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

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Lawton McIntosh, Circuit Court Judge

Case No. 2015-CP-37-635

Community First Bank, Inc., Appellant,

v.

John Michael Powell, Frederick D. Shepherd, Jr., James E. McCoy, MPS Golf Course, Inc., and MPS Development, Inc., Defendants, Of whom Frederick D. Shepherd, Jr. is the Respondent.

REPLY BRIEF OF APPELLANT

James Edward Bradley, SC Bar #66130
MOORE TAYLOR LAW FIRM, PA
P.O. Box 5709
West Columbia, SC 29171
Telephone: 803-796-9160
Ward @mttlaw.com

Elizabeth M. McMillan (SC Bar #15049)
McAngus, Goudelock & Courie, LLC
P.O. Box 2980
Greenville, SC 29602
Telephone: (864) 239-4037

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

Attorneys for Appellant Community First Bank

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES AND REGULATIONS

INTRODUCTION

Through its Sanctions Order the trial court fundamentally faulted Community First Bank ("Community First") for "willfully" failing to *immediately* produce certain documents that Shepherd sought in discovery. In doing so, the Court ignored controlling federal law that prohibited Community First from acknowledging the existence of the documents at issue and prohibited it from producing them until permitted to do so by its federal regulator, the Federal Deposit Insurance Corporation ("FDIC"). Community First and Shepherd (and the trial court) all agree Community First produced the documents at issue timely after FDIC approval was granted. Nevertheless, the trial court found that the "belated production of discoverable documents" prejudiced Shepherd and sanctioned Community First. (Nov. Sanctions Order at 24-25, R. pp. 62-63). The trial court's Sanctions Orders, however, conflict with the actual facts and are plainly in error.

Shepherd's arguments and attempts to sustain the Sanctions Orders[1] should be rejected. Shepherd's arguments in his Initial Brief are based on a series of incomplete and misleading statements that are belied by the entire record. Not surprisingly, the November Sanctions Order – which Shepherd's counsel prepared – suffers the same defects. The entire record reflects (1) there is no factual basis either for Shepherd's arguments or the Sanctions Orders, (2) Community First did not violate any discovery order of the trial court let alone violate any order "willfully," (3) Shepherd was not substantially prejudiced as a result of any conduct by Community First, (4) the trial court's order on Shepherd's Motion to Compel ("Discovery Order") was not narrowly tailored, and (5) Community First did

[1] The term "Sanctions Orders" refers to both the May Sanctions Order and the finalized November Sanctions Order.

not waive its right to challenge the Discovery Order. The Sanction Orders should be reversed.

ARGUMENT

I. SHEPHERD'S ARGUMENTS AND THE SANCTIONS ORDERS ARE BASED ON CONDUCT THAT DID NOT VIOLATE ANY DISCOVERY ORDER.

Shepherd argues that the trial court's Sanctions Orders are supported and warranted because of (1) the "Bank's treatment of the FDIC Report" (through Community First's alleged hiding of the existence and delayed production of the FDIC Report) and (2) Community First's "pattern of discovery" (through Community First's production of documents on a rolling basis). (Resp't Br. at 14-16). His arguments, however, are without merit because they are not based in fact. As will be discussed, Shepherd does not consider a host of material uncontested facts relating to the merits of the case and discovery and misconstrues the facts on which he does rely.

What Shepherd's Initial Brief does make clear is that the only substantive basis for the Sanctions Orders is Community First's purported delay in identification and production of the FDIC's Report on Examination ("FDIC Report"). Although Shepherd makes passing references to late-produced meeting minutes and insider loans (which were neither late nor properly the subject of the Discovery Order) the focus, including his claims of prejudice, all rest on the FDIC Report. The factual record is clear that Community First did not act in a sanctionable manner with respect to the FDIC Report. In an effort to shore up the Court's defective Sanctions Orders, Shepherd invokes his Requests to Admit – which were not the subject of a Motion to Compel or Motion for Sanctions and are therefore incompetent to be the subject of a Sanctions Order – and events that took place after the Sanctions Order was issued and could not have formed a basis for it. Those efforts are

distractions. In short, Shepherd's Initial Brief discloses that the Sanctions Orders were not orders to sanction Community First for non-compliance with the trial court's Discovery Order, but were an effort to punish Community First in general. That conclusion is buttressed by the Court's stated desire to award sanctions to parties who never made motions to compel or motions for sanctions. Shepherd, however, does not dispute the law on the issuance of sanctions as stated in Community First's Initial Brief. Under Rule 37 of the South Carolina Rules of Civil Procedure, sanctions plainly may not be imposed against a party unless the party violated a discovery order of the court. Rule 37(b), SCRCP (entitled "Failure to Comply With Order"). Thus, the trial court's imposition of sanctions against Community First based on Shepherd's fact-free allegations, and for alleged Bank actions which had no connection to any prior discovery order of the court, was not proper. The full record reflects no legal basis for the Sanctions Order itself or for the amount of the sanction. Shepherd's arguments should be rejected.

A. Community First Should Not And Cannot Be Sanctioned For Delayed Production Of (FDIC) Documents, Which Shepherd And The Court Were Aware Of And Community First Could Not Have Legally Produced Earlier In Discovery.

