

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Ninth Judicial Circuit

Honorable Diane S. Goodstein, Circuit Court Judge

Case No.: 2012-CP-10-05887
Appellate Case No. 2020-000162

RECEIVED

Aug 14 2020

SC Court of Appeals

Pinnacle Bank, as successor in interest to Bank of North Carolina, previous successor in interest to Harbor National Bank, Plaintiff,

v.

Anthony Whitfield and Cindy Whitfield, Defendants

Anthony Whitfield, Counterclaimant,

v.

David Swanson, Counterclaim Defendant

Of Whom Anthony Whitfield is the Appellant and David Swanson is the Respondent.

RESPONDENT'S MOTION TO DISMISS APPEAL

Respondent David Swanson, by and through the undersigned counsel, moves to dismiss this appeal as the trial court orders sought to be appealed from are not immediately appealable. The only cause of action pending against Respondent is a civil conspiracy counterclaim interposed

in a foreclosure action. Accordingly, Appellant waived his right to a jury trial and the trial court's order striking the jury demand is not immediately appealable.

With respect to the trial court's order bifurcating the civil conspiracy counterclaim, this portion of the appeal is moot. Appellant has resolved this case with Pinnacle Bank (the "Bank").

Furthermore, to the extent that this portion of the appeal is not moot, the trial court's order bifurcating the trial of the civil conspiracy claim in its entirety is not immediately appealable.

Facts

This appeal arises out of a foreclosure action filed by Pinnacle Bank's predecessor, Harbor National Bank (the "Bank"), against Appellant Anthony Whitfield ("Whitfield"). The foreclosure action related to a loan that the Bank extended to Whitfield in 2007. (Exhibit A, Summons and Complaint). The loan was secured by real property located in Charleston County, South Carolina, referred by the parties as the "Black Rush Property." (Id.).

When the loan was originated in 2007, Whitfield owned the Black Rush Property by himself in fee simple. As the 5-year balloon note began maturing in 2012, Whitfield and the Bank negotiated renewal terms, and a closing was scheduled to take place on June 28, 2012. Scott Warren was the Bank's primary point of contact for the Whitfield loan. (Exhibit B, Fifth Amended Answer and Counterclaims).

Two days prior to closing, Whitfield's closing attorney brought to the attention of the Bank that subsequent to the origination of the loan in 2007, Whitfield had deeded a one-half interest in the Black Rush Property to his ex-wife, Cindy Whitfield. The closing attorney's office initially indicated that Cindy Whitfield would need to sign the mortgage on the Black Rush Property, and then asked if the Bank was okay with keeping the existing lender's title insurance policy in place rather than issuing a new policy. (Exhibit C, Mtn to Strike, Ex. A.)

Thereafter, the Bank investigated whether the transfer of interest in the Black Rush Property would impact its collateral in the Black Rush Property. On June 27, 2012, the Bank's representative, Scott Warren, sent an email to the closing attorney's office stating "I called bank council [sic] to get some advice on how to handle it. (a) we need a title endorsement on Black Rush only... We can rely on your title opinion and existing policies for the others." (Exhibit C, Mtn. to Strike, Ex. B).

As a result of Cindy Whitfield's 50% ownership interest in the Black Rush Property, and to ensure protection of its security interest in the entirety of the Black Rush Property, the Bank sought either a title endorsement from the title insurer or Mrs. Whitfield's signature on the mortgage as a condition of renewing the loan. Neither a title endorsement nor Mrs. Whitfield's signature was obtained, and ultimately, the loan was not renewed. (Exhibit B, Fifth Amended Answer and Counterclaim ¶32).

On November 13, 2013, Scott Warren was deposed and was questioned about the email he sent prior to closing in which he informed the closing attorney's office that he "called bank council [sic] to get some advice on how to handle it. . . We need a title endorsement . . . Mr. Warren identified David Swanson as the bank counsel he was referring to in the email and testified that Swanson recommended that the Bank obtain a title endorsement on the Black Rush Property. . ." (Exhibit C, Mtn. to Strike, Ex. C, Warren Dep. 48:3-4).

Whitfield subsequently deposed Mr. Swanson, who testified that he received the call from Scott Warren and recommended that the Bank obtain a title endorsement. (Exhibit C, Mtn. to Strike, Ex. D, Swanson Dep. 19:1-25). Mr. Swanson testified that "[Mr. Warren] asked me my advice as to whether he should do [the loan renewal] without—with or without [an endorsement], I told him he should get a title endorsement." (Id.).

Following Mr. Swanson's deposition, Whitfield decided that he did not believe the telephone conversation between Swanson and Warren actually occurred. Instead, Whitfield alleges that Swanson and Warren conspired to give false deposition testimony about the existence of the subject phone call to justify the Bank's demand for a title endorsement, i.e. to create an "advice of counsel" defense. (Exhibit B, Fifth Amended Answer and Counterclaim at ¶¶66-69).

Whitfield then amended his pleadings a fifth time in which he alleged that Swanson and the Bank engaged in a civil conspiracy by providing false deposition testimony about the existence of the subject phone call. In particular, Whitfield alleges:

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

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

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

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

(Id.)(emphasis in original pleading).

At his deposition, Whitfield detailed his allegations against Swanson. Whitfield testified:

"The bank-Harbor National Bank—claimed the reason for backing out of the deal a year later, in the lawsuit (Warren depo 11/13/13), to close my nine loan renewals on 6/28/12 was because of advice it got—the bank got—from a 'mystery lawyer,' who never appeared in the pleadings or on a witness list until that time."

(Exhibit B, Mtn to Strike, Ex. F, Whitfield Dep. 33:19-25).

Further clarifying his position, Whitfield testified:

Q: “Your position is that the phone call between Scott Warren and David Swanson never occurred:

A: “Correct”

(Id.)

Q: “And you believe that they concocted this notion that the phone call occurred after the closing didn’t go forward?”

A: “Oh. Yeah. When Harbor National Bank got real concerned, then they had to bring in some other guns, they had to convince somebody to lie for the bank to get them out of the hole they were in, and Mr. Swanson volunteered.”

(Id.).

Q: “And is it your testimony as well that Mr. Swanson and the bank conspired sometime after June 28, 2012?”

A: “Yeah, I guess that would be a good way to define it.”

(Id.).

On March 8, 2019, Swanson filed a motion to strike the jury demand on the civil conspiracy counterclaim and to bifurcate the civil conspiracy counterclaim arguing that the counterclaim was permissive under Rule 13(b), SCRCP, and therefore was not entitled to a jury trial as of right. (Exhibit C).

A hearing was held on Swanson’s motion on October 7, 2019 at which counsel for Whitfield conceded that “we don’t believe it [the civil conspiracy counterclaim] relates to the foreclosure action.” (Exhibit D, Transcript).

The trial court entered an order on October 16, 2019 granting Swanson’s motion. (Exhibit E). The trial court denied Whitfield’s motion to reconsider on January 6, 2020 (Exhibit F). Whitfield then appealed both orders on February 3, 2020. (Exhibit G).

(Exhibit B, Mtn to Strike, Ex. F, Whitfield Dep. 33:19-25).

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A: “Correct”

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After filing the notice of appeal, the Bank and Whitfield settled all claims against one another. (Exhibit H, Stipulation of Dismissal).

Argument

I. The civil conspiracy counterclaim is permissive, and therefore, Whitfield is not entitled to a jury trial as of right, and therefore the trial court's order is not immediately appealable

It is well established under South Carolina law that “[i]f [a] complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.” *Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987).

“By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim.” *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 330-331, 755 S.E.2d 437, 442 (2014)(citing *Wells Fargo Bank, N.A. v. Smith*, 398 S.C. 487, 495, 730 S.E.2d 328, 332–33 (Ct.App.2012)).

Here, the allegations in Whitfield's civil conspiracy counterclaim-- that Swanson and Warren conspired to falsely testify in depositions—is indisputably a permissive counterclaim. The success or failure of the civil conspiracy counterclaim would not in any way impact the enforceability of the Bank's note and mortgage. Therefore, Whitfield waived his right to a jury trial. *See, Johnson*, 292 S.C. at 55, 354 S.E.2d at 897.

As an order denying a party a jury trial is not immediately appealable unless it deprives him of a mode of trial to which he is entitled as a matter of right, this appeal is interlocutory and not immediately appealable. *C & S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 300, 350 S.E.2d 191, 192 (1986) (emphasis added).

II. The order granting bifurcation is not immediately appealable

To the extent that the Court does not deem Whitfield's appeal of the trial court's order bifurcating the civil conspiracy counterclaim moot, this appeal should be dismissed as the order bifurcating the entire civil conspiracy counterclaim is not immediately appealable.

Under South Carolina law, unless an order granting bifurcation deprives a party of a mode of trial to which they are entitled as a matter of right, the bifurcation order is not immediately appealable. In *Flagstar Corp. v. Royal Surplus Lines*, the Supreme Court of South Carolina held:

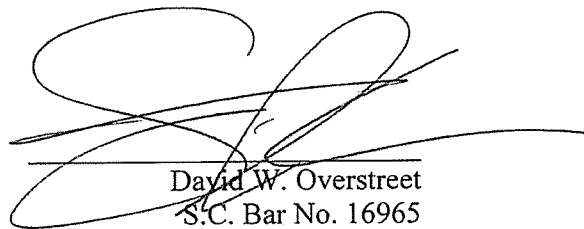
In short, trial of all issues in the case in a single proceeding is not a mode of trial to which the parties are entitled as a matter of right. Any abuse of discretion on the part of the trial court in severing issues for trial may be appealed after the trial, and after full development of the evidence. We therefore hold that an order granting separate trials of issues in a contract case is not immediately appealable, either permissibly or mandatorily, pursuant to S.C.Code Ann. § 14-3-330(2) (1976).

341 S.C. 68, 73, 533 S.E.2d 331, 333-334 (2000).

Here, the trial court severed the entire civil conspiracy counterclaim to be tried separately. There is no indication or suggestion that trial of the civil conspiracy counterclaim will deprive Whitfield of a mode of trial that he is entitled. Indeed, Whitfield will be able to put on a full trial concerning the sole cause of action alleged against Swanson.

Accordingly, the trial court's order bifurcating the civil conspiracy counterclaim is not immediately appealable and should be dismissed.

WHEREFORE, Respondent respectfully requests that this Court dismiss the appeal.

A large, stylized handwritten signature in black ink, appearing to be 'D. Overstreet', is written over a horizontal line.

David W. Overstreet
S.C. Bar No. 16965
Steven R. Kropski
S.C. Bar No. 101441
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P.O. Box 22528
Charleston, S.C. 29413

Attorneys for Respondent David Swanson

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Harbor National Bank,

Plaintiff,

v.

Anthony M. Whitfield and Cindy Whitfield,

Defendant.

) IN THE COURT OF COMMON PLEAS
)
)

CASE NUMBER: 2012-CP-10- 5807

SUMMONS

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

TO: THE DEFENDANTS ABOVE NAMED:

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

BERNSTEIN & BERNSTEIN, P.A.

Robert A. Bernstein

Robert A. Bernstein

Post Office Box 20519

Charleston, SC 29413-0519

(843) 529-1111

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ATTORNEYS FOR THE PLAINTIFF

September 5, 2012
Charleston, South Carolina



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
)

) CASE NUMBER: 2012-CP-10- 5887
)

Harbor National Bank,

)
)
) Plaintiff,
)

)
) v.
)

) Anthony M. Whitfield and Cindy Whitfield,
)

) Defendants.
)
)

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

(Non-Jury)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TMS #594-10-00-507

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

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

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

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

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

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#4

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

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

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

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

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

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

disbursements of this action, and attorney's fees.

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

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

FOR A THIRD CAUSE OF ACTION
(Appointment of Receiver)

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

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

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

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

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

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

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

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

WHEREFORE, the Plaintiff prays for judgment as follows:

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

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

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

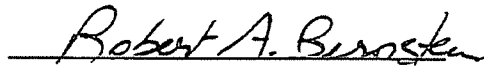
Second, to the payment and discharge of the amount due on the Plaintiff's Note and Mortgage, with the costs and disbursements of this action together with attorneys' fees, and

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

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

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

BERNSTEIN & BERNSTEIN, P.A.



Robert A. Bernstein

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Charleston, SC 29413-0519

(843) 529-1111

(843) 529-0035 (fax)

ATTORNEYS FOR THE PLAINTIFF

September 5, 2012
Charleston, South Carolina

ANTHONY M WHITFIELD 2141 DORCHESTER ROAD NORTH CHARLESTON, SC 29405	Harbor National Bank 1503 Old Towne Road Charleston, SC 29407	247-86-7213 Loan Number <u>400032000</u> Date <u>04/23/2007</u> Maturity Date <u>05/03/2012</u> Loan Amount \$ <u>325,000.00</u> Renewal Of _____
BORROWER'S NAME AND ADDRESS *Includes each borrower above, jointly and severally.	LENDER'S NAME AND ADDRESS *You* means the lender, its successors and assigns.	

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

☒ **Single Advance:** I will receive all of this principal sum on 04/23/2007. No additional advances are contemplated under this note.

☐ **Multiple Advance:** The principal sum shown above is the maximum amount of principal I can borrow under this note. On _____ I will receive the amount of \$ _____ and future principal advances are contemplated.

Conditions: The conditions for future advances are _____

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

☐ **Closed End Credit:** You and I agree that I may borrow up to the maximum only one time (and subject to all other conditions).

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

☐ **Variable Rate:** This rate may then change as stated below.

☐ **Index Rate:** The future rate will be _____ the following index rate: _____

☐ **No Index:** The future rate will not be subject to any internal or external index. It will be entirely in your control.

☐ **Frequency and Timing:** The rate on this note may change as often as _____.
A change in the interest rate will take effect _____.

☐ **Limitations:** During the term of this loan, the applicable annual interest rate will not be more than _____ % or less than _____ %.

Effect of Variable Rate: A change in the interest rate will have the following effect on the payments:

☐ The amount of each scheduled payment will change. ☐ The amount of the final payment will change.

ACCUAL METHOD: Interest will be calculated on a Actual/360 basis.

POST MATURITY RATE: I agree to pay interest on the unpaid balance of this note owing after maturity, and until paid in full, as stated below:

☐ on the same fixed or variable rate basis in effect before maturity (as indicated above).

☒ at a rate equal to 24.000%

☒ **LATE CHARGE:** If a payment is not made within 10 days after it is due, I agree to pay a late charge of 5.000% of the payment amount with a minimum of \$20.00.

☒ **ADDITIONAL CHARGES:** In addition to interest, I agree to pay the following charges which ☐ are ☒ are not included in the principal amount above: APPRAISAL FEE \$325.00, FLOOD SEARCH FEE \$15, ORIGINATION FEE \$1625.00

PAYMENTS: I agree to pay this note as follows:

☒ **Interest:** I agree to pay accrued interest See Additional Terms

☒ **Principal:** I agree to pay the principal See Additional Terms

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

ADDITIONAL TERMS: I AGREE TO PAY 24 MONTHLY INTEREST ONLY PAYMENTS BEGINNING 06/03/2007, FOLLOWED BY 35 MONTHLY PRINCIPAL AND INTEREST PAYMENTS OF \$2,297.15 BEGINNING 06/03/2009 WITH 1 (ONE) FINAL PAYMENT OF THE OUTSTANDING PRINCIPAL AND ACCRUED INTEREST ON 05/03/2012.

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

Signature for Lender

Angela Bell
 Angela Bell
 Commercial Lender

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

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

Anthony M Whitfield
 ANTHONY M WHITFIELD

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

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

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

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

PAYMENTS: Each payment I make on this note will first reduce the amount I owe you for charges which are neither interest nor principal. The remainder of each payment will then reduce accrued unpaid interest. If I make any such payment in excess of the amount of accrued unpaid interest, payments, we will apply the amount of this note to principal. If I make any part of, or the entire balance of this loan without penalty, unless we specify to the contrary on this note. Any partial prepayment will not be considered or reduce any later scheduled payment until this note is paid in full. When I make the prepayment, you and I agree in writing to the contrary.

INTEREST: Interest accrues on the principal remaining unpaid from time to time, until paid in full. If I receive the principal in more than one advance, each advance will start to earn interest only when I receive that advance. The interest rate in effect on this note at any given time shall be the rate in effect on the date of the last advance of principal. If I do not receive the principal in more than one advance, to the contrary, I do not agree to pay and you do not intend to charge anything any rate of interest that is higher than the maximum rate of interest you could charge under applicable law for the extension of credit that is agreed to here (either before or after maturity). If any notice of interest accrual is sent and is in error, we mutually agree by law and this note, that the actual amount of interest shall be the amount actually paid.

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

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

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

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

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

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

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

"Right to receive money from you" means:

(1) any deposit account balance I have with you;

(2) any money owed to me on an item presented to you or in your possession for collection or exchange; and

(3) any repurchase agreement or other nondeposit obligation.

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

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

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

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

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

DEFAULT: I will be in default if any one or more of the following occur: (1) I fail to make a payment on time or in the amount due; (2) I fail to keep the property insured, if required; (3) I fail to pay, or keep any promise, on any debt or agreement I have with you; (4) any other creditor of mine attempts to collect any debt I owe him through court proceedings; (5) I die, am declared incompetent, make an assignment for the benefit of creditors, or become insolvent (either because my liabilities exceed my assets or I am unable to pay my debts as they become due); (6) I make any written statement or provide any financial information that is untrue or inaccurate at the time it was provided; (7) I do or fail to do something which causes you to believe that you will have difficulty collecting the amount I owe you; (8) any collateral securing this note is used in a manner or for a purpose which threatens confiscation by a legal authority; (9) I change my name or assume an additional name without first notifying you before making such a change; (10) I fail to plant, cultivate and harvest crops in due season if I am a producer of crops; (11) any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in 7 C.F.R. Part 1940, Subpart G, Exhibit M.

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

(1) You may demand immediate payment of all I owe you under this note (principal, accrued unpaid interest and other accrued charges).

(2) You may set off this debt against any right I have to the payment of money from you, subject to the terms of the "SET-OFF" paragraph herein.

(3) You may demand security, additional security, or additional parties to be obligated to pay this note as a condition for not using any other remedy.

(4) You may refuse to make advances to me or allow purchases on credit by me.

(5) You may use any remedy you have under state or federal law.

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

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

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

(1) demand payment of amounts due (presentment);

(2) obtain official certification of nonpayment (protest); or

(3) give notice that amounts due have not been paid (notice of dishonor).

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

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

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

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

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

[illegible]

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

BORROWER NAME AND ADDRESS	LENDER NAME AND ADDRESS	LOAN DESCRIPTION
ANTHONY M. WHITEFIELD 2143 BOWENWOOD ROAD WORTH CHARLESTON, SC 29406	Barber National Bank 1552 Old Towne Road Charleston, SC 29407	Number 40031099 Amount \$228,000.00 Date 04/23/2007

☐ Refer to the attached Signature Addendum, incorporated herein, for additional Borrowers and their signatures.

COMMERCIAL DEBT MODIFICATION AGREEMENT

DATE AND PARTIES. The date of this Debt Modification Agreement (Modification) is 04/23/2007.

DEFINITIONS. As used in this Modification, the terms have the following meanings:
Parties. The persons "I," "me," and "my" refer to each Borrower signing this Modification, individually and together with their heirs, executors, administrators, successors, and assigns. "You" and "your" refer to the Lender, with its participants or syndicators, successors and assigns, or any person or entity that acquires an interest in this Modification or Prior Obligation.
Prior Obligation. "Prior Obligation" refers to any previous agreement governing my promise to pay you money, including any loan agreement, note, or document that evidences my indebtedness, and any extensions, renewals, modifications, and substitutions.

