

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein
Circuit Court Judge

Case No. 2012-CP-10-02758
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

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Nov 25 2020

SC Court of Appeals

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.

RECORD ON APPEAL – VOLUME III

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, South Carolina 29464
(843) 284-5790

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

Attorneys for Appellant

David W. Overstreet
Michael B. McCall
Steven R. Kropski
Earhart Overstreet LLC
P.O. Box 22528
Charleston, South Carolina 29414
(843) 972-9404

Attorneys for Respondents

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1 Q. Okay. But it alleges it's for her own
2 benefit. What benefit do you think -- do you
3 allege that she got from these -- from squandering
4 the properties' income?

5 A. I could have sworn I've already answered
6 that question.

7 Q. Is that the skimming the funds?

8 A. Yeah, yeah, skimming the funds.

9 Q. Do I presume correctly that you have
10 read the pleadings before your amended answers and
11 affirmative defenses, cross-claims and
12 counterclaims -- when they're filed?

13 A. Yeah, I think so.

14 Q. And are you satisfied that the Fifth and
15 most current one is what you intend to allege at
16 this point in the lawsuit?

17 A. That's --

18 MR. HALVERSEN: Object to the form.

19 A. That's up to my attorney -- both of my
20 attorneys. That's a legal question.

21 Q. Sally Rossman is listed as a witness.
22 What is your understanding of her involvement in
23 the case?

24 A. Read who she is. It doesn't ring a bell
25 yet.

1 Q. Southeastern Transcript. "She possesses
2 information regarding the recording of Mr.
3 Whitfield's first deposition."

4 A. Yes. I remember her well. She was the
5 court reporter at my first deposition, where --
6 with Mr. Bernstein. I was served a Rule to Show
7 Cause that had no cause by Mr. Swanson's henchman,
8 which is the next guy on there, Freeman, he's a
9 private detective, after Mr. Bernstein told Mr.
10 Seibert I would be at the deposition. Right here,
11 on that day, I was served the Rule to Show Cause.
12 That was dropped, and I incurred \$12,000 in fees.

13 When I came back, after being served
14 coming off the elevator, I came to Mr. Bernstein
15 -- and read the transcript. Do you have the
16 revised? Because he told the court reporter to
17 delete a statement -- several statements that were
18 on the record. I came in, and I asked the court
19 reporter, Sally, are we on the record? I made it
20 clear, Are we on the record? And then I went into
21 chewing him out about his conversations with Mr.
22 Seibert about this deposition. So his -- Mr.
23 Seibert -- and that's also going to be -- that's
24 part of Seibert, why he's involved. We're going
25 to probably depose him. I'm going to file a

1 complaint on him with the Bar; I'll do that at
2 about the same time as yours.

3 So he first denied he knew Mr. Seibert.
4 Okay? And then he admitted he did talk to
5 Seibert's office about having me served. So then
6 he goes behind and tells the court reporter -- he
7 goes and says, Back on the record, trying to cover
8 it up. And then tells the court reporter to
9 delete that conversation that was during that
10 first part of the afternoon deposition after
11 lunch. So she's involved.

12 Q. She's involved because she has a
13 recording; is that your understanding?

14 A. She was involved with him telling her to
15 delete it.

16 Q. And have you talked with her?

17 A. We talked to her boss. We went back and
18 put it back in. So there's two transcripts.
19 There's the first transcript, where that
20 conversation was deleted. And then the court
21 reporter had to go back and see that it was on the
22 record, the conversation was on the record, and
23 put it back in the transcript.

24 Q. And how does that -- in your
25 understanding, how does that play into your claims

1 in this case? You don't have claims against Mr.
2 Bernstein or Mr. Freeman or Seibert; is that
3 right?

4 A. No.

5 Q. Okay. Julie Bonomo, Southeastern
6 Transcript.

7 A. Well, one of them is the boss of the
8 other one. It explains it in there, I think.

9 Q. And Wayne Freeman is --

10 A. He's the guy that served me coming off
11 the elevator.

12 Q. Have you had any further discussions, or
13 are you aware of any further discussions your
14 attorney has had, with Mr. Freeman?