1. Community First followed the Process Required by Federal Law.

The November Sanctions Order is clear, and the parties all agree, that Community First produced the FDIC Report and other documents covered by 12 C.F.R. § 309 ("Section 309") within two weeks of Community First's receipt of the FDIC's permission to do so. (Sanctions Order at 15, R. p. 26 ("The FDIC report was produced to Community First within weeks, and after it complied with instructions from the FDIC, the Report was produced on December 14, 2016"), 22, R. p. 33 ("The Court finds that redactions at the

direction of the FDIC were proper. To the extent that documents produced after the Order's deadline are considered privileged by the FDIC, they are not a part of this Order."); (Resp't Br. at 18). The Sanctions Order and Shepherd nonetheless fault Community First for not producing the FDIC Report sooner. Indeed, the November Sanctions Order concludes the FDIC Report "should have irrefutably been produced *at the beginning of discovery.*" (Sanctions Order at 25, R. p. 36) (emphasis added). That was legally impossible. Tacitly recognizing that fact, Shepherd directs his attention to Community First's process instead. In doing so, Shepherd fundamentally misunderstands or misconstrues controlling law on FDIC documents covered by Section 309. (*See* Appellant Br. at 17-18).

Shepherd maintains that "Federal requirements on the front page of the [FDIC] Report required the Bank to notify the court and Shepherd of the Report." (*Id.* at 15; *see also* Sanctions Order at 23, R. p. 34). Shepherd's claim is a plain and bold misstatement of both the facts and the law. Neither on the front page nor elsewhere in the FDIC Report is there any such a statement nor does any law or any federal regulation contain any such requirement. *See e.g.,* 12 C.F.R. § 309.6. Section 309.7 requires Community First to notify the Court and party of the substance of the law. 12 C.F.R. § 309.7. No law or regulation required Community First to notify the trial court or party issuing the subpoena of the FDIC *documents* requested. *See id.* In fact, the revelation of the existence of certain documents is expressly prohibited by federal regulation. *See, e.g.*, 12 C.F.R. § 309.6, 31 C.F.R. § 1020.320(e) ("A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (e)").

Even if Community First was required to notify the trial court and Shepherd of the FDIC Report or other FDIC Documents (which it was not), Community First met any such

requirement. First, Shepherd and the trial court were independently aware of the existence of the FDIC Documents and Community First did not need to inform them. *See, infra. See also, e.g., Orange Bowl Corp. v. Warren*, 300 S.C. 47, 52, 386 S.E.2d 293, 296 (1989)("The law does not require a party to perform a useless act.") *Infra.* For example, Shepherd's Answer's to Community First's Complaint, dated even before the discovery requests at issue were served, explicitly referred to the FDIC Documents. (*See, e.g.,* Resp't Ans. ¶57, R. p. 128). Moreover, Shepherd was plainly independently and long aware of the FDIC Documents because he was Community First's President and CEO during the relevant period when the FDIC was investigating Community First and issuing its report. Every document produced following receipt of FDIC permission was created while Shepherd was CEO. (*See, e.g.*, Bank's Resp. in Opp'n to Sanctions Mot., Ex. B-000047-57, 59-60, 63-66, Ex. A, R. pp. 932-942, 944-945, 948-951, 875-884; Mar. 15, 2016 Hr'g Tr. at 33, lines 4 to 6, R. p. 1380). In fact, Shepherd received, reviewed and signed the FDIC Report. (Bank's Resp. in Opp'n to Sanctions Mot., Ex. B-000063-66 at 66, R. p. 951).

Second, the record is replete with evidence of the fact that Bank advised Shepherd and the trial court about the FDIC Documents, including the FDIC Report, as well as the laws and regulations relating to the requested production of such documents:

- At the March 15, 2016 hearing on Shepherd's Motion to Compel, Shepherd's counsel indicated awareness and familiarity with the various FDIC Documents which Community First was not permitted to produce, including making specific reference to the existence of the FDIC Report. (Mar. 15, 2016 Hr'g Tr. at 33, lines 2 to 25, at 34, lines 1 to 4, R. pp. 1380-1381).

- On September 16, 2016, Community First produced additional documents in response to the specific requests Shepherd made on August 19, 2016, identifying the specific request(s) to which those documents were responsive and providing a detailed privilege log. (Bank's Mot. to Strike at 10-11 & Ex. J thereto, R. pp. 446-447, 572-601). In connection with the production and with respect to federal banking law, Community First specifically noted to Shepherd that "[a]s soon as it is permitted to do so, Community First will provide Defendant Shepherd any of these documents the FDIC allows it to produce" (*Id.*, Ex. J. at 3, R. p. 574).
- On September 15, 2016, the Court sent the parties an email regarding the FDIC Documents, stating "[i]t appears Community First is complying with federal law and regulation concerning its redaction of Confidential Supervisory Information and Suspicious Activity Reporting. It appears defense counsel have no objection to the withheld information pursuant to the attorney client privilege." (Bank's Resp. in Opp'n to Sanctions Mot., Ex. B-000039, R. p. 924).