BACKGROUND. You and I have entered into a Prior Obligation which is evidenced by NOTEBOOK & ASSIGNMENT OF LOAN & DEBIT
dated 04/23/2007. ☒ in the original principal amount of / ☐ with a maximum possible principal amount of \$ 228,000.00.
☐ payable on demand, / ☐ payable on demand but if no demand is made, by the maturity date of / ☒ with a maturity date of 04/23/2012.
As of the date of this Modification, the ☐ amount remaining due is / ☒ current amount outstanding on the Prior Obligation is \$ 228,000.00.
principal (Principal) plus \$ 577.00 accrued interest, for a total of \$ 228,577.00.

MODIFICATION. For value received, you and I agree to modify the Prior Obligation as follows:

☐ **INTEREST RATE MODIFICATION.**
☐ **INTEREST RATE.**

Mechanism Interest Amount. Any amount assessed or collected as interest will be limited to the maximum lawful amount of interest allowed by state or federal law. Amounts collected in excess of the maximum lawful amount will be applied first to the unpaid principal balance. Any remainder will be refunded to me.

☐ **Post-Maturity/Default Interest Rate.**

☐ **Compounding.** This Modification provides for the compounding of interest.

☒ **PAYMENT MODIFICATION.**
TEN MONTHLY PAYMENTS 12 MONTHS CHANGED FROM THE 1ST DAY OF EACH MONTH TO THE 15TH DAY OF EACH MONTH BEGINNING ON OCTOBER 15, 2007 UNTIL APRIL 15, 2012. THE FINAL PAYMENT OF THE OUTSTANDING PRINCIPAL AND ACCRUED INTEREST WILL REMAIN ON 04/23/2012. ALL OTHER TERMS AND CONDITIONS REMAIN THE SAME.

☐ **DRAW PERIOD MODIFICATION.**

☐ **FEE AND CHARGES MODIFICATION.**

ADDITIONAL TERMS.

CONTINUATION OF TERMS. Except as specifically amended in this Modification, all terms of the Prior Obligation remain in effect.

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

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

☐ **ORAL AGREEMENTS OR COMMITMENTS TO LOAN MONEY, EXTEND CREDIT OR TO FORBEAR FROM ENFORCING REPAYMENT OF A DEBT INCLUDING PROMISES TO EXTEND OR RENEW SUCH DEBT ARE NOT ENFORCEABLE, REGARDLESS OF THE LEGAL THEORY UPON WHICH IT IS BASED THAT IS IN ANY WAY RELATED TO THE CREDIT AGREEMENT. TO PROTECT YOU (BORROWER/DEBTOR) AND US (LENDER/SECURED PARTY) FROM MISUNDERSTANDING OR DISAPPOINTMENT, ANY AGREEMENTS WE REACH COVERING SUCH MATTERS ARE CONTAINED IN THIS WRITING, WHICH IS THE COMPLETE AND EXCLUSIVE STATEMENT OF THE AGREEMENT BETWEEN US, EXCEPT AS WE MAY LATER AGREE IN WRITING TO MODIFY IT. BY SIGNING THIS MODIFICATION, THE PARTIES AFFIRM THAT NO UNWRITTEN ORAL AGREEMENT EXISTS BETWEEN THEM.**

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

BORROWER:
Signature: Anthony M. Whitefield Date: 9/20/07 (Seal)
Signature: _____ Date: _____ (Seal)
Signature: _____ Date: _____ (Seal)

LENDER:
Signature: Barber National Bank Date: _____ (Seal)
Signature: Sara Abel Date: _____ (Seal)
Signature: _____ Date: _____ (Seal)

COMMERCIAL DEBT MODIFICATION AGREEMENT
© 1992, 2001 Barco Systems, Inc., St. Cloud, MN Form CDM-42400 7/1/2004

NOT TO BE USED FOR LOANS SUBJECT TO CONSUMER LENDING LAWS
Page 1 of 1

EXHIBIT B
Page 1 of 1

J. STANLEY CLAYPOOLE, PA
2155 NORTH PARK LANE
NORTH CHARLESTON, S.C. 29406
Whitfield 07-0513

BK E 623PG742

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

Harbor National Bank
1503 Old Towne Road
Charleston, SC 29407

State of South Carolina

Space Above This Line For Recording Data

REAL ESTATE MORTGAGE
(With Future Advance Clause)

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

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

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

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

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

SEE ATTACHED EXHIBIT 'A'

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

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

3. **MAXIMUM OBLIGATION LIMIT.** The total principal amount of the Secured Debt (hereafter defined) secured by this Mortgage at any one time shall not exceed \$ 325,000.00. This limitation of amount does not include interest, loan charges, commitment fees, brokerage commissions, attorneys' fees and other charges validly made pursuant to this Mortgage and does not apply to advances (or interest accrued on such advances) made under the terms of this Mortgage to protect Lender's security and to perform any of the covenants contained in this Mortgage. Interest under the Note will be deferred, accrued or capitalized; however, Mortgagee shall not be required to defer, accrue or capitalize any interest except as provided in the Note. Future advances are contemplated and, along with other future obligations, are secured by this Mortgage even though all or part may not yet be advanced. Nothing in this Mortgage, however, shall constitute a commitment to make additional or future loans or advances in any amount. Any such commitment would need to be agreed to in a separate writing.

4. **SECURED DEBT DEFINED.** The term "Secured Debt" includes, but is not limited to, the following:

A. The promissory note(s), contract(s), guaranty(ies) or other evidence of debt described below and all extensions, renewals, modifications or substitutions (Evidence of Debt) (e.g., *borrower's name, note amount, interest rate, maturity date*):

One note of even date in the principal amount of 325,000.00 with final payment due 05/03/2012

- B. All future advances from Lender to Mortgagor or other future obligations of Mortgagor to Lender under any promissory note, contract, guaranty, or other evidence of debt existing now or executed after this Mortgage whether or not this Mortgage is specifically referred to in the evidence of debt.
- C. All obligations Mortgagor owes to Lender, which now exist or may later arise, to the extent not prohibited by law, including, but not limited to, liabilities for overdrafts relating to any deposit account agreement between Mortgagor and Lender.
- D. All additional sums advanced and expenses incurred by Lender for insuring, preserving or otherwise protecting the Property and its value and any other sums advanced and expenses incurred by Lender under the terms of this Mortgage, plus interest at the highest rate in effect, from time to time, as provided in the Evidence of Debt.
- E. Mortgagor's performance under the terms of any instrument evidencing a debt by Mortgagor to Lender and any Mortgage securing, guarantying, or otherwise relating to the debt.

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

5. **PAYMENTS.** Mortgagor agrees to make all payments on the Secured Debt when due and in accordance with the terms of the Evidence of Debt or this Mortgage.

6. **WARRANTY OF TITLE.** Mortgagor covenants that Mortgagor is lawfully seized of the estate conveyed by this Mortgage and has the right to grant, bargain, convey, sell, and mortgage the Property and warrants that the Property is unencumbered, except for encumbrances of record.

7. **CLAIMS AGAINST TITLE.** Mortgagor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities, and other charges relating to the Property when due. Lender may require Mortgagor to provide to Lender copies of all notices that such amounts are due and the receipts evidencing Mortgagor's payment. Mortgagor will defend title to the Property against any claims that would impair the lien of this Mortgage. Mortgagor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses which Mortgagor may have against parties who supply labor or materials to improve or maintain the Property.

8. **PRIOR SECURITY INTERESTS.** With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Property and that may have priority over this Mortgage, Mortgagor agrees:

- A. To make all payments when due and to perform or comply with all covenants.
- B. To promptly deliver to Lender any notices that Mortgagor receives from the holder.
- C. Not to make or permit any modification or extension of, and not to request or accept any future advances under any note or agreement secured by, the other mortgage, deed of trust or security agreement unless Lender consents in writing.

9. **DUE ON SALE OR ENCUMBRANCE.** Lender may, at its option, declare the entire balance of the Secured Debt to be immediately due and payable upon the creation of any lien, encumbrance, transfer, or sale, or contract for any of these on the Property. However, if the Property includes Mortgagor's residence, this section shall be subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable. For the purposes of this section, the term "Property" also includes any interest to all or any part of the Property. This covenant shall run with the Property and shall remain in effect until the Secured Debt is paid in full and this Mortgage is released.

10. **TRANSFER OF AN INTEREST IN THE MORTGAGOR.** If Mortgagor is an entity other than a natural person (such as a corporation or other organization), Lender may demand immediate payment if (1) a beneficial interest in Mortgagor is sold or transferred; (2) there is a change in either the identity or number of members of a partnership or similar entity; or (3) there is a change in ownership of more than 25 percent of the voting stock of a corporation or similar entity. However, Lender may not demand payment in the above situations if it is prohibited by law as of the date of this Mortgage.

11. **ENTITY WARRANTIES AND REPRESENTATIONS.** If Mortgagor is an entity other than a natural person (such as a corporation or other organization), Mortgagor makes to Lender the following warranties and representations which shall be continuing as long as the Secured Debt remains outstanding:

- A. Mortgagor is an entity which is duly organized and validly existing in the Mortgagor's state of incorporation (or organization). Mortgagor is in good standing in all states in which Mortgagor transacts business. Mortgagor has the power and authority to own the Property and to carry on its business as now being conducted and, as applicable, is qualified to do so in each state in which Mortgagor operates.
- B. The execution, delivery and performance of this Mortgage by Mortgagor and the obligation evidenced by the Evidence of Debt are within the power of Mortgagor, have been duly authorized, have received all necessary governmental approval, and will not violate any provision of law, or order of court or governmental agency.
- C. Other than disclosed in writing Mortgagor has not changed its name within the last ten years and has not used any other trade or fictitious name. Without Lender's prior written consent, Mortgagor does not and will not use any other name and will preserve its existing name, trade names and franchises until the Secured Debt is satisfied.

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

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

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

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

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

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

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

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

(page 3 of 8)

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

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

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

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

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

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

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

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

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

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

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

- A. No Hazardous Substance has been, is, or will be located, transported, manufactured, treated, refined, or handled by any person on, under or about the Property, except in the ordinary course of business and in strict compliance with all applicable Environmental Law.
- B. Mortgagor has not and will not cause, contribute to, or permit the release of any Hazardous Substance on the Property.
- C. Mortgagor will immediately notify Lender if (1) a release or threatened release of Hazardous Substance occurs on, under or about the Property or migrates or threatens to migrate from nearby property; or (2) there is a violation of any Environmental Law concerning the Property. In such an event, Mortgagor will take all necessary remedial action in accordance with Environmental Law.
- D. Mortgagor has no knowledge of or reason to believe there is any pending or threatened investigation, claim, or proceeding of any kind relating to (1) any Hazardous Substance located on, under or about the Property; or (2) any violation by Mortgagor or any tenant of any Environmental Law. Mortgagor will immediately notify Lender in writing as soon as Mortgagor has reason to believe there is any such pending or threatened investigation, claim, or proceeding. In such an event, Lender has the right, but not the obligation, to participate in any such proceeding including the right to receive copies of any documents relating to such proceedings.
- E. Mortgagor and every tenant have been, are and shall remain in full compliance with any applicable Environmental Law.
- F. There are no underground storage tanks, private dumps or open wells located on or under the Property and no such tank, dump or well will be added unless Lender first consents in writing.
- G. Mortgagor will regularly inspect the Property, monitor the activities and operations on the Property, and confirm that all permits, licenses or approvals required by any applicable Environmental Law are obtained and complied with.
- H. Mortgagor will permit, or cause any tenant to permit, Lender or Lender's agent to enter and inspect the Property and review all records at any reasonable time to determine (1) the existence, location and nature of any Hazardous Substance on, under or about the Property; (2) the existence, location, nature, and magnitude of any Hazardous Substance that has been released on, under or about the Property; or (3) whether or not Mortgagor and any tenant are in compliance with applicable Environmental Law.
- I. Upon Lender's request and at any time, Mortgagor agrees, at Mortgagor's expense, to engage a qualified environmental engineer to prepare an environmental audit of the Property and to submit the results of such audit to Lender. The choice of the environmental engineer who will perform such audit is subject to Lender's approval.
- J. Lender has the right, but not the obligation, to perform any of Mortgagor's obligations under this section at Mortgagor's expense.
- K. As a consequence of any breach of any representation, warranty or promise made in this section, (1) Mortgagor will indemnify and hold Lender and Lender's successors or assigns harmless from and against all losses, claims, demands, liabilities, damages, cleanup, response and remediation costs, penalties and expenses, including without limitation all costs of litigation and attorneys' fees, which Lender and Lender's successors or assigns may sustain; and (2) at Lender's discretion, Lender may release this Mortgage and in return Mortgagor will provide Lender with collateral of at least equal value to the Property secured by this Mortgage without prejudice to any of Lender's rights under this Mortgage.
- L. Notwithstanding any of the language contained in this Mortgage to the contrary, the terms of this section shall survive any foreclosure or satisfaction of this Mortgage regardless of any passage of title to Lender or any disposition by Lender of any or all of the Property. Any claims and defenses to the contrary are hereby waived.

20. CONDEMNATION. Mortgagor will give Lender prompt notice of any action, real or threatened, by private or public entities to purchase or take any or all of the Property, including any easements, through condemnation, eminent domain, or any other means. Mortgagor further agrees to notify Lender of any proceedings instituted for the establishment of any sewer, water, conservation, ditch, drainage, or other district relating to or binding upon the Property or any part of it. Mortgagor authorizes Lender to intervene in Mortgagor's name in any of the above described actions or claims and to collect and receive all sums resulting from the action or claim. Mortgagor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property. Such proceeds shall be considered payments and will be applied as provided in this Mortgage. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.

21. INSURANCE. Mortgagor agrees to maintain insurance as follows:

- A. Mortgagor shall keep the Property insured against loss by fire, theft and other hazards and risks reasonably associated with the Property due to its type and location. Other hazards and risks may include, for example, coverage against loss due to floods or flooding. This insurance shall be maintained in the amounts and for the periods that Lender requires. What Lender requires pursuant to the preceding three sentences can change during the term of the Secured Debt. The insurance carrier providing the insurance shall be chosen by Mortgagor subject to Lender's approval, which shall not be unreasonably withheld. If Mortgagor fails to maintain the coverage described above, Lender may, at Lender's option, obtain coverage to protect Lender's rights in the Property according to the terms of this Mortgage.

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

(page 5 of 8)

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

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

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

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

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

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

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

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

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

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

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

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

(page 6 of 8)

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

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

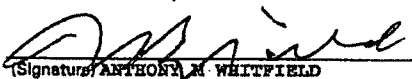
- ☐ **Line of Credit.** The Secured Debt includes a revolving line of credit provision. Although the Secured Debt may be reduced to a zero balance, this Mortgage will remain in effect until released.
- ☒ **Waiver of Appraisal Rights.** The laws of South Carolina provide that in any real estate foreclosure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

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

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

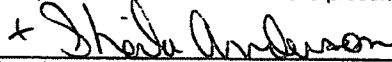
Entity Name: _____

Entity Name: _____

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

(Signature) (Date) (Seal)

Signed, Sealed and delivered in the presence of:

+ 
(Witness)


(Witness)

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

BK E 623PG749

PROBATE:

STATE OF South Carolina, COUNTY OF Charleston } ss.

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

Sworn to and subscribed before me this 23rd day

of April, 2007

[Signature]
Notary Public for South Carolina

x [Signature]

My commission expires: 1-28-2012

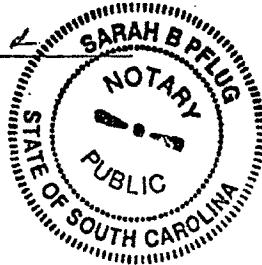


Exhibit "A"

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

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

BK E 623PG751

RECORDER'S PAGE

NOTE: This page MUST remain
with the original document



FILED

April 24, 2007

3:54:11 PM

BK E 623PG742

Charlie Lybrand, Register
Charleston County, SC

Filed By:

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

Number of Pages:

10

DESCRIPTION

AMOUNT

	\$ 15.00
Postage	

TOTAL

\$ 15.00

DRAWER:

A - bmm

DO NOT STAMP BELOW THIS LINE

EXHIBIT C
Page 10 of 10

J. STANLEY CLAYPOOLE, PA
2155 NORTH PARK LANE
NORTH CHARLESTON, S.C. 29406
Whitfield 07-0513

BKF 623PG152

____ State of South Carolina _____ Space Above This Line For Recording Data _____

This document was prepared by (name, address, phone number): Harbor National Bank
1503 Old Towne Road
Charleston, SC 29407

(843) 852-6400

ASSIGNMENT OF LEASES AND RENTS

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

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

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

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

2. **ASSIGNMENT OF LEASES AND RENTS.** For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debts and Assignor's performance under this Assignment, Assignor irrevocably assigns, grants, bargains, conveys and mortgages to Lender as additional security all the right, title and interest in the following (all referred to as Property).
- A. Existing or future leases, subleases, licenses, guaranties and any other written or verbal agreements for the use and occupancy of the Property, including any extensions, renewals, modifications or replacements (all referred to as Leases).
- B. Rents, issues and profits (all referred to as Rents), including but not limited to security deposits, minimum rent, percentage rent, additional rent, common area maintenance charges, parking charges, real estate taxes, other applicable taxes, insurance premium contributions, liquidated damages following default, cancellation premiums, "loss of rents" insurance, guest receipts, revenues, royalties, proceeds, bonuses, accounts, contract rights, general intangibles, and all rights and claims which Assignor may have that in any way pertain to or are on account of the use or occupancy of the whole or any part of the Property.
- C. The term Property as used in this Assignment shall include the following described real property:
SEE ATTACHED EXHIBIT 'A'

BKF 623PG153

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

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

3. **MAXIMUM OBLIGATION LIMIT.** The total principal amount secured by this Assignment at any one time will not exceed \$ 325,000.00. This limitation of amount does not include interest and other fees and charges validly made pursuant to this Assignment. Also, this limitation does not apply to advances made under the terms of this Assignment to protect Lender's security and to perform any of the covenants contained in this Assignment. Interest under the Note will be deferred, accrued or capitalized; however, Lender will not be required to defer, accrue or capitalize any interest except as provided in the Note.
4. **SECURED DEBTS.** This Assignment will secure the following Secured Debts:
- A. ☐ **Specific Debts.** The following debts and all extensions, renewals, refinancings, modifications and replacements. (Include items such as borrowers' names, note amounts, interest rates, maturity dates, etc.)

- ☐ One or more of the debts secured by this Assignment contains a future advance provision.
- B. ☒ **All Debts.** All present and future debts from Assignor and _____

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

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

5. **PAYMENTS.** Assignor agrees that all payments under the Secured Debts will be paid when due and in accordance with the terms of the Secured Debts and this Assignment.
6. **COLLECTION OF RENTS.** Assignor may collect, receive, enjoy and use the Rents so long as Assignor is not in default. Assignor will not collect in advance any Rents due in future lease periods, unless Assignor first obtains Lender's written consent. Upon default, Assignor will receive any Rents in trust for Lender and Assignor will not commingle the Rents with any other funds. When Lender so directs, Assignor will endorse and deliver any payments of Rents from the Property to Lender. Amounts collected will be applied at Lender's discretion to the Secured Debts, the costs of managing, protecting and preserving the Property, and other necessary expenses. Assignor agrees that this Assignment is immediately effective between Assignor and Lender and effective as to third parties on the recording of this Assignment.
7. **WARRANTIES AND REPRESENTATIONS.** To induce Lender to enter into the Loan, Assignor makes these representations and warranties for as long as this Assignment is in effect.
- A. **Power.** Assignor is duly organized, validly existing and in good standing under the laws in the jurisdiction where Assignor was organized and is duly qualified, validly existing and in good standing in all jurisdictions in which Assignor operates or Assignor owns or leases property. Assignor has the power and authority to enter into this transaction and to carry on Assignor's business or activity as now conducted.
- B. **Authority.** The execution, delivery and performance of this Assignment and the obligation evidenced by this Assignment: are within Assignor's duly authorized powers; has received all necessary governmental approval; will not violate any provision of law or order of court or governmental agency; and will not violate any agreement to which Assignor is a party or to which Assignor is or any of Assignor's property is subject.

