

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

Aug 24 2020

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Diane S. Goodstein
Circuit Court Judge

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.

APPELLANT'S RETURN TO
RESPONDENT'S MOTION TO DISMISS

This is an appeal of orders affecting the mode of trial, specifically, orders affecting Appellant Anthony Whitfield's right to a jury trial on a civil conspiracy counterclaim against Respondent David Swanson (Orders, Exhibit A). As set forth below, these orders are not

interlocutory, but rather immediately appealable, and must be appealed at the first opportunity.

ARGUMENT

As delineated in both Appellant and Respondent's Initial Briefs, the central issue before this Court is whether the lower court erred in striking Mr. Whitfield's jury trial demand, referring what is indisputably a legal counterclaim against Respondent David Swanson to a bench trial.

A controversy exists as to whether the civil conspiracy counterclaim is compulsory or permissive. "If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim." *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d, 437, 441 (2014). [Emphasis added]. However, if the complaint is equitable and the counterclaim is legal and permissive, the defendant waives the right to a jury trial. *Id.* Mr. Whitfield asserts that the civil conspiracy counterclaim is legal and compulsory, entitling him to a jury trial. (See Appellant's Initial Brief, Argument II, p. 8, attached hereto as Exhibit B, setting forth the logical relationship between the counterclaim and underlying foreclosure action). Respondent, however, contends that the counterclaim is legal and permissible.

Another controversy exists as to whether the lower court erred in allowing Respondent to withdraw his own jury trial demand, despite the requirement set forth under Rule 38(d), SCRPC, which states, "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties, except where an opposing party is in default under Rule 55(a)." Respondent notably made a jury trial demand in his own Answer, filed February 18, 2016. (Answer, Exhibit C). However, after a delay of more than three years, Respondent reversed course, filing a Motion to Bifurcate the Civil Conspiracy Counterclaim, Strike the Jury Demand, and Refer the Civil Conspiracy Counterclaim to a Bench Trial before the Master in Equity.

(Motion, filed March 8, 2019, Exhibit D). Mr. Whitfield did not consent to the withdrawal of Respondent's jury demand. (See Mr. Whitfield's Rule 52(b) Motion to Amend Findings and Rule 59(e) Motion to Alter or Amend Order, Exhibit E). Nonetheless, the lower court effectively allowed Respondent to withdraw his own jury trial demand, striking Mr. Whitfield's jury trial demand, and referring the civil conspiracy counterclaim to a bench trial, thereby affecting the mode of trial.

A third controversy exists as to whether the bifurcation order failed to "preserved inviolate" Mr. Whitfield's right to a trial by jury. (Appellant's Initial Brief, Argument III, p. 10, Exhibit B).

Because the lower court's determination of these issue affect the mode of trial (i.e. Mr. Whitfield's right to a jury trial), the order is immediately appealable. "Issues regarding mode of trial must be raised in the trial court at first opportunity, and the order of the trial judge is immediately appealable." *Foggie v. CSX Transp.*, 313 S.C. 98, 103, 431 S.E.2d 587, 590 (1993). "Moreover, the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue." *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241(1996), citing *Edwards v. Timmons*, 297 S.C. 314, 377 S.E.2d 97 (1988) (where appellant did not appeal the order referring matter to master in equity, she could not complain after final order that she was deprived of her right to a trial by jury), and *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985) (where appellant failed to timely appeal an order referring dispute to master in equity, appellant could not later complain that he had been entitled to a trial by jury).

These are issues for this Court to determine on the merits, based on the totality of

circumstances, and review of the parties' fully-briefed arguments.¹ This appeal should not be dismissed because, as noted *supra*, orders affecting mode of trial are immediately appealable. Contrary to Respondent's contention, such orders are not interlocutory and must be raised at the first opportunity or otherwise waived.

Further, the resolution of claims interposed between Mr. Whitfield and Harbor National Bank does not render the bifurcation issue moot because the bifurcation order refers the bifurcated counterclaim to a bench trial, thereby affecting the mode of trial. Respondent cites to *Flagstar Corp. v. Royal Surplus Lines* in an effort to support of his proposition that bifurcation orders are not immediately appealable. However, Appellant's reliance on *Flagstar* is misplaced. In *Flagstar*, the South Carolina Supreme Court found that bifurcation in *that* case did not present a mode of trial issue because "[i]n this case, no party is denied the right to a trial by jury." Here, Mr. Whitfield has specifically been denied the right to a trial by jury. Accordingly, *Flagstar* is incongruous to the present matter and Appellant's Motion to Dismiss should be denied.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that Respondent's Motion to Dismiss be denied. Because the lower court's orders affect the mode of trial (i.e. deny Mr. Whitfield's request for a jury trial), the orders are immediately appealable. Contrary to Respondent's contention, the orders are not interlocutory, but rather immediately appealable and must be appealed at the first opportunity.

[Signature on following Page]

¹ As of the date of this filing, both parties have filed Initial Briefs with the Court. Mr. Whitfield's deadline for filing his Initial Reply Brief has been held in abeyance pending the Court's decision on the present Motion to Dismiss.

Respectfully submitted,

s/Jesse Sanchez

Jesse Sanchez

The Law Office of Jesse Sanchez, LLC
98 ½ Broad Street, Suit B
Charleston, South Carolina 29401
(843) 814-8181

Daniel S. Slotchiver

Andrew J. McCumber

Slotchiver & Slotchiver, LLP

751 Johnnie Dodds Boulevard, Suite 100
Mount Pleasant, South Carolina 29464
(843) 577-6531

Brent S. Halversen

Brent Souther Halversen, LLC

751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, SC 29464
(843) 284-5790

August 24, 2020
Charleston, South Carolina

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	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	)	
	)	ORDER
	)	
	)	BY _____
	)	JULIE J. ARMSTRONG
	)	CLERK OF COURT
	)	2019 OCT 16 PM 12:23
	)	FILED
Plaintiff,	)	
	)	
vs.	)	
	)	
Anthony Whitfield and	)	
Cindy Whitfield,	)	
	)	
Defendants.	)	
	)	
Anthony Whitfield,	)	
Counterclaimant	)	
	)	
vs.	)	
	)	
David Swanson,	)	
Counterclaim Defendant	)	

Before the Court is Counterclaim Defendant David Swanson's motion requesting Defendant Anthony Whitfield's counterclaim for civil conspiracy against Swanson and Pinnacle Bank be bifurcated, that the jury demand be struck as to the civil conspiracy counterclaim, and that the bifurcated civil conspiracy counterclaim be referred to the master in equity. A hearing was held on October 7, 2019 where the Court heard arguments of counsel for all parties. After careful consideration of the submissions, arguments of counsel and the relevant legal authority, the Court grants Mr. Swanson's motion.

I

The current matter is a foreclosure lawsuit by Pinnacle Bank, as successor in interest to Bank of North Carolina, previous successor in interest to Harbor National Bank. Defendant Whitfield has asserted multiple counterclaims in this foreclosure action. In Defendant Whitfield's Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Whitfield asserts

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), SCRPC, 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.

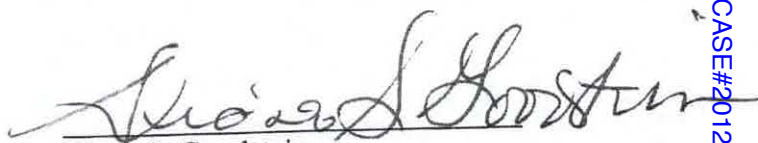
IV

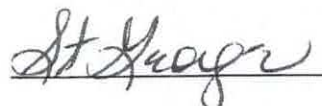
For the reasons stated herein, the Court grants the motion of counterclaim defendant David Swanson. Therefore, it is hereby

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)

EXHIBIT B

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

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.

INITIAL BRIEF OF APPELLANT

RECEIVED
JUN 19 2020
SC Court of Appeals

Daniel S. Slotchiver
Andrew J. McCumber
Slotchiver & Slotchiver, LLP
751 Johnnie Dodds Boulevard, Suite 100
Mount Pleasant, South Carolina 29464
(843) 577-6531

Jesse Sanchez
The Law Office of Jesse Sanchez, LLC
98 ½ Broad Street, Suite B
Charleston, South Carolina 29401
(843) 814-8181

Brent S. Halversen
Brent Souther Halversen, LLC
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, SC 29464
(843) 284-5790

Attorneys for Appellant

TABLE OF CONTENTS

Table of Authorities.....	iv
Statement of Issues on Appeal	v
Statement of the Case	1
Standard of Review.....	5

ARGUMENTS

I. BECAUSE BOTH COUNTERCLAIMANT ANTHONY WHITFIELD AND COUNTERCLAIM DEFENDANT DAVID SWANSON <u>DEMANDED</u> A JURY TRIAL ON MR. WHITFIELD'S CIVIL CONSPIRACY COUNTERCLAIM AGAINST MR. SWANSON, THE COURT ERRED IN STRIKING THE JURY DEMANDS AND FINDING THAT MR. WHITFIELD IS NOT ENTITLED TO A JURY TRIAL.....	7
II. BECAUSE ANTHONY WHITFIELD'S COUNTERCLAIM FOR CIVIL CONSPIRACY AGAINST DAVID SWANSON, IF ESTABLISHED, WOULD HAVE AFFECTED THE FORECLOSURE ACTION BROUGHT BY PLAINTIFF PINNACLE BANK, THE COURT ERRED IN FINDING THAT THE CIVIL CONSPIRACY COUNTERCLAIM WAS MERELY PERMISSIVE AND NOT COMPULSORY.....	8
III. BECAUSE ANTHONY WHITFIELD'S COUNTERCLAIM AGAINST DAVID SWANSON WAS A COMPULSORY COUNTERCLAIM AFFECTING THE OUTCOME OF PLAINTIFF'S FORECLOSURE ACTION AND OTHER CROSS-CLAIMS, THE COURT ERRED IN BIFURCATING THE CLAIM FOR CIVIL CONSPIRACY FROM THE REST OF THE CASE.....	10
Conclusion.....	11

TABLE OF AUTHORITIES

CASES

<i>Advance Int’l, Inc. v. N.C. Nat’l Bank of S.C.</i> , 316 S.C. 266, 449 S.E.2d 580 (Ct. App. 1994).....	6, 8
<i>Advance Int’l, Inc. v. N.C. Nat’l Bank of S.C.</i> , 320 S.C. 532, 466 S.E.2d 367 (1996).....	6, 8
<i>First-Citizens Bank & Trust Co. of S.C. v. Hucks</i> , 305 S.C. 296, 408 S.E.2d 222 (1991).....	5
<i>Gardner v. Travis</i> , 316 S.C. 316, 450 S.E.2d 54 (Ct. App. 1994).....	7, 10
<i>Hayne Fed. Credit Union v. Bailey</i> , 327 S.C. 242, 489 S.E.2d 472 (1997).....	5
<i>Mcmillan v. Oconee Memorial Hosp., Inc.</i> , 626 S.E.2d 884, 367 S.C. 559 (2006).....	5
<i>Mullinax v. Bates</i> , 317 S.C. 394, 453 S.E.2d 894 (1995).....	5, 8
<i>North Carolina Federal Sav. and Loan Ass’n v. DAV Corp.</i> , 268 S.C. 514, 381 SE.2d 903 (1989).....	9
<i>Shaw v. Atlantic Coast Life Ins. Co.</i> , 470 S.E.2d 382, 322 S.C. 139 141 (Ct. App. 1996).....	6
<i>Verenes v. Alvanos</i> , 387 S.C. 11, 690 S.E.2d 771 (2010).....	5
<i>Wachovia Bank, N.A. v. Blackburn</i> , 407 S.C. 321, 755 S.E.2d 437 (2014).....	5, 10, 11

RULES

Rule 13(a), SCRCF.....	5
Rule 38(b), SCRCF.....	6, 7
Rule 38(d), SCRCF.....	6, 7, 8
Rule 42(b), SCRCF.....	6
Rule 55(a), SCRCF.....	7, 8

STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE COUNTERCLAIMANT WAS NOT ENTITLED TO A JURY TRIAL ON HIS CIVIL CONSPIRACY COUNTERCLAIM AGAINST THE COUNTERCLAIM DEFENDANT WHEN BOTH PARTIES HAD PREVIOUSLY DEMANDED A JURY TRIAL ON THE CLAIM.
2. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE CIVIL CONSPIRACY COUNTERCLAIM WAS MERELY PERMISSIVE AND NOT COMPULSORY WHERE THE COUNTERCLAIM, IF ESTABLISHED, WOULD HAVE AFFECTED THE FORECLOSURE ACTION BROUGHT BY THE PLAINTIFF.
3. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE COUNTERCLAIMANT WAS NOT ENTITLED TO A JURY TRIAL AS A MATTER OF RIGHT ON HIS CIVIL CONSPIRACY COUNTERCLAIM.
4. WHETHER THE TRIAL COURT ERRED IN BIFURCATING MR. WHITFIELD'S CIVIL CONSPIRACY FROM THE REST OF THE CASE.