Additionally, it is beyond dispute Community First produced the FDIC Documents (including the FDIC Report) to Shepherd as soon as it legally could. After significant delay by the FDIC, which Shepherd's counsel himself sought to remedy, (Resp't Mem. in Supp. Sanctions Mot. at 11, R. p. 613), Community First produced the FDIC Documents within approximately two weeks of its receipt of permission from the FDIC to do so. (*See* Bank's Resp. in Opp'n to Sanctions Mot., Ex. B-000061, 64-65, 69-70, R. pp. 946, 949-950, 954-

955).[2] Community First had no control over the FDIC's timing – the very thing it was sanctioned for.

To the extent there was any delay from which the trial court could have concluded that Community First violated the Discovery Order (the only discovery order upon which the Sanctions Orders could be based), such delays were not willful. The delays were not the result of actions (or omissions) by Community First. Rather, the delays were because of the complex requirements of federal banking law. *See generally*, 12 C.F.R. Part 309 (setting forth requirements for banks to disclose records owned by the FDIC); (*see also* Bank's Resp. to Mot. for Sanctions, Ex. B-000045, R. p. 930 (August 24, 2016 Letter from Deputy Regional Counsel for the FDIC to the trial court explaining protections of Bank Secrecy Act)). Thus, Community First cannot legally be sanctioned in connection with those delays. *See Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 435, 673 S.E.2d 448, 457 (2009). ("In deciding what sanction to impose for failure to disclose evidence during the discovery process under Rule 37, SCRCP, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice.").[3] The trial court and Shepherd agree Community First produced the

---

[2] During this two week period, the Bank prepared the FDIC Documents for production pursuant to the express instructions of the FDIC to redact certain text (which legally belonged to it). But for those instructions, Community First would have produced the documents the very day it received permission from the FDIC to do so.

[3] Shepherd suggests the Bank somehow engaged in misconduct by not including the FDIC Documents (including the FDIC Report) on one or more of the privilege logs provided to him. (*See* Resp't Br. at 17). As a matter of law, however, the FDIC documents belonged to the FDIC (not the Bank), regardless of whether the Bank had physical custody of the documents. 12 C.F.R. § 309.7 (obligations of entities which receive subpoenas for documents which belong to the FDIC, but are in the entities' custody). Further, the revelation of the existence of certain documents (through a privilege log or otherwise) is expressly prohibited. *See, e.g.*, 12 C.F.R. § 309.6, 31 C.F.R. § 1020.320(e). Moreover, as the November Sanctions Order itself (which Shepherd wrote) acknowledges, CSI and SAR

FDIC documents promptly after receiving FDIC permission. (Sanctions Order at 15, R. p. 26).

2. The FDIC Documents Could Not Form The Basis of the Sanctions Order Because They Were Not Subject to the Discovery Order.

The Discovery Order ordered Community First to produced documents requested by Shepherd "if the documents are in [the Bank's] actual and/or constructive possession." (Discovery Order p. 3, R. p. 3) As a matter of federal law, the FDIC Documents, including the FDIC Report, were not in the actual or constructive possession of Community First. Those documents were the sole and exclusive property of the FDIC. 12 C.F.R. § 309; see cases cited in App. Initial Brief p. 22-23. Community First did not have possession of the documents for purposes of production until the FDIC granted permission to produce. *See id.* Thus, Community First could not violate the Discovery Order related to the FDIC documents unless it failed to produce them following receipt of FDIC permission. It is undisputed that did not occur.

Federal banking laws and associated regulations clearly dictate that banks are prohibited from disclosing records which Community First has, but belong to the FDIC without following certain procedures[4] and obtaining the FDIC's authorization. 12 C.F.R. § 309.6(a) ("[N]o person shall disclose or permit the disclosure of any exempt records, or

---

information are not "privileged." (Sanctions Order at 12, R. p. 23). Thus, the Bank was correct to not include the FDIC Documents in any of the privilege logs it provided to Shepherd.

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

information contained therein, to any persons . . . ." "[U]nder no circumstances shall any person, entity or agency disclose or make public in any manner the exempt records or information without written authorization from" the FDIC); 12 C.F.R. § 309.6 (b)(10) ("All steps practicable shall be taken to protect the confidentiality of exempt records and information. Any disclosure permitted . . . . Wherever practicable, disclosure of exempt records shall be made pursuant to a protective order and redacted to exclude all irrelevant or non-responsive exempt information.").

Moreover, Community First was not the exclusive party entitled to request documents from the FDIC. Section 309.7(a) is clear: Any person may make such a request of the FDIC. Shepherd offers no explanation why he did not make an FDIC request on his own. The reason is obvious: Shepherd knew from experience that the FDIC was not prompt and waited to use that fact to cause harm to Community First. Accordingly, Community First's treatment of the FDIC Documents (including the FDIC Report) was proper, and certainly not willfully disobedient of any order of the trial court or in bad faith. Shepherd's argument fails and the trial court erred by sanctioning Community First for delayed production of the FDIC Documents.

B. Community First Should Not And Cannot Be Sanctioned For Its "Pattern Of Discovery," Which Did Not Violate Any Court Order.