- C. **Name and Place of Business.** Other than previously disclosed in writing to Lender, Assignor has not changed Assignor's name or principal place of business within the last ten years and has not used any other trade or fictitious name. Without Lender's prior written consent, Assignor does not and will not use any other name and will preserve Assignor's existing name, trade names and franchises.
- D. **Ownership or Lease of Property.** Assignor owns or leases all property that Assignor needs to conduct Assignor's business and activities. All of Assignor's property is free and clear of all liens, security interests, encumbrances and other adverse claims and interests, except those Lender previously agreed to in writing.
- E. **Compliance with Laws.** Assignor is not violating any laws, regulations, rules, orders, judgments or decrees applicable to Assignor or Assignor's property, except for those that Assignor is challenging in good faith through proper proceedings after providing adequate reserves to fully pay the claim and its challenge should Assignor lose.
- F. **Title.** Assignor has good title to the Leases, Rents and Property and the right to assign, grant, bargain, convey and mortgage to Lender as additional security the Leases and Rents, and no other person has any right in the Leases and Rents.
- G. **Recordation.** Assignor has recorded the Leases as required by law or as otherwise prudent for the type and use of the Property.
- H. **Default.** No default exists under the Leases, and the parties subject to the Leases have not violated any applicable law on leases, licenses and landlords and tenants. Assignor, at its sole cost and expense, will keep, observe and perform, and require all other parties to the Leases to comply with the Leases and any applicable law. If Assignor or any party to the Lease defaults or fails to observe any applicable law, Assignor will promptly notify Lender.
- I. **Lease Modification.** Assignor has not sublet, modified, extended, canceled, or otherwise altered the Leases, or accepted the surrender of the Property covered by the Leases (unless the Leases so required).
- J. **Encumbrance.** Assignor has not assigned, compromised, subordinated or encumbered the Leases and Rents.
8. **COVENANTS.** Assignor agrees to the following covenants:
- A. **Rent Abatement and Insurance.** When any Lease provides for an abatement of Rents due to fire, flood or other casualty, Assignor will insure against this risk of loss with a policy satisfactory to Lender. Assignor may choose the insurance company, subject to Lender's approval, which will not be unreasonably withheld.
- B. **Copies of Leases.** Assignor will promptly provide Lender with copies of the Leases and will certify these Leases are true and correct copies. The existing Leases will be provided on execution of the Assignment, and all future Leases and any other information with respect to these Leases will be provided immediately after they are executed.
- C. **Right to Rents.** Immediately after the execution of this Assignment, Assignor will notify all current and future tenants and others obligated under the Leases of Lender's right to the Leases and Rents, and will request that they immediately pay all future Rents directly to Lender when Assignor or Lender asks them to do so.
- D. **Accounting.** When Lender requests, Assignor will provide to Lender an accounting of Rents, prepared in a form acceptable to Lender, subject to generally accepted accounting principles and certified by Assignor or Assignor's accountant to be current, accurate and complete as of the date requested by Lender.
- E. **Lease Modification.** Assignor will not sublet, modify, extend, cancel, or otherwise alter the Leases, or accept the surrender of the Property covered by the Leases (unless the Leases so required) without Lender's written consent.
- F. **Encumbrance.** Assignor will not assign, compromise, subordinate or encumber the Leases and Rents without Lender's prior written consent.
- G. **Future Leases.** Assignor will not enter into any future Leases without prior written consent from Lender. Assignor will execute and deliver such further assurances and assignments as to these future Leases as Lender requires from time to time.
- H. **Personal Property.** Assignor will not sell or remove any personal property on the Property, unless Assignor replaces this personal property with like kind for the same or better value.
- I. **Prosecution and Defense of Claims.** Assignor will appear in and prosecute its claims or defend its title to the Leases and Rents against any claims that would impair Assignor's interest under this Assignment and, on Lender's request, Assignor will also appear in any action or proceeding on behalf of Lender. Assignor agrees to assign to Lender, as requested by Lender, any right, claims or defenses which Assignor may have against parties who supply labor or materials to improve or maintain the leaseholds subject to the Leases and/or the Property.
- J. **Liability and Indemnification.** Lender does not assume or become liable for the Property's maintenance, depreciation, or other losses or damages when Lender acts to manage, protect or preserve the Property, except for losses or damages due to Lender's gross negligence or intentional torts to the extent permitted by law. Otherwise, Assignor will indemnify Lender and hold Lender harmless for all liability, loss or damage that Lender may incur when Lender opts to exercise any of its remedies against any party obligated under the Leases.
- K. **Leasehold Estate.** Assignor will not cause or permit the leasehold estate under the Leases to merge with Assignor's reversionary interest, and agrees that the Leases shall remain in full force and effect regardless of any merger of the Assignor's interests and of any merger of the interests of Assignor and any party obligated under the Leases.
- L. **Insolvency.** Lender will be the creditor of each tenant and of anyone else obligated under the Leases who is subject to an assignment for the benefit of creditors, an insolvency, a dissolution or a receivership proceeding, or a bankruptcy.

(page 3 of 7)

9. **TRANSFER OF AN INTEREST IN THE ASSIGNOR.** If Assignor is an entity other than a natural person (such as a corporation or other organization), Lender may demand immediate payment if:
- A. A beneficial interest in Assignor is sold or transferred.
 - B. There is a change in either the identity or number of members of a partnership or similar entity.
 - C. There is a change in ownership of more than 25 percent of the voting stock of a corporation or similar entity.
- However, Lender may not demand payment in the above situations if it is prohibited by law as of the date of this Assignment.
10. **DEFAULT.** Assignor will be in default if any of the following occur with regard to the Secured Debts that are secured by this Assignment:
- A. **Payments.** Assignor fails to make a payment in full when due.
 - B. **Insolvency or Bankruptcy.** Assignor makes an assignment for the benefit of creditors or becomes insolvent, either because Assignor's liabilities exceed Assignor's assets or Assignor is unable to pay Assignor's debts as they become due; or Assignor petitions for protection under federal, state or local bankruptcy, insolvency or debtor relief laws, or is the subject of a petition or action under such laws and fails to have the petition or action dismissed within a reasonable period of time not to exceed 60 days.
 - C. **Death or Incompetency.** If Assignor is an individual, Assignor dies or is declared legally incompetent.
 - D. **Business Termination.** If Assignor is not an individual, Assignor merges, dissolves, reorganizes or ends its business or existence, or a partner or majority owner dies or is declared legally incompetent.
 - E. **Failure to Perform.** Assignor fails to perform any condition or to keep any promise or covenant of this Assignment, any other document evidencing or pertaining to the Loan, or any other debt or agreement Assignor has with Lender.
 - F. **Misrepresentation.** Assignor makes any verbal or written statement or provides any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.
 - G. **Property Transfer.** Assignor transfers all or a substantial part of Assignor's money or property.
 - H. **Property Value.** The value of the Property declines or is impaired.
 - I. **Name Change.** Assignor changes Assignor's name or assumes an additional name without notifying Lender before making such a change.
 - J. **Material Change.** Without first notifying Lender, there is a material change in Assignor's business, including ownership, management, and financial conditions.
 - K. **Insecurity.** Lender reasonably believes that Lender is insecure.
11. **REMEDIES.** After Assignor defaults, and after Lender gives any legally required notice and opportunity to cure the default, Lender may at Lender's option do any one or more of the following:
- A. **Acceleration.** Lender may make all or any part of the amount owing by the terms of the Secured Debts immediately due.
 - B. **Additional Security.** Lender may demand additional security or additional parties to be obligated to pay the Secured Debts.
 - C. **Sources.** Lender may use any and all remedies Lender has under the state law where the Property is located or federal law or in any instrument evidencing or pertaining to the Secured Debts.
 - D. **Insurance Benefits.** Lender may make a claim for any and all insurance benefits or refunds that may be available on Assignor's default.
 - E. **Payments Made On Assignor's Behalf.** Amounts advanced on Assignor's behalf will be immediately due and may be added to the Secured Debts.
 - F. **Rents.** Lender may terminate Assignor's right to collect Rents and directly collect and retain Rents in Lender's name without taking possession of the Property and to demand, collect, receive, and sue for the Rents, giving proper receipts and releases. In addition, after deducting all reasonable expenses of collection from any collected and retained Rents, Lender may apply the balance as provided for by the Secured Debts.
 - G. **Entry.** Lender may enter, take possession, manage and operate all or any part of the Property; make, modify, enforce or cancel or accept the surrender of any Leases; obtain or evict any tenants and licensees; increase or reduce Rents; decorate, clean and make repairs or do any other act or incur any other cost Lender deems proper to protect the Property as fully as Assignor could do. Any funds collected from the operation of the Property may be applied in such order as Lender may deem proper, including, but not limited to, payment of the following: operating expenses, management, brokerage, attorneys' and accountants' fees, the Secured Debts, and toward the maintenance of reserves for repair or replacement. Lender may take such action without regard to the adequacy of the security, with or without any action or proceeding, through any person or agent, or receiver to be appointed by a court, and irrespective of Assignor's possession. The collection and application of the Rents or the entry upon and taking possession of the Property as set out in this section shall not cure or waive any notice of default under the Secured Debts, this Assignment, or invalidate any act pursuant to such notice. The enforcement of such remedy by Lender, once exercised, shall continue for so long as Lender shall elect, notwithstanding that such collection and application of Rents may have cured the original default.

(page 4 of 7)

H. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

12. **APPOINTMENT OF A RECEIVER.** On or after an Assignor's default, Assignor agrees to Lender making an application to the court for an appointment of a receiver for the benefit of Lender to take possession of the Property and the Leases, with the power to receive, collect and apply the Rents. Any Rents collected will be applied as the court authorizes to pay taxes, to provide insurance, to make repairs and to pay costs or any other expenses relating to the Property, the Leases and Rents, and any remaining sums shall be applied to the Secured Debts. Assignor agrees that this appointment of a receiver may be without giving bond, without reference to the then-existing value of the Property, and without regard to the insolvency of any person liable for any of the Secured Debts.

13. **COLLECTION EXPENSES AND ATTORNEYS' FEES.** To the extent permitted by law, Assignor agrees to pay all expenses of collection, enforcement or protection of Lender's rights and remedies under this Assignment. Unless the applicable law that governs this Assignment is North Dakota, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. These expenses are due and payable immediately. These expenses will bear interest from the date of payment until paid in full at the contract interest rate then in effect for the Loan. To the extent permitted by the United States Bankruptcy Code, Assignor agrees to pay the reasonable attorneys' fees Lender incurs to collect this Assignment as awarded by any court exercising jurisdiction under the Bankruptcy Code.

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

Assignor represents, warrants and agrees that:

- A. Except as previously disclosed and acknowledged in writing to Lender, no Hazardous Substance has been, is, or will be located, transported, manufactured, treated, refined, or handled by any person on, under or about the Property, except in the ordinary course of business and in strict compliance with all applicable Environmental Law.
- B. Except as previously disclosed and acknowledged in writing to Lender, Assignor has not and will not cause, contribute to, or permit the release of any Hazardous Substance on the Property.
- C. Assignor will immediately notify Lender if (1) a release or threatened release of Hazardous Substance occurs on, under or about the Property or migrates or threatens to migrate from nearby property; or (2) there is a violation of any Environmental Law concerning the Property. In such an event, Assignor will take all necessary remedial action in accordance with Environmental Law.
- D. Except as previously disclosed and acknowledged in writing to Lender, Assignor has no knowledge of or reason to believe there is any pending or threatened investigation, claim, or proceeding of any kind relating to (1) any Hazardous Substance located on, under or about the Property; or (2) any violation by Assignor or any tenant of any Environmental Law. Assignor will immediately notify Lender in writing as soon as Assignor has reason to believe there is any such pending or threatened investigation, claim, or proceeding. In such an event, Lender has the right, but not the obligation, to participate in any such proceeding including the right to receive copies of any documents relating to such proceedings.
- E. Except as previously disclosed and acknowledged in writing to Lender, Assignor and every tenant have been, are and will remain in full compliance with any applicable Environmental Law.
- F. Except as previously disclosed and acknowledged in writing to Lender, there are no underground storage tanks, private dumps or open wells located on or under the Property and no such tank, dump or well will be added unless Lender first consents in writing.
- G. Assignor will regularly inspect the Property, monitor the activities and operations on the Property, and confirm that all permits, licenses or approvals required by any applicable Environmental Law are obtained and complied with.
- H. Assignor will permit, or cause any tenant to permit, Lender or Lender's agent to enter and inspect the Property and review all records at any reasonable time to determine (1) the existence, location and nature of any Hazardous Substance on, under or about the Property; (2) the existence, location, nature, and magnitude of any Hazardous Substance that has been released on, under or about the Property; or (3) whether or not Assignor and any tenant are in compliance with applicable Environmental Law.

(page 5 of 7)

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

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

23. **INTERPRETATION.** Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Assignment.
24. **NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail and by registered or certified mail, return receipt requested, to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one party will be deemed to be notice to all parties. Assignor will inform Lender in writing of any change in Assignor's name, address or other application information. Assignor will provide Lender any financial statements or information Lender requests. All financial statements and information Assignor gives Lender will be correct and complete. Assignor agrees to sign, deliver, and file any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Assignor's obligations under this Assignment and to confirm Lender's lien status on any Property. Time is of the essence.
25. **SIGNATURES.** By signing under seal, Assignor agrees to the terms and covenants contained in this Assignment. Assignor also acknowledges receipt of a copy of this Assignment.

(Entity Name)

(Signature) ANTHONY M. WHITFIELD

(Seal)

(Signature)

(Seal)

Signed, sealed and delivered in the presence of:

(Witness)

(Witness)

PROBATE:

STATE OF South Carolina, COUNTY OF Charleston } ss.

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

Sworn to and subscribed before me this 23rd day

of April, 2007

Notary Public for South Carolina

My commission expires: 1-28-2014

Exhibit "A"

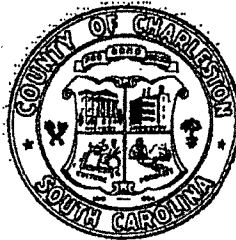
ALL that certain piece, parcel or tract of land, situate, lying and being in the Town of Mt. Pleasant, Charleston County, South Carolina, shown and designated as Lot 78, on that certain plat prepared by Mark S. Busey, S.C.R.L.S., entitled "A FINAL SUBDIVISION PLAT OF PHASE 2 WHISPERING MARSH, DUNES WEST,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

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

BKF 623PG160

RECORDER'S PAGE

NOTE: This page MUST remain
with the original document



Filed By:

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

Number of Pages:

9

FILED

April 24, 2007

3:54:44 PM

BKF 623PG152

Charlie Lybrand, Register
Charleston County, SC

DESCRIPTION	AMOUNT
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MISC/ASGT	\$ 14.00
Postage	

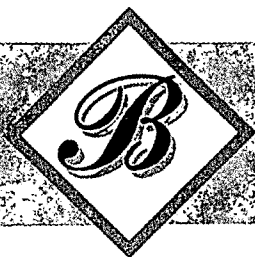
TOTAL	\$ 14.00
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DRAWER:

A - bmm

DO NOT STAMP BELOW THIS LINE

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Page 9 of 9



BERNSTEIN & BERNSTEIN, P.A.
ATTORNEYS AT LAW

P.O. Box 20519 • CHARLESTON, SC 29413-0519
5418-B RIVERS AVENUE • NORTH CHARLESTON, SC 29406-6129
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CHARLES S. BERNSTEIN, ESQUIRE
cbernstein@bernsteinpa.com

September 5, 2012

ROBERT A. BERNSTEIN, ESQUIRE
rbernstein@bernsteinpa.com

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

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

Dear Ms. Armstrong:

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

Yours Very Truly,

BERNSTEIN & BERNSTEIN, P.A.

Robert A. Bernstein

Robert A. Bernstein

cc: Mr. Ryan Werking ✓

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

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

HARBOR NATIONAL BANK,)
)
Plaintiff,)

vs.)

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

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

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

(Jury Trial Demanded)

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

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

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



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

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

FIRST AFFIRMATIVE DEFENSE

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

SECOND AFFIRMATIVE DEFENSE

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

THIRD AFFIRMATIVE DEFENSE

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

FOURTH AFFIRMATIVE DEFENSE

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

FIFTH AFFIRMATIVE DEFENSE

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

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

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

Plaintiff violated TILA and Regulation Z by, inter alia:

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

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

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

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

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

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

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

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

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

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

SIXTH AFFIRMATIVE DEFENSE

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

COUNTERCLAIMS

Factual Allegations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FOR A FIRST COUNTERCLAIM
(Breach of Contract)

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

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

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

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

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

FOR A SECOND CAUSE OF ACTION
(Negligent Misrepresentation)

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

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

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

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

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

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

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

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

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

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

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

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

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

FOR A FOURTH CAUSE OF ACTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

suffering; and k) adverse tax consequences.

FOR AN EIGHTH CAUSE OF ACTION

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

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

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

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

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

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

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

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

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

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

FOR A NINTH CAUSE OF ACTION

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

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

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

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

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

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

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

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

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

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

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

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

FOR A TENTH CAUSE OF ACTION

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

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

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

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

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

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

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

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

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

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

DEMAND FOR JURY TRIAL

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

Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

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-and-

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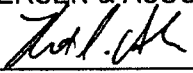
Charleston, SC
January 8, 2016

12-5887

CERTIFICATE OF SERVICE

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

HALVERSEN & ASSOCIATES, LLC

By: 

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Charleston, SC
January 8, 2015

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

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

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

*ALSO ADMITTED IN FLORIDA

January 8, 2016

VIA HAND DELIVERY

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

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

Dear Ms. Armstrong:

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

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

Thank you for your assistance in this matter.

Sincerely yours,



Brent Souther Halversen

BSH/ak
Enclosure(s)

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

COUNTY OF CHARLESTON

Harbor National Bank,

☐ Plaintiff,

vs.

Anthony Whitfield and Cindy Whitfield,

☐ Defendants,

Anthony Whitfield

☐ Counterclaimant

v.

David Swanson

☒ Counterclaim Defendant

CASE NO.: 2012-CP-10-5887

**MOTION INFORMATION FORM
AND COVER SHEET**

Check box above indicating submitting party.