STATEMENT OF THE CASE

This appeal is about whether a counterclaim defendant may unilaterally seek to strike and/or withdraw a jury trial demand on a civil conspiracy counterclaim where (1) both the counterclaimant and counterclaim defendant had demanded a jury trial on the claim, (2) the opposing party does not consent, and (3) neither party is in default. This appeal is also about whether a civil conspiracy counterclaim against a counterclaim defendant can be deemed as merely permissive when, if established, the counterclaim would serve as a bar to Plaintiff's underlying foreclosure action. Lastly, this appeal is about whether it was proper for the lower court to bifurcate the counterclaim for civil conspiracy against the counterclaim defendant from the rest of the case and refer it to the Master in Equity for a bench trial.

On September 7, 2012, Harbor National Bank, Plaintiff Pinnacle Bank's predecessor-in-interest, brought the present residential foreclosure action against Anthony M. Whitfield and his ex-wife, Cindy Whitfield. (Complaint, R.___). The action involved a residential property located in Charleston County, commonly referred to in the pleadings as the "Black Rush Property".

The action was one of five (5) foreclosure lawsuits brought by Harbor National Bank against Mr. Whitfield in 2012 for loans made to him in 2007 and 2008, covering eight (8) residential properties located throughout Berkeley, Dorchester, and Charleston Counties. In March of 2014, Harbor National Bank also brought a sixth foreclosure lawsuit against Mr. Whitfield in Dorchester County covering a ninth residential property.

In response to each of the lawsuits—including the present one—Mr. Whitfield filed counterclaims, alleging, *inter alia*, that Plaintiff Harbor National Bank had agreed to renew the loans being foreclosed upon for an additional five-year term, breached that agreement, and caused him damages. (Defendant's Answer, R.___). Specifically, Mr. Whitfield's Answer and

Counterclaim alleged (1) that he met with the president of Harbor National Bank on June 21, 2012, wherein an agreement was made to renew all nine of the loans for an additional five-year term at a reduced interest rate of 4.75%; (2) that a closing was scheduled for the following week on June 28, 2012 and attended by both Mr. Whitfield and a Harbor National Bank representative; and (3) that Harbor National Bank refused to close on any of the nine loan renewals at the closing. (Defendant's Answer, R.___).

As justification and defense for not closing on the loan renewals, Harbor National Bank contended during litigation, and after the foreclosure suit was filed, that it had sought and relied upon the advice of its counsel, David Swanson, Esq., in deciding not to close on any of Mr. Whitfield's loan renewals. (Pl's Memo in Support of Motion for Sum. Judgment, R.___). Specifically, Harbor National Bank, through its employee Scott Warren, claimed that in reliance upon Mr. Swanson's advice, Harbor National Bank had refused to renew the loan for the Black Rush Property without a title endorsement or co-signature from Cindy Whitfield.¹ (Scott Warren Depo. Tr., R.___).

Both Scott Warren and Mr. Swanson testified at their respective depositions that Mr. Warren had a telephone conversation with Mr. Swanson prior to the scheduled closing on June 28, 2020 and that Mr. Swanson had advised Mr. Warren that "under this set of facts" the Bank should get an endorsement from the title company. (R.___). However, Mr. Swanson testified that

¹ Mark Weeks, Esq., the closing attorney for the loan renewal transaction, however, testified that a title endorsement was **not necessary or required** for renewing the loan on the Black Rush Property and that he could have renewed any of the loans without a title endorsement or Ms. Cindy Whitfield's permission and/or authorization to renew the loans. (Memo in Opp. to Motion for Summ. Judgment, R.___). Moreover, according to affidavits on file, he had no knowledge of Mr. Swanson be involved in the transaction or that the bank based its decision in not closing on Mr. Swanson's alleged advice. (R.___).

he had not reviewed any documents or performed any legal research in rendering this advice and that he had not even been aware of the bank customer's name during the call despite a general policy of conducting conflict checks for incoming cases. (R.___). Mr. Swanson also testified that he did not send any bills, record any time, or otherwise keep record of his phone call with Mr. Warren. (R.___).

Subpoenaed telephone records reflected the absence of any calls from Mr. Warren's cell phone and/or office number to Mr. Swanson's cell phone and/or office number at the time and place claimed. (R.___).

On January 8, 2016, as a result of discovery conducted in this case, including the depositions of Mr. Scott Warren, Mr. David Swanson, Mr. Mark Weeks, and multiple bank employees, Mr. Whitfield filed Defendant's Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims ("Fifth Amended Answer"), in which he asserted counterclaims for Civil Conspiracy and Abuse of Process against both Mr. Swanson and the Plaintiff. (Fifth Amended Answer, R.___). The Civil Conspiracy counterclaim against Mr. Swanson alleged, *inter alia*, that both Mr. Swanson and the Plaintiff, through its employee Scott Warren, had provided false testimony that a call had occurred between the two of them prior to the closing; that phone records and other evidence produced during discovery demonstrate that no such call occurred; and that the sworn testimony provided by Mr. Swanson and Mr. Warren—in which they purport that Mr. Swanson advised the bank to procure a title endorsement in order to close on the loan—was given for the ulterior purpose of fabricating a defense as to the bank's failure to renew the loan in accordance with its contractual obligation. (R.___).

As with all previous pleadings filed by Mr. Whitfield, the Fifth Amended Answer demanded a jury trial. (R.___) Like the Fourth Amended Answer before it, the Fifth Amended

Answer also asserted a cross-claim for Contractual Indemnity against Co-Defendant Cindy Whitfield. (R.__)

On February 18, 2016, David Swanson filed Third Party Defendant David Swanson's Answer to the Fifth Amended Answer. (R.__). Mr. Swanson's Answer made a demand for a jury trial. (R.__).

On July 28, 2017, Mr. Swanson filed a Motion for Summary Judgment on the Abuse of Process and Civil Conspiracy claims made against him by Mr. Whitfield. (R.__).

On November 8, 2017, The Honorable J.C. Nicholson, Jr. entered an Order granting Mr. Swanson's Motion for Summary Judgment as to the Abuse of Process claim, but denying the Motion as to the Civil Conspiracy, finding that a genuine issue of material fact exists as to the claim. (R.__).

On March 8, 2019, David Swanson filed a Motion to Bifurcate the Claims Against Mr. Swanson, Strike Mr. Whitfield's Jury Trial Demand, and to Refer the Civil Conspiracy Claim to the Master-In-Equity for a Bench Trial. (R.__). On October 7, 2019, a hearing on Mr. Swanson's motion was heard before the Honorable Diane S. Goodstein. (R.__). An Order granting Mr. Swanson's Motion was entered on October 16, 2019. (R.__). The Order found, *inter alia*, that (1) the civil conspiracy counterclaim is permissive, not compulsory (2) that the counterclaim will not affect the enforceability of the note and mortgage, (3) that Mr. Whitfield is not entitled to a jury trial as of right on the civil conspiracy claim, (4) that no logical relationship exists between Mr. Whitfield's civil conspiracy counterclaim and the foreclosure action or Mr. Whitfield's other counterclaims, and (5) that bifurcation of the civil conspiracy claim is prudent.

On October 18, 2019, Mr. Whitfield filed Defendant Anthony Whitfield's Rule 52(b) Motion to Amend Finding and Rule 59 (e) Motion to Alter or Amend Order. (R.__) An Order

denying Mr. Whitfield's Motion to Alter or Amend was entered in January 6, 2020. (R.__). On February 3, 2020, Mr. Whitfield filed his Notice of Appeal. This Appeal follows.

For purposes of this Appeal, it is also important to note that on June 9, 2020, Plaintiff Pinnacle Bank and Defendant Anthony Whitfield filed a Stipulation of Voluntary Dismissal with Prejudice as to their respective claims against each other. (R.__). The Stipulation does not end the case. The claims against Mr. Swanson and Co-Defendant Cindy Whitfield remain.

STANDARD OF REVIEW

Jury Trials

"[W]hether a party is entitled to a jury trial is a question of law." *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437, 441 (2014), citing *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). "Appellate courts may decide questions of law with no particular deference to the circuit court's findings." *Id.*

Right to Jury Trials for Compulsory Counterclaims

"If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim." *Id.* 407 S.C. at 330, 755 S.E.2d at 441.

"A mortgage foreclosure is an action in equity." *Id.* 407 S.C. at 328, 755 S.E.2d at 440, quoting *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). "An action for civil conspiracy is an action at law." *Mcmillan v. Oconee Memorial Hosp., Inc.*, 626 S.E.2d 884, 886, 367 S.C. 559 (2006).

"By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." *First-Citizens Bank & Trust Co. of S.C. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991), citing Rule 13(a), SCRCP.

Determining Compulsory Counterclaims in Foreclosure Actions

The test for determining if a counterclaim is compulsory is whether there is a “logical relationship” between the claim and the counterclaim. *Mullinax v. Bates*, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). In a foreclosure action, the “logical relationship” test is performed by determining whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage. *Advance Int’l, Inc. v. N.C. Nat’l Bank of S.C.*, 316 S.C. 266, 269-70, 449 S.E.2d 580, 582 (Ct. App. 1994), *aff’d in part, vacated in part*, 320 S.C. 532, 466 S.E.2d 367 (1996).

The Effect of Demanding a Jury Trial in Litigation

The method for demanding a jury trial is set forth in Rule 38(b), SCRCP:

Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. **Such demand may be endorsed upon a pleading of the party.** [Emphasis added]

See also, *Shaw v. Atlantic Coast Life Ins. Co.*, 470 S.E.2d 382, 384, 322 S.C. 139 141 (Ct. App. 1996), which applies the rule.

Pursuant to Rule 38(d), SCRCP, once a demand for jury trial has been made, it may not be withdrawn without the consent of the parties, except where an opposing party is in default:

(d) **Waiver.** The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. **A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties, except where an opposing party is in default under Rule 55(a).** [Emphasis added]

Bifurcation

Rule 42(b), SCRCP, sets forth the Rule as to ordering separate trials. Specifically, Rule 42(b) states:

(b) **Separate Trials.** 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. [Emphasis Added].

Where a defendant in an equitable action asserts a compulsory counterclaim that alleges actions at law, both the plaintiff and the defendant **have a right to have a jury trial** on the issues raised by the compulsory legal counterclaim. *Gardner v. Travis*, 316 S.C. 316, 317-318, 450 S.E.2d 54, 56 (Ct. App. 1994). If there are factual issues common to both the legal and equitable claims, the legal claim, “absent the most imperative circumstances,” must be tried, that is disposed of first *Id.* In determining whether to order separate trials or a single proceeding, “caution should be taken” by the trial court “to assure that, under the circumstances of the case, a joint trial will not deprive a party of his right to a full jury trial of legal issues.” *Id.*

ARGUMENTS

- I. BECAUSE BOTH COUNTERCLAIMANT ANTHONY WHITFIELD AND COUNTERCLAIM DEFENDANT DAVID SWANSON DEMANDED A JURY TRIAL ON MR. WHITFIELD’S CIVIL CONSPIRACY COUNTERCLAIM AGAINST MR. SWANSON, THE COURT ERRED IN STRIKING THE JURY DEMANDS AND FINDING THAT MR. WHITFIELD IS NOT ENTITLED TO A JURY TRIAL.

In the present action, both Counterclaimant Anthony Whitfield and Counterclaim Defendant David Swanson asked for a jury trial on the Civil Conspiracy counterclaim. Specifically, both parties placed jury demand endorsements upon their respective pleadings as permitted by Rule 38(b), SCRCP. (Defendants’ Fifth Amended Answer, R. __; Third Party Defendant David Swanson’s Answer to Defendant’s Fifth Amended Answer, R. __). Pursuant to Rule 38(d), SCRCP, “A demand for trial by jury made as herein provided **may not be withdrawn without the consent of the parties, except where an opposing party is in default**

under Rule 55(a)." [Emphasis Added]. Mr. Whitfield did not consent to either party withdrawing their jury demand. (Transcript, Motion to Strike Jury Demand, R.__; Motion to Alter or Amend, R.__). In addition, neither party is in default under Rule 55(a), SCRCP. Accordingly, pursuant to Rule 38(d), it was an error of law to strike the jury demand. The Circuit Court's Order should be reversed.

II. BECAUSE ANTHONY WHITFIELD'S COUNTERCLAIM FOR CIVIL CONSPIRACY AGAINST DAVID SWANSON, IF ESTABLISHED, WOULD HAVE AFFECTED THE FORECLOSURE ACTION BROUGHT BY PLAINTIFF PINNACLE BANK, THE COURT ERRED IN FINDING THAT THE CIVIL CONSPIRACY COUNTERCLAIM WAS MERELY PERMISSIVE AND NOT COMPULSORY.

During this litigation, Plaintiff Harbor National Bank asserted that it had refused to close on the agreed-upon loan renewal for the Black Rush Property on the advice of its counsel. (Plaintiff's Memo in Support of Motion for Sum. Judgment, p. 4, R.__; Scott Warren, Depo. Tr., R.__). Specifically, Plaintiff Bank asserted that on the advice of its counsel, David Swanson, it would not close on the loan renewal for the Black Rush Property without a title endorsement or co-signature from Cindy Whitfield. (R.__).

