there is controlling binding precedent on the
16 primary issues in this case, which are the fraud based
17 claims. That the lower court is handcuffed as to what
18 it can do based in part on a 1941 decision and does
19 state that those fraud claims when you die, die with
20 you.

21 There's a 2002 opinion as well. I think that's
22 the Ferguson case, which cited to Madison further for
23 the support that your fraud based claim simply cannot
24 continue on. We're one of seven states that hold that
25 fraud based claims die when the claimant dies.

1 And so I recognize this may be at this stage in
2 the proceeding an exercise of futility in terms of what
3 the Court can do on fraud based claims, but those claims
4 were not adjudicated at the federal level. Res judicata
5 nor collateral estoppel apply to forbid those claims
6 from going forward. We could not go forward with them,
7 but upon realizing that there was a disallowance based
8 in part on the Madison case, we withdrew the claims.

9 And they could not be certified back to the
10 Supreme Court by the Federal Court, so there was nothing
11 that the Federal Court could do, nor could we move
12 forward, so we withdrew them and chose in part the
13 proper course of action, which is to challenge the state
14 of the law through the Circuit Court and ultimately
15 through the appellate courts. That is the intention.

16 So I know where this case is going at this level
17 in terms of the fraudulent claims and we set forth the
18 policy reasons as to why we are endeavoring to do that.
19 I've committed to this family to see this case through.
20 You've seen through the procedural history where we have
21 unsuccessfully applied to the Fourth Circuit and the
22 United States Supreme Court to visit at least the TILA
23 claims and the breach of contract claims. But there was
24 no adjudication. There was no full and fair opportunity
25 to litigate the issues of fraud.

1 I'm inclined to concede the point on the
2 remaining stated four claims of the conversion and
3 breach of fiduciary duty, that they may be barred by
4 collateral estoppel and res judicata analysis. I would
5 tend to perhaps agree, but the crux of this case is to
6 challenge the state of the law on the fraud claims.

7 And so even if the Court -- and I don't mean to
8 try to make the Court's job any easier, as I understand
9 a dismissal is likely forthcoming. What my request
10 would be, Judge Kelly, is that an order of dismissal be
11 limited on the grounds that there is controlling
12 precedent in place that forbids the fraud based claims,
13 rather than founded on any statute of limitations
14 argument or collateral estoppel or res judicata
15 defenses. So I think that the order can be confined to
16 that ruling.

17 If the Court is so inclined to explore those
18 issues, I have made clear why we think they don't apply
19 in the memo, that they were not adjudicated. That there
20 were discovery inhibitions, procedural disadvantages.
21 That they were not fully and fairly explored. I think
22 that -- and I haven't seen much in the way of argument
23 that they were because they were withdrawn. There was
24 no discovery at those levels.

25 And so even beyond that, Judge, if you were

1 inclined to believe that res judicata and collateral
2 estoppel may be in play, there are exceptions. The
3 State has adopted the restatement of judgment. And
4 provisions 27, 28 and 29 find that when you deal with
5 interests of public policy and fundamental unfairness
6 that the Court can refuse to apply collateral estoppel
7 and res judicata.

8 And we've made clear through certain studies that
9 we've cited about what is happening to senior citizens
10 in this country in terms of exploitation and fraudulent
11 schemes, that one in three -- over one in three senior
12 citizens are subject to fraudulent exploitation and
13 schemes. And the victims of that conduct -- and that
14 it's costing the country over 36 billion dollars each
15 year, that there are policy reasons in play. Not to
16 mention, you have Jane and John Hughes, who were
17 defrauded of several thousand dollars by Bank of
18 America.

19 And just very quickly, although it's in the, the
20 brief, the factual context for this entire case is a
21 2006 transaction with Bank of America. Jane and John
22 Hughes were 86 years old at the time. Owned their home
23 outright and took out a line of credit with Bank of
24 America. I don't know why. If they were sold a bill of
25 goods or if they just needed money because they were

1 outliving their retirement. That's possible. They did
2 it.