Plaintiff's Counsel

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Attorneys for Third Party Defendant

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Charleston, SC 29413
(843) 972-9400

☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)**SECTION I: Hearing Information**

Nature of Motion: Motion to Bifurcate

Estimated Time Needed: 15 mins Court Reporter Needed: Yes

SECTION II: Motion Type☒ Written motion attached☐ Form Motion

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for Third-Party Defendant

Date

SECTION III: Motion Fee☒ **PAID - AMOUNT: \$25.00**☐ **EXEMPT:** ☐ Rule to Show Cause in Child or Spousal Support☐ Domestic Abuse or Abuse and Neglect☐ Indigent Status ☐ State Agency v. Indigent Party☐ Sexually Violent Predator Act ☐ Post-Conviction Relief☐ Motion for Stay in Bankruptcy☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____**JUDGE'S SECTION**☐ Motion Fee to be paid upon filing of the attached order.☐ Other: _____

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATIONDATE FILED

Collected by: _____

(print name)

☐ **MOTION FEE COLLECTED:** _____☐ **CONTESTED - AMOUNT DUE:** _____**EXHIBIT**

tabbles

MTD C

) IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) CASE NO.: 2012-CP-10-5887

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BACKGROUND

This action arises out of a longstanding and acrimonious dispute between Defendant Whitfield (“Whitfield”) and the Plaintiff, Pinnacle Bank¹ (“Bank”) which culminated in the filing of six separate foreclosure lawsuits in the counties of Charleston (one action), Dorchester (three actions), and Berkeley (two actions). As it relates to the overarching factual background relevant to this motion, the facts are largely undisputed.

A. Whitfield’s loans and the Bank’s request for a title endorsement

In 2007 and 2008, Whitfield took out a series of loans secured by nine properties in Charleston, Dorchester and Berkeley counties. As the 5-year balloon notes began maturing in 2012, Whitfield and the Bank negotiated renewal terms, and a closing was scheduled to take place on June 28, 2012.

One of the loans that was scheduled to close in June 2012 was secured by real property located in Charleston County that is referred to throughout the pleadings as the “Black Rush Property.” In 2007, when Whitfield gave the Bank a first mortgage on the Black Rush Property, he owned it in fee simple. The updated title search that was conducted in connection with the 2012 closing revealed that Whitfield had subsequently deeded a one-half interest in the Black Rush Property to his ex-wife, Cindy Whitfield, as part of their divorce decree. Two days prior to closing, Whitfield’s closing attorney brought this to the attention of the Bank. The closing attorney’s office initially indicated that Cindy Whitfield would need to sign the mortgage on the Black Rush Property, and then asked if the Bank was okay with keeping the existing lender’s title insurance policy in place rather than issuing a new policy. (Exhibit A).

¹ Plaintiff has been the party of several mergers/acquisitions since initiation of this lawsuit. The original Plaintiff was Harbor National Bank. Recently, Bank of North Carolina was acquired by Pinnacle Bank.

Thereafter, the Bank investigated whether the transfer of interest in the Black Rush Property would impact its collateral in the Black Rush Property. On June 27, 2012, the Bank's representative, Scott Warren, sent an email to the closing attorney's office stating "I called bank council [sic] to get some advice on how to handle it. (a) we need a title endorsement on Black Rush only... We can rely on your title opinion and existing policies for the others." (See, Exhibit B, Warren 6-27-12 email).

As a result of Mrs. Whitfield's 50% ownership interest in the property, and to ensure protection of its security interest in the entirety of the Black Rush Property, the Bank sought either a title endorsement from the title insurer or Mrs. Whitfield's signature on the mortgage as a condition of renewing the loan. Neither a title endorsement nor Mrs. Whitfield's signature was obtained, and ultimately, none of the loans were renewed.

B. This litigation

Subsequently, the Bank initiated foreclosure proceedings against Whitfield. In response, Whitfield counterclaimed against the Bank for various causes of action sounding in fraud and unfair trade practices. As it relates to those allegations relevant to the motion at bar, Whitfield alleged in his third amended answer and counterclaims, filed on August 27, 2014:

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

upon.

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

(Third Amended Answer and Counterclaims ¶¶32-33).

In response to these allegations in the Third Amended Answer and Counterclaims, the Bank stated:

Plaintiff admits the Plaintiff attended a scheduled closing at the office of attorney Mark Weeks, that it was discovered that Defendant had transferred an interest in the Black Rush property to his ex-wife, Cindy Whitfield, and that it was required as a condition of the closing either that Mrs. Whitfield sign the new mortgage or that a title endorsement be obtained.

(Plaintiff's Reply to Third Amended Answer ¶14).

C. Bank representative Warren testified that he received advice to obtain a title endorsement via phone call with Swanson.

In connection with the subject foreclosure lawsuits, Scott Warren was deposed on November 13, 2013. Mr. Warren was questioned about the email he sent prior to closing in which he informed the closing attorney's office that he "called bank council [sic] to get some advice on how to handle it. . . We need a title endorsement" (Exhibit B). Mr. Warren identified David Swanson as the bank counsel he was referring to in the email who he called and who recommended that the Bank obtain a title endorsement on the Black Rush Property. (Exhibit C, Warren Nov. 13, 2013 Dep., 47:22-49:2-5).

D. David Swanson testified that he recommended the Bank obtain a title endorsement.

Whitfield subsequently deposed Mr. Swanson, who testified that he received the call from Scott Warren and recommended that the Bank obtain a title endorsement. Mr. Swanson testified that “[Mr. Warren] asked me my advice as to whether he should do [the loan renewal] without— with or without [an endorsement], I told him he should get a title endorsement.” (Exhibit D, Swanson May 13, 2014 Dep. 19:1-9). Mr. Swanson testified that he did not open a file or bill the Bank for this call, which is customary when he receives a generic phone call. (Exhibit E, Swanson Apr. 18, 2017 Dep. pg. 21).

E. Whitfield alleges the Swanson-Warren phone call never occurred.

Following Mr. Swanson’s deposition, Whitfield convinced himself that the telephone conversation between Swanson and Warren never occurred. Whitfield instead alleges that Mr. Swanson gave false testimony about the existence of the subject phone call to corroborate Scott Warren’s testimony and legitimize the Bank’s demand for a title endorsement. In this respect, Whitfield alleges that Mr. Swanson engaged in a civil conspiracy and abuse of process by committing perjury concerning the existence of the subject phone call. In particular, Whitfield alleges:

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

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

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

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

(Def's Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims ¶¶66-69)(emphasis in original pleading).

At his deposition, Mr. Whitfield detailed his allegations against Swanson. Whitfield testified that Swanson is "a fool" and he believes Swanson rendered negligent advice to the Bank².

Whitfield further testified:

"The bank-Harbor National Bank—claimed the reason for backing out of the deal a year later, in the lawsuit (Warren depo 11/13/13), to close my nine loan renewals on 6/28/12 was because of advice it got—the bank got—from a 'mystery lawyer,' who never appeared in the pleadings or on a witness list until that time."

(See, Exhibit F, Whitfield June 1, 2017 Dep. 32:21-33:25).

Further clarifying his position, Whitfield testified:

Q: "Your position is that the phone call between Scott Warren and David Swanson never occurred:

A: "Correct"

(Whitfield June 1, 2017 Dep. 45:14-17)

Q: "And you believe that they concocted this notion that the phone call occurred after the closing didn't go forward?"

A: "Oh. Yeah. When Harbor National Bank got real concerned, then they had to bring in some other guns, they had to convince somebody to lie for the bank to get them out of the hole they were in, and Mr. Swanson volunteered."

(Whitfield Jun 1, 2017 Dep. 45:24-46:6).

² Of course, Whitfield cannot pursue a claim against Mr. Swanson for providing the alleged "bad advice" to the Bank because there was no attorney-client relationship between Whitfield and Swanson.

Q: “And is it your testimony as well that Mr. Swanson and the bank conspired sometime after June 28, 2012?”

A: “Yeah, I guess that would be a good way to define it.”

(Whitfield June 1, 2017 Dep. 225:7-11).

F. Whitfield sues Swanson for civil conspiracy

As alleged throughout Whitfield’s pleadings and described in his deposition testimony, Whitfield’s claim against Swanson for civil conspiracy is based on Mr. Swanson’s deposition testimony that corroborated the testimony of Scott Warren. Whitfield alleges that the testimony was false, that Swanson conspired with the Bank to offer the false testimony, and that offering the false testimony amounted to a civil conspiracy³.

In other words, the claim for civil conspiracy against Swanson has no relationship at all to the liability or damages at issue in the Bank’s foreclosure action, nor any relationship to Whitfield’s attempts to avoid enforcement of the Bank’s loans and mortgages. In this respect, the claim against Swanson is unrelated and entirely ancillary to the primary issues in this litigation, i.e. the enforcement of the Bank’s note and mortgage, defenses thereto and alleged claims that the bank’s note enforcement and foreclosure has caused Whitfield financial damages related to the subject properties.

Accordingly, it would serve the interests of justice and aid in judicial efficiency to hold a separate bench trial as to the limited issue of whether, at some point during this litigation, Mr. Swanson conspired with the Bank to provide false testimony to aid the Bank in defense of Whitfield’s counterclaims.

³ Whitfield also brought a claim against Swanson for Abuse of Process, which was dismissed in an order partially granting Swanson’s motion for summary judgment.

ARGUMENT

A. The Civil Conspiracy Claim Should Be Bifurcated

Rule 42(b), SCRCP provides that “the court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State.” Bifurcation is proper by the trial court where the issues in the case are complex, and bifurcation helps to clarify or simplify the issues. *Durham v. Vinson*, 360 S.C. 639, 602 S.E.2d 760 (2004).

Here, between the Bank and Whitfield, there will be ten expert witnesses and fifteen to twenty fact witnesses who will testify to issues only relevant to the foreclosure actions, claims regarding enforcement of the note and mortgage, Whitfield’s counterclaims against the Bank for alleged unfair lending practices, and Whitfield’s claims that he has been financially injured due to Whitfield’s properties being tied up in this foreclosure litigation. These witnesses will likely take more than one week of testimony, about highly complex issues, all unrelated to Mr. Swanson or the civil conspiracy action.

To the contrary, as it relates to the civil conspiracy claim against Swanson, there will be at most two expert witnesses and four to five fact witnesses who will testify concerning only one issue—whether the testimony provided by Mr. Swanson and Scott Warren was truthful or fabricated to allegedly bolster the Bank’s position in this litigation.

The issues between Whitfield and Swanson are limited, simple and can be concluded in one or two days of trial. The introduction of the claims against Swanson, which are entirely

unrelated the foreclosure, loan enforcement, and lending practices issues between the Bank and Whitfield will only serve to complicate the issues before the jury and cause greater inefficiencies in bringing conclusion to the litigation.

B. Whitfield is not entitled to a jury trial on his Civil Conspiracy counterclaim

“The constitutional declaration that a right to trial by jury shall remain inviolate does not apply to cases within the equitable jurisdiction of the court.” *Defender Properties, Inc. v. Doby*, 307 S.C. 336, 338, 415 S.E.2d 383 (1992). “In equity the parties are not entitled, as a matter of right, to a trial by jury.” *Williford v. Downs*, 265 S.C. 319, 321, 218 S.E.2d 242 (1975).

A foreclosure action is an action in equity, and a party has no right to trial by jury. *Gardner v. Travis*, 316 S.C. 315, 317, 450 S.E.2d 54, 56 (Ct. App. 1994)(“Because a foreclosure action is an action in equity, a party has no right to a jury trial of the issues raised in a foreclosure action.”)*Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014)(“If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.”).

“By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim.” *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 330-331, 755 S.E.2d 437, 442 (2014)(citing *Wells Fargo Bank, N.A. v. Smith*, 398 S.C. 487, 495, 730 S.E.2d 328, 332-33 (Ct.App.2012)); *see also* Rule 13(a), SCRCP. Claims that arise out of separate transactions or occurrences than the subject matter of the opposing party's claims are, instead, permissive. Rule 13(b), SCRCP.

Under South Carolina law, whether a counterclaim is compulsory or permissive is viewed through the logical relationship test. “Under this test, “the ‘logical relationship’ determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and

foreclose the mortgage. If the defendant's prevailing on his counterclaim would affect the bank's right to enforce the note and foreclose the mortgage, there is a logical relationship between the counterclaim and the underlying suit, and the counterclaim is therefore compulsory.” *Blackburn*, 407 S.C. at fn 7, 755 S.E.2d at fn 7 (internal citations omitted).

Here, it is indisputable that the claim against Swanson for civil conspiracy is wholly separate from the loan agreements that are sought to be enforced by the Bank. Likewise, the counterclaim for civil conspiracy against Swanson will have no impact on the “bank’s right to enforce the note and foreclose the mortgage.” Indeed, every allegation against Swanson arose out of activity that occurred *after* these foreclosure actions were initiated. Thus, the civil conspiracy counterclaim is a permissive counterclaim to the Foreclosure action filed by the Bank.

Accordingly, Whitfield is not entitled to a jury trial on his permissive counterclaim for civil conspiracy, and the jury trial demand should be struck. Furthermore, as the only claim between Whitfield and Swanson is that related to alleged civil conspiracy arising out of alleged untrue deposition testimony that occurred almost two years after this foreclosure action was initiated, this case should be referred to the Master in Equity pursuant to Rule 53, SCRCF.

Conclusion

For the reasons stated herein, Whitfield’s civil conspiracy counterclaim should be bifurcated from the remaining case between the Bank and Whitfield, the jury trial demand should be struck as the counterclaim is permissive, and the civil conspiracy counterclaim should be referred to the Master in Equity for a bench trial.

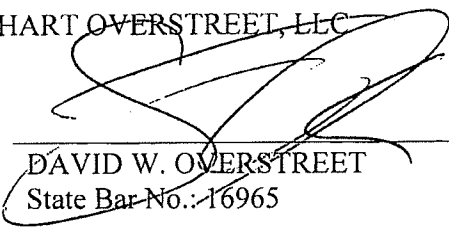
[SIGNATURE TO FOLLOW]

This 5 day of March, 2019.

Respectfully submitted,

EARHART OVERSTREET, LLC

By:



DAVID W. OVERSTREET
State Bar No.: 16965

MICHAEL B. MCCALL
State Bar No.: 73028

STEVEN R. KROPSKI
State Bar No.: 101441

Attorneys for Counterclaim Defendant David
Swanson

P.O. Box 22528
Charleston, SC 29413
843-972-9400

) IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) CASE NO.: 2012-CP-10-5887

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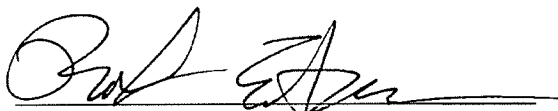
CERTIFICATE OF SERVICE

FILED
2019 MAR -8 PM 12:23
JULIE J. ARMSTRONG
CLERK OF COURT

Brian C. Duffy, Esq.
Blake A. McKie, Esq.
Duffy & Young, LLC
96 Broad Street

Paul B. Ferrara, III, Esquire
Ferrara Law Firm, PLLC
2300 Otranto Road
N. Charleston, SC 29406

This 6 day of March, 2019.



Legal Assistant to Steven R. Kropski

Exhibit “A”

Teresa Farley

From: Felicia Pringle <fpringle@harborbankgroup.com>
Sent: Tuesday, June 26, 2012 1:03 PM
To: Teresa Farley; Scott Warren
Subject: Anthony Whitfield

I will get with Scott when he returns from lunch.
Scott is working on the commitment letter.
Okay, Scott did mention his ex-wife was on Black Rush.

Felicia Pringle
Loan Specialist
Harbor National Bank
843-852-6424

-----Original Message-----

From: Teresa Farley [mailto:tfarley@weekslawfirm.net]
Sent: Tuesday, June 26, 2012 1:02 PM
To: Felicia Pringle; Scott Warren
Subject: RE: Anthony Whitfield

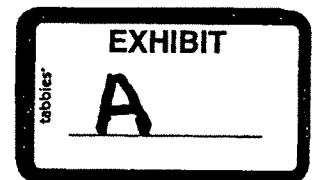
Okay...I have no idea how it is working LOL...I never got any commitment letter...I can do it however you guys want it done...YES, July of 2004 after the mtg was done he deeded Cindy Whitfield a one half interest

PLEASE NOTE THAT IF YOUR BUYER IS PURCHASING A SHORT SALE PROPERTY..I WILL NEED THE BUYER'S LOAN PACKAGE AT LEAST 48 HOURS PRIOR TO THE CLOSING. This can be reviewed on a case by case basis. I will do my best to accommodate.

ALSO: IF THE SHORT SALE IS A GOVERNMENT BACKED LOAN THEN THE PACKAGE MUST BE RECEIVED FIVE DAYS PRIOR TO CLOSING.

These issues are to help with funding sooner after closing as well as to not have to reclose so many loans on the borrower sides.

Teresa K. Farley
Real Estate Paralegal
WEEKS & IRVINE, LLC
8086-B Rivers Avenue
North Charleston, SC 29406
Phone: (843) 553-9800 ext. 3015
Fax: (843) 553-5847
tfarley@weekslawfirm.net



-----Original Message-----

From: Felicia Pringle [mailto:fpringle@harborbankgroup.com]
Sent: Tuesday, June 26, 2012 12:58 PM
To: Teresa Farley; Scott Warren

Subject: RE: Anthony Whitfield

1. Try 843-744-5584 or 324-2556
2. I didn't think we were doing new mortgages, just referencing the existing mortgage recorded already. Did Mr. Whitfield add Cynthia's name to the deed after the Harbor loan closed April 23, 2007?
3. All fees will be made payable to Harbor National Bank. We will pay the appraiser. Each appraisal is \$300.
4. I guess I was under the wrong assumption or Scott forgot to inform me of what we were actually doing on these loans. Loan Amounts will be the principal balance on the payoffs. Interest will be collected at closing. Most likely the late fee will be waived. The loan number will remain the same.
5. I am working on the closing documents.
6. Scott is out to lunch, I need to find out exactly what we are doing on these loans.

Felicia Pringle
Loan Specialist
Harbor National Bank
843-852-6424

-----Original Message-----

From: Teresa Farley [mailto:tfarley@weekslawfirm.net]
Sent: Tuesday, June 26, 2012 12:49 PM
To: Scott Warren; Felicia Pringle
Subject: Anthony Whitfield

Hey...I still need the following:

1. Buyer phone number
2. Payoff on Black Rush - PLEASE note that Cindy Whitfield is on this property Deed and will need to sign the Charleston county mortgage
3. \$300 appraisal fee for Black Rush - is that payable also to Atlantic Appraisals (Is there a revised invoice)
4. Need loan amount so I can get you the title and prelm docs
5. Closing package

Thanks. Teresa

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Exhibit “B”

From: Teresa Farley
To: Scott Warren; Felicia Pringle
Subject: RE: Lender Title Policy Question - Whitfield / Mod of Mig
Date: Wednesday, June 27, 2012 12:45:23 PM

See below..

PLEASE NOTE THAT IF YOUR BUYER IS PURCHASING A SHORT SALE PROPERTY..I WILL NEED THE BUYER'S LOAN PACKAGE AT LEAST 48 HOURS PRIOR TO THE CLOSING. This can be reviewed on a case by case basis. I will do my best to accommodate.

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Phone: (843) 553-9800 ext. 3015
Fax: (843) 553-5847
tfarley@weekslawfirm.net

-----Original Message-----

From: Barry Sloop (msb@stewarttitle.com)
Sent: Wednesday, June 27, 2012 12:42 PM
To: Teresa Farley
Subject: RE: Lender Title Policy Question - Whitfield / Mod of Mig

Teresa, I agree that the wife should sign any modification. But, regardless of whether she signs, still subject to the original mortgage.

Barry S. Sloop
Vice President - Counsel
Stewart Title Guaranty Company
Phone: (803) 765-1631 / (800) 327-3596
Fax: (803) 753-9342

-----Original Message-----

From: Teresa Farley (tfarley@weekslawfirm.net)
Sent: Wednesday, June 27, 2012 12:16 PM
To: Scott Warren; Felicia Pringle
Cc: Barry Sloop
Subject: RE: Lender Title Policy Question - Whitfield / Mod of Mig

Okay I think we can handle all this.