The Civil Conspiracy counterclaim made against Mr. Swanson alleges, *inter alia*, that Mr. Swanson and Harbor National Bank employee Scott Warren never actually had a conversation regarding the loan renewal for the Black Rush Property; and that Mr. Swanson and Mr. Warren had conspired with each other in an effort to manufacture a defense as to Harbor National Bank's failure to renew the loan in accordance with its obligation. (Defendant's Fifth Answer, R.__).

As noted above, the test for determining if a counterclaim is compulsory is whether there is a "logical relationship" between the claim and the counterclaim. *Mullinax v. Bates*, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). In a foreclosure action, the "logical relationship" test is

performed by determining whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage. *Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C.*, 316 S.C. 266, 269-70, 449 S.E.2d 580, 582 (Ct. App. 1994), *aff'd in part, vacated in part*, 320 S.C. 532, 466 S.E.2d 367 (1996).

In the present case, a finding that Mr. Swanson conspired with Plaintiff Bank to manufacture a defense in order to avoid closing on the agreed-upon loan renewals would clearly affect the bank's ability to enforce the note and foreclose on the mortgage. Such a finding would eviscerate Plaintiff Bank's reasoning for reneging on its agreement to close on the loan renewals at the June 28, 2012 closing. Had the closing occurred as planned, the terms of the loans would have been modified and Plaintiff Bank would have lacked any conceivable basis for proceeding with a foreclosure action. If Mr. Whitfield were to prevail in establishing his civil conspiracy claim, the subject foreclosure claim would be completely preempted. Accordingly, the Civil Conspiracy counterclaim is a compulsory counterclaim.

Additionally, *North Carolina Federal Sav. and Loan Ass'n v. DAV Corp.*, 268 S.C. 514, 381 S.E.2d 903 (1989), provides us with a similar set of facts from which to view the present case. In *North Carolina Federal*, the South Carolina Supreme Court held that a Defendant's counterclaim in a mortgage foreclosure action was **compulsory** where the Defendant had alleged that the Plaintiff Bank breached an oral agreement to modify the terms of the original loan and provide additional financing. In the present case, Mr. Whitfield's Civil Conspiracy counterclaim, in effect, alleges that Plaintiff Bank and Mr. Swanson conspired to manufacture a bogus defense in an effort to avoid modification of the loan terms and to provide a semblance of legitimacy to Plaintiff's Bank's failure to close on the agreed upon loan renewals. (R. __) As the Supreme Court explicitly held, "Clearly, there is a **logical relationship** between the

enforceability of the note which is the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note by the joint venture.” [Emphasis added] *Id.* at 268 S.C. 518.

Based on the foregoing, it is clear that a logical relationship exists between Mr. Whitfield’s Civil Conspiracy counterclaim and Plaintiff Bank’s ability to foreclose on the mortgage. The counterclaim is compulsory. “If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim.” *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014). Accordingly, the Circuit Court’s finding that Mr. Whitfield is not entitled to a trial by jury as a matter of right should be reversed.

III. BECAUSE ANTHONY WHITFIELD’S COUNTERCLAIM AGAINST DAVID SWANSON WAS A COMPULSORY COUNTERCLAIM AFFECTING THE OUTCOME OF PLAINTIFF’S FORECLOSURE ACTION AND OTHER CROSS-CLAIMS, THE COURT ERRED IN BIFURCATING THE CLAIM FROM THE REST OF THE CASE AND REFERRING IT TO THE MASTER IN EQUITY FOR A BENCH TRIAL.

In the present case, there does not exist “the most imperative circumstances” to warrant separate trials: nearly all of Mr. Whitfield’s claims are grounded in the bank’s failure to renew the loans. See *Gardner v. Travis*, 316 S.C. 316, 317-318, 450 S.E.2d 54, 56 (Ct. App. 1994). Mr. Swanson’s alleged advice is the only reason that Plaintiff Bank did not close on Mr. Whitfield’s loan renewals. (R.__). This decision to not close on the loan renewals served as a catalyst for the alleged default, the ensuing foreclosure action, Mr. Whitfield’s counterclaim against Mr. Swanson, and also Mr. Whitfield’s crossclaim for contractual indemnification against Cindy Whitfield.

As set forth above, if Mr. Whitfield were to prevail in his civil conspiracy claim against

Mr. Swanson, all other claims in this action would be affected and, in effect, likely subsumed and rendered moot. There would be no foreclosure action at all. Accordingly, it was a legal error to bifurcate Mr. Whitfield's compulsory counterclaim from the rest of the case. In addition, because Mr. Whitfield's claim for civil conspiracy is a compulsory claim, it was error to refer this case to the Master in Equity for a bench trial. "If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim." *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014). Further, because a bench trial on a compulsory counterclaim does not preserve inviolate Mr. Whitfield right of trial by jury, as required under Rule 42(b), SCRPC, the Order should be reversed.

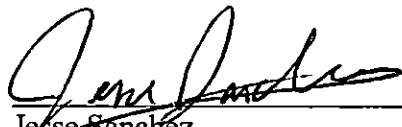
CONCLUSION

For each of the foregoing reasons, it was error for the Circuit Court to grant Mr. Swanson's Motion to Bifurcate the Civil Conspiracy Counterclaim, Strike the Jury Demand, and Refer the Bifurcated Trial to the Master in Equity for a Bench Trial. It was error for the Court to strike Mr. Whitfield's jury demand because 1) Both Mr. Whitfield and Mr. Swanson demanded a jury trial as to the Mr. Whitfield's counterclaim in their respective pleadings; 2) the Parties did not meet the pre-requisites set forth under Rule 38(d), SCRPC, for withdrawing a demand for trial by jury: Mr. Whitfield did not consent to withdrawal of his jury demand and neither party was in default under Rule 55(a), SCRPC; 3) Mr. Whitfield's counterclaim for civil conspiracy is compulsory counterclaim, which affords him the right to a jury trial; 4) Mr. Whitfield's counterclaim for civil conspiracy, if established, would have affected the Plaintiff Bank's ability to enforce the note and foreclose on the mortgage; 5) A logical relationship exist between Mr. Whitfield's Civil Conspiracy Counterclaim and Plaintiff Bank's ability to foreclose on the

mortgage.

In addition, it was error for the Circuit Court to bifurcate Mr. Whitfield's claim from the rest of the case and refer it to the Master in Equity for a bench trial, because 1) a Defendant in an equitable action who asserts a compulsory counterclaim has a right to a jury trial; 2) The reference to the Master in Equity for a bench trial will deprive Mr. Whitfield of his right to a full jury trial of the legal issues in this case; and 3) There are factual issues and witnesses that are common to all the claims set forth in this action, which would render separate trials inconvenient to the Parties and work counter to principles of judicial economy. For these reasons, the Circuit Court's Order should be reversed.

Respectfully submitted,



Jesse Sanchez

The Law Office of Jesse Sanchez, LLC
98 ½ Broad Street, Suite B
Charleston, South Carolina 29401
(843) 814-8181

Daniel S. Slotchiver
Andrew J. McCumber
Slotchiver & Slotchiver, LLP
751 Johnnie Dodds Boulevard, Suite 100
Mount Pleasant, South Carolina 29464
(843) 577-6531

Brent S. Halversen
Brent Souther Halversen, LLC
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, SC 29464
(843) 284-5790

June 15, 2020
Charleston, South Carolina

EXHIBIT C

3. Responding to the allegations contained in Paragraphs 66 and 67 of Third Party Plaintiffs Complaint, Third Party Defendant admits only so much of the allegations contained in Paragraph 66 and 67 as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraphs 66 and 67.

4. Third Party Defendant denies the allegations contained in Paragraphs 68 and 69 of Third Party Plaintiff's Complaint.

5. Responding to Paragraph 70 of Third Party Plaintiff's Complaint, Third Party Defendant admits only so much of the allegations contained in Paragraph 70 of Third Party Plaintiff's Complaint as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraph 70.

6. Third Party Defendant denies the allegations contained in Paragraphs 71 and 72 of Third Party Plaintiff's Complaint.

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

8. Responding to Paragraphs 74 and 75 of The Third Party Plaintiff's Complaint, Third Party Defendant admits only so much of the allegations contained in Paragraphs 74 and 75 of Third Party Plaintiff's Complaint as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath

concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraph 74 and 75.

9. Third Party Defendant denies the allegations contained in Paragraphs 76 and 77 of Third Party Plaintiff's Complaint.

10. Responding to Paragraph 78 of The Third Party Plaintiff's Complaint, Third Party Defendant admits only so much of the allegations contained in Paragraph 78 of Plaintiff's Complaint as to indicate Third Party Defendant had a conversation with Scott Warren regarding a title endorsement, and both parties to that conversation have testified under oath concerning the existence of that conversation and the substance thereof. Third Party Defendant denies the remainder of the allegations contained in Paragraph 78.

11. Third Party Defendant denies the allegations contained in Paragraphs 79 through 82 of Third Party Plaintiff's Complaint.

12. In response to Paragraph 83 of Third Party Plaintiff's Complaint, Third Party Defendant repeats and re-alleges every preceding paragraph of this Third Party Answer as if restated herein verbatim.

13. Third Party Defendant is without sufficient knowledge and information to form an opinion as to the allegations contained in Paragraphs 84 through 87 of Third Party Plaintiff's Complaint, and therefore denies the same.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

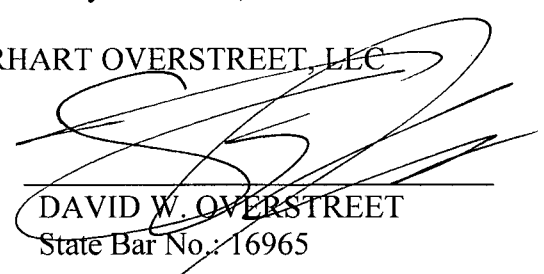
27. Third Party Defendant reserves any additional and further defenses that may be revealed by information obtained during the course of investigation and discovery as consistent with the South Carolina Rules of Civil Procedure.

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

This 15 day of February, 2016.

Respectfully submitted,

EARHART OVERSTREET, LLC

By: 

DAVID W. OVERSTREET
State Bar No.: 16965

STEVEN R. KROPSKI
State Bar No.: 101441

Attorneys for Third Party Defendant David Swanson

P.O. Box 22528
Charleston, SC 29413
843-972-9404

EXHIBIT D

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Bank of North Carolina,

Plaintiff,

vs.

Anthony Whitfield and
Cindy Whitfield,

Defendants.

Anthony Whitfield,

Counterclaimant

vs.

David Swanson,

Counterclaim Defendant

) IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

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

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

**DAVID SWANSON'S NOTICE OF
MOTION AND MOTION TO BIFURCATE
TRIAL, STRIKE JURY DEMAND, AND
REFER BIFURCATED TRIAL TO THE
MASTER IN EQUITY**

FILED
MAR -8 PM 12:21
J. ARMSTRONG
CLERK OF COURT
3/8/19

TO: BRENT S. HALVERSON, ESQ. and DANIEL S. SLOTCHIVER, ESQ., ATTORNEYS
FOR DEFENDANT/COUNTERCLAIMANT ANTHONY WHITFIELD:

PLEASE TAKE NOTICE that David Swanson, by and through his undersigned counsel, moves for an Order bifurcating the claim of civil conspiracy brought against him, striking the claimant's jury demand, and referring the trial of the civil conspiracy claim to the master in equity, as the claims brought against Swanson are permissive counterclaims to an action of foreclosure. This Motion is supported by the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and all arguments of counsel made at a hearing on this motion.

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), SCRPC. 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), SCRPC.

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, SCRC.

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.

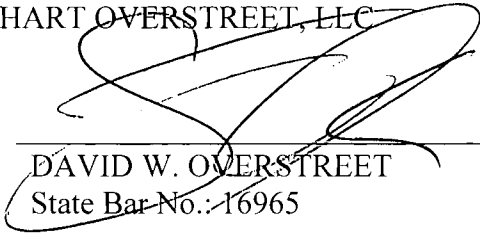
[SIGNATURE TO FOLLOW]

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

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.

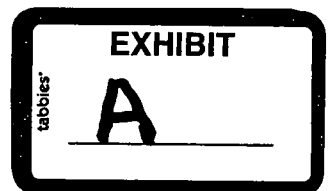
ALSO: IF THE SHORT SALE IS A GOVERNMENT BACKED LOAN THEN THE PACKAGE MUST BE RECEIVED FIVE DAYS PRIOR TO CLOSING.

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 prelim docs
5. Closing package

Thanks. 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.

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

Disclaimer:

This message is intended only for specified recipients. If you are not the intended recipient you are notified that disclosing, copying, distributing, or taking any action in reliance on the contents of this information is strictly prohibited. This communication represents the originator's personal views, which may not reflect those of Harbor National Bank. Security Warning: This message is being sent over an unsecured medium. Recipients should not reply to this message with sensitive or confidential account information. If the need arises to communicate sensitive or confidential account information, customers should visit or contact the nearest branch office. If you received this email in error, please immediately notify websupport@harborbankgroup.com

Disclaimer:

This message is intended only for specified recipients. If you are not the intended recipient you are notified that disclosing, copying, distributing, or taking any action in reliance on the contents of this information is strictly prohibited. This communication represents the originator's personal views, which may not reflect those of Harbor National Bank. Security Warning: This message is being sent over an unsecured medium. Recipients should not reply to this message with sensitive or confidential account information. If the need arises to communicate sensitive or confidential account information, customers should visit or contact the nearest branch office. If you received this email in error, please immediately notify websupport@harborbankgroup.com

Exhibit “B”

From: Teresa Farley
To: Scott Warren; Felicia Pringle
Subject: FW: Lender Title Policy Question - Whitfield / Mod of Mtg
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.