3 And during that transaction, they were offered an
4 optional line of protection plan where if they died or
5 became disabled or unemployed, which they already were,
6 it might provide some assurance that they would not have
7 to make some of the monthly payments. They declined
8 that expressly. It's commemorated. They both signed
9 it, we don't want this product, we don't need this
10 product. They checked the box that we -- do not charge
11 us for it.

12 Soon after the closing, John Hughes died. And
13 Jane Hughes was diagnosed with dementia, a-typical
14 psychosis, cataracts, which required surgery and some
15 degree of blindness, renal insufficiency. She broke her
16 hip, went to a nursing home. Was noted to lack
17 decisional capacity. So she had a precipitous decline
18 in her mental condition and her physical condition.

19 She was unaware that she was ever being charged
20 by Bank of America. It was a \$28-a month charge. It
21 was buried in a nondescript, ambiguous line item charge
22 that didn't say anything about Bank of America. It was
23 an abbreviated insurance charge with some serial numbers
24 attached. She had no idea. She was in a nursing home,
25 in and out of hospitals.

1 What became known to the family was by way of a
2 letter from Bank of America in March of 2017, about
3 seven years after her husband had died, that we are
4 gonna stop charging you for this product, a product that
5 they had never signed up for. A family member got that
6 letter, did some due diligence, if you will, put two and
7 two together and quickly realized they had rejected it
8 and been absconded of several thousand dollars and then
9 came to see us and we filed suit shortly thereafter.

10 And so the Court knows the discovery rule in this
11 state for fraud is when they were aware of the
12 misconduct. And so for the purposes of the statute of
13 limitations argument, this case was timely filed. If
14 the Court were so inclined to find that it were not,
15 then that's where we go into a equitable estoppel
16 argument, that based on her condition she certainly had
17 no knowledge of the misconduct.

18 And what the Federal Court did, Judge Lewis, and
19 ultimately the Fourth Circuit, was they, they looked
20 into equitable estoppel. That was the, the thrust of
21 our argument. But they applied a federally created rule
22 that was more restrictive than what our court uses,
23 which is based in part on the Hooper case in 2009 which
24 looks at all the circumstances. There's no due
25 diligence requirement. And so it's to avoid technical

1 forfeitures and to allow trials on the merits. So it's
2 a test, less restrictive.

3 And so I've said all that to say this, that I
4 think that the decision for the Court is fairly straight
5 forward on the fraud claims, and that we endeavor to
6 change the law in this state, which has been a law,
7 really a common law created since 1941 in a very
8 different world when you didn't have to worry about
9 certain types of identity theft, perhaps when people
10 could trust their banks.

11 And as a relevant aside, I know these allegations
12 made by the Hughes family are true. We've been
13 approached by other families. It happened to me as a
14 former Bank of America customer. Right about the same
15 time, right when I got married and purchased my first
16 house, we're financing through Bank of America and I
17 found a few months after the closing I was getting
18 charged for things I didn't sign up for.

19 Now, I had the physical and mental fortitude to
20 address it with Bank of America right then and there.
21 Ms. Hughes did not. And so that's the context as to why
22 we're here.

23 And so I know what the Court decision will be in
24 terms of the disposition. My hope is that it would be
25 confined to controlling precedent and that it would not

1 be founded on any statute of limitations, collateral
2 estoppel, res judicata type issues. For that matter,
3 the statute of limitations, according to this state
4 under *Johnston versus Bowing*, is an issue for the jury
5 to decide as to when the party knew or should have known
6 of the wrongdoing.

7 And so considering we're one of the few remaining
8 states that hold the way we do with fraud, any illusion
9 to this being sanctionable type conduct to me is far
10 fetched. You know, the way the law gets changed in
11 terms of common law is you challenge it.

12 So I think I would tend to agree that the
13 conversion claim, breach of fiduciary claims are
14 probably foreclosed and that we would forego those
15 claims. As to unfair trade, if there is -- and I may
16 have just missed this in the research. And it may be
17 clear in the legislation. If there's a case on point
18 where once you die, your unfair trade claim dies with
19 you, I would again concede the point that there's
20 controlling precedent. And this is being brought in a
21 represented capacity obviously.