Shepherd further asserts that Community First's "pattern of discovery" evidences abuse of the discovery process, which sustains the trial court's Sanctions Orders. According to Shepherd, the abuse was Community First allegedly: (1) producing documents to Shepherd without attribution – i.e., in an order that could not be discerned by Shepherd – in Community First's first document production; (2) failing to list withheld Bank documents on a privilege log and not producing documents Shepherd believed (a)

were missing from prior document productions and (b) to which he believed he was entitled; (3) untimely producing redacted Board meeting minutes; and (4) producing documents on a "rolling basis." Shepherd's assertion is flatly wrong on the law and the facts, however.

As the November Sanctions Order correctly notes, the imposition of sanctions against a party is governed by Rule 37 of the South Carolina Rules of Civil Procedure. (Nov. Sanctions Order at 17-18, R. pp. 28-29). *See also Downey v. Dixon*, 294 S.C. 42, 44, 362 S.E.2d 317, 318 (Ct. App. 1987) ("Rule 37(b) provides sanctions for the violation of an order of the Court to provide or permit discovery."). Sanctions may not be imposed against a party unless the party violated a discovery order of the court. *Id.*

Here, it is indisputable that the purported discovery requirements of Community First upon which Shepherd bases his "discovery abuse" assertion (and the trial court apparently based its Sanctions Orders, which it adopted verbatim or nearly verbatim from a document Shepherd sent to it) were (1) complied with by Community First or (2) not a part of the trial court's Discovery Order.

As the filings submitted to the trial court related to Shepherd's Sanctions Motion showed, Community First complied with each of the requirements of it actually contained in the Discovery Order. Most had been complied with even before the Discovery Order was issued because Community First complied with the Hearing Directives – a fact conceded by Shepherd (at least at the time) (Appellant's Initial Br., Ex. B-000034-35, R. pp. 919-920).

Attribution. Community First attributed each document produced to the specific discovery request(s) to which it was responsive by letter dated April 11, 2016. (Bank's

Mot. to Strike, Ex. F thereto, R. pp. 514-542). In supplemental productions, Community First continued to attribute documents to the specific discovery request(s) to which they were responsive. (*E.g., id.*, Ex. J thereto, at 1-19 of letter Ex. C, R. pp. 577-596).

Privilege Log and "Missing" Documents. The trial court itself confirmed on September 15, 2016 that "it appears defense counsel have no objection to the withheld information pursuant to the attorney client privilege." (*Id.*, Ex. B thereto, R. p. 459).

Furthermore, on March 23, 2016, Shepherd sent a list of illegible documents (ones retrieved from microfiche) and categories of documents—not itemized documents—that he alleged that he had requested but had not been produced. The next day, Community First responded asking for more precise identification of documents by Shepherd. (*Id.* at 6, R. pp. 442, 459-472).

On April 11, 2016, Community First produced all of the claimed illegible documents and all other known documents in its possession, custody, and control, while noting that it was continuing to search for documents and that it would immediately produce any such documents if located. (*Id.* at 6-8 & Ex. F thereto, R. pp. 442-444, 514-542). Community First confirmed this again on July 1, 2016. (*Id.* at 7 & Ex. H thereto, R. pp. 443, 551-558).

On September 16, 2016—and before the thirty day deadline in the August 2016 Order expired—Community First produced additional documents in response to Shepherd's specific requests, identifying the specific request(s) to which those documents were responsive and providing a detailed privilege log. (*Id.* at 10-11 & Ex. J thereto, R. pp. 446-447, 572-601). In early December, the FDIC granted its approval for the production of the remaining FDIC Documents. Community First produced the FDIC Documents in

two sets: one set on December 15, 2016 and the other set on December 22, 2016. (*Id.* at 16 & Ex. B-000064, R. pp. 863, 949-950). Thus, the documents Community First could legally produce before the August 2016 Order's deadline (i.e., Community First's documents) were produced before the deadline. The documents that belonged to the FDIC which Community First could not legally produce until it received the FDIC's permission to do so (i.e., the FDIC Documents), were produced almost immediately after the FDIC allowed Community First to produce those documents.

Board Minutes. On August 29, 2016, Community First sent the Court copies of redacted board minutes, noting that the attorney-client and work-product privilege redactions were uncontested and that the remaining redactions were required by federal banking law. (*Id.* at 4-5 & Ex. A thereto, R. pp. 440-441, 455-457). In total, Community First produced 144 sets of Board minutes spanning between 1997 and 2016. Shepherd complains that one set of board minutes – from April 2012 – were produced late – 1 out of 144. As Community First explained at the time, the April 2012 minutes do not make any reference to the Powell Loan or any other subject of a Shepherd document request. When Community First (not Shepherd) discovered documents which indicated the Powell Loan was included in the batch of loans which were charged off by the Board at Shepherd's direction at the April 2012 Board meeting, Community First voluntarily produced those minutes. (*See* Mar. 15, 2016 Hr'g Tr. at 89, lines 18 to 21, R. p. 1484). In the months the discovery dispute had been ongoing, Shepherd had never separately identified them as missing most likely because he consistently (but wrongly) claimed the charge off came before the Board at its March 2012 meeting. (*See e.g.,* Resp't First Set Reqs. to Admit, R. pp. 1674-1679). Thus, as soon as the April 2012 minutes were identified as being relevant

and responsive they were produced. Any complaint about the production of those minutes is a complaint about the normal course of producing documents when it is discovered they are relevant.