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

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 (mailto: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 Mtg

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

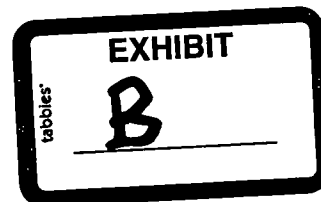
BARRY: please respond to my email as to confirm or correct...thanks. TF

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.

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

Those 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: Scott Warren [mailto:swarren@harborbankgroup.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 these 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.

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 re-close 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: 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.

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
6086-B Rivers Avenue
North Charleston, SC 29406
Phone: (843) 553-9800 ext. 3015
Fax: (843) 553-5847
tfarley@weekslawfirm.net

Disclaimer:

This message is intended only for specified recipients. If you are not the intended recipient you are notified that disclosing, copying, distributing, or taking any action in reliance on the contents of this information is strictly prohibited. This communication represents the originator's personal views, which may not reflect those of Harbor National Bank. Security Warning: This message is being sent over an unsecured medium. Recipients should not reply to this message with sensitive or confidential account information. If the need arises to communicate sensitive or confidential account information, customers should visit or contact the nearest branch office. If you received this email in error, please immediately notify websupport@harborbankgroup.com

Exhibit “C”

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

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

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

HARBOR NATIONAL BANK,
Plaintiff,

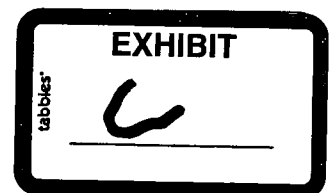
-vs-

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



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

Page

EXAMINATION

By Mr. Halversen

5

Certificate of Reporter

127

E X H I B I T S

DEFENDANT'S

Page

1 June 20, 2012 E-mail
2 Credit Narrative
3 June 21, 2012 E-mail
4 June 22, 2012 E-mail
5 June, 25, 2012 E-mail
6 June 25, 2012 E-mail
7 June 26, 2012 E-mail
8 June 26, 2012 E-mail
9 Renewal & Modification
10 E-mail with attachment
11 Settlement Statement
12 June 27, 2012 E-mail
13 June 27, 2012 E-mail
14 June 27, 2012 E-mail

17
20
20
23
27
27
29
30
31
39
42
42
45
55

1	Exhibits continued:		
2	15	June 27, 2012 E-mail	55
3	16	E-mail with attachment	56
4	17	June 27, 2102 E-mail	58
5	18	Payoff Statement	74
6	19	June 7, 2012 E-mail	75
7	20	FIS Document	76
8	21	June 28, 2012 E-mail	85
9	22	June 29, 2012 E-mail	100
10	23	July 2, 2012 E-mail	109
11	24	July 2, 2012 E-mail	112
12	25	July 17, 2012 E-mail	116
13	26	August 22, 2012 E-mail	117
14	27	November 30, 2012 E-mail	118
15	28	Affidavit of Scott Warren	118
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			

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

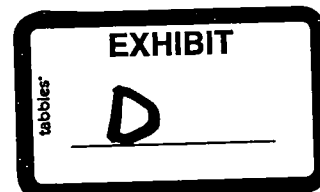
HARBOR NATIONAL BANK,	)	DEPOSITION OF:
	)	DAVID SWANSON
Plaintiff,	)	
	)	
-versus-	)	
	)	
ANTHONY M. WHITFIELD,	)	
	)	
Defendant.	)	
	)	

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



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

Witness	
SWANSON, DAVID (sworn)	
	Page
Examination by Mr. Halversen	4, 70
Examination by Mr. Whitaker	68
Reporter's Certificate	73

EXHIBITS

(No exhibits were offered or marked for
identification.)

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

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

4 VIDEOTAPED DEPOSITION OF DAVID M. SWANSON

5 HARBOR NATIONAL BANK,

6 Plaintiff,

7 vs. CASE NO. 2012-CP-10-5887

8 ANTHONY WHITFIELD, CINDY WHITFIELD AND DAVID SWANSON,

9 Defendants.

10
11
12
13 DEPONENT: DAVID M. SWANSON

14 DATE: April 18, 2017

15 TIME: 2:06 PM

16 LOCATION: HAYNSWORTH SINKLER BOYD, P.A.
17 134 Meeting Street
18 3rd Floor
19 Charleston, SC 29401

20
21
22
23
24
25
19 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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

Page

Witness Sworn	4
EXAMINATION	
By Mr. Slotchiver	5
By Ms. Garan	75
Certificate of Reporter	77
Deponent Correction Sheet	78

E X H I B I T S

Page

Defendants' Exhibit Number 1	7
Defendants' Exhibit Number 2	15
Defendants' Exhibit Number 3	25
Defendants' Exhibit Number 4	30
Defendants' Exhibit Number 5	59
Defendants' Exhibit Number 6	59

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
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S

REPRESENTING HARBOR NATIONAL BANK:

BRIAN C. DUFFY, ESQUIRE
Duffy & Young, LLC
96 Broad Street
Charleston, South Carolina 29401
Bduffy@duffyandyoung.com

REPRESENTING ANTHONY WHITFIELD:

BRENT S. HALVERSEN, ESQUIRE
Halversen & Associates, LLC
171 Church Street
Suite 330
Charleston, South Carolina 29401
Brent@halversenlaw.com

DANIEL S. SLOCHIVER, ESQUIRE
Slotchiver & Slotchiver
44 State Street
Charleston, South Carolina 29401

REPRESENTING DAVID SWANSON:

DAVID W. OVERSTREET, ESQUIRE
STEVEN R. KROPSKI, ESQUIRE
Earhart Overstreet, LLC
P.O. Box 22528
Charleston, South Carolina 29413
David.overstreet@earhartoverstreet.com

1	INDEX	
2	TESTIMONY OF ANTHONY WHITFIELD	
3	EXAMINATION BY MR. OVERSTREET	8
	EXAMINATION BY MR. DUFFY	85
4	EXAMINATION BY MR. KROPSKI	217
	EXAMINATION BY MR. SLOTCHIVER	225
5	EXAMINATION BY MR. DUFFY	255
6		
	REPORTER'S CERTIFICATE	258
7	ERRATA SHEET	259

8	INDEX OF EXHIBITS		
9			
10	Number	Description	Page
11			
12	Deposition Exhibit No. 1	Handwritten notes of Anthony Whitfield	8
13	Deposition Exhibit No. 2	5/30/17 letter from Earhart Overstreet to Mr. Slotchiver identifying documents for use at deposition	13
14			
15	Deposition Exhibit No. 3	Notice of Deposition	15
16	Deposition Exhibit No. 4	Settlement Statement - Black Rush Circle	16
17	Deposition Exhibit No. 5	Note	18
18	Deposition Exhibit No. 6	Real Estate Mortgage 4/23/07	19
19	Deposition Exhibit No. 7	Final Order and Decree of Divorce	22
20	Deposition Exhibit No. 8	Title to Real Estate	26
21	Deposition Exhibit No. 9	1/8/16 Defendant's Fifth Amended Answer, Affirmative Defenses, Cross-Claim and Counterclaims	27
22			
23	Deposition Exhibit No. 10	E-mail chain	55
24	Deposition Exhibit No. 11	E-mail chain	56
25	Deposition Exhibit No. 12	E-mail chain	64
	Deposition Exhibit No. 13	E-mail chain	65

1	Deposition Exhibit No. 14	Financial Statement	71
		Anthony M. Whitfield	
2		10/1/2011	
3	Deposition Exhibit No. 15	Real Estate	75
		Mortgages/Rental	
4	Deposition Exhibit No. 16	Income April 1, 2012	79
		Charleston County	
5	Deposition Exhibit No. 17	Public Index	
		100 Coachman Drive	104
6	Deposition Exhibit No. 18	documents	
		Deposition	126
7		Transcript of Scott	
		Warren, taken	
8		11/13/13	
	Deposition Exhibit Nos.	List of homes	144
9	19, 20, and 21		
10	Deposition Exhibit No. 22	Plaintiff's First	189
		Set of Requests for	
11		Admissions to	
		Defendant Anthony M.	
12		Whitfield	
	Deposition Exhibit No. 23	Defendant's Answers	189
13		to Plaintiff's First	
		Set of Requests for	
14		Admission	
	Deposition Exhibit No. 24	Documents regarding	230
15		106 Peppertree	
	Deposition Exhibit No. 25	Documents regarding	244
16		68 Princeton	
	Deposition Exhibit No. 26	Documents regarding	250
17		8206 Holly Knoll	

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

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?

EXHIBIT E

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

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,

vs.

ANTHONY WHITFIELD, CINDY
WHITFIELD AND DAVID SWANSON

Defendants.

DEFENDANT ANTHONY WHITFIELD'S
RULE 52(b) MOTION TO AMEND
FINDINGS AND RULE 59 (e) MOTION
TO ALTER OR AMEND ORDER ON
MOTION TO BIFURCATE TRIAL,
STRIKE JURY TRIAL DEMAND, AND
REFER BIFURCATED TRIAL TO THE
MASTER IN EQUITY

BY

2019 OCT 18 PM 4:19
JULIE J. ARMSSTRONG
CLERK OF COURT

FILED

Pursuant to Rule 52(b) and Rule 59(e) of the South Carolina Rules of Civil Procedure, Defendant, Anthony M. Whitfield, respectfully moves the Court to amend its findings and alter or amend the Order filed October 16, 2019 in which the Court granted Mr. David Swanson's Motion to Bifurcate Trial, Strike Jury Trial Demand filed March 8, 2019. Mr. Whitfield respectfully moves the Court for an Order reconsidering and altering or amending its October 16, 2019 Order. The undersigned certifies that consultation with opposing counsel would serve no useful purpose.

GROUND FOR MOTION

A party may file a motion to reconsider and alter or amend an order when it believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider

or rule on it. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). In addition, a party may file a motion with the Court to amend its findings, or make additional findings and to amend the judgment accordingly pursuant to Rule 52, SCRCP.

PROCEDURAL BACKGROUND

In 2007 and 2008, Plaintiff made nine loans to Mr. Whitfield, for nine different residential properties. The loans were for five year terms. Beginning in 2012, those loans began coming due. In 2012, Plaintiff initiated five (5) foreclosure lawsuits covering eight of those properties in Berkeley, Dorchester, and Charleston Counties. In March of 2014, another foreclosure lawsuit covering one of the properties was filed in Dorchester County, bringing the total of six (6) foreclosure lawsuits covering nine (9) different properties. All of the properties were single family residential rental properties, except the Charleston County property which was purchased by Mr. Whitfield for his ex-wife, in order to meet his family court obligations in 2007.

In response to the foreclosure lawsuits, Mr. Whitfield counterclaimed in each of the lawsuits claiming, *inter-alia*, that Plaintiff made an agreement to renew all the loans for another five year term, breached that agreement, and caused him damages. Specifically, Mr. Whitfield met the president of the bank on June 21, 2012 where an agreement was made to renew all nine of Mr. Whitfield's loans for another five year term, at a reduced interest rate of 4.75%. After the meeting, the bank contacted the closing attorney Mark Weeks, Esq. and set up a closing for the following week, on June 28, 2012. Mr. Whitfield attended the

closing for the renewal of all nine (9) loans on June 28, 2012, and the bank refused to close any of the nine (9) loans at the closing.

The bank's **main defense** of Mr. Whitfield's counterclaims is that **the bank sought and relied upon the advice of its counsel, Mr. David Swanson, in deciding not to close any of Mr. Whitfield's renewals at the closing attended by the bank on June 28, 2012:**

On June 28, 2012, Warren and Whitfield attended an attempted closing of the renewal transactions at the office of Mark Weeks, Esq. On the advice of its counsel, David Swanson, Esq., Harbor refused to close without a title endorsement or co-signature from Cindy Whitfield.³

(Plaintiff's Memorandum In Support of Motion for Summary Judgment, filed September 15, 2014, P. 4)

Harbor National Bank through its employee Mr. Scott Warren¹ - who attended the closing- claims to have relied upon the advice of its attorney, Mr. David Swanson, that a title endorsement was needed to renew the loan for the Black Rush Property. Mark Weeks, the closing attorney at the June 28, 2012 closing, testified that no title endorsement was necessary or required for the Black Rush Property and that he could have renewed any of the loans without an endorsement or Ms. Cindy Whitfield's permission and/or authorization to renew the loans. (See Memorandum in Opposition to Summary Judgment, Exhibit "B" filed September

¹ It was not necessary to add Scott Warren as an individual defendant as Harbor National Bank is liable for its employees torts when the employee acts in the course and scope of their employment, even if the acts alleged exceed the bank's authority if the acts done were in furtherance of the master's business. See Crittenden v. Thompson-Walker Co., 288 S.C. 112, 115, 341 S.E.2d 385, 387 (Ct. App. 1986)

12, 2014). Mr. Swanson also claims that his advice to procure a “title endorsement” was provided to Harbor National Bank without receiving or reviewing any documents or even knowing the name of the bank customer. Mr. Swanson further testified that he did not perform any legal research, provide any written opinion, and did not charge the bank any fees for the advice. In fact, there is not a single document at Mr. Swanson’s law firm suggesting or confirming that the advice was ever given. (See Memorandum in Opposition to Swanson Summary Judgment, filed August 25, 2017).