22 And so the challenge in this case is to try to
23 change the stat of the law in South Carolina for fraud
24 based claims and this is the only way I know how to do
25 it. There was adjudication of these claims on the

1 federal level, which is why we're here today.

2 So unless the Court has any questions, I do
3 appreciate your time.

4 THE COURT: No, I don't have any.
5 Anything?

6 MR. MUCKENFUSS: Very briefly, Your Honor. I
7 think it is appropriate for this Court to apply issue
8 preclusion in addition to the fact that there is no
9 claim in South Carolina for fraud post death. But it is
10 appropriate issue preclusion as to equitable estoppel
11 decision by the federal court would apply to all of
12 these claims.

13 That's different than claim preclusion, but the
14 federal court very specifically held that the plaintiffs
15 in this case, the plaintiffs in this case did not
16 exercise the due diligence that would be required. It's
17 cited in the South Carolina case that's on point for
18 that standard.

19 So there is not a different federal standard to
20 the standard that South Carolina courts will apply. So
21 we would ask that when the case is dismissed, that it's
22 dismissed on the fact that there's clear precedent,
23 obviously, you know, bringing these claims, in addition
24 to issue preclusion on the equitable estoppel, equitable
25 tolling argument that in addition -- that would be

1 applied to the fraud based claims, not just the non
2 fraud based claims. All of those claims would be
3 dismissed based on the fact that the court rejected the
4 equitable tolling argument by the plaintiffs. Thank
5 you, Your Honor.

6 THE COURT: Thank you. All right, gentlemen.
7 Watch your e-mail addresses and we'll get something to
8 you.

9 MR. MUCKENFUSS: Okay.

10 MR. HEWITT: Thank you, Your Honor.

11 MR. MUCKENFUSS: Thank you, Your Honor.

12 (Whereupon, hearing concluded at 9:19 a.m.)

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14 --- THIS ENDS REQUESTED TRANSCRIPT ---

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1 COURT REPORTER CERTIFICATE

2
3 I, the undersigned Julie A. Ashbrook, Court
4 Reporter for the Seventh Judicial Circuit Court of the
5 State of South Carolina, do hereby certify that to the
6 best of my ability the foregoing is a true, accurate,
7 and complete transcript of record of all the proceedings
8 and evidence introduced in the hearing and/or trial of
9 the captioned case, relative to appeal, in the Court of
10 Common Pleas for Spartanburg County, South Carolina, on
11 the 22nd day of February, 2018.

12 I do further certify that I am neither of kin,
13 counsel, nor interest to any party hereto.
14
15
16
17
18

19 s/Julie A Ashbrook
20 Julie A. Ashbrook
21 Circuit Court Reporter
22 Seventh Judicial Circuit
23
24
25

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No.: 2017-CP-42-02834

Appellate Case No. 2018-001443

Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes..... Respondent,

v.

Bank of America National Association Appellant.

CERTIFICATION OF COUNSEL

Pursuant to Rule 210(g), of the South Carolina Appellate Court Rules, the undersigned,
an attorney in this matter for the Appellant, certifies that this Record on Appeal includes all
matters proposed to be included by the parties and not any other material.

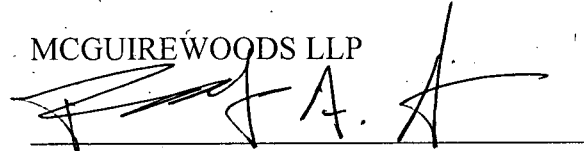
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SC Court of Appeals

December 7, 2018

MCGUIREWOODS LLP

A handwritten signature in black ink, appearing to read 'R. A. Muckenfuss', is written over a horizontal line.

Robert A. Muckenfuss

(SC Bar No. 13903)

McGuireWoods LLP

201 N. Tryon Street, Suite 3000

Charlotte, NC 28202

T: (704) 343-2052

rmuckenfuss@mcguirewoods.com

Elizabeth M.Z. Timmermans

(SC Bar No. 100288)

McGuireWoods LLP

434 Fayetteville St. Suite 2600

Raleigh, NC 27601

T: (919) 755-6576

eztimmermans@mcguirewoods.com

Attorneys for Appellant