Rolling Production. Shepherd's (and the Court's) complaint about Community First's "Rolling Production" is misguided. Of Community First's 18 productions, 11 occurred prior to the entry of the Discovery Order, 3 were in response to the Discovery Order, and 2 were as a result of the FDIC's belated permission to produce documents. The remaining 2 were produced after the newly discovered documents were requested by Shepherd, and then identified and located by Community First[5]. Community First worked diligently and in good faith to produce the documents – over 47,000 – in an orderly fashion as soon as they were discovered. Community First's production of documents on a rolling-basis was not prohibited by the Discovery Order (especially the pre-order productions) and productions made to comply with the Discovery Order.

Moreover, the production of documents on a rolling basis is permitted under the Rules of Civil Procedure and common practice in South Carolina in document intensive matters, such as this case. In his Initial Brief, Shepherd does not argue to the contrary. Instead, Shepherd nakedly asserts that rolling productions are allowed only where there is an "initial complete response, not one continual response." (Resp't Br. at 16 (emphasis omitted)). However, Shepherd does not offer any legal support for his argument (and there does not appear to be any).

[5] A 19th production was made in April 2017 following the trial court's clarification of the Discovery Order.

As discovery progressed, and Shepherd made requests for additional documents and Community First identified additional documents which it believed were responsive to Shepherd's requests, Community First provided those documents to Shepherd. Community First did not "continually" produced documents. Further, all of Community First's document productions were made long before the close of discovery. Thus, the trial court erred by sanctioning Community First for producing documents as it did. *See e.g., Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 108, 410 S.E.2d 537, 541 (1991) ("Plaintiffs properly responded to Nassau's Interrogatory 6, which sought information concerning any medical doctor who has diagnosed illness or injury caused by materials from Nassau's plant. When Dr. Panitz's identity became known to them, Plaintiffs promptly notified Nassau."); *Brandi v. Brandi*, 302 S.C. 353, 359, 396 S.E.2d 124, 127 (Ct. App. 1990) ("It does not appear counsel for Mr. Brandi willfully violated S.C.R.Civ.P. 33 by failing to supplement answers to interrogatories. The record supports the inference the witness was literally discovered the night before trial."). Even if Community First's production methodology was somehow improper it did not constitute a violation of the Discovery Order, nor was any conduct a willful violation.

II. SHEPHERD'S ARGUMENTS AND THE SANCTIONS ORDER FAIL BECAUSE SHEPHERD CLEARLY WAS NOT "SUBSTANTIALLY PREJUDICED" AS A RESULT OF ANY MISCONDUCT BY COMMUNITY FIRST.

Shepherd's arguments also fail (and the Sanctions Orders should be reversed) because Shepherd plainly did not suffer any prejudice generally, and certainly not as a result of any misconduct by Community First. Shepherd's contention that he was "[s]ubstantially [p]rejudiced" because the case "could have been dismissed much sooner" "[i]f the [FDIC] documents were produced earlier" has absolutely no merit. (*See* Resp't

Br. at 20.) The argument does, however, confirm that the alleged prejudice arises only from the timely produced FDIC Report.

A. Shepherd Suffered No Prejudice From The Timing of The Production Of The FDIC Report.

Shepherd's statute of limitations argument – which he claims is the source of the prejudice – is based on a contorted view of disputed facts and intentionally omits other facts. Shepherd claims the allegation of a 2012 fraudulent charge off is the only allegation that saved the Powell Loan from a statute of limitations defense (Resp't Initial Br. at 5) and that the FDIC Report shows that the charge off was not fraudulent causing the claim to fail. *Id.* That argument has multiple flaws.

First, in 2014, when Community First's Board discovered the Powell loan had been charged off but should not have been, Powell affirmed the Powell Loan, executed an amended promissory note, and renewed making payments. (Bowman Aff. ¶ 18, R. p. 1700); (Compl. ¶ 72, R. p. 81); (Compl., Ex. N, R. pp. 117-119). When Powell defaulted on the 2014 amended note in 2015 that default precipitated the lawsuit which was filed within months of the default. The lawsuit was thus timely under S.C. Code §15-3-530.

Second, it was not until Powell's 2015 confession to Community First that the Powell Loan was for Shepherd's benefit that the statute of limitations on Community First's fraud and other misrepresentation claims began to run against Shepherd, McCoy and their companies. (Bowman Aff. ¶ 18, R. p. 1700); (Bowman Aff., Ex. A, R. pp. 1704-1705); (Compl. ¶ 72, R. p. 81); S.C. Code §15-3-530(7); *Burgess v. Am. Cancer Society*, 300 S.C. 182, 188, 386 S.E.2d 798, 799 (1989) (discovery rule applies to fraud claims). Community First had no prior notice and that its former CEO and Chairman were the real beneficiaries of the Powell Loan. Community First timely brought suit against the

Defendants within three years of Powell's breach of the terms of the Powell Loan after he affirmed it and within three years of the discovery of the fraud. Shepherd's statute of limitations defense – if it had been decided – would have failed. Shepherd suffered no prejudice.