Although Mr. Swanson testified that Mr. Warren called him with a “question on this set of facts,” on June 28, 2012, telephone records subpoenaed over objection from each Mr. Warren and Mr. Swanson confirm no calls were received from Mr. Warren’s cell phone or office number to Mr. Swanson’s cell phone or office number at the time and place claimed: one day before the closing on June 27, 2012.

Additionally, the bank never raised a legal defense of the title endorsement requirement until October, 2013 *after initially replying to Mr. Whitfield’s counterclaims that an agreement was reached* with Mr. Whitfield to renew his loans, and never making any mention of the “title endorsement” defense. The bank admitted that it made an agreement to renew Mr. Whitfield’s loan in its first Reply to his counterclaims filed with this Court on April 25, 2013. The bank subsequently changed its pleading on this matter and denied it made an agreement to renew Mr. Whitfield’s loans in its later filed Replies wherein it asserted the “title endorsement” defense -- based upon Mr. Warren and Mr.

Swanson's testimony that Mr. Warren called Mr. Swanson just before the June 28, 2012 closing. Moreover, the closing attorney Mark Weeks and Mr. Whitfield were never told at the time that the reason the bank decided not to close was because of Mr. Swanson's advice.

The lack of any physical evidence that the advice was given to the bank pre-closing -- in addition to multiple witnesses' testimony that no communications were made with Mr. Swanson at any point in time during the closing or in the months thereafter—is all evidence that the defense was fabricated by Mr. Warren and Mr. Swanson in an attempt to provide a defense for the bank's failure to close the loans.

Because there is substantial evidence that tends to prove that the advice was never given at the time Mr. Warren and Mr. Swanson claim it was given, Mr. Whitfield amended his Answer and Counterclaims to assert a cause of action based upon civil conspiracy, because, **if the finder of fact decides the advice was never given at the time and place claimed, then the bank will not be able to foreclose.** The law regarding what constitutes a civil conspiracy in South Carolina states:

Conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators and other circumstances. [citations omitted] Civil conspiracy is an act which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence; concert of action, amounting to a conspiracy, may be shown by circumstantial as well as direct evidence. [citations omitted]. And in order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise. Proof showing concert of action in the commission of the unlawful acts, from which the natural or reasonable inferences arise that the acts were in furtherance of the common design of the alleged conspirators, is sufficient; at least to establish a prima facie case of conspiracy. [citations omitted]

Island Car Wash, Inc. v. Norris, 292 S.C. 595, 601-02, 358 S.E.2d 150, 153 (Ct. App. 1987).

On July 28, 2017, David Swanson moved for summary judgment on abuse of process and civil conspiracy counts lodged against him by Mr. Whitfield. Judge Nicholson granted the motion as to abuse of process, but denied the motion as to the civil conspiracy claim, finding an issue of material fact as to the civil conspiracy claim, i.e., that facts to be decided could make out a civil conspiracy between Mr. Warren and Swanson. (See Judge Nicholson Order filed November 8, 2017). On March 8, 2019, David Swanson filed the motion to bifurcate the claims against Mr. Swanson, strike Mr. Whitfield's jury trial demand, and to refer the civil conspiracy claim to the Master-In-Equity for a bench trial, which this Court granted on October 16, 2019. This motion follows.

Argument

I. Mr. Whitfield's counterclaim of civil conspiracy against the alleged co-conspirators, Mr. Warren and Mr. Swanson, is a legal claim, afforded a trial by jury.

Mr. Whitfield properly sued Mr. Swanson and the bank, alleging them to be co-conspirators who had fabricated a legal defense to Mr. Whitfield's claims based upon events that either never occurred, or did not occur as claimed. Mr. Swanson was added as a party to the civil conspiracy cause of action counterclaim, as specifically allowed under Rule 13(h):

(h) Joinder of Additional Parties. Parties other than those to the original action may be made parties to a counterclaim or cross-claim in accordance with Rules 19 and 20.

13(h), SCRCP.

Specifically with regard to joinder of persons, the law has set forth the following analysis. Rule 19(a)(1) states:

(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties.

19(a)(1), SCRCP.

The South Carolina Constitution provides “[t]he right of trial by jury shall be preserved inviolate.” S.C. Const. art. I, § 14. “The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868.” Mims Amusement Co. v. S.C. Law Enforcement Div., 366 S.C. 141, 149, 621 S.E.2d 344, 348 (2005) (citation omitted)(Emphasis added). Additionally, Rule 38(b), SCRCP, provides, in pertinent part:

Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor[e] in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

Mr. Whitfield demanded a jury trial on Page 22 of his Fifth Answer, Affirmative Defenses, and Counterclaims filed on January 8, 2016. “Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions.” Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). In response to Mr. Whitfield’s

civil conspiracy claim, **Mr. Swanson asked for a jury trial.** (See Answer filed February 18, 2016). Swanson should be barred from now asking for a bench trial pursuant to SCRCP 38(d):

(d) **Waiver.** The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. **A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties,** except where an opposing party is in default under Rule 55(a).

As argued at the hearing on the motion, Mr. Whitfield is not in default and never consented to Mr. Swanson's request to waive the demand to a jury trial. On this ground alone, Mr. Swanson should not now be able to waive his demand for a jury trial and seek equitable disposition, two weeks before trial set for October 21, 2019.

II. **Mr. Whitfield's claim for civil conspiracy, if established, would prevent the bank from enforcing its note and mortgage and therefore is an indisputably compulsory – not permissive-- counterclaim.**

A. Mr. Whitfield's civil conspiracy claim is based upon a concert of activity between Mr. Swanson and Mr. Warren **that the Mr. Warren and Mr. Swanson allege occurred before the closing.**

A counterclaim is "compulsory" if it arises out of the transaction or occurrence that is **the subject matter** of the opposing party's claim. See Rule 13(a), SCRCP (Emphasis added). Conversely, a counterclaim is "permissive" if it does not arise out of the transaction or occurrence that is **the subject matter** of the opposing party's claim. See Rule 13(b), SCRCP (Emphasis Added). In this case, **Mr. Whitfield's claim of civil conspiracy arises out of the renewal of**

his loans on or about June 28, 2012 (the transaction or occurrence) that is the subject matter of the bank's claim of mortgage foreclosure and alleged default.

In North Carolina Federal Sav. and Loan Ass'n v. DAV Corp., 298 S.C. 514, 381 S.E.2d 903 (1989) the South Carolina Supreme Court held that a defendant asserted compulsory counterclaims in a mortgage foreclosure action when it alleged the Plaintiff bank breached an oral agreement to provide additional financing by modifying the terms of the original financing. **The same fact pattern is true in this case:** Mr. Whitfield alleges on June 21, 2012 he reached an oral agreement² with the CEO of the Plaintiff's bank, Mr. Charlie Rivers, to extend the terms of the original loans an additional five years at a reduced interest rate of 4.75%, and went to a closing 7 days later attended by Mr. Warren from the bank. In North Carolina Federal, the Supreme Court adopted the "logical relationship test" in order to determine whether a counterclaim was compulsory or permissive in the context of a mortgage foreclosure case. The Court found that there was a logical relationship, "between the enforceability of the note which is the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note." *Id.* at 518.

The North Carolina Federal Court found that because the borrower relied upon the purported oral agreement in its first five counterclaims of breach of oral

² For purposes of this motion, statute of frauds positions by both parties have not been addressed. Those positions have been thoroughly briefed and addressed by the Court in this Court's motion denying Plaintiff's motion for summary judgment.

contract, breach of fiduciary duty, wrongful dissolution, and violation of unfair trade practices act, “there was a logical relation between the enforceability of the note and the purported oral agreement, which if performed, would have avoided a default.” *Id.* Likewise here, Mr. Whitfield alleges the Plaintiff bank made an agreement to renew his loans and breached this agreement without any factual or legal basis, but for the alleged interjection of Mr. Swanson’s dubious advice in which Mr. Whitfield has significant evidence was never given to the Plaintiff bank on the date and time claimed:

- (a) No record of the telephone call on the date and times it was claimed was made;
- (b) No record at the law firm of any work done or billing entry to corroborate advice was given;
- (c) Closing attorney testimony that he was unaware of Swanson’s advice not to close at the time of closing;
- (d) Mr. Whitfield’s testimony that no one told him the basis for the failure to close;
- (e) Not a shred of any communication corroborating the involvement of Swanson or between Swanson and the bank at any time in the months that followed when the parties were attempting a work out;
- (f) Legal justification of Mr. Swanson’s advice has no supportable basis in any caselaw (equitable subordination of lien holder to after acquired equity interest by Mrs. Whitfield); and
- (j) bank compliance officer testimony they told Mr. Warren a day after closing to get an attorney involved immediately, suggesting one was never involved before then.

On the authority of *North Carolina Federal*, Mr. Whitfield has stated a compulsory counterclaim because if the jury finds that a conspiracy did exist between Mr. Warren and Mr. Swanson to manufacture a reason not to close,

then necessarily, the bank will not be able to foreclose as Mr. Whitfield will have proved his counterclaim: that the bank made an agreement to renew them and the bank failed to close without any legitimate excuse.

Mr. Whitfield never alleged in his counterclaim that the factual basis of the civil conspiracy is due to events that occurred solely after the closing, as Mr. Swanson's counsel alleged in the motion and at the hearing, although it is true that further evidence of the conspiracy was learned after the fact at Mr. Swanson's witness deposition.

Mr. Whitfield never made an allegation in his civil conspiracy cause of action (§§ 74-79) as to the *timing* of when Mr. Swanson and the bank made an agreement to conspire. "Civil conspiracy is an act which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence." Island Car Wash, Inc., 292 S.C. at 601-02. Indeed, it would be near impossible in any civil conspiracy claim to have such precise information, including here. Essentially, the motion before the Court seeks to use Mr. Whitfield's lack of knowledge as to when the conspiracy crystalized, as a means to argue that the conspiracy occurred after the closing and that the conspiracy claim was therefore a a permissive counterclaim.

By adopting the argument advanced by Mr. Swanson, this Court has, in effect, found that no conspiracy claim can be made against Mr. Swanson or the bank because the Court has determined the conspiracy occurred after the closing. However, it is irrefutable that the bank and Swanson each *claim* they were involved with this transaction- **before** the closing of the loans- not afterwards.

Although Mr. Whitfield, based upon deposition testimony cited in Mr. Swanson's motion, believes there was possibly some additional conspiring done between the parties after the closing -- that does not negate the factual allegation that the parties began conspiring before the closing (§§ 66-69 of Civil Conspiracy Counterclaim). Accordingly, the existence of a post-closing conspiracy does not negate Mr. Whitfield's ability to assert the compulsory counterclaim that a conspiracy began before the closing. The elements of civil conspiracy are as follows and are only determined by three factors:

A civil conspiracy, on the other hand, consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage. [citations omitted] **The gravamen of the tort is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination.** [citation omitted]. A civil conspiracy may, of course, be furthered by an unlawful act.

Lee v. Chesterfield Gen. Hosp., Inc., 289 S.C. 6, 10–11, 344 S.E.2d 379, 382 (Ct. App. 1986)

It is entirely possible that Mr. Warren conspired with Mr. Swanson to manufacture the bank's excuse not to close before the date of the closing on June 28, 2012. It is also entirely possible that Mr. Swanson's deposition testimony after the closing, where it appears he testified to events that never occurred, was an unlawful act, furthering the conspiracy. The lynchpin of Mr. Swanson's argument that Mr. Whitfield's counterclaim is permissive is the contention that the alleged conspiring was temporally done after the closing:

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.

Judge Goodstein Order, dated October 16, 2019, P.6

As stated above, Mr. Whitfield has no knowledge of when the conspiracy agreement between the bank and Mr. Swanson was reached- but he has marshalled evidence contradicting Mr. Warren and Mr. Swanson's testimony that the advice *did not occur at the time and place which they claimed*, and that it was in Mr. Warren and Mr. Swanson's mutual self-interest to fabricate the defense. *Exactly* when Mr. Warren and Mr. Swanson formed their conspiracy is **ultimately a question for the jury**- not to be decided in motion practice- and certainly not to form the predicate to strip Mr. Whitfield's right to a trial by jury.

- III. **In addition to conditioning the renewal of the loans on a title endorsement, the bank also expressly conditioned the renewal of the loans on Mr. Whitfield signing a fraudulent affidavit that the properties were owned and pledged for a business purpose-including Black Rush-the property undisputedly known at the time to be the residential home of Cindy Whitfield, as opposed to a rental. This demand came from David Swanson per bank testimony. This is evidence that has previously been presented to the Court, in the Court record.**

Mr. Swanson's only documentary evidence of giving the advice to obtain a title endorsement before closing (on June 28, 2012) is in the form of an email the day before closing from Mr. Scott Warren to Teresa Farley, a paralegal in Mark Weeks office, discussing the fact that Mr. Whitfield's ex-wife Cindy Whitfield was on title. The email states:

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 these properties are owned and pledged for business purpose.