The deal with the maturity date is as follows: a mortgage of record is valid for 20 years from the date of the maturity if not satisfied. If you were to record any modification of the mortgage, Cindy would have to sign it since she is now on the Deed but according to the mortgage rule above your mortgage will still be valid anyways even after the maturity date on the original recorded mortgage has passed.

The deal would be whether or not your bank counsel is okay to not record any new modification of mortgage since the maturity date has changed. If

BARRY: please respond to my email as to confirm or correct...thanks. TF

PLEASE NOTE THAT IF YOUR BUYER IS PURCHASING A SHORT SALE PROPERTY..I WILL NEED THE BUYER'S LOAN PACKAGE AT LEAST 48 HOURS PRIOR TO THE CLOSING. This can be reviewed on a case by case basis. I will do my best to accommodate.

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WEEKS & IRVINE, LLC
8086-B Rivers Avenue
North Charleston, SC 29406



Phone: (843) 553-9800 ext. 3015
Fax: (843) 553-5847
tfarley@weekslawfirm.net

-----Original Message-----

From: Scott Warren [mailto:swarren@barharbark.com]
Sent: Wednesday, June 27, 2012 12:10 PM
To: Teresa Farley; Felicia Pringle
Subject: RE: Lender Title Policy Question - Whitfield / Mod of Mtg

Teresa,

Thank you for your work on this...

I called bank council to get some advice on how to handle it.

(a) We need a title endorsement on Black Rush only... We can rely on your title opinion and existing policies for the others.

The e-mail to Stewart states that the maturity dates are not changing but they are... The maturity date on Black Rush was this past May.

(b) We also need an affidavit from Tony that those properties are owned & pledged for business purpose.

Thanks again. Felicia is getting you the updated payoff for Black Rush & we should be good to close if you can satisfy the two requirements above.

Best regards,

Scott

-----Original Message-----

From: Teresa Farley [mailto:tfarley@weekslawfirm.net]
Sent: Wednesday, June 27, 2012 11:09 AM
To: Scott Warren; Felicia Pringle
Subject: FW: Lender Title Policy Question - Whitfield / Mod of Mtg

See below response...does this work for you?

Teresa

PLEASE NOTE THAT IF YOUR BUYER IS PURCHASING A SHORT SALE PROPERTY...I WILL NEED THE BUYER'S LOAN PACKAGE AT LEAST 48 HOURS PRIOR TO THE CLOSING. This can be reviewed on a case by case basis. I will do my best to accommodate.

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North Charleston, SC 29406
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Fax: (843) 553-5847
tfarley@weekslawfirm.net

-----Original Message-----

From: Barry Sloop [mailto:BSloop@stewart.com]
Sent: Wednesday, June 27, 2012 11:06 AM
To: Teresa Farley
Subject: RE: Lender Title Policy Question - Whitfield / Mod of Mtg

Hey, T,

Cindy took title subject to the mortgage. She would be named in the foreclosure action as defendant, but they should prevail. Thanks.

Barry S. Sloop
Vice President - Counsel
Stewart Title Guaranty Company
Phone: (803) 765-1631 / (800) 327-3596
Fax: (803) 753-9342

-----Original Message-----

From: Teresa Farley [mailto:tfarley@weekslawfirm.net]

Sent: Wednesday, June 27, 2012 10:52 AM

To: Barry Sloop

Subject: Lender Title Policy Question - Whitfield / Mod of Mtg

Hey...I have a question for one of our bank lenders...Harbor National Bank gave a loan to Mr. Whitfield on 1055 Black Rush. After the mortgage was done, signed and recorded, Mr. Whitfield gave a one half interest to his wife, Cindy Whitfield. So now the Deed is in both of their names and the mortgage is only in his name and Cindy resides at the residence.

We are now doing a modification of the note. There is no modification of mortgage being recorded since the loan amount previously insured is actually less now and the maturity dates are not changing. Where does this leave Harbor National Bank in the event they had to foreclose on the property. Would they foreclose just like normal and just have Cindy served as an additional defendant? How does this affect their title policy?

PLEASE NOTE THAT IF YOUR BUYER IS PURCHASING A SHORT SALE PROPERTY...I WILL NEED THE BUYER'S LOAN PACKAGE AT LEAST 48 HOURS PRIOR TO THE CLOSING. This can be reviewed on a case by case basis. I will do my best to accommodate.

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Exhibit “C”

Warren Nov. 13, 2013 Dep.,
47:22-49:2-5

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON NINTH JUDICIAL CIRCUIT

HARBOR NATIONAL BANK,
Plaintiff,

-vs-

Case No.:
2012-CP-10-5887

ANTHONY M. WHITFIELD,
Defendant.

THE VIDEOTAPE DEPOSITION OF SCOTT WARREN,
taken on behalf of the Defendant, on November 13, 2013,
commencing at 9:43 a.m., at the Law Offices of
Bernstein & Bernstein, 5418 Rivers Avenue, North
Charleston, South Carolina, 29406.

Reported by: Douglas K. Liperote
 Spectrum Reporting Services



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A P P E A R A N C E S

FOR THE PLAINTIFF:

ROBERT A. BERNSTEIN, Esq.
Bernstein & Bernstein
5418 Rivers Avenue
North Charleston, SC 29406
(843) 529-1111

FOR THE DEFENDANT:

BRENT S. HALVERSEN, Esq.
Halversen & Associates
171 Church Street, Suite 330
Charleston, SC 29401
(843) 284-5790
Brent@Halversenlaw.com

ALSO PRESENT: Anthony M. Whitfield

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4			
5	By Mr. Halversen		5
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1 title endorsement on Black Rush only. We can rely on
2 your title opinion and existing policies for the
3 others. The E-mail to Stewart states that the maturity
4 dates are not changing but they are. The maturity date
5 on Black Rush was this past May. (b) We also need an
6 affidavit from Tony that these properties are owned and
7 pledged for business purposes. Thanks again. Felicia
8 is getting you the updated payoff for Black Rush, and
9 we should be good to close if you can satisfy the two
10 requirements above. Best regards, Scott."

11 Did I read that accurately?

12 **A. Correct.**

13 Q. Now, about this time -- was this the first
14 time that an issue of a title endorsement was being
15 brought up in discussion with the ability to renew
16 these loans, or was it before then?

17 **A. Well, we're talking a matter of days**
18 **between all these E-mails. As far as is this is the**
19 **first time, I wouldn't be able to say for sure, but**
20 **this is approximately the time we became aware of Cindy**
21 **Whitfield being added to the deed.**

22 Q. Was it your idea that there needed to be a
23 title endorsement, or was it someone else's idea?

24 **A. I consulted bank counsel, and as far as who**
25 **had the original idea, my recollection is we saw that**

1 **Cindy Whitfield was on the deed and how do we maintain**
2 **title insurance that would be adequate.**

3 Q. Okay. Who is bank counsel?

4 A. **David Swanson.**

5 Q. Who is he?

6 A. **He's with Haynsworth Sinkler Boyd.**

7 Q. And does Harbor National use him for real
8 estate matters, or do you know -- how did you know to
9 contact David Swanson?

10 A. **As far as for opinions -- as far as all the**
11 **capacities that Harbor National uses him for I can't**
12 **speak to, but for questions such as this, David Swanson**
13 **is who I would call.**

14 Q. Okay. So at that point in time, David
15 Swanson told you we need to get a title endorsement on
16 Black Rush and everything you've put in that E-mail, is
17 that accurate?

18 A. **Uh-huh.**

19 Q. Yes?

20 A. **Yes, yes.**

21 Q. Okay. Do you remember your phone
22 conversation with Mr. Swanson?

23 A. **I do not, specific.**

24 Q. Well did you send him a copy of the deed,
25 or did you just explain generally the scenario?

1 A. I can't recall.

2 Q. Okay. But he would have been the person
3 that gave you this information that is in this E-mail?

4 A. As far as bank counsel, I'd say in -- or
5 suggesting that we have the endorsement, yes.

6 Q. Okay. Did you discuss with any other
7 attorney this issue, or only David Swanson?

8 A. Well, I believe this is -- we're discussing
9 this with Mark Weeks' office and eventually spoke with
10 Mark directly.

11 Q. Would that have been -- these discussions
12 were at the closing or before the closing did you have
13 conversations with Mark Weeks about this issue?

14 A. As far as getting on the phone with Mark
15 Weeks, I can't say specifically before, but through
16 Teresa Farley, who would be communicating with Mark
17 Weeks. Obviously, there was communication. I can say
18 that at the closing table this was something that we
19 were still trying to get resolved.

20 Q. Okay. We'll get to that. Do you recall as
21 we sit here today telling Mr. Swanson about Barry
22 Sloop's response to Teresa Farley's question in
23 Exhibit 13?

24 A. Do I remember -- I don't believe that Barry
25 Sloop's name ever came up in any conversations with

Exhibit “D”

Swanson May 13, 2014 Dep.

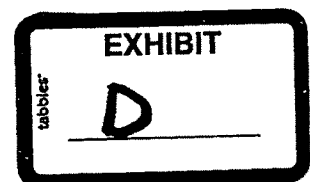
19:1-9

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON
CASE NO. 2012-CP-10-5887

HARBOR NATIONAL BANK,	)	DEPOSITION OF:
	)	DAVID SWANSON
Plaintiff,	)	
	)	
-versus-	)	
	)	
ANTHONY M. WHITFIELD,	)	
	)	
Defendant.	)	
	)	

DATE: Tuesday, May 13, 2014
TIME: 10:14 a.m.
LOCATION: Haynsworth Sinkler Boyd
134 Meeting Street, Third Floor
Charleston, SC 29401

REPORTED BY: JENNIFER M. HUGGINS,
Certified Shorthand Reporter



APPEARANCES

For the Plaintiff: DUFFY & YOUNG
BY: SETH W. WHITAKER
Attorney at Law
96 Broad Street
Charleston, SC 29401

For the Defendants: HALVERSEN & ASSOCIATES
BY: BRENT S. HALVERSEN
Attorney at Law
171 Church Street
Suite 330
Charleston, SC 29401

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2 Witness

3 SWANSON, DAVID (sworn)

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9

10 EXHIBITS

11

12 (No exhibits were offered or marked for
13 identification.)

14

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1 (The reading and signing of the
2 deposition by the witness is waived.)

3 (DAVID SWANSON, having been first
4 duly sworn, testified as follows:)

5 EXAMINATION

6 BY MR. HALVERSEN:

7 Q. Good morning, Mr. Swanson. My name is
8 Brent Halversen. I just introduced myself to you.
9 And we are -- Mr. Whitfield is a defendant in a
10 case that's been filed by Harbor National Bank.
11 And I understand that's a client of this firm; is
12 that accurate?

13 A. That's correct.

14 Q. Okay. Have you ever had your
15 deposition taken before?

16 A. Yes.

17 Q. Okay. Tell me a little bit about
18 yourself. I know some things about you, but how
19 long have you been at the Haynsworth firm?

20 A. Well, I started off back in 1980 with a
21 small firm in Charleston called Bailey & Buckley.
22 It's not here anymore. And, about a year into
23 that, year and a half, I was made an offer by one
24 of the predecessor firms of Haynsworth, which was
25 Sinkler, Gibbes & Simons. Sinkler, Gibbes & Simons

1 Q. Okay. Did you tell Mr. Warren that --
2 that obtaining the title endorsement in this
3 situation was something that was absolutely
4 necessary or advisable, or did you -- did you give
5 any equivocation on -- on getting the title
6 endorsement as a prerequisite to doing this deal?

7 A. Well, he asked me my advice as to
8 whether he should do it without -- with or without.
9 I told him he should get a title endorsement.

10 Q. Okay. So, basically, you were telling
11 him to -- don't do it without getting the title
12 endorsement; is that accurate?

13 A. Well, yes.

14 Q. Okay.

15 A. Well, I -- I didn't tell him that.
16 He's got to make his own decision. He's asking me
17 for advice. They can then take that advice and do
18 what they want with it.

19 Q. Sure. Just like any client?

20 A. Yeah, that's right.

21 Q. You --

22 A. That's right.

23 Q. You can give them advice --

24 A. All I can do is tell them pros and
25 cons. And so I think that's what I did. I told

Exhibit “E”

Swanson Apr. 18, 2017 Dep. pg.
21

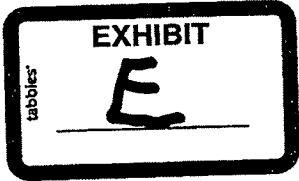
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IN THE COURT OF COMMON PLEAS
FOR THE STATE OF SOUTH CAROLINA
CHARLESTON COUNTY

VIDEOTAPED DEPOSITION OF DAVID M. SWANSON

HARBOR NATIONAL BANK,
Plaintiff,
vs. CASE NO. 2012-CP-10-5887
ANTHONY WHITFIELD, CINDY WHITFIELD AND DAVID SWANSON,
Defendants.

DEPONENT: DAVID M. SWANSON
DATE: April 18, 2017
TIME: 2:06 PM
LOCATION: HAYNSWORTH SINKLER BOYD, P.A.
134 Meeting Street
3rd Floor
Charleston, SC 29401
REPORTED BY: NANCY ENNIS TIERNEY, CSR (IL)



1 A P P E A R A N C E S

2 FOR THE PLAINTIFF:

3 DUFFY & YOUNG, LLC
4 BY: BRIAN C. DUFFY
5 96 Broad Street
6 Charleston, SC 29401
7 (843) 720-2044
8 bduffy@duffyandyoung.com

9 FOR THE DEPONENT DAVID M. SWANSON:

10 EARHART OVERSTREET
11 BY: DAVID W. OVERSTREET
12 1037-D Chuck Dawley Boulevard, Suite 100
13 Mt. Pleasant, SC 29464
14 (843) 972-9400
15 david@earhartoverstreet.com

16 FOR THE DEFENDANT ANTHONY WHITFIELD:

17 SLOTCHIVER & SLOTCHIVER, LLP
18 BY: DANIEL S. SLOTCHIVER
19 44 State Street
20 Charleston, SC 29401
21 (843) 577-6531
22 F: (843) 577-0261
23 dan@slotchiverlaw.com

24 - and -
25 HALVERSEN & ASSOCIATES, LLC
BY: BRENT S. HALVERSEN
171 Church Street, Suite 330
Charleston, SC 29401
(843) 284-5790
F: (864) 326-4844
Brent@halversenlaw.com

FOR THE DEFENDANT CINDY WHITFIELD:

FERRARA LAW FIRM, PLLC
BY: KASSANDRA GARAN
2300 Otranto Road
North Charleston, SC 29406
(843) 569-5511
K.Garan@ferraralawfirm.net

ALSO PRESENT: Anthony M. Whitfield
Doug White - Clearview Legal Video

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1 place."

2 But I was curious where you would go in
3 order to confirm when it took place. You are welcome to
4 look at that. I'm just reading it.

5 A. No, I believe you. No, I don't know where I
6 would look. I haven't looked back -- I don't know.

7 Q. Do you keep a journal or a document of some sort?

8 A. No. I don't have -- the only thing I keep is my
9 time, and I already looked at that. There is no time
10 written down. I didn't write down a time because I
11 didn't consider it something that I could bill, so --

12 Q. Why would it not have been something you could
13 bill?

14 A. Just because I get phone calls all the time like
15 that, and I don't bill them.

16 Q. When you are contacted and asked to give advice,
17 do you, in a real estate transaction, do you normally
18 like to look at the documents and the contracts before
19 you give that advice?

20 A. It all depends on how the phone call goes. You
21 know, if somebody is asking me, well, what do I do about
22 this contract, and here is what the provisions say, no,
23 I don't -- it just depends on what it is and what I'm
24 asked to do, what the fact situation is, what the
25 question is.

Exhibit “F”

Whitfield June 1, 2017 Dep.,
32:21-33:25

STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CASE NO. 2012-CP-10-5887
HARBOR NATIONAL BANK,)
Plaintiff,)
vs.)
ANTHONY WHITFIELD and CINDY)
WHITFIELD,)
Defendant.)

ANTHONY WHITFIELD)
vs.)
DAVID SWANSON,)
Third-Party Defendant.)

* * * * *

DEPOSITION OF: ANTHONY WHITFIELD
DATE TAKEN: Thursday, June 1, 2017
TIME: 10:07 a.m.
PLACE: Halversen & Associates, LLC
171 Church Street, Suite 310
Charleston, South Carolina
REPORTED BY: EVE WILBANKS
Registered Professional
Reporter, Certified LiveNote
Reporter and Notary Public

* * * * *

POST OFFICE BOX 21784
CHARLESTON, SOUTH CAROLINA 29413-1784



1 A P P E A R A N C E S

2 REPRESENTING HARBOR NATIONAL BANK:

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7 Bduffy@duffyandyoung.com

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14 Brent@halversenlaw.com

15 DANIEL S. SLOTCHIVER, ESQUIRE
16 Slotchiver & Slotchiver
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18 Charleston, South Carolina 29401

19 REPRESENTING DAVID SWANSON:

20 DAVID W. OVERSTREET, ESQUIRE
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22 Earhart Overstreet, LLC
23 P.O. Box 22528
24 Charleston, South Carolina 29413
25 David.overstreet@earhartoverstreet.com

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1 S T I P U L A T I O N S

2 It is hereby stipulated and agreed by and
3 between the parties hereto, through their
4 respective counsel, that the reading and signing
5 of the transcript is reserved by the Deponent.

6 MR. OVERSTREET: Mr. Whitfield, you've
7 laid out a number of documents in front of you
8 before the deposition, and I'd just like to
9 ask you, if you would, please, sir, set those
10 documents aside, and I will hand you exhibits
11 over which I will ask you questions. What I'd
12 like for you to do is answer my questions
13 without any documents initially. And if you
14 need a document, I'm happy to hand one to you.

15 THE WITNESS: I disagree with that.

16 MR. OVERSTREET: You're not going to let
17 me control the deposition and use the exhibits
18 I see fit to use?

19 THE WITNESS: I'm going to use what has
20 been filed and which ones are referenced by
21 you to refer to. And I have your letter here
22 somewhere that says what you are going to ask
23 questions about. And I have those documents.

24 MR. OVERSTREET: Yes, sir. And I'm not
25 going to be asking you about those documents

1 ex-wife's attorney -- regarding my renewal
2 closings and any problems that existed or supposed
3 to have existed.

4 There are no e-mails from any Harbor
5 National Bank officers regarding Swanson's advice
6 not to close any of the renewals or to any of the
7 just named above -- I just named -- individuals
8 and attorneys.

9 Mr. Swanson has no record of any record
10 or conversation or advice to Warren -- Scott
11 Warren -- or any basis of law in making his
12 opinion of risk, or legal advice, I should say.
13 The level of risk to the bank or any reference to
14 any of the loan documents and the file documents,
15 including the Whitfield Divorce Settlement
16 Agreement, the Black Rush sales contract, deeds,
17 mortgage, commitment letter 6/26/17 (sic). "The
18 fabricated advice given by Swanson and Warren has
19 no support of any law and is refuted by the
20 closing attorney, Weeks."

21 "Swanson admits in his deposition that
22 he never reviewed any of my loan files, nor
23 conducted any legal research before he concocted
24 the defense of equitable subordination. This is
25 not just negligence by Swanson to the bank, but

1 only an attorney who gives legal advice not
2 supported by law or without reviewing all the
3 facts is a fool in my opinion."

4 Q. Mr. Swanson is a fool?

5 A. Yes, he's a fool. Or he's very foolish,
6 either way you want to look. A fool is foolish.
7 "Swanson law firm, Haynsworth Sinkler Boyd, has no
8 record of any call around 6/28/12. Furthermore,
9 Swanson stated he has no idea what exact date the
10 call was received, which he clearly fabricated.