Third, separate from the limitations issue, the production of the FDIC Documents (including the FDIC Report) were in no way detrimental to Community First's case against Shepherd – an under-pinning of Shepherd's prejudice argument. A charge off is merely the declaration by a creditor that an amount of debt is unlikely to be collected. It has no effect on a creditor's legal liability for his debts. Further, as acknowledged by Shepherd himself, *Community First* (which was aware of the contents of the FDIC Documents), asked the FDIC for permission to provide the documents to Shepherd.

Moreover, while Shepherd did, in fact, have Community First's Board of Directors approve a large number of charge offs in April 2012, a batch charge-off that included the Powell Loan, the members of the Board did not know that the Powell Loan was included. (*Id.* ¶¶ 71-72, R. p. 81; Second Affidavit of Richard D. Burleson at 2, R. p. 1692; Affidavit of Dr. Larry S. Bowman ¶¶ 12-19, R. pp. 1699-1701; Affidavit of John R. Hamrick ¶¶ 11-18, R. pp. 1740-1742). Further, the FDIC Report confirms Shepherd's and Powell's fraud because and nowhere in the FDIC Report did the FDIC describe the Powell Loan as a loan for the benefit of Shepherd; Shepherd, as CEO, had concealed its true nature. (*See* Defs.' Ans. to Pl.'s Am. Compl. & Am. Countercls. ¶¶ 34, 77, R. pp. 157, 165). In short, the FDIC Report is immaterial to the timeliness of Community First's lawsuit.

Without Shepherd's contrived statute of limitations argument, he has no prejudice. The delay in production of the FDIC Documents itself caused no prejudice. Shepherd does

not dispute that he received the documents about which he complains well in advance of depositions and trial (which never occurred). Shepherd's mere desire to have received the documents earlier than he did does not mean that he was prejudiced (or even suffered any hardship beyond the same hardships all litigants face in litigating matters). The law does not allow a party to receive tens of thousands of dollars in compensation merely because he did not get what he wanted when he wanted it. Shepherd cites no case to the contrary.

Further, there is no link between the production of the FDIC Documents by Community First and the resolution of the case. Community First dismissed Shepherd *without prejudice*, and only after it successfully settled its claim against Shepherd's business partner, Powell. The settlement obviated the desirability of Community First continuing to litigate the case against Shepherd.

To the extent there were any delays with the timing of their production, however, those delays clearly were not attributable to any misconduct by Community First. *Supra.* It is undisputed that Community First could not produce the documents until the FDIC gave it permission to do so. *Id.* In full compliance with the law, Community First produced the documents almost immediately after it was legally allowed to do so (once it received the FDIC's permission and redacted portions of text in the documents as the FDIC instructed). *Id.* Thus, the documents were timely produced by Community First. *Id.*

B. Shepherd Claims No Prejudice From The Delayed Production Of The other Documents.

Despite his complaints in support of his Sanctions Motion that Community First should be sanctioned because it purportedly failed to produce "unsecured Insider and Board Loans," it is beyond dispute Shepherd did not suffer any prejudice in connection with the production of any loan documents. First, the Bank (rightly) did not believe the Court's

Discovery Order provided Defendant Shepherd with *carte blanche* to request categories of documents (*e.g.,* "unsecured Insider and Board Loans" spanning a period of thirty-five years and covering thousands and thousands of patently irrelevant documents of all types, including those relating to credit cards) which Community First was later obligated to provide, but rather was an order to provide a list of specific known, but believed to be unproduced documents. (Discovery Order, p. 3, R. p. 3) Second, to the extent Shepherd requested specific documents, they were produced (and Shepherd does not contend otherwise). Third, Shepherd's position is tantamount to stating that the Court granted Shepherd with *carte blanche* to request and receive any documents it wanted without regard to the constraints of discovery such as relevance, oppression or burdensomeness. Fourth, Shepherd's complaints were not a material part of the Sanctions Orders or Shepherd's Initial Brief, belying their lack of merit and materiality. Lastly, Shepherd's own Initial Brief claims prejudice only in the timing of the production of the FDIC Report.

Shepherd was not prejudiced as a result of any misconduct by Community First. *Id.* Community First's conduct was not sanctionable. The Sanctions Orders should be reversed.

III. SHEPHERD'S ARGUMENTS AND THE SANCTIONS ORDERS FAIL BECAUSE THE SANCTIONS ORDERS PLAINLY WERE NOT NARROWLY TAILORED AND PREJUDICED COMMUNITY FIRST.

Shepherd argues the Sanctions Orders and the sanctions awarded were reasonable because the trial court held a hearing on the matter, allowed Bank to provide a written submission to the court *on new matters which Shepherd sprung upon Community First for the first time at the hearing*, and "reduced the amount of the sanction by over 50%." (*See*

Resp't Br. at 20-21). Shepherd's argument conflicts with the realities of the case, as well as the law.