Thanks again. Felecia 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

Email from Scott Warren to Teresa Farley and Felicia Pringle dated June 27, 2012, attached as Exhibit 13 to Dep. of S. Warren taken on November 13, 2013. (Emphasis added).

Mr. Warren was questioned in his deposition about where the advice for a business purpose affidavit came from:

Q. [a]nd then you respond and say, "Thank you for your work on this. I called bank counsel to get some advice on how to handle it." And then you say, (a) need to get a title endorsement on Black Rush, da, da, da. And then you say, (b) "We also need an affidavit from Tony that these properties are owned & pledged for business purpose." Do you recall -- I'm assuming that that was part and parcel of your discussion with Mr. Swanson since the way you have the E-mail laid out, but it may not be, and that's all I was trying to figure out.

A. That -- I can -- you know, we're going off recollections, you know, prior conversations, and as far as what I can say with certainty, I remember a lot about the discussions as far as title endorsements, and I remember less about the business purpose affidavit. And if that was -- **it makes sense that it was discussed**

with Swanson. I can't give you any specifics on that conversation. My recollection is not good enough.

Q. Okay. Let me ask you this then and I hear what you're saying: Is there somebody else that would have put that in as a demand about the business -- the affidavit signed for -- that the properties are owned and pledged for business purpose other than Mr. Swanson?

A. Is there somebody that would have put it in as a demand? You know, as you can see, group effort, third parties within the bank come up with the best closing package specific to this situation and, **yes, it's possible somebody else came up with that as a way to do it.**

Q. Because if it's not somebody else and this is an instruction coming from you to them, that we need (a) and (b), and all I want to know is, did the idea for (b) come from just you or did it come from somebody else, or maybe it came from Mr. Swanson, but you really don't remember?

A. Again, at this time, I don't remember enough to speak to that. I can go back through the E-mails and try to -- or prior conversations, whatever I can do to clarify it, but I cannot speak to that right now as far as where the idea came from.

Q. Okay.

A. And that's what's being asked I believe.

Q. Correct. And I think you're not sure if that was your idea --

A. Correct.

Q. -- given what you're telling me?

A. Correct.

Dep. of S. Warren, P. 80, L. 6 – P. 82, L. 4)

Mr. Swanson, for his part, knew at deposition that the issue of asking Mr. Whitfield to sign an affidavit that his properties were owned and pledged for a business purpose was a hot potato, as the bank undeniably knew at this time that the Black Rush loan was a consumer loan in order to fulfill Mr. Whitfield's family court obligations. Harbor National Bank's "demand" that Mr. Whitfield swear out

an affidavit that Black Rush was for a "business purpose" as a condition of their renewing the Black Rush loan was asking Mr. Whitfield to lie about who was living in the property and why. Presumably, that is why Mr. Swanson was emphatic that he did not give advice to Mr. Warren regarding procuring a business purpose affidavit (subsection (b) of the email):

Q. Okay. Did you advise Mr. Warren that -- that he needed to procure an affidavit from the borrower, that the property was to be pledged for business purposes?

A. **No. I didn't get into that. I read about that in that -- I guess his deposition, but he didn't ask me about that particular issue.**

Q. Okay. So that wasn't advice you gave him?

A. **No.**

Q. Okay. If Mr. Warren said that, would you disagree with him?

A. If he said what?

Q. If he suggested that -- or stated that you told him to get a business- purpose affidavit from Mr. Whitfield for the house that the ex-spouse was living in? If he said that, would you disagree with him?

A. **Yeah. I think I would disagree with that.**

(Dep. of D. Swanson, P. 43, L. 16 – P. 44, L. 10)(emphasis added).

Curiously, Mr. Warren later in 2015 (nearly three years into the lawsuit) testified that Mr. Swanson was incorrect, and that they definitely discussed the issue of procuring a business purpose affidavit:

Q: Regarding the second page of Exhibit 5, your E-mail that starts, "I called bank counsel," I believe I asked this of you in your individual deposition. Subparagraph (b) where it says, "We also need an affidavit from Tony that these properties are

owned and pledged for business purpose." You've had a chance to review Mr. Swanson's testimony ?

A. Correct.

Q. Mr. Swanson said that that demand did not come from him?

A. Correct. It said that.

Q. And do you agree with that?

A. **No, I don't agree with it.**

Q. Okay. You're pretty sure he said you better get a business purpose affidavit, or something to that effect?

A. **Yes. It was discussed and, yes.**

(Dep. of S. Warren taken March 24, 2015, P. 42, L. 22 - P. 43, L. 3 -

14)(emphasis added)

According to Mr. Warren, a business purpose affidavit was discussed with Mr. Swanson and demanded by Mr. Swanson, and then Mr. Warren incorporated the title endorsement and business purpose affidavit demands into his June 27, 2012 email as conditions to close. In this scenario, both the bank and its lawyer were asking Mr. Whitfield to suborn perjury that Black Rush was a commercial loan versus a consumer loan by signing the business purpose affidavit. The business purpose affidavit was actually drafted by Mark Weeks law office per Mr. Warren's request, and was produced in response to a document subpoena served upon them. (See Business Purpose Affidavit, attached as Exhibit "D" to Mr. Whitfield's Memorandum In Opposition to Summary Judgment filed August 25, 2017).

According to Mr. Swanson's testimony, a business purpose affidavit was never discussed when he was consulted. If this is believed, Mr. Warren's

representation that a business purpose affidavit was discussed with the closing agent and incorporated into the bank's condition to close is false and fraudulent. Either way, the conflicting testimonies surrounding the June 27, 2012 email are evidence that at the very least, some of the advice offered in the June 27, 2012 email as a condition to close was not given- which is evidence of fabrication. One need look no further than Mr. Warren and Mr. Swanson's respective testimony that one is not telling the truth for this determination. This is de facto proof that the "advice" for both subsections (A) and (B) contained in the e-mail is unreliable and fabricated, was established as conditions to close, and evidence that Mr. Whitfield's claims against Mr. Swanson affect the bank's ability to foreclose-- and are compulsory counterclaims.

IV. Mr. Whitfield's legal claims, including civil conspiracy, must be tried before the bank's equitable claim of foreclosure.

Where a defendant in an equitable action asserts a compulsory counterclaim that alleges actions at law, both the plaintiff and the defendant have a right to have a jury trial on the issues raised by the compulsory legal counterclaim. Gardner v. Travis, 316 S.C. 315, 317-318, 450 S.E.2d 54, 56 (Ct. App.1994). **If there are factual issues common to both the legal and equitable claims, the legal claim, "absent the most imperative circumstances," must be tried, that is, disposed of, first. Id** (Emphasis Added). In determining whether to order separate trials or a single proceeding, "caution should be taken" by the trial court "to assure that, under the circumstances of the case, a joint trial will not deprive a party of his right to a full

jury trial of legal issues. Id. This law was later set forth in a mortgage foreclosure case where there was no jury trial waiver (as is the case here):

“(4) If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim unless a valid jury trial waiver exists that encompasses the counterclaim. If such a waiver does not exist, the proper procedure for handling the counterclaims is as follows:

- (a) The trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.
- (b) If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.
- (c) If the claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the equitable claims, but the jury's determination of common factual issues shall be binding upon the court.”

Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 330, 755 S.E.2d 437, 441–42 (2014).

In this case, there do not exist “the most imperative circumstances” to warrant separate trials or the equitable claims being tried first as there are factual issues that are shared with Mr. Whitfield’s non-conspiracy claims: nearly all of Mr. Whitfield’s claims are grounded in the bank’s failure to renew the loans, the defense to which is Mr. Swanson’s allegation that he rendered advice.

V. Swanson’s request for bifurcation to promote judicial economy-- does the exact opposite in this matter.

SCRCP 42(b) states:

(b) **Separate Trials.** 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.

(Emphasis Added).

Mr. Swanson's alleged advice is the only reason that Mr. Warren based his decision not to close Mr. Whitfield's renewal loans. (See Dep. of S. Warren filed September 10, 2014). That decision sparked the claimed default and ensuing foreclosure actions, and Mr. Whitfield's attendant counterclaims. Indeed, the alleged advice forms the same factual basis to be litigated in the civil conspiracy claim: whether it happened, why it happened, how it happened -- and if it happened as claimed. If the trials were bifurcated, **Mr. Whitfield will still be using the same witness testimony to prosecute the bifurcated legal counterclaims against the bank (Breach of Contract, Breach of Contract Accompanied by Fraudulent Act, Negligent Misrepresentation, Fraud in the Inducement, Unfair Trade Practices, Tortious Interference with Prospective Contractual Relations) as he would in the civil conspiracy claim.** When the bank promotes its defense that loans were not renewed on the basis of Mr. Swanson's advice (*The bank has named David Swanson as Witness in its own case and based its defense not to close on Mr. Swanson's advice in its Pre-Trial Brief and Witness List, attached hereto as Exhibit "A"*), Mr. Whitfield will refute the testimony that the advice was given at the time and place claimed as stated

above. Not only was the advice unreliable, it was also fraudulent, untrustworthy and based upon unlawful acts: **the very same nexus of factual events that belie the claim for civil conspiracy.**

VI. The Order should be amended because it makes findings that are not supported by the evidence.

Page 5 of the Order states:

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.

Page 6 of the Order states:

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.

As stated above and herein, there is evidence (from Mr. Warren and Mr. Swanson themselves) that they were in communication before closing regarding the very transaction that is the subject of Mr. Whitfield's counterclaims. As Swanson's Notice of Motion and Motion incorporated "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, and all arguments of counsel made at [the] hearing on this motion," all of it is subject to review and consideration by this Court in rendering the present Order.

Page 8-9 of the Order states:

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.

The focus of Plaintiff's motion and argument at hearing, and disposition thereof in the Court's Order was that Mr. Whitfield's civil conspiracy claim was a permissive and not compulsory counterclaim. Indeed, that was the claimed basis for striking the jury trial, the bifurcation, and referral to the Master-In-Equity. The parties never actually pled nor litigated the issue of whether or not Mr. Whitfield's other counterclaims would be affected by the Court's Order or whether the trial would or would not be proceeding on October 21, 2019 in light of the ruling. The first and only time this matter was raised was wherein counsel for Plaintiff submitted that this language be added to the proposed Order. The Court never addressed this matter. Accordingly, it should be removed from the Order.

Conclusion

The Court's ruling, if allowed to stand, removes Mr. Whitfield's right to a jury trial on the civil conspiracy claim-- and it necessitates the conclusion *that even if a civil conspiracy existed and was demonstrated* between the bank and Mr. Swanson in order to refute Mr. Whitfield's claims of loan renewal-- *Mr. Whitfield would still be in default and the bank could still foreclose in spite of that same conspiracy*. This would be an anathema and a paradoxical result.

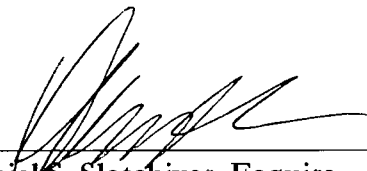
Certainly justice would not be served if the trial judge, in a bifurcated trial, found a civil conspiracy existed between the bank and Mr. Swanson concerning advice not to close the transaction, but yet that same determination would not be related to Mr. Whitfield's other counterclaims of non-renewal.

Rather than shielding Mr. Swanson from a jury of his peers to sit in judgment of his actions in a bifurcated trial, the jury should hear the bank's excuses for failing to close (as they will be anyway, even in a bifurcated trial as contemplated by this Court's Order), and then also decide whether the bank and Mr. Swanson engaged in a civil conspiracy to create an out for the bank. If the bank and Mr. Swanson convince the trier of fact that Mr. Swanson gave legal advice before the closing, and it was reasonable for the bank to rely on the advice, then the bank will have successfully defended all of Mr. Whitfield's counterclaims- including the civil conspiracy claim. Conversely, if Mr. Whitfield convinces the trier of fact that Mr. Swanson's legal advice was not given before the closing, and that Mr. Swanson and the bank manufactured the existence of such event- then Mr. Whitfield will have prevailed on his counterclaims, and the trier of fact may rightfully decide the bank and Mr. Swanson did engage in a civil conspiracy.

The only damages Mr. Whitfield has sought from Mr. Swanson are his attorney's fees and costs expended in refuting that Mr. Swanson gave the bank advice as claimed. If the conspiracy is established, then Mr. Whitfield should never have incurred over a million dollars in litigation costs in refuting the bank's claims of default- all predicated on advice that either never occurred or never

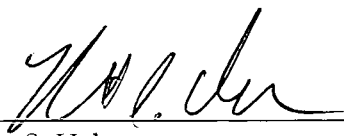
occurred as claimed. For these reasons, the Court must fully reconsider its Order to Strike and Bifurcate, and amend the Order to allow all claims to proceed to a jury. The existence of the alleged legal advice is common to **all claims and defenses**. A determination as to whether the bank and Mr. Swanson conspired with each other will determine the bank's ability to foreclose, one way or another.