11 "Swanson law firm, Haynsworth Sinkler
12 Boyd, destroyed the phone records it had kept
13 after they were put on notice that the phone call
14 was an issue and even after being served a
15 subpoena for records.

16 Records from AT&T show no phone call was
17 received from his office line, where Swanson said
18 he received the call.

19 "The bank -- Harbor National Bank --
20 claimed the reason for backing out of the deal a
21 year later, in the lawsuit (Warren depo 11/13/13),
22 to close my nine loan renewals on 6/28/12 was
23 because of advice it got" -- the bank got -- "from
24 a 'mystery lawyer,' who never appeared in the
25 pleadings or on a witness list until that time."

Whitfield June 1, 2017 Dep.,
45:14-17 & 45:24-46:6

1 closing didn't go forward?

2 A. Oh, yeah. When Harbor National Bank got
3 real concerned, then they had to bring in some
4 other guns, and they had to convince somebody to
5 lie for the bank to get them out of the hole they
6 were in, and Mr. Swanson volunteered.

7 Q. Do you know, according to your theory,
8 when that happened?

9 A. I just told you, about the time Mr.
10 Duffy came in the picture -- it's a little strange
11 that Mr. Duffy came in five days after Mr. Warren
12 named your client, Swanson -- David Swanson in his
13 deposition on November 13th. I find that pretty
14 much tied that Mr. Duffy had quite a few
15 conversations with Mr. Swanson before that name
16 came up.

17 Q. So was a title endorsement -- or getting
18 a title endorsement on Black Rush never an issue
19 before the closing was supposed to go forward?

20 A. Repeat that question.

21 Q. Sure. The issue with this title
22 endorsement and whether or not the bank should or
23 needed to get one, was that never brought up
24 before the closing in 2012?

25 A. There was only mention that it may be

1 5 7 8

Whitfield June 1, 2017 Dep.,
225:7-11

1 June 28, 2012?

2 A. I think it was concocted sometime around
3 the time of Scott Warren's deposition, which is
4 November 13, '13.

5 Q. So that's a yes to my question?

6 A. Yes.

7 Q. And is it your testimony as well that
8 Mr. Swanson and the bank conspired sometime after
9 June 28, 2012?

10 A. Yeah. I guess that would be a good way
11 to define it.

12 MR. KROPSKI: That's all I have. Thank
13 you.

14 MR. SLOTCHIVER: Do you have more?

15 MR. DUFFY: No.

16 MR. SLOTCHIVER: Let's you and I talk
17 one second.

18 (The deposition went off the record.)

19 EXAMINATION

20 BY MR. SLOTCHIVER:

21 Q. Mr. Whitfield, I'm going to ask you just
22 a couple of questions. First, are you familiar
23 that -- are you familiar with the fact that
24 there's a difference in bank council,
25 C-O-U-N-C-I-L, and bank counsel, C-O-U-N-S-E-L?



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March 6, 2019

Julie J. Armstrong, Clerk
Circuit Court of Charleston County
100 Broad Street, Suite 106
Charleston, SC 29401

Re: Harbor National Bank v. Whitfield, *et al.* v. Swanson
Case No.: 2012-CP-10-5887
EO File No.: 130-0190

Dear Ms. Armstrong:

Enclosed please find an original and one copy of Counterclaim Defendant David Swanson's Notice of Motion and Motion to Bifurcate Trial, Strike Jury Demand, and Refer Bifurcated Trial to the Master in Equity, as well as the corresponding motion slip and \$25 filing fee. Please file the Motion and return the file-stamped copy to our office in the enclosed self-addressed, stamped envelope.

By copy of this correspondence, I have served the same upon all counsel of record. If you have any questions or concerns, please do not hesitate to contact me. With best regards, I am

With kind regards, I am

Sincerely,

STEVEN R. KROPSKI

SRK/rle
Enclosures

cc: Brent Halversen, Esq.
Daniel Slotchiver, Esq.
Andrew McCumber, Esq.
Brian Duffy, Esq.
Blake A. McKie, Esq.
Paul B. Ferrara, III, Esq.

In The Court of Common Pleas
Ninth Judicial Circuit
2012-CP-10-05887

Transcript of Record

B E F O R E:

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

Daniel S. Slotchiver, Esquire
Attorney for Defendant Whitfield

EXHIBIT
MTD D

I N D E X

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Certificate Page.	37

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>Ev.</u>
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No exhibits introduced.

1 CLERK OF COURT: We have position number one, case
2 number 2012-CP-10-05887, *Harbor National Bank vs. Anthony*
3 *M. Whitfield*.

4 THE COURT: Good morning. Motion to bifurcate is what
5 I'm showing, right? Correct?

6 MR. KROPSKI: That, that's correct. It's a motion to
7 strike the jury demand, bifurcate, and refer it to the
8 master.

9 THE COURT: Okay. All right. I'm listening. Whose
10 motion is it?

11 MR. KROPSKI: It's, it's, it's our motion.

12 THE COURT: All right.

13 MR. KROPSKI: Steve Kropski with Earhart Overstreet
14 for David Swanson.

15 THE COURT: Okay.

16 MR. KROPSKI: Your Honor once a year or so gets the
17 pleasure of hearing motions in this case. It is a 2012
18 action, action. It's a foreclosure that was filed by
19 Harbor National Bank, which has since gone through a couple
20 acquisitions: Bank of North Carolina and then Pinnacle Bank
21 most recently. It was a foreclosure action filed against
22 Mr. Whitfield related to the loans that were secured by the
23 eight or nine properties, one in Charleston. There were
24 three foreclosure actions that are in Dorchester, two
25 foreclosure actions in Berkeley.

1 We represent David Swanson, who is a lawyer at
2 Haynsworth, Sinkler, Boyd. He's a real estate attorney,
3 and Mr. Whitfield added him as an additional counterclaim
4 defendant at, I believe, the end of 2016, right around then
5 in this foreclosure action. The sole claim against Mr.
6 Swanson is a claim for civil conspiracy: that Mr. Swanson
7 conspired with the bank to create, to give false testimony
8 in a deposition about a year and half after the foreclosure
9 proceedings began to create an additional defense for the
10 bank related to advice of counsel.

11 The counterclaim for civil conspiracy does not go to
12 the enforceability of any of the notes, of the loans, the
13 ability to foreclosure on a mortgage. It relates solely to
14 the activity that occurred about a year and a half later in
15 2013, claiming that Mr. Swanson testified he had a phone
16 call with the bank and said you need to get title
17 endorsements for the property in Charleston before you
18 renew these loans that Mr. Whitfield has. Mr. Whitfield
19 claims that that phone call never happened and that Mr.
20 Swanson and the bank agreed -- will falsely testify about
21 this phone call to give the bank an excuse for refusing to
22 renew the loans.

23 To give you some context, the Charleston property was
24 -- half of it was deeded to over Mr. Whitfield's ex-wife in
25 their divorce. That happened after the original loans in

1 2007. That was the reason for the concern over what do we
2 need to do about the title insurance, how do we make sure
3 that we're protected in the event that we have to
4 foreclose. Mr. Swanson says he got a ten-minute phone call
5 from a representative of the bank. No specifics were
6 discussed. He said, well, I would get a title endorsement
7 to protect yourself. The representative from the bank also
8 testified I called David Swanson, then counsel, and he told
9 us this. We couldn't get a title endorsement, so we'll go
10 on to another review, and that's how we ended up in these
11 foreclosure proceedings. Mr. Whitfield says that call
12 never happened, and that is the basis for the civil
13 conspiracy claim.

14 The basis for this motion is that Mr. Whitfield has, I
15 believe, eight, nine counterclaims currently pending and
16 this civil -- ten. One is against his ex-wife, I think for
17 equitable contribution or something along those lines. The
18 civil conspiracy claim is the only one that's pending
19 against Mr. Swanson. He was brought in at a later date,
20 and the point behind this motion is that it's very clearly
21 a permissive counterclaim in a foreclosure in an equitable
22 action, and the law is clear that when a foreclosure, when
23 a foreclosure is an action in equity, then a party is not
24 entitled to a jury trial as a matter of right. The only
25 time you would be entitled to a jury trial on a foreclosure

1 or an equitable counterclaim is if the counterclaim
2 actually goes to the enforceability of the note and
3 mortgage.

4 In this case, we don't really take the position as to
5 whether there's merit or, or they necessarily go to the
6 enforceability, but counterclaims one through seven are
7 against the bank only, and there is -- they say breach of
8 contract, negligent -- personal breach of contract, that
9 you told us you were renewing the loans. You didn't renew
10 the loans, so you breached that agreement. Negligent
11 misrepresentation, you told us back in 2007 that these
12 loans would automatically renew. That was a lie. You
13 induced me to enter into these loans and, therefore, they
14 shouldn't be enforceable; that's the gist of the third
15 fraudulent inducement. Fourth, the violation of Federal
16 Trade Commission Act: that the original 2007 loans were
17 induced with unfair practices, lies, and they should not be
18 enforceable. Promissory estoppel: that the bank said these
19 would automatically renew. Then we relied on that. Breach
20 of contract accompanied by fraudulent act related to the
21 actual loans themselves, and tortious interference with
22 perspective contract is the other counterclaim, and that
23 says that the bank interfered with his businesses because
24 he couldn't rent or sell the properties that were
25 encumbered by these mortgages.

1 The point being that the counterclaims against the
2 bank, at least those first six or seven, are compulsory.
3 Those relate to whether or not the note and mortgage are
4 enforceable. The counterclaim against Mr. Swanson for
5 civil conspiracy has no basis, no relationship to whether
6 or not the note and mortgage are enforceable at all. It's
7 related to activity that actually occurred after the
8 foreclosure proceedings began. So, we believe that the law
9 is pretty clear that when there is permissive counterclaim,
10 you're not entitled to a jury trial, and the process for
11 striking the jury demand is via motion.

12 So, what we would, we would like is the jury trial
13 to be stuck for the civil conspiracy claim, and that
14 referred to the master, and that's the point behind the
15 motion to bifurcate as well. This is set for a two-week
16 trial. As I mentioned, all of these claims, except for the
17 civil conspiracy claim which doesn't relate to the
18 enforceability of the note and mortgage, are not against
19 Mr. Swanson. Civil conspiracy claim I think is a day or
20 two maybe to determine whether or not what they said in
21 this deposition testimony was true, whether or not there
22 was a conspiracy that relates to one phone call that Mr.
23 Swanson said happened and Mr. Whitfield says did not
24 happen, and you created that to hurt me.

25 So, the other part about bifurcation that I think

1 compels bifurcation is the outcome of Mr. Whitfield's
2 counterclaims, and the foreclosure proceeding will dictate
3 whether the claim against Mr. Swanson is moot. If Mr.
4 Whitfield succeeds on his counterclaims, then the alleged
5 testimony, the alleged defense that was created is not
6 found. If the court determines that the foreclosure is
7 rightful and forecloses, then the counterclaim against Mr.
8 Swanson is moot as the bank had a right to foreclose in any
9 event, regardless of what Mr. Swanson said in the phone
10 call.

11 So, the outcome of the actual trial and the outcome of
12 the actual claims that relate to the note and mortgage and
13 enforceability of the note and mortgage will dictate
14 whether or not the claim against Mr. Swanson is moot. That
15 can happen after the trial. It can happen in front of
16 Judge Scarborough. It can happen in front of anybody on
17 bench trial, which can be done very quickly. There is
18 really no need to make Mr. Swanson prepare for a two-week
19 trial, sit through a two-week trial that relates to the
20 enforceability of a note and mortgage that he has nothing
21 to do with when he only has an interest in what I said in a
22 deposition is true or I made it up. And that's the only
23 claim. So, our point being it's a permissive counterclaim.
24 There's no right to a jury trial, and that's well
25 established law.

1 The law on bifurcation relates to judicial economy.
2 It relates to prejudice to the parties and if there is a, a
3 rational basis for doing it, and here there is because the
4 claim may go away if Mr. Whitfield actually succeeds on his
5 counterclaim.

6 THE COURT: Let me ask you this question. Is the
7 basis for the foreclosure -- well, let me ask it this way.
8 What were the grounds for the foreclosure? What was the
9 alleged breach which prompted the foreclosure?

10 MR. KROPSKI: The note, the original notes and
11 mortgages matured in -- some of them in late 2011, some of
12 them early 2012. I, I should have told you this date.
13 June 28, 2012, is when they were trying to close the loan
14 renewals and they fell apart. So, the original basis of
15 the foreclosures that are all pending is that the loans
16 matured and they weren't paid. They had a balloon; they
17 weren't paid. The loans were not modified or they weren't
18 renewed. None of that actually happened. So, that's the
19 basis for the foreclosures.

20 THE COURT: Okay.

21 MR. KROPSKI: All pre-June of 2012.

22 THE COURT: All right. Got it.

23 Yes, sir, Mr. Slotchiver.

24 MR. SLOTCHIVER: Good morning. How are you?

25 THE COURT: I'm fine.

1 MR. SLOTCHIVER: I wanted to stay away from the facts
2 -- I'd be happy to talk about them if you'd like -- but
3 only because I don't believe they're pertinent for today.
4 I will say one thing, which is in response to your last
5 question, and it will give you kind of an understanding of
6 the giant picture.

7 The only defense that the bank has presented to why
8 they did not close is based on their allegation that came
9 years later that they relied on advice that was given to
10 them by Mr. Swanson, which for a variety of reasons is
11 questionable whether or not it ever took place, and it's
12 something we will argue.

13 The trial is scheduled to start two weeks from today
14 in front of Judge Young from a timing perspective.

15 THE COURT: Okay.

16 MR. SLOTCHIVER: It just took a while to get this
17 matter heard.

18 Judge, as I understand the law -- and, and I'll be
19 brief -- under conspiracy, which is our theory against Mr.
20 Swanson, you must have two parties, and one of the parties
21 is the bank and one of the parties is Mr. Swanson. Same
22 witnesses because the underlying fact that took place
23 throughout the case with all the witnesses is they relied
24 on this representation. They claim they relied on the
25 representation by Mr. Swanson. We question it. There's

1 been a lot of matters with this. There's no notes; there's
2 no memorandums. There's no -- there's nothing. In fact,
3 Judge Nicholson ordered that the head of the firm give an
4 affidavit confirming that they have nothing because he
5 didn't want it to show up later on, if it was going to show
6 up, which we have. We've subpoenaed phone records.
7 There's no phone records. There was a phone machine the
8 law firm had that, that monitored every call that went in
9 and out, but for some reason after this litigation started
10 -- they were a party. They destroyed this machine, which
11 was a hard drive, and is no longer accessible. So, it's a
12 fact question, we believe, that goes to the jury.

13 It also would promote -- it would not promote judicial
14 economy to sever the cases because it really is the same
15 witnesses. We would have to try the same case twice.

16 Judge, the next thing is we asked for a jury trial,
17 and keeping in mind that Mr. Swanson came into the case
18 years after it started, I will represent to the court --
19 and I'm happy to hand to the court, if you like, a copy of
20 motions filed by the bank. It's the same motions:
21 permissive or compulsory. Same motions, same law, and
22 Judge Dennis heard it and Judge Dennis denied it, and I'm
23 happy to hand it -- if you'd like, I've got a copy of the
24 motion. I've got a copy of the memorandum that they filed;
25 if you'd like a copy to review, I'm happy to give it to

1 you. I know it's in the court record, but I've got a copy
2 if you would like, but it's been heard already. It's not a
3 two-judge rule violation because they weren't in the case
4 at the time. But it's kind of the law of land in a sense,
5 the law of the case, because it has been heard.

6 The other thing interesting here is that Mr. Swanson
7 himself asked for a jury trial, and so he asked for a jury
8 trial. And then we look at the rule under South Carolina
9 Rules of Civil Procedure 38(d) which talks about waiver,
10 and it says that a demand for a trial by jury may, as
11 herein provided, may not be withdrawn without the consent
12 of the parties except where an opposing party is in
13 default. Nobody's in default here, and certainly my client
14 does not consent.

15 Also, we don't believe that it relates to the
16 foreclosure action; it's kind of separate. This is a
17 conspiracy action tied into a foreclosure lawsuit that's
18 started, but this is a conspiracy action that's been filed
19 against Mr. Swanson in this case. And we believe it does
20 impact the effectiveness of the foreclosure because if the
21 only reason they didn't renew the loan which would have
22 precluded the foreclosure was based on the advice given to
23 them by Mr. Swanson, then if Mr. Swanson never gave that
24 advice, or even if it wasn't reliable advice -- because the
25 testimony bears out that Mr. Swanson, they agree and he

1 agrees he never saw a filing, never knew the person's name.
2 He gave advice on something that's, that's called -- it's
3 coined equitable subordination concern. Although he,
4 himself, agreed in his deposition that there are no
5 literature, there's no notations, there's no, no articles,
6 there's no case law supporting an equitable subordination
7 claim. That's something that belongs in bankruptcy court;
8 it doesn't belong in civil court. It's never been heard
9 anywhere that he knows of. It's just theoretical it could
10 be heard.

11 He wasn't aware of the fact that my client was
12 married. He wasn't aware of the fact there was a prior
13 family court order that said that she would get property,
14 but that it would be subject to the mortgages which were in
15 effect, which gave the right to him to renew it as he was
16 asking to do. None of that stuff as given to him. So, can
17 the bank rely on him? Or did the bank come in and say we
18 need you to get us out. Come up with some theory. Or did
19 he come up with this?

20 Or the other thing, Judge, is there's something we've
21 learned called bank council, and the references in the
22 notations we received in the email was the bank
23 representatives contacted bank council. Normally I would
24 think bank council meant the bank attorney, but we noticed
25 that bank council is spelled differently: c-o-u-n-c-i-l.

1 And then we learned there is something like bank council.
2 Almost like a chaplain for people to go to get advice on
3 what to do with banking issues. Nothing to do with legal
4 advice.

5 Under the rules of bifurcation 42(b), it uses the word
6 may. The court may bifurcate in furtherance or -- in
7 furtherance of convenience or to avoid prejudice. We don't
8 believe that would be applicable here, or when separate
9 trials will be conducted to expedition and economy. Once
10 again, it's the same facts we're going to be going over
11 again and again in both cases.

12 Another concern, Judge, would deal with, which we
13 don't want -- this is an older case, but it would deal with
14 appealability of it because -- it's interesting. When we
15 researched this matter, we found that there is a difference
16 in bifurcating cases and whether or not they would be
17 interlocutory. The issue was -- and I've got a case and
18 I'm happy to hand up a copy to the court -- but this is
19 *Morrow vs. Fundamental Long-Term Holdings, LLC*, which is
20 773 S.E. 2d 144, and it said the court was faced with a
21 similar situation because usually bifurcation is
22 interlocutory, and it usually deals with actual or punitive
23 damages which is different than here because in here you're
24 asking to divide parties. And we could have to retry it
25 again, but we couldn't retry it again because a successful

1 case against Mr. Swanson would not be binding -- excuse me.
2 A successful case against the bank would not be binding on
3 Mr. Swanson. But a successful case against the bank would
4 block the plaintiff from bringing the case against Mr.
5 Swanson because there would no longer be a conspirator, if
6 that makes sense.

7 So, Judge, we would ask that you dismiss the motion.
8 We do not believe it's tied to the foreclosure and such
9 that we waive the right to a jury trial. They've agreed to
10 a jury trial regardless of that. We believe that from
11 judicial economy, it is what it is, and he's, he's an
12 essential witness in the case, and the witnesses that are
13 going to testify all happen to surround this issue. So, we
14 would ask that you deny, deny their motion. Thank you.