Under South Carolina law, the imposition of sanctions must be reasonable and cannot "go beyond the necessities of the situation . . . ." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 543, 489 S.E.2d 679, 682 (Ct. App. 1997). Any sanction imposed must be "be aimed at the specific misconduct of the party sanctioned." *Id.* Where, as here, there is no misconduct, there is no legal basis for the imposition of sanctions. *See id.*; *supra.*

Fundamentally, the imposition of sanctions must be underpinned by logic. *Id.* Moreover, in the exceedingly rare cases where the imposition of sanctions is necessary, the sanction imposed must be a "rifle shot," not a "shotgun blast." *Id.* (quoting *Balloon Plantation v. Head Balloons*, 303 S.C. 154, 399 S.E.2d 440 (Ct. App. 1990)). The actual sanction awarded in this case fails to satisfy that standard.

The May Sanctions Order, issued on May 25, 2017, states that sanctions will be awarded for "attorneys' fees incurred in bringing [the] Motion for Sanctions." (May Sanction Order at 2, R. p. 6). The Motion for Sanctions was filed on September 26, 2016. Shepherd's subsequent fee request totaled over $170,000 and demanded payment from Community First for fees and costs for expenses to which Shepherd indisputably could not be entitled because they could not have been "incurred in bringing the Motion." (Resp't Itemization of Fees on Mot. For Sanctions, R. pp. 1545-1615). For example, the fee request included paralegal time and attorney time incurred prior to the issuance of the Discovery Order and which could not have been incurred as part of the Motion. (*Id.*, Ex. F, R. pp. 1609-1615). It included fees Shepherd's lawyers charged him for unrelated matters, for conversations he would have had regardless of any allegedly sanctionable conduct by

Community First and for reviewing the thousands of documents previously produced by Community First. (*Id.*, R. pp. 1609-1615) Community First outlined its objections to the excessive fee request. (Appellant's Objs. To Resp't Petition for Atty's Fees & Costs, R. pp. 1626-1673). After a hearing on July 28, 2017 during which the parties argued about detailed orders and Community First objected to Shepherd's inflated fee request, the Court entered a Form 4 Judgment, ordering Community First to pay Shepherd the remarkable sum of $64,920.04 in sanctions, made up of attorneys' fees of $50,000 and costs of $14,920.04.[6] The Form 4 Judgment, contained absolutely no factual support or basis and no explanation for the amount awarded. The fee award of $50,000 was clearly an arbitrary number without any basis or support. Neither Community First, nor this reviewing Court, can have any idea what the trial court's fee award was based upon. (*Id.*) Shepherd's claim that the trial court reduced the fee award by our 50% is meaningless since the request was itself over 80% excessive.

Although the trial court's subsequent November Sanctions Order contains some factual findings purportedly justifying an award of sanctions in general, the order contains no explanation for the actual award amounts. Further showing the lack of support for the award and the amount, the Form 4 Judgment purported to award fees to Lee Plumblee, counsel for James McCoy, despite the fact that McCoy made no motion to compel or for sanctions and was not legally entitled to sanctions. Rule 37(b), SCRCP. The only reason to award fees to Mr. Plumblee would be to punish Community First. Further, the trial court's statements (both factual and legal) in the November Sanctions Order were taken verbatim (or nearly verbatim) from a proposed order Defendants provided to the trial court.

[6] The May Sanctions Order did not order payment of costs.

(*Compare id.*, *with* Defs.' Proposed Order on Shepherd's Sanctions Mot., R. pp. 39-64). Despite month-long opportunities to after-the-fact justify the arbitrary fee award, no justification was provided.

In sum, there is no discernable logic which supports the trial court's imposition of sanctions against Community First or the amount of the sanctions award. Further, the sanction the trial court imposed is certainly not a "rifle" shot as legally required. The trial court's Sanctions Orders should be reversed.

IV. COMMUNITY FIRST DID NOT WAIVE ITS RIGHT TO COMPLAIN ABOUT THE DISCOVERY ORDER.

Lastly, Shepherd argues the "Bank has waived any challenge to the trial Court's *Discovery Order* that forms the basis for the sanctions" pursuant to *Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014). (*See* Resp't Br. at 22-24).

Shepherd's argument is misplaced. Community First is not challenging the substance of the (comprehensible) specific rulings contained in the Discovery Order. Community First appeals the Sanctions Orders on the additional ground that the trial court's Discovery Order was so vague or unclear that it cannot support the imposition of sanctions. Community First has consistently maintained its argument that the Discovery Order abrogated the trial court's obligation to issue a specific ruling that was capable of being complied with. (*See, e.g.,* Bank's Resp. in Opp'n to Sanctions Mot., Ex. B-000036-38, R. pp. 921-923). Instead it impermissibly granted Shepherd *carte blanche* to request any document he wanted without regard to Community First's valid objections. (*Id.*, R. pp. 921-923); (Aug. 1, 2016 Order on Mot. To Compel at 3, R. p. 3). Thus, that component of the Discovery Order – the only one the trial court found that Community First did not comply with – cannot, as a matter of law, support the award of sanctions. *See Davis*, 409

S.C. at 296, 762 S.E.2d at 551 (Pleicones, J., dissenting) (a vague discovery order cannot form the basis of sanctions).