Respectfully submitted,

By: 
Daniel S. Slotchiver, Esquire
Andrew McCumber, Esquire
SLOTCHIVER & SLOTCHIVER, LLP
751 Johnnie Dodds Blvd, Suite 100
Mount Pleasant, SC 29464
(843) 577-6531 ext 207
(843) 577-0261 (fax)
dan@slotchiverlaw.com
S.C. Bar No. 15129
Attorneys for Defendant

-And-

Brent Souther Halversen, LLC

By: 
Brent S. Halversen
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, SC 29464
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com
S.C. Bar No. 76495

10/18, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

COUNTY OF CHARLESTON

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 M. WHITFIELD and CINDY
WHITFIELD,**

Defendants.

PRE-TRIAL BRIEF

COMES NOW Plaintiff, Pinnacle Bank (hereinafter "Plaintiff"), and submits this Pre-trial Brief, in accordance with Rule 16(c) of the South Carolina Rules of Civil Procedure.

This matter is one of several foreclosure proceedings brought by Plaintiff against Anthony M. Whitfield (hereinafter "Defendant") in 2012 in connection with a series of loans taken out by Defendant and secured by nine properties located in Charleston, Berkeley, and Dorchester counties. These loans have now been in default for over seven years. Not only has the Defendant refused to pay back the approximate total principal of \$1,300,000, he has also filed numerous counterclaims sounding in fraud and unfair trade practices to prevent foreclosure, and accused the bank and its officers of conspiracy, forgery, and causing him heart failure. Plaintiff contends that these counterclaims should be dismissed as a matter of law.

EXHIBIT
A

This case has moved forward first among the group of cases and the lone action in Charleston County. After seven years and multiple efforts by Plaintiff to get to trial in this action, the case has been set for a date certain trial beginning on October 21, 2019.

(1) A concise, non-argumentative statement of the facts of the case.

The bank and Whitfield began a commercial relationship in 2007 when Harbor National Bank agreed to provide a guidance line of credit of up to \$1,500,000 for Whitfield's business of buying, renting, and selling residential properties. Under the guidance line, Whitfield could secure individual loans for a particular property presuming all requirements were met for each. The bank provided nine loans to Anthony Whitfield secured by nine separate residential mortgages. All nine loans matured long ago and remain outstanding. All nine mortgages have been in default for at least seven years, and are the subject of foreclosure actions in Dorchester, Berkeley, and Charleston Counties. One of the mortgaged properties is the subject of the present Charleston case.

The nine loans in question were originated in 2007 and 2008, pursuant to the guidance line of credit. Each loan was the subject of its own note, mortgage, and assignment of leases and rents, all of which had five-year terms, thirty-year amortizations, and fixed interest rates specified in the loan documents. Whitfield made regular monthly payments on all the loans for the five-year loan period of each.

Upon the maturity of the first three loans in 2012, including the loan at issue here, Plaintiff and Defendant Whitfield had difficulty coming to terms for their renewal. By the time the 2012 renewals were due, Mr. Whitfield was a poor credit risk and had failed to provide Plaintiff with financial information when requested. Whitfield also sought to avoid requirements the bank set for the loan renewals.

Despite these difficulties, Charlie Rivers, the president of Plaintiff's predecessor Harbor National Bank at the time, agreed to meet with Whitfield on June 21, 2012 in an effort to identify terms on which the loans could be renewed. After their conversation, Rivers instructed Scott Warren, a loan officer at Harbor National Bank, to prepare a term sheet based on the general terms agreed to in the June 21 meeting and move the loans toward a closing.

On its face, the resulting Term Sheet was a preliminary "agreement to agree." Among the statements in the Term Sheet making this point clear are:

- that "[t]he following is not a commitment to lend, but is our proposal for the general terms and conditions of the subject loans if the transactions were to close on June 28, 2012," Term Sheet at 1 (emphasis added);
- that "the Bank will require a minimum of title updates & new title opinion(s), but additional services and documentation may be required," *id.* at 2 ¶ A(6);
- that the "proposed renewals/modifications will be closed under the supervision of the borrower's attorney," *id.* ¶ B(2) (emphasis added); and
- that "[u]pon reaching an agreement on these general terms, we can proceed to a formal commitment very quickly," *id.* at 3 (emphasis added).

Whitfield received the Term Sheet from Scott Warren at a meeting on June 27, 2012. Shortly before that meeting, Harbor had become aware of a potential title defect in its collateral for the Charleston loan. Unknown to Harbor, Whitfield had conveyed a one-half interest in the subject property to his ex-wife, Cindy Whitfield. Whitfield does not dispute that Warren told him at their meeting that a title endorsement might be required to address this problem.

On June 28, 2012, Warren and Whitfield attended an attempted closing of the renewal transactions at the office of Mark Weeks, Esq. On the advice of its counsel, David Swanson, Esq.,

Harbor refused to close without either a title endorsement or a co-signature from the now co-owner Cindy Whitfield. When contacted during the attempted closing, Cindy Whitfield's counsel advised the parties that she would not sign. Harbor did not close the loans that day as a result, and after further unsuccessful attempts to address the outstanding loans, this litigation followed.

(2) An objective statement of the facts in controversy.

- Whether Mr. Whitfield has a legal obligation to repay the loans made to him, with interest.
- Whether, notwithstanding the requirement of a closing and the language of the only writing at issue, Plaintiff ever made a legally enforceable promise to renew Mr. Whitfield's loans irrespective of title work on the collateral.
- If Mr. Whitfield has any viable claim, whether his failure to mitigate his damages by substituting available, unencumbered collateral to secure the renewal of his loans precludes any recovery.
- If Mr. Whitfield has any viable claim, whether Mr. Whitfield incurred any damages as a result of Plaintiff's refusal to renew his loans without adequate security.

(3) The legal issues involved.

Plaintiff anticipates a robust directed verdict motion that will address the following issues and deficiencies in Whitfield's claims, among others:

(i) Whether the June 26, 2012 Term Sheet constitutes or reflects the terms of a binding contract between the parties.

South Carolina precedent is controlling as to Whitfield's contention that the June 26, 2012 Term Sheet is a binding contract. "[W]here the language of a purported contract clearly expresses the intent to be non-binding, the analysis is limited to the four corners of the document." Stevens and Wilkinson of South Carolina, Inc. v. City of Columbia, 409 S.C. 568, 578 (2014). "The preliminary negotiations leading up to execution of a contract must be distinguished from the

contract itself. There is no meeting of the minds of the parties while they are merely negotiating as to the terms of an agreement to be entered into.” McLaurin v. Hamer, 165 S.C. 411 (1932) (emphasis in original) (quoting 13 Corpus Juris ¶ 100).

(ii) Whether the lender statute of frauds, S.C. Code § 37-10-107 and/or statute of frauds, S.C. Code § 32-3-10, applies to bar Mr. Whitfield’s claims.

S.C. Code § 37-10-107 states in pertinent part that:

No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:

- (a) to lend or borrow money;
- (b) to defer or forbear in the repayment of money; or
- (c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.

S.C. Code § 37-10-107(1). Under South Carolina law, for a writing to be a memorandum sufficient to take a writing out of the statute of frauds, it must “sufficiently indicate a contract has been made between the parties.” Player v. Chandler, 299 S.C. 101, 106 (1989) (emphasis added); accord Smith v. McClam, 289 S.C. 452, 456 (1986). Alleged oral assurances may not be used to alter the requirement for a writing. Sea Cove Development, LLC v. Harbourside Community Bank, 387 S.C. 95, 106 (2010). These rules of law prevent Mr. Whitfield from claiming that any oral representations by Harbor National Bank created a contractual obligation for it to lend.

Further, the statute of frauds precludes Whitfield from seeking to enforce any contract for an interest in real property unless the agreement was reduced to “writing and signed by the party to be charged.” S.C. Code Ann. § 32-3-10. To avoid the Statute of Frauds, the writing “must identify the subject matter of the contract, sufficiently indicate a contract had been made between the parties, and state with reasonable certainty the essential terms of the agreement.” Player 299

S.C. at 105. The failure to express “every essential element . . . in the writing” renders the purported contract void. Id.

It makes no difference for purposes of the statute of frauds that this case involves the purported extension or modification of an existing mortgage, rather than the execution of an entirely new agreement. The statute of frauds applies equally to a purported modification of an agreement. Player, 299 S.C. at 105. Thus, the modification of a contract must follow the same requirements as the original contract, including compliance with the statute of frauds. Sterling Dev. Co. v. Collins, 309 S.C. 237, 241 (1992). Whitfield’s alleged agreement to change the existing mortgage interest must independently satisfy the statute of frauds’ requirements that the modification appear in a writing, signed by the party to be charged, and state the essential terms with reasonable certainty. Windham v. Honeycutt, 279 S.C. 109, 302 S.E.2d 856 (1983) (holding that the oral modification of a contract affecting an interest in land violates the Statute of Frauds).

(iii) Whether part performance applies to prevent application of the statute of frauds.

To qualify as a part performance preventing application of the statute of frauds, the performance at issue must “clearly and unequivocally” relate to the agreement to be taken out of the operation of the statute of frauds and must be “exclusive of any other relation between parties touching such an agreement.” Player, 299 S.C. at 105-06. The lender statute of frauds contains language producing the same result: it only permits part performance to apply “to the extent that the part performance may be explained only by reference to the promise, undertaking, accepted offer, commitment, or agreement [that is, the qualifying writing.]” S.C. Code § 37-10-107(2)(c) (emphasis added). In the present case, the alleged part performance is Plaintiff’s acceptance of payments on loans which were existing obligations between the parties, which still persist today

and remain unpaid, and which exist independent of whether there was a contractual obligation to renew the loans.

(iv) Whether Mr. Whitfield can establish fraud in the inducement, negligent misrepresentation, and related claims as a matter of law.

To establish his claim for fraud in the inducement, Whitfield must prove twelve different elements. The first nine are the elements of common-law fraud in South Carolina:

(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

Moseley v. All Things Possible, Inc., 388 S.C. 31, 35-36 (Ct. App. 2010). To establish fraud in the inducement, a plaintiff must also establish three additional elements: "(1) that the alleged fraudfeasor made a false representation relating to a present or preexisting fact; (2) that the alleged fraudfeasor intended to deceive him; and (3) that he had a right to rely on the representation made to him." Id. Thus, a forward-looking statement cannot be the subject of an action for fraud in the inducement, because the misrepresentation must relate to a present or preexisting fact. Fraud must be proved by clear and convincing evidence. Id. at 35.

Plaintiff will argue at trial that Mr. Whitfield cannot establish, as a matter of law, sufficient evidence of (1) the falsity of any of Plaintiff's statements regarding a present or preexisting fact; (2) Plaintiff's intent that Mr. Whitfield rely on the Term Sheet; (3) that any such reliance by Mr. Whitfield was justifiable; (4) that Plaintiff intended to deceive Mr. Whitfield; and (5) that Mr. Whitfield had a right to rely on the Term Sheet. Any one of these five defects is sufficient to support a directed verdict for the Plaintiff.

The elements of false representation, justifiable reliance, and right to rely are also elements of a claim for negligent misrepresentation. Brown v. Stewart, 348 S.C. 33, 42 (2001). A fraudulent

act accompanying a breach of a contract, which must also be proved by clear and convincing evidence, is required for a claim for breach of contract accompanied by a fraudulent act. Vann v. Nationwide Ins. Co., 257 S.C. 217, 220 (1971). A right to rely is also an element of a claim for promissory estoppel. Powers Construction Co., Inc. v. Salem Carpets, Inc., 283 S.C. 302, 306 (Ct. App. 1984) (promissory estoppel). Harbor is therefore also entitled to a directed verdict on those claims.

(v) Whether Mr. Whitfield can establish any conduct by Plaintiff which affects the public interest.

In order to constitute violation of the South Carolina Unfair Trade Practices Act, a party's conduct must affect the public interest. Glob. Prot. Corp. v. Halbersberg, 332 S.C. 149, 156 (Ct. App. 1998) ("To be actionable under the UTPA, the unfair or deceptive act or practice must have an impact upon the public interest."). The South Carolina Supreme Court recently held that if conduct only affects the parties to a transaction, it does not affect the public interest, and is thus beyond the scope of the Act. Woodson v. DLI Properties, 406 S.C. 517, 530-31 (2014). Mr. Whitfield cannot establish any conduct of Plaintiff that affects the public interest, and thus lacks a cause of action under the Act as a matter of law. Further, Harbor National Bank is no longer in business after its acquisition and thus these alleged unfair trade practices are not capable of repetition.

(vi) Whether Mr. Whitfield can establish promissory estoppel by clear and convincing evidence.

The equitable claim of promissory estoppel requires (1) a promise unambiguous in its terms; (2) reasonable reliance on the promise by Whitfield; (3) reliance expected and foreseeable by Harbor; and (4) injury in reliance on the promise. Powers Construction Co., Inc. v. Salem Carpets, Inc., 283 S.C. 302, 306 (Ct. App. 1984). In cases involving real property, such as this one, the burden of proof for a promissory estoppel claim is clear and convincing evidence. Satcher

v. Satcher, 351 S.C. 477, 483 (Ct. App. 2002). In addition to the lack of evidence of reasonable reliance and the application of the lender statute of frauds discussed above, Mr. Whitfield's claim also suffers from a lack of evidence of any injury caused by his reliance.