15 THE COURT: Thank you, Mr. Slotchiver.

16 Yes.

17 MR. McKIE: Hi, Your Honor. My name is Blake McKie.
18 I'm, I'm one of the attorneys for Pinnacle Bank in this
19 case and, and we have no position on, on this motion, but I
20 wanted to clarify some things on the record related to the
21 conversation between the bank and Mr. Swanson, which I, I
22 think they, they claim there's no evidence of or doesn't
23 exist.

24 But if I could for the record, I, I would just, for
25 the record, like to point out that there is an email in

1 which one of the bank employees says that he reached out to
2 David Swanson and, and got advice about dealing with the
3 not -- or not closing the loan. Additionally, there's been
4 several witnesses that have been deposed who, who testified
5 on, on that point. So, there's, there's evidence there as
6 well. I think ---

7 THE COURT: Are you saying that they recall the
8 conversation? They remember that they had a conversation?

9 MR. McKIE: Yes, Your Honor.

10 THE COURT: Okay.

11 MR. McKIE: So, I, I just want that on the, on the
12 record since that was ---

13 THE COURT: Sure.

14 MR. McKIE: --- an issue floating out there.

15 THE COURT: Sure.

16 MR. McKIE: Thank you.

17 MR. SLOTCHIVER: Your Honor, just for the record, the
18 email he's referring to did not mention David Swanson's
19 name. It referred to bank c-o-u-n-c-i-l, but there was no
20 reference to his name in particular.

21 THE COURT: Okay.

22 MR. SLOTCHIVER: Thank you, ma'am.

23 MR. KROPSKI: Your Honor, if, -- very briefly?

24 THE COURT: No. Yeah. Absolutely. I do want to hear
25 from you, yes.

1 MR. KROPSKI: I apologize, jumping up so quickly.

2 THE COURT: Let me ask you this question. Mr.
3 Slotchiver has said that Mr. Swanson necessarily is going
4 to be a witness because -- and I gather the way that that's
5 going to look is that even if the bank takes the position
6 that these loans had matured, they had not been paid off,
7 and there is no obligation for the bank to, under the
8 contracts, there was no obligation for the bank to renew.
9 The bank simply wanted to be paid off and they weren't paid
10 off. End of discussion. That even if that happens, what
11 Mr. Slotchiver has indicated is that it isn't going to end
12 there. That he's -- that this issue of the legal advice
13 and the telephone conversation, Mr. Swanson is coming into
14 this case one way or the other. Do you agree or disagree
15 with that?

16 MR. KROPSKI: I, I disagree with the statement and I,
17 I think that Mr. Slotchiver actually agreed with what we
18 said: that there is an outcome of the trial that will make
19 this claim not viable.

20 One of the outcomes is if the court determines the
21 bank had the right to foreclose no matter what -- because
22 again the activity that we're talking about is from 2013
23 and on. It's actual litigation activity that occurred
24 after the foreclosure began. So, the right to foreclosure
25 stops when these are filed. What Mr. Swanson -- when Mr.

1 Swanson testified a year and a half later, that's what this
2 is about. The, the claim is that there is a conspiracy to
3 create a defense within the litigation. So, it's not
4 accurate to say this is going somewhere even if the bank
5 foreclosures. If the bank forecloses and had a right to
6 foreclose on the contracts alone, that there is no, there
7 is no basis to defend. These are viable loans. These are
8 loans that matured.

9 THE COURT: I get all that; I understand that. My
10 question to you is really different, is do you agree or
11 disagree that, that Mr. Swanson is going to be a witness in
12 this litigation irrespective of the positions taken by the
13 bank? In other words, if the bank takes the position that
14 we were entitled to foreclose -- these loans have matured,
15 end of discussion -- that the defense of legal advice has
16 been in this case, it has been a defense of the bank, and
17 that it's coming in one way or the other?

18 MR. KROPSKI: Well, I, I do want to state that -- and
19 I don't want to speak for the bank. It's not a defense;
20 it's not an affirmative defense. It's not a defense
21 that's, that's been presented.

22 THE COURT: Okay.

23 MR. KROPSKI: It was a comment that was made in
24 passing concerning why they said we need to get a title
25 endorsement. That was something that was discussed in the,

1 in the, in the scope of discovery related to why didn't you
2 renew these loans. We were at closing. You said I want to
3 get a title endorsement or we need the ex-wife to sign the
4 mortgage. We think that these are modifications. We need
5 to protect ourselves. That's when that came up.

6 This, this is not a defense to the foreclosure, and
7 it's not a defense to the counterclaims. The, the bank's
8 foreclosing and they're still on their original foreclosure
9 complaint. It's here's the loans. They weren't paid, and
10 we're foreclosing.

11 So, the point -- and I, and I apologize for not being
12 clear enough. The claims that are going to be tried are
13 compulsory counterclaims. Did you fraudulently induce me
14 in 2007 to enter into these loans? Did you tell us that
15 these would automatically renew? Did you tell us that
16 these were going to be thirty-year mortgages and then I was
17 blind sided in 2012 and I was scrambling to renew and then
18 you didn't renew these loans? That has nothing to do with
19 whether Mr. Swanson lied in his deposition testimony, and
20 that's the only claim against Mr. Swanson. It's did you
21 and the bank representatives sit down and hatch this plan
22 to say, hey, I came up with the reason we didn't renew?
23 But the claims that are going to be tried first, because
24 it's an equitable claim or an equitable complaint, the
25 counterclaims that are legal and compulsory, like is the

1 mortgage enforceable, would be tried first according to the
2 rules the Supreme Court has laid out.

3 The counterclaim against Mr. Swanson, permissive, did
4 not need to be interposed in this lawsuit. In fact, there
5 was another lawsuit separately filed which would have a
6 right to a jury trial, by the way. But because it's
7 interposed in an equitable action, it's a counterclaim in
8 an equitable action, it's a permissive counterclaim.

9 The claim against Mr. Swanson will not be retried
10 whether or not this was true. It's a very limited fact.
11 It's did you have this conversation? Here's the couple of
12 witnesses that would know anything about this loan. The
13 facts concerning whether the loan and the mortgage are
14 enforceable relate to 2007; they relate to the origination
15 of the loans before they even tried to renew them.

16 If -- I don't know how Mr. Swanson would come into
17 play in any of that. He may be called as a witness. I'm
18 sure that the defendants will call him as a witness, to get
19 him as a witness since they've made the representation.
20 But from the position of whether the mortgages are
21 enforceable, that is 2007. Mr. Swanson was never involved
22 in 2007. This is solely related to the, to the renewal and
23 the failure of renewals. So, Swanson's -- the case against
24 him is did you lie in deposition testimony. All of the
25 bank representatives that have to do with 2007, that have

1 to do with the loan renewals, they will not have any sort
2 of -- the two-week trial will have about a day or two or
3 maybe a day or two related to Mr. Swanson. Did you lie in
4 your deposition testimony, and that's generous. It's, it's
5 a simple question, and there's probably only four or five
6 -- probably only three fact witnesses and maybe two
7 experts. That's about it. There is forty-something other
8 witnesses in this two-week trial. It will not be the same
9 claims tried all over all again.

10 And I do want to point out the claim as we originally
11 heard it, when we originally looked at it, we thought it
12 was a third-party complaint. You've got a foreclosure.
13 You've got the defendant who says I shouldn't be foreclosed
14 on. He says, hey, Swanson, your actions are the reason I'm
15 being foreclosed on. It's your fault. The defendants told
16 us that's not true. This is a counterclaim. You're an
17 additional counterclaim defendant, and that's been put in
18 the pleadings. I believe it was put in the pleadings, our
19 motions to dismiss the other cases, because they were the
20 exact same as this. It's a counterclaim defense, a
21 counterclaim that is permissive, and this is definitely
22 permissive.

23 And Mr. Slotchiver says this isn't related to the
24 foreclosure. That's right. It's not related to the
25 enforceability. So, there is no right to a jury trial.

1 The law on whether or not a jury trial is required is that
2 once a party has made a timely demand for a jury trial
3 under Rule 38, the trial, all issues so demanded by jury
4 unless, one, the parties and their attorneys agree by
5 written stipulation filed with the court or by oral
6 stipulation consent to the court sitting without a trial;
7 or, two, the court upon motion or its own initiative finds
8 that a right of trial by jury of some or all of those
9 issues does not exist.

10 A permissive counterclaim never has a right to a jury
11 trial. So, regardless of who demanded a jury trial, given
12 the posture that we're in, given that this is a
13 counterclaim, there's no right to a jury trial. So, a jury
14 demand is not effective. You cannot create the right to a
15 jury trial. It's constitutional. So, we can't do it in
16 our pleadings. We can't agree to it. If the judge says
17 you guys don't have a right to a jury trial, whether or not
18 we want a jury trial, it can still be sent to
19 master-in-equity and still be an equitable claim. That's
20 what we've got here.

21 Because it's going to be a short trial against Mr.
22 Swanson, because the rest of the litigation, all of the
23 other seven counterclaims have nothing to do with Mr.
24 Swanson, it makes sense to bifurcate it, to strike the
25 jury, and to go forward with a bench trial. It can be

1 resolved quickly. That, that's our position.

2 THE COURT: All right.

3 Yes, sir, Mr. Slotchiver.

4 MR. SLOTCHIVER: Very briefly, Your Honor. Mr.
5 Swanson's actions in this case absolutely affect the
6 ability to foreclose. That's our position. It is
7 compulsory. It is not permissive.

8 Secondly, Your Honor, there was a deal, and I've, I've
9 tried to stay away from the evidence as much as I can, but
10 everybody says there was arguments back and forth. Was
11 there a deal? Was there not a deal? They claim there was
12 no deal. The court ultimately brought in Steve Abrams to
13 pull documents, and he found evidence in other documents
14 talking about there was a deal. The only reason the deal
15 didn't go through, our position, is because of the
16 interjection of Mr. Swanson.

17 But even more so interesting in the case is that in
18 his deposition testimony he said, well, it wasn't really
19 legal advice. It was just a question. Well, maybe it was
20 advice, but I wasn't telling them not to do it. I was
21 telling them that this is a risk and if you want to protect
22 a risk, this is a way to protect a risk. So, these are
23 fact questions and ---

24 THE COURT: Let me ask you this question. What you
25 are telling me is the explanation about why the loans

1 didn't close, why the renewals didn't close, right?

2 Correct?

3 MR. SLOTCHIVER: Why that's -- they had a deal and why
4 they didn't close?

5 THE COURT: Yeah. Exactly.

6 MR. SLOTCHIVER: Absolutely.

7 THE COURT: And so that, based on what you are telling
8 me now, Mr. Swanson's testimony becomes relevant with
9 regards to whether or not the bank properly failed to renew
10 the loans, right?

11 MR. SLOTCHIVER: Correct, following the deal they
12 made, yes.

13 THE COURT: Yes, yes.

14 MR. SLOTCHIVER: Yes.

15 THE COURT: But that's a different issue to whether or
16 not that occurred or didn't occur insofar as the civil
17 conspiracy is concerned, correct?

18 MR. SLOTCHIVER: Well, we don't know the time. They,
19 they continue to argue that the question with Mr. Swanson
20 is did he lie or not lie in his deposition. That's not the
21 question for him. The question is did he give the advice,
22 or did he get with the bank and create a defense? Did he
23 do that early on? Did he do it before they, before they
24 agreed to go forward? Did he do it later? We wouldn't
25 have known about it until they listed him and we've taken

1 his deposition, but there are certainly some issues that
2 have come up that we've been dealing with. And I don't
3 want to talk about our trial but -- and the facts and those
4 issues that we've been dealing with ---

5 THE COURT: I understand that.

6 MR. SLOTCHIVER: --- give us pause and give us
7 questions.

8 THE COURT: Well, it seems to me that -- and help me,
9 help me understand because I see it really is Mr. Swanson
10 becomes relevant really in two different ways. As the jury
11 makes a determination regarding this transaction, then the
12 failure to renew the loans, one of the things I guess the
13 court could say is that the loans have matured. The bank
14 had every right to renew the loans. Badda bing, done. And
15 then of course you've got your position that at the
16 inception of these loans, there were certain understandings
17 that did not occur and when -- and those were breached.

18 MR. SLOTCHIVER: There's, there's one other element,
19 which is two days before the closing, my client met with
20 the president of the bank and they struck a deal.

21 THE COURT: Yeah.

22 MR. SLOTCHIVER: And it's written. They argue whether
23 it's binding or not.

24 THE COURT: Yes.

25 MR. SLOTCHIVER: But there was a deal made, yes.

1 THE COURT: Yeah. Exactly. So, you've really got,
2 you've got three different things going on. You have *ab*
3 *initio* there were problems, and these are all allegations,
4 y'all. I'm just talking in terms of allegations.
5 Secondly, should have renewed, didn't renew as a
6 separate, if you will, transaction ---

7 MR. SLOTCHIVER: Right.

8 THE COURT: --- to use that term really loosely.

9 MR. SLOTCHIVER: Sure.

10 THE COURT: And then thirdly, and then thirdly, that
11 the reason there wasn't a renewal was not as articulated in
12 discovery because of the Swanson-made defense which Swanson
13 and the bank generated, yes? So, that's the third thing.

14 MR. SLOTCHIVER: Generally, yes. Yes.

15 THE COURT: Right. Right. Right. However, it seems
16 to me that Mr. Swanson's testimony becomes relevant,
17 excising out any civil conspiracy, that Mr. Swanson's
18 testimony becomes relevant from your perspective perhaps or
19 from the bank's perspective perhaps with regards to whether
20 or not there was -- these renewals should have occurred and
21 didn't occur and why.

22 MR. SLOTCHIVER: Yes.

23 THE COURT: Okay, as opposed to the inception of these
24 loans.

25 MR. SLOTCHIVER: Correct. It's not the -- correct.

1 THE COURT: Right. Right, and so, so, so, as I
2 understand it, the civil conspiracy, you believe that the
3 civil conspiracy cause of action is a compulsory rather
4 than a permissive counterclaim. Tell me why you believe it
5 is compulsory, not permissive, with regards to Mr. Swanson.

6 MR. SLOTCHIVER: It, it arose out of the same set of
7 facts is essentially the position. The -- and, and what's
8 -- let's go into some facts.

9 THE COURT: Some of them.

10 MR. SLOTCHIVER: If we are correct.

11 THE COURT: Yes.

12 MR. SLOTCHIVER: They cannot foreclose on them. They
13 made a deal to extend the loan. If they'd never made a
14 deal, it's a whole different situation. They made a deal
15 to extend the loan, and after they made a deal ---

16 THE COURT: You're talking about the two days before
17 the closing?

18 MR. SLOTCHIVER: Well, yes, but they made a deal and
19 then they set the closing. It wasn't as if the closing was
20 already set. They made a deal and they set a closing to
21 close.

22 THE COURT: Okay.

23 MR. SLOTCHIVER: And they backed out of the deal. Our
24 position is for whatever reason, they decided they didn't
25 want to go forward. Whether they spoke to Mr. -- spoke to

1 bank council -- c-i-l -- whether they spoke to Mr. Swanson,
2 whether they decided they didn't want to do it at all, but
3 they're using Mr. Swanson as a crutch for the reason why
4 they didn't go forward. And that's, that's throughout the
5 testimony over and over with multiple witnesses, and we
6 have witnesses from the bank that say this is a deal. This
7 is a, this is a term sheet. Some say it is; some say it
8 isn't. We believe it is.

9 THE COURT: Let me ask you this question. If, in
10 fact, that conversation occurred and it actually happened
11 that Mr. Swanson had that conversation with the bank, it
12 would be, I would think -- and you correct me now if I'm
13 incorrect. It is not the position of your client that even
14 if the conversation occurred, that it's game over, correct?

15 MR. SLOTCHIVER: Correct.

16 THE COURT: All right. If the conversation did not
17 occur and was created, conveniently created, that's when
18 the civil conspiracy occurs, yes?

19 MR. SLOTCHIVER: Yes.

20 THE COURT: Okay. All right. Now, and you may not
21 have -- you may not care when it occurred, but based upon
22 your position, your allegations, do you attach a time to
23 the creation of the conversation?

24 MR. SLOTCHIVER: Based on discovery, they tell us they
25 contacted Mr. Swanson on his office phone, and he spoke to

1 them before the closing was to take place. We don't know
2 what really happened, but based on the information
3 provided, that's, that's the best that we could guess.

4 THE COURT: And so ---

5 MR. SLOTCHIVER: As to when it took place, if it took
6 place.

7 THE COURT: If it took place.

8 MR. SLOTCHIVER: Yeah.

9 THE COURT: And it's your position, your allegation
10 that in reality, that conversation took place post closing.

11 MR. SLOTCHIVER: That's the allegation that we've
12 made.

13 THE COURT: Okay.

14 MR. SLOTCHIVER: Is if it took place, that whatever
15 conversation about it would have taken place later on.
16 That's not even getting into the fact of the reliability of
17 it by the bank.

18 THE COURT: Yes, yes, yes, that's a whole ---

19 MR. SLOTCHIVER: Which also makes it ---

20 THE COURT: --- different issue.

21 MR. SLOTCHIVER: Correct.

22 THE COURT: That's a whole different issue because one
23 of them, on one set of considerations -- if I can use that
24 term -- involves, involves even if the conversation
25 occurred ---

1 MR. SLOTCHIVER: That's correct.

2 THE COURT: --- even if that conversation occurred, it
3 ought not, it ought not be game over for your client.

4 MR. SLOTCHIVER: Yes.

5 THE COURT: The other position is if it did not occur
6 prior to closing, and it occurred some time after closing
7 to create a defense that did not -- or create a reason that
8 did not exist, then you're in some sort of civil
9 conspiracy.

10 MR. SLOTCHIVER: And, and then we have a deal. We
11 also would have a deal.

12 THE COURT: Yes.

13 MR. SLOTCHIVER: Correct.

14 THE COURT: Well, maybe. Maybe. Maybe, yeah. So,
15 so, I think I have it.

16 MR. SLOTCHIVER: Okay.

17 THE COURT: Now, now, if, given that scenario, given
18 that scenario, then it does not arise out of the same facts
19 and circumstances. So, why isn't, why isn't the
20 counterclaim against Mr. Swanson a permissive counterclaim?
21 Understanding -- I think he's a witness. Irrespective,
22 he's a witness, but with regards to civil conspiracy, why
23 isn't that a permissive counterclaim?

24 MR. SLOTCHIVER: Well, it depends on which -- what
25 situation you decide to go with is the problem.

1 THE COURT: Yeah.

2 MR. SLOTCHIVER: If, if he gave -- if, if he conspired
3 with them as early on as before the deal to make up a legal
4 defense that doesn't exist or that's never been tested --
5 not doesn't exist. Never been tested; never been ruled
6 upon. There's no literature. There's nothing. Then
7 that's within the timeframe. If afterwards he did it two
8 years later, a year later, that's a whole nother situation.
9 We don't know. I mean, that's part of the issue that
10 we ---

11 THE COURT: Well, you'll agree with me that the
12 after-the-closing creation of that defense clearly is
13 permissive, yes, because it doesn't arise out of the same
14 facts and circumstances. It gives them a reason after the
15 fact why it was we did what we did. It's a different fact.

16 MR. SLOTCHIVER: It would still deal with the
17 effectiveness of the, of the foreclosure, whether or not it
18 was effective, whether or not it took place after or not.
19 They're trying to limit our argument to, to being when it
20 took place as opposed to how it affects the enforceability
21 of the foreclosure. Whether it took place before or after,
22 it still would have the same effect on the effectiveness of
23 the foreclosure because the only defense they've raised
24 throughout the entire case -- and I may be generalizing,
25 but as a general basis is we didn't go forward with the

1 deal. They argue there's a deal. We say there isn't.
2 They say there's not. We say there is. But they say the
3 reason we did not go forward is because of this advice.