Further, this case is distinguishable from *Davis*. In *Davis*, the trial court ordered the plaintiffs to produce both non-privileged documents that had been withheld and documents Plaintiffs claimed were privileged. *Davis*, 409 S.C. at 280-83, 762 S.E.2d at 542-44. Over the course of the proceedings, Plaintiffs never challenged the terms of the various discovery orders – they simply failed to comply with the orders. Ultimately, after years of non-compliance, the trial court issued the sanctions order but withheld the actual sanction stating that if the plaintiffs failed to comply with its discovery orders within a specified period of time, the trial court would dismiss the plaintiffs' claims with prejudice and award attorneys' fees and costs. *Id.* When plaintiffs continued the failure, the court dismissed the case and the plaintiffs appealed the sanctions order, attacking the underlying discovery orders as well. *Id.*

On appeal, the Supreme Court held that the sanctions order was a final order, and thus the plaintiffs' appeal was proper. *Id.* In so holding, the Supreme Court evaluated the substance of the plaintiffs' appeal of the sanctions order and remarked that "to challenge the *specific* rulings of the discovery orders, the *normal course* is to refuse to comply, suffer contempt, and appeal from the contempt finding." *Id.* at 280 (emphasis added). The Court also noted that Plaintiffs "continued to accept the circuit court's formulation of discovery." *Id.* at 281, 762 S.E.2d at 543. Because of the Plaintiffs' failure to object to the trial courts "formulation of discovery" the Court held that Plaintiffs had waived any right to complain about the discovery orders. Here, Community First never accepted the court's formulation of discovery, consistently objecting to the trial court's order which gave Shepherd *carte*

blanche to ask for – and receive – anything he requested. (*See, e.g.,* Bank's Resp. in Opp'n to Sanctions Mot., Ex. B-000036-38, 40-43, R. pp. 921-923, 925-928).

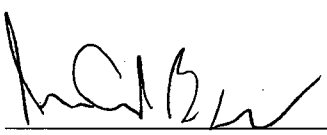
Davis does not support the proposition that Community First waived its right to challenge the Discovery Order, Community First appeals the trial court's Sanctions Order on the ground that Community First fully complied with each of the requirements of the trial court's order on Shepherd's Motion to Compel and to the extent it may not have, the Discovery Order is so vague to not support sanctions. (Appellant's Initial Br. at 13-15.) *Davis* plainly held such appeals and challenges are categorically appropriate for appellate review. *Supra.*

Accordingly, *Davis* has no bearing on this case. Community First did not waive its right to challenge the trial court's Discovery Order.

CONCLUSION

For the reasons stated, this Court should reverse the trial court's Sanctions Orders.

Respectfully submitted,



James Edward Bradley (S.C. Bar #66130)
MOORE TAYLOR LAW FIRM, PA
P.O. Box 5709
West Columbia, SC 29171
Telephone: (803)796-9160
Facsimile: (803)803-791-8410
Ward@mttlaw.com

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

Facsimile: 336-378-1001
jadams@brookspierce.com
joutling@brookspierce.com

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

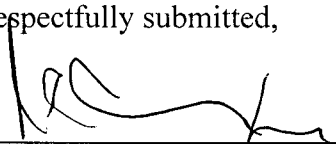
Attorneys for Appellant Community First Bank

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to SOUTH CAROLINA APPELLATE COURT RULES, RULE 215, Appellant Community First Bank respectfully submits that oral argument may aid the Court in resolving the issues in this matter.

This the 23rd day of July, 2018.

Respectfully submitted,



James Edward Bradley (S.C. Bar #66130)
MOORE TAYLOR LAW FIRM, PA
P.O. Box 5709
West Columbia, SC 29171
Telephone: (803)796-9160
Facsimile: (803)803-791-8410
Ward@mttlaw.com

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

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

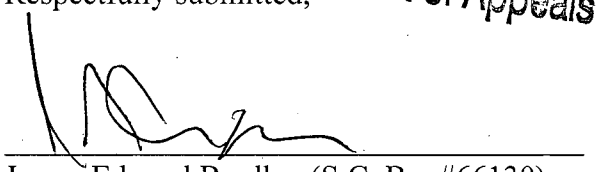
Attorneys for Appellant Community First Bank

CERTIFICATE OF COUNSEL

The undersigned certifies that the foregoing brief complies with Rule 211(b), SCACR, except that the phrase "for nearly a million dollars" was removed from page 17 to eliminate an alleged ambiguity.

This the 23rd day of July, 2018.

Respectfully submitted,



James Edward Bradley (S.C. Bar #66130)
MOORE TAYLOR LAW FIRM, PA
P.O. Box 5709
West Columbia, SC 29171
Telephone: (803)796-9160
Facsimile: (803)803-791-8410
Ward@mttlaw.com

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

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

Attorneys for Appellant Community First Bank

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

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2015-CP-37-635

Community First Bank, Inc., ... Appellant,

v.

Frederick D. Shepherd, Jr., ... Respondent.

PROOF OF SERVICE

I, Lynn G. Ivey, an employee of Moore Taylor Law Firm, P.A., certify that I have served the Reply Brief of Appellant on Respondent Frederick D. Shepherd, Jr., by depositing a copy of same in the United States Mail, postage prepaid, on July 23, 2018, addressed to his attorneys of record, Douglas F. Patrick, Esq. and Austin F. Watts, Esq., Covington Patrick Hagins Stern & Lewis, P.O. Box 2343, Greenville, SC 29602.

Lynn G. Ivey

West Columbia, South Carolina

July 23, 2018