(vii) Whether Mr. Whitfield can establish tortious interference with a specific prospective contract.

To establish tortious interference with a prospective contract, Whitfield must provide evidence of a specific prospective contract with which Harbor intentionally interfered, for an improper purpose or by improper methods, and which caused him injury. United Educational Distributors, LLC v. Educational Testing Service, 350 S.C. 7, 14 (Ct. App. 2002). "There can be no intentional interference with prospective contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its own contractual rights with a third party." Id. Mr. Whitfield cannot identify any particular contract to rent or sell any of his properties with which Plaintiff intentionally interfered, rendering this claim fit for directed verdict.

(viii) Whether Mr. Whitfield can establish abuse of process.

There are two essential elements required for an abuse of process action: (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings. Food Lion, Inc. v. United Food & Commercial Workers Intern. Union, 351 S.C. 65, 71 (2002). "An ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process." Id. As to the "willful act" element, our supreme court has stated that "[s]ome definite act . . . not authorized by the process or aimed at an object not legitimate in the use of the process is required." Id. Mr. Whitfield has come forward with no evidence of any such abuse of process by Plaintiff or by Defendant Swanson, making this claim a proper one for directed verdict.

(ix) Whether Mr. Whitfield can establish a civil conspiracy.

The gravamen of a civil conspiracy claim is the special damages resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se. Pye v. Estate of Fox, 369 S.C. 555, 567-68 (2006). The damages alleged must go beyond the damages alleged in other causes of action. Id. Civil conspiracy cannot be an “embellishment” of a breach of contract action and cannot simply incorporate or demonstrate other allegations to prove a conspiracy. Vaught v. Waites, 300 S.C. 201, 208-09 (Ct. App. 1989).

To prove special damages, a plaintiff must show that the acts in furtherance of the conspiracy were separate and independent from other wrongful acts alleged in complaint. AJG Holdings LLC v. Dunn, 392 S.C. 160, 167-68 (Ct. App. 2011). Mr. Whitfield has failed to demonstrate any special damages arising from a conspiracy in addition to those damages alleged in his other causes of action.

(x) Whether the statute of limitations applies to bar Mr. Whitfield’s claims as to conduct by Plaintiff at the time of the initial loan in 2007.

Under S.C. Code § 15-3-530, the statute of limitations for Mr. Whitfield’s claims in this action is three years. Some of Mr. Whitfield’s claims appear to be based on events which took place at the time of the initial loans in 2007 but were not brought until he answered this lawsuit in 2012. Whitfield had copies of all the closing documents and made regular monthly payments based on them over the ensuing five-year period; he cannot, therefore, claim a lack of knowledge of the existence of such claims. All such claims arising from the circumstances of the initial 2007 loans are therefore time-barred.

(4) A listing of exhibits, indicating those to which there is disagreement and a listing of witnesses who may be called and, if available, their address and phone number.

Plaintiff is submitting its Exhibit List and Witness List contemporaneously with this Pre-Trial Brief.

Plaintiff reserves the right to introduce other documents produced in discovery in this action but inadvertently left off the preceding list, and to introduce other documents for impeachment or other similar purposes.

(5) Any unusual problems relating to evidence.

None anticipated. Plaintiff notes that the loan agreement provides for fees and costs associated with enforcement. Plaintiff requests that the Court accept submission of an affidavit of fees and costs following a verdict in favor of Plaintiff, which would entitle such recovery. If the Court prefers a different process, please advise counsel so that we may comply.

The parties have agreed to the authenticity of documents exchanged in discovery. Accordingly, the parties need not call records custodians of third parties to establish the authenticity of records that have been produced and served in this litigation.

(6) Any unusual question or matter which should be brought to the attention of the court.

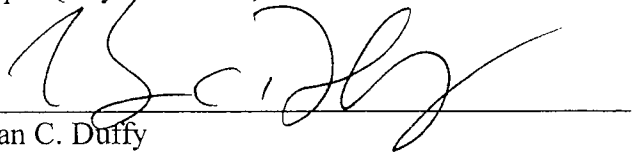
This action involves equitable determinations for the Court. Plaintiff has brought claims for action on a note and for foreclosure and requests a non-jury trial as to these claims. Additionally, Whitfield has asserted a promissory estoppel/detrimental reliance counterclaim that is ripe for an equitable determination by the Court. Accordingly, Plaintiff anticipates that, following the presentation of all evidence and the jury's determination of the legal claims, the Court will then issue judgment on the remaining equitable claims.

(7) A statement that settlement negotiations were attempted before the date of the pre-trial hearing and the status of settlement negotiations.

The parties have conducted several mediations and have attempted to negotiate a settlement but remain far apart in their efforts to resolve the matter.

This 14th day of October, 2019 at Charleston, South Carolina.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'B. C. Duffy', is written over a horizontal line.

Brian C. Duffy
Blake A. McKie
Kara Grevey
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, SC 29401
(843) 720-2044 (phone)
(843) 720-2047 (fax)
bduffy@duffyandyoung.com

Counsel for Plaintiff Pinnacle Bank

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

COUNTY OF CHARLESTON

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 M. WHITFIELD and CINDY
WHITFIELD,**

Defendants.

PLAINTIFF'S WITNESS LIST

Plaintiff Pinnacle Bank expects to call the following witnesses:

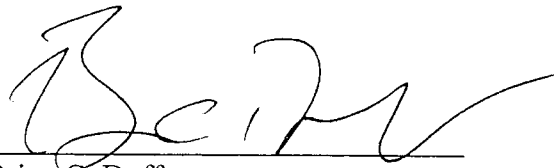
1. Stan Ashburne
2. William Barksdale
3. Angela Bell
4. Ryan Griffin
5. Felicia Howard
6. Charlie Rivers
7. Willard Stout
8. David Swanson
9. Scott Warren
10. Ryan Werking
11. Anthony Whitfield

12. Cindy Whitfield

13. Teresa Farley

14. Blake Irwin

Plaintiff reserves the right to call any witness identified by any party to this action if the need arises and to call additional witnesses in rebuttal. Plaintiff further reserves the right to supplement this list should additional facts or information become available between the date of service and the time of trial.

A handwritten signature in black ink, appearing to read 'B. C. Duffy', written over a horizontal line.

Brian C. Duffy
Blake A. McKie
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, SC 29401
(843) 720-2044 (phone)
(843) 720-2047 (fax)
Attorneys for Plaintiff Pinnacle Bank

October 14, 2019
Charleston, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PLAINTIFF'S WITNESS LIST** has been served upon each of the parties to this action via email and/or by depositing same in the United States mail, postage prepaid, in an envelope(s) addressed as follows:

Brent S. Halversen, Esq.
Brent Souther Halversen, LLC
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, SC 29464

Daniel S. Slotchiver, Esq.
Andrew J. McCumber, Esq.
Slotchiver & Slotchiver, LLP
751 Johnnie Dodds Blvd., Suite 100
Mount Pleasant, SC 29464
dan@slotchiverlaw.com
andrew@slotchiverlaw.com

Attorneys for Defendant Anthony Whitfield

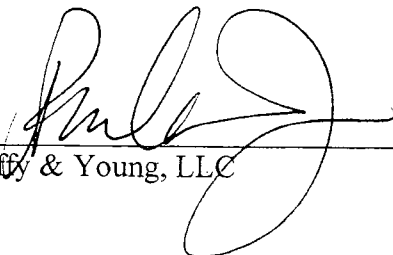
Steven A. James
Attorney & Counselor at Law
520 Folly Road, Suite 25 – PMB 303
Charleston, SC 29412
sajlaw@att.net

Attorneys for Cindy Whitfield

David W. Overstreet, Esq.
Earhart Overstreet, LLC
PO Box 22528
Charleston, SC 29413
David.Overstreet@earhartoverstreet.com

Attorneys for David Swanson

This 14th day of October, 2019.



Duffy & Young, LLC

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

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.

RECEIVED
Aug 24 2020
SC Court of Appeals

PROOF OF SERVICE

I, the undersigned, certify that I have served *Appellant's Return to Respondent's Motion to Dismiss* on Respondent David Swanson, by emailing a copy on August 24, 2020, addressed to his

attorneys of record at the following email addresses: David W. Overstreet, Esq. (david@earhartoverstreet.com), Michael B. McCall, Esq. (mike@earhartoverstreet.com), and Steven R. Kropski, Esq. (steve.kropski@earhartoverstreet.com).

Pursuant to the May 29, 2020 Amended Order of the Supreme Court, a copy of the aforementioned email correspondence is attached.

Respectfully submitted,

THE LAW OFFICE OF JESSE SANCHEZ, LLC

s/Jesse Sanchez

Jesse Sanchez (SC Bar No. 101906)

The Law Office of Jesse Sanchez, LLC

98 ½ Broad Street, Suite B

Charleston, South Carolina 29401

(843) 814-8181 Telephone

(843) 284-3953 Fax

jesse@jessesanchezlaw.com

Attorney for Appellant

Charleston, South Carolina
August 24, 2020

From: Jesse Sanchez jesse@jessesanchezlaw.com
Subject: 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. AND Anthony Whitfield, Counterclaimant, v. David Swanson, Counterclaim Defendant, Of whom, Anthony Whitfield is the Appellant and David Swanson is the Respondent. Appellate Case No. 2020-000162
Date: August 24, 2020 at 4:16 PM
To: david@earhartoverstreet.com, mike@earhartoverstreet.com, Steve Kropski steve.kropski@earhartoverstreet.com
Cc: Dan dan@slotchiverlaw.com, Andrew J. McCumber andrew@slotchiverlaw.com, Brent Halversen Brent@halversenlaw.com

Counsel,

Attached for service, please find the attached Cover Letter and Appellant's Return to Respondent's Motion to Dismiss, which are being filed momentarily with the Court of Appeals via One Drive electronic submission.

Regards,

Jesse

--

Jesse Sanchez
The Law Office of Jesse Sanchez, LLC
98 1/2 Broad Street, Suite B
Charleston, SC 29401
P: (843) 814-8181
F: (843) 284-3953
jesse@jessesanchezlaw.com

CONFIDENTIALITY NOTICE

This electronic mail transmission and any accompanying documents constitute information belonging to the sender and may be confidential and legally privileged. This information is intended only for the use of the individual or entity to whom it is addressed. If you are not the intended recipient, any disclosure, copying, distribution, or action taken in reliance on the contents of the information contained in this transmission is strictly prohibited. If you have received this transmission in error, please immediately notify us by telephone at (843) 814-8181 and delete the message. Thank you.



August 24, 2020

VIA ONE DRIVE ELECTRONIC SUBMISSION

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: 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. AND Anthony Whitfield, Counterclaimant, v. David Swanson, Counterclaim Defendant, Of whom, Anthony Whitfield is the Appellant and David Swanson is the Respondent. Appellate Case No. 2020-000162

Dear Ms. Kitchings:

Enclosed for filing, please find *Appellant's Return to Respondent's Motion to Dismiss* and corresponding *Proof of Service*.

Thank you for your assistance with this matter. Should you have any questions or

Thank you for your assistance with this matter. Should you have any questions or wish to discuss this filing, please do not hesitate to contact me directly.

Sincerely,

s/Jesse Sanchez

Jesse Sanchez

Enclosures (as stated)

Cc (Via Email Only): Daniel S. Slotchiver, Esquire
Andrew J. McCumber, Esquire
Brent S. Halversen, Esquire
David W. Overstreet, Esquire
Michael B. McCall, Esquire
Steven R. Kropski, Esquire

THE LAW OFFICE OF JESSE SANCHEZ, LLC

98½ Broad Street, Suite B, Charleston, SC 29401 P: 843.814.8181 F: 843.284.3953
jesse@jessesanchezlaw.com jessesanchezlaw.com



2020-000162
Whittfi...20 .pdf



August 24, 2020

VIA ONE DRIVE ELECTRONIC SUBMISSION

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RECEIVED

Aug 24 2020

SC Court of Appeals

RE: 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. AND Anthony Whitfield, Counterclaimant, v. David Swanson, Counterclaim Defendant, Of whom, Anthony Whitfield is the Appellant and David Swanson is the Respondent. Appellate Case No. 2020-000162

Dear Ms. Kitchings:

Enclosed for filing, please find *Appellant's Return to Respondent's Motion to Dismiss* and corresponding *Proof of Service*.

Thank you for your assistance with this matter. Should you have any questions or wish to discuss this filing, please do not hesitate to contact me directly.

Sincerely,

s/Jesse Sanchez

Jesse Sanchez

Enclosures (as stated)

Cc (Via Email Only): Daniel S. Slotchiver, Esquire
Andrew J. McCumber, Esquire
Brent S. Halversen, Esquire
David W. Overstreet, Esquire
Michael B. McCall, Esquire
Steven R. Kropski, Esquire

THE LAW OFFICE OF JESSE SANCHEZ, LLC

98½ Broad Street, Suite B, Charleston, SC 29401 P: 843.814.8181 F: 843.284.3953

jesse@jessesanchezlaw.com jessesanchezlaw.com