4 So, either way it still bootstraps into that same
5 defense, and that is the same set of facts is why they
6 didn't go forward, is the foreclosure enforceable, and
7 should they have made a deal. It's all intertwined. I
8 don't know how you distinguish them.

9 THE COURT: Well, I don't believe that it -- oh, I
10 think I've got it. I think I've got your position.

11 Yes, sir.

12 MR. KROPSKI: Your Honor, I'm sorry. We've been
13 running into this issue throughout this entire case. Their
14 allegation is that Mr. Swanson did not give this advice; it
15 never happened. That's the linchpin of the civil
16 conspiracy claim. Mr. Swanson and the bank made up
17 something that didn't happen. It's not possible that that
18 -- that they can have it both ways. They can't argue in
19 trial that, hey, Mr. Swanson, your advice was terrible,
20 you're a horrible lawyer, and then also say you guys
21 created this after the fact.

22 If the advice existed, then it happened before the
23 closing, yes. If the advice did not exist and it was
24 created to manufacture a defense to their counterclaims, it
25 necessarily happened after the foreclosure began. And

1 that's the allegation is Mr. Whitfield asserted
2 counterclaims. I think in a motion somewhere it was
3 mentioned, hey, they contacted bank council, and then
4 that's when this came out. They said, hey, we need to
5 depose Swanson. Swanson was deposed and after that, then
6 this counterclaim was asserted. That has to be permissive.
7 I think the court is correct that ---

8 THE COURT: All right, now, here we go because let me
9 ask you this question. All right, let's set aside the
10 communications between -- the alleged communications.

11 And I mean alleged. Everybody please hear me. I mean
12 alleged even if I don't say that. Certainly help me. Give
13 me that.

14 All right, let's take the allegations that the
15 communication was -- and I'm looking for, I'm searching for
16 another term other than trumped up -- created after the
17 fact. Am I right? Let's say that's permissive. Let's
18 just put that aside, okay? Let's just set permissive over
19 there.

20 Now, here's my question to you, and I heard what you
21 just said, that it's always been their position, blah,
22 blah, blah. I just heard Mr. Slotchiver tell me that their
23 position is that the communication may have occurred prior
24 to the closing to create a defense or to create a reason
25 not to close. That it was something other than the giving

1 and the receiving of legal advice which caused the bank
2 concern, through which there was no closing. And what he's
3 says is that the reason given by Mr. Swanson that you may
4 want to get the title assurances, that that reason for not
5 closing doesn't exist in the literature. It's not
6 considered to be a reason not to close and that defense.
7 He just told me that. So, that then places the interaction
8 between the bank and Mr. Swanson, we're going to make up --
9 help give us a reason not to close. We don't want to
10 close. Help give us a reason not to close. Here's one.
11 You good with that? You good with that? Now, it's a whole
12 nother issue whether, even if that happened, okay, it can
13 happen.

14 So, and I'm not passing any -- I don't have an opinion
15 about whether that -- even if that existed, that whether or
16 not the bank is absolutely entitled to say a lawyer raised
17 it, we were concerned about it, we were concerned about the
18 closing, we didn't know why we were concerned about it,
19 this is one reason that we talked about, and we were
20 concerned about it, and we chose not to close.

21 Considering -- I, I'm not going there. I'm only
22 asking if that now is in the mix, does that make it a --
23 well, I guess maybe it does matter because can you have a
24 civil conspiracy under those circumstances?

25 MR. KROPSKI: Your Honor, the point being -- and I'm

1 happy to read straight from the pleadings. This is all in
2 our submission. This is a totally new position. This is
3 legitimately the first time it's ever been presented and it
4 can't -- the facts can't, can't be reconciled. The
5 allegation in the complaint and for four years what we've
6 been defending against is you lied in a deposition. You
7 and Mr. Warren from the bank conspired to lie in deposition
8 to create a defense to a counterclaim. This has never been
9 an issue of Mr. Swanson created a reason for them not to,
10 not to renew the loans. We have no -- we all know that the
11 loans didn't renew, and if Mr. Swanson did it and gave them
12 bad advice, the bank can sue Mr. Swanson. And if
13 ultimately Mr. Swanson's bad advice is the reason that the
14 bank loses, they can sue Mr. Swanson for legal malpractice.
15 That's a backdoor legal malpractice claim: hey, your legal
16 advice was so bad, I, I didn't -- you know, now I'm getting
17 foreclosed upon.

18 If it was wrongful foreclosure, they have all these
19 counterclaims. The point being this is not the position,
20 and if they take that position that you actually gave this
21 advice, then the civil conspiracy has to go away, right?
22 Then it wasn't false testimony, and the point being the
23 civil conspiracy claim is you gave false testimony in the
24 course of litigation.

25 THE COURT: I'm with you.

1 MR. KROPSKI: That's why it's permissive and not
2 compulsory.

3 THE COURT: I got you. I got it, got it.

4 All right, wonderful. Thank you so much. With your
5 permission, just a couple things I want to take a look at,
6 and what I'll do is I'll just give you -- what I'll do is
7 --- I know what I'll be doing over lunch today, and then I
8 will just get my law clerk to send you all an email. And
9 just before y'all head out, and just be sure I've got where
10 I can send it to you all email-wise, and I'll just email
11 you the decision, then ask you to draft an order, if that's
12 okay.

13 MR. KROPSKI: Thank you, Judge.

14 THE COURT: Is that all right because I know y'all --
15 and the only reason I say it is I know you guys are on a
16 fast track. Y'all need to know, yes?

17 MR. SLOTCHIVER: Yes.

18 THE COURT: All right.

19 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR CHARLESTON COUNTY, SOUTH CAROLINA,
ON THE 7TH DAY OF OCTOBER, 2019.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/S/Elizabeth B. Harris, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

DECEMBER 31ST, 2019



counterclaims for (1) Breach of Contract, (2) Negligent Misrepresentation, (3) Fraud in the Inducement, (4) Violation of Federal Trade Commission Act Section 5(a) 15 U.S.C. §45 as made applicable through S.C. Code §39-5-10 et seq, (5) Promissory Estoppel/Detrimental Reliance, (6) Breach of Contract Accompanied by a Fraudulent Act, and (7) Tortious Interference with Prospective contractual Relations, all against Pinnacle Bank only, and (9) Civil Conspiracy against Pinnacle Bank and David Swanson (as an additional counterclaim defendant)¹ and (10) a cross-claim against Cindy Whitfield for Equitable Indemnity.

The current motion relates solely to the ninth counterclaim for civil conspiracy, which is the only cause of action including Swanson as a party. The issue currently before the Court is whether Defendant Whitfield is entitled to a jury trial as a matter of right on his civil conspiracy counterclaim to the foreclosure complaint, and if the civil conspiracy claim should be bifurcated and tried in a separate non-jury proceeding. To aid in the disposition of this motion, a brief factual background of Mr. Swanson's connection to the litigation is as follows.

In 2007, Whitfield entered into several loan agreement secured by real property with Harbor National Bank. One of the subject loans was secured by the real property located at 1055 Black Rush Circle, Mount Pleasant, SC 29466 ("Black Rush Property")². (Pl. Compl. ¶16; Ex. C to Pl. Compl.). The maturity date on the subject promissory note was May 3, 2012. (Pl. Compl. Ex. A.).

¹ Whitfield's eighth counterclaim also asserted against additional counterclaim defendant Swanson for Abuse of Process was dismissed by an order entered November 8, 2017 granting in part Swanson's motion for summary judgment.

²Loans secured by other real property in Dorchester and Berkeley Counties are the subject of separate foreclosure actions between Plaintiff and Defendants in those respective counties. Mr. Swanson is not a party to the Dorchester or Berkeley foreclosure actions.

In or about January 2012, Mr. Whitfield alleges that he and Harbor National representatives discussed renewing his loans. (Defs. 5th Am. Ans., Aff. Def., Crossclaim and Counterclaims ¶¶28-29). Mr. Whitfield alleges that on June 26, 2012, Harbor National Bank's vice president signed a loan commitment letter to Mr. Whitfield outlining the terms and conditions of his loan renewals. (Id. ¶31).

Mr. Whitfield further alleges that the parties attended an anticipated closing of the loan renewals on June 28, 2012 wherein the Harbor National Bank representative "informed Mr. Whitfield that a signed endorsement from a title company was needed so that Mr. Whitfield's ex-spouse Cindy Whitfield would not be required to sign the loan documents for the Black Rush Property." (Id. ¶¶32, 37). According to Whitfield, the closing attorney advised him the endorsement could not be procured, that his ex-wife would not sign the mortgage to the Black Rush Property, and that ultimately all of his properties secured by loans from Harbor National Bank then became the subject of foreclosure proceedings. (Id. ¶¶32-33). Whitfield contends that he subsequently learned that a title endorsement was not required to close the loan renewals and asserts that Plaintiff breached an alleged agreement to renew the loans. (Id. ¶33).

After the loan renewals did not close, Plaintiff initiated the current foreclosure action. During the course of this foreclosure action, Mr. Whitfield conducted depositions of Harbor National Bank representative Scott Warren and Mr. Swanson. Mr. Swanson is an attorney who advised Harbor National Bank on certain matters. Both Warren and Swanson testified in their depositions that in a phone call on or prior to June 28, 2018, Swanson recommended that Harbor National Bank get a title endorsement for the Black Rush Property. (See, Id. at ¶¶74-79).

In his civil conspiracy counterclaim, Whitfield alleges that the alleged phone call between Warren and Swanson wherein Swanson recommended Harbor National Bank obtain a title endorsement *did not* occur before the anticipated closing of the loan renewals. Whitfield instead alleges that Harbor National Bank and Swanson conspired to give false deposition testimony for the purpose of justifying Harbor National Bank's request for a title endorsement.

In the operative pleading, Mr. Whitfield's civil conspiracy counterclaim alleges:

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

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

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

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

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

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

(Def's 5th Am Ans, Aff. Def., Crossclaim and Counterclaims ¶¶74-79)(emphasis in original pleading).

As is clear from the factual allegations supporting the civil conspiracy counterclaim, the civil conspiracy claim does not arise out of the underlying loans or prospective loan renewals, but rather, out of activity that took place after the alleged loan renewals did not close.

II

Mr. Swanson argues that the civil conspiracy counterclaim is a permissive counterclaim under Rule 13, SCRPC and therefore, Mr. Whitfield is not entitled to a jury trial as of right on the civil conspiracy counterclaim. Whitfield, on the other hand, argues that the civil conspiracy counterclaim arises out of the same transactions and occurrences as the underlying loan and alleged renewal transactions. The Court finds that the civil conspiracy counterclaim is permissive, and therefore, Whitfield is not entitled to a jury trial as of right on the civil conspiracy counterclaim.

“Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable....” *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). Because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial. *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014). A party is entitled to a jury trial in an equitable action “only if the counterclaims are legal and compulsory.” *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 295, 778 S.E.2d 106, 109 (2015). “By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party’s claim.” *Blackburn*, 407 S.C. at 330-331, 755 S.E.2d at 442. When a defendant asserts permissive counterclaims which are legal in nature, he waives the

right to a jury trial on these issues. *C&S Real Estate Services, Inc., v. Massengale*, 290 S.C. 299, 301, 350 S.E.2d 191, 193 (1986).

Under South Carolina law, whether a counterclaim is compulsory or permissive is viewed through the logical relationship test. “Under this test, the logical relationship determination is made by asking whether the counterclaim would affect the lender’s right to enforce the note and foreclose the mortgage. If the defendant’s prevailing on his counterclaim would affect the bank’s right to enforce the note and foreclose the mortgage, there is a logical relationship between the counterclaim and the underlying suit, and the counterclaim is therefore compulsory.” *Blackburn*. A407 S.C. at fn7, 755 S.E.2d at fn7 (internal citations omitted).

Here, the civil conspiracy counterclaim has no logical relationship to Pinnacle Bank’s right to enforce the note and foreclose the mortgage. The alleged facts supporting the civil conspiracy counterclaim--that Swanson and Harbor National Bank conspired to give false testimony for the purpose of providing an *after-the-fact* justification for Harbor National Bank’s request for a title endorsement--relate to activity that occurred after Mr. Whitfield’s loans were not renewed. Accordingly, the outcome of the civil conspiracy counterclaim will not affect the enforceability of the note and mortgage, will not affect whether Harbor National Bank had an obligation to renew Mr. Whitfield’s the loans, and will not affect Whitfield’s other counterclaims alleging improper acts against the bank with respect to the original loans and the failed alleged loan renewals.

The Court finds that Mr. Whitfield’s civil conspiracy counterclaim is a permissive counterclaim asserted in an equitable foreclosure action, and therefore, Mr. Whitfield is not entitled to a jury trial as of right on his civil conspiracy counterclaim. Accordingly, upon motion of counterclaim defendant Swanson pursuant to Rule 39(a)(2), SCRCP, the civil conspiracy counterclaim shall be tried by non-jury trial.

III

Mr. Swanson also moves for an order bifurcating the civil conspiracy claim from the other claims and counterclaims asserted in the litigation.

Rule 42(b), SCRCP provides that “the court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claims, counterclaims, or third-party claims, or issues, always preserving inviolate the right to trial by jury as declared by the Constitution or as given by statute of the State.” Bifurcation is proper where the issues in the case are complex, and bifurcation helps to clarify or simplify the issues. *Durham v. Vinson*, 360 S.C. 639, 602 S.E.2d 760 (2004).

Here, counterclaim defendant Swanson is only a party to one cause of action asserted in the complex litigation between Pinnacle Bank and Mr. Whitfield. Pursuant to this order, the Court has determined that Whitfield’s civil conspiracy counterclaim is not entitled to a jury trial as of right. Likewise, as discussed herein, the outcome of the civil conspiracy cause of action will not affect the remainder of the claims asserted between the parties.

As the Court has determined that no logical relationship exists between Mr. Whitfield’s civil conspiracy counterclaim and the foreclosure action or Mr. Whitfield’s other counterclaims to which Mr. Swanson is not a party, the Court finds that bifurcation of the civil conspiracy counterclaim is prudent. Bifurcation of the civil conspiracy counterclaim will simplify the evidence and issues presented before the jury, will avoid the inconvenience of forcing those witnesses and parties only material to the civil conspiracy claim to attend a lengthy trial regarding the other counterclaims asserted by Whitfield, and will aid in avoiding jury confusion over which facts are relevant to the claims that are to be decided by the jury rather than by the Court.

Accordingly, the Court finds that the civil conspiracy claim should be bifurcated and tried in a separate trial conducted non-jury.

IV

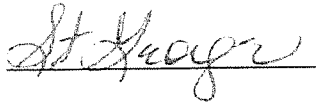
For the reasons stated herein, the Court grants the motion of counterclaim defendant David Swanson. Therefore, it is hereby

ORDERED, that the Defendant Whitfield's civil conspiracy counterclaim shall be bifurcated from the trial of all other claims in the subject litigation and shall proceed in a non-jury trial; and it is further

ORDERED, that this Order shall apply only to the civil conspiracy counterclaim asserted by Defendant Anthony Whitfield and shall not affect any of the remaining claims, counterclaims, or crossclaims asserted between the parties to this litigation, the trial of which is set to begin October 21, 2019 and shall proceed.

IT IS SO ORDERED!


Diane S. Goodstein
Circuit Court Judge

, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Pinnacle Bank,)
Plaintiff,)
vs.)
Anthony M. Whitfield et al,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Case No.: 2012-CP-10-5887

**ORDER DENYING DEFENDANT'S
MOTION TO ALTER OR AMEND
THE COURT'S ORDER ENTERED**

This matter came before this Court by way of Defendant's Motion to Alter or Amend Judgment brought forth pursuant to South Carolina Rules of Civil Procedure 52(b) and 59(e). Because the Defendant's Motion does not raise any novel issues for the Court's consideration, the Defendant's Motion to Alter or Amend Judgment is denied.

AND IT IS SO ORDERED!

Judge Diane S. Goodstein
First Judicial Circuit

January _____, 2020





Charleston Common Pleas

Case Caption: Harbor National Bank , plaintiff, et al VS Anthony M Whitfield ,
defendant, et al
Case Number: 2012CP1005887
Type: Order/Other

This Order is Hereby GRANTED!

S/ Diane S. Goodstein (2112)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein
Circuit Court Judge

Case No. 2012-CP-10-5887

Pinnacle Bank, as successor in
interest to Bank of North
Carolina, previous successor
in interest to Harbor National
Bank, Plaintiff

v.

Anthony Whitfield and Cindy
Whitfield, Defendants

Anthony Whitfield,
Counterclaimant

v.

David Swanson, Counterclaim
Defendant

of whom

Anthony Whitfield is the Appellant and David Swanson is the Respondent.

NOTICE OF APPEAL

Anthony Whitfield appeals the *Order* of the Honorable Diane S. Goodstein, entered on



October 16, 2019 and the corresponding *Order Denying Defendant's Motion to Alter or Amend the Court's Order Entered*, entered on January 6, 2020. Copies of the subject orders are attached hereto.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein
Circuit Court Judge

Case No. 2012-CP-10-5887

Pinnacle Bank, as successor in
interest to Bank of North
Carolina, previous successor
in interest to Harbor National
Bank, Plaintiff

v.

Anthony Whitfield and Cindy
Whitfield, Defendants

Anthony Whitfield,
Counterclaimant

v.

David Swanson, Counterclaim
Defendant

of whom

Anthony Whitfield is the Appellant and David Swanson is the Respondent.

PROOF OF SERVICE

I, the undersigned, certify that I have served the Notice of Appeal on all parties to this action by

depositing a copy of the same in the United States Mail, postage prepaid on February 3, 2020,
addressed to their respective attorneys of record as follows:

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February 3, 2020

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

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

PINNACLE BANK, as successor in interest
to BANK OF NORTH CAROLINA, as
previous successor in interest to HAVOR
NATIONAL BANK,

Plaintiff,

v.

ANTHONY M. WHITFIELD,

Defendant.

STIPULATION OF VOLUNTARY
DISMISSAL WITH PREJUDICE
(Does Not End Case)

By and through the undersigned counsel and pursuant to Rule 41(a)(1)(B) of the South Carolina Rules of Civil Procedure, Plaintiff Pinnacle Bank and Defendant Anthony M. Whitfield voluntarily dismiss their respective claims against each other with prejudice. The Parties agree to bear their own costs, expenses, and attorneys' fees.

This 9th day of June, 2020 at Charleston, South Carolina.

s/Brian C. Duffy

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Ninth Judicial Circuit

Honorable Diane S. Goodstein, Circuit Court Judge

Case No.: 2012-CP-10-05887
Appellate Case No. 2020-000162

Pinnacle Bank, as successor in interest to Bank of North Carolina, previous successor in interest to Harbor National Bank, Plaintiff,

v.

Anthony Whitfield and Cindy Whitfield, Defendants

Anthony Whitfield, Counterclaimant,

v.

David Swanson, Counterclaim Defendant

Of Whom Anthony Whitfield is the Appellant and David Swanson is the Respondent.

PROOF OF SERVICE

I certify that I have served the Motion to Dismiss Appeal upon Appellant on August 14, 2020, by email addressed to Appellant's attorneys of record as follows:

RECEIVED
Aug 14 2020
SC Court of Appeals

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Attorneys for Appellant

This 14th day of August, 2020.



Steven R Kropski