15 A. Not that I'm aware of.

16 Q. Okay. Another witness I understand is
17 newly listed is Jimmy Duffy. And he's listed as a
18 financial damages expert.

19 A. He's my CPA. He's been my CPA for
20 probably 20 years now.

21 Q. Have you had communications with him
22 since our deposition?

23 A. Yeah. We even had a deposition, I
24 believe.

25 Q. Have you continually had communications

1 with Mr. Duffy about this case?

2 A. No. I don't --

3 Q. Have you had communications with Mr.
4 Duffy about this case and his opinions, or
5 information for him to use for his opinions, since
6 you were last deposed?

7 A. I gave him information, which is
8 reflected in his deposition, about what damages
9 were caused because of the tax consequences from
10 having to sell these properties prematurely.
11 Okay? There's a lot of tax consequences when you
12 have to dump a lot of properties.

13 Q. How about any communications with Mr.
14 Duffy about your alleged damages since his
15 deposition?

16 A. Since his deposition? I don't even
17 remember what date his deposition was. But the
18 only time I ever speak with Jimmy Duffy is when
19 it's time to do my taxes.

20 Q. You were identified as an expert witness
21 in real estate. Can you tell me what -- the scope
22 of the expertise you have been named as possessing
23 in this case?

24 A. I've been in the business 45 years, and
25 I've had over -- gosh, I can't remember -- a

1 thousand, 2000 transactions, anywhere from
2 purchases, to refinance, sales, modifications,
3 rehab, renovation, marketing, finances. I've been
4 doing that all along. So I have -- now, I didn't
5 -- I wasn't an expert on bank law or bank crookery
6 and trickery and malice and extortion and
7 strong-arming until I got to know Mr. Harbor
8 National Bank-Rivers, and then I really got in the
9 books. So I'm very well educated on banking
10 mortgages now and who is corrupt and who is not
11 corrupt, and who is not acting right, and who is
12 doing something wrong.

13 So now, on top of my experience, before
14 you all foreclosed on me and sued me
15 maliciously -- and I'll be going after you for
16 that too after we're done -- so I've learned a lot
17 since. So that makes me even more of an expert
18 than I was before.

19 Q. Do you contend you're an expert in
20 banking law?

21 A. Not like they are. I know a lot more
22 about it now.

23 Q. I would do this with any expert witness
24 in a case. I want to understand what they believe
25 the field is they're being offered in in the case.

1 Okay? And you just told me a lot. And I know
2 you've been very involved in the case, but I want
3 to know what you understand your involvement is as
4 an expert witness in the case.

5 A. You'll have to get that from my
6 attorneys. That's a legal question. I'm an
7 expert in the field of real estate. I've been
8 acknowledged as an expert in real estate, okay, by
9 a Court.

10 Q. What do you understand your role is as
11 an expert in this case?

12 A. To testify to the facts and
13 circumstances involving this case.

14 Q. Well, experts give opinions. They don't
15 give facts and circumstances of the case. What is
16 an expert opinion that you have in this case?

17 A. I'm not giving you a legal opinion right
18 now. I'm not giving a legal opinion.

19 Q. Okay, Mr. Whitfield. I'm not trying to
20 be difficult. But you all have listed you as an
21 expert in the case, and these are questions I ask
22 of any expert. If you want to reconvene for a
23 particular expert deposition, we'll do that. But
24 if you -- otherwise, could you tell me what the
25 field is of your expertise for this case, what

1 your role is --

2 A. I just explained what the field was. My
3 knowledge of real estate business -- all the way
4 through until today, my knowledge of real estate.
5 We're talking every kind: Repossessions, bank
6 foreclosures -- I did all of those -- regular
7 sales, MLS, owner financing. It goes on and on.
8 And I know a corrupt document when I see it. I
9 can recognize it. So my opinion is I was frauded
10 -- defrauded, conspired against; and Mr. Swanson,
11 on top of everything else, committed abuse of
12 process. And that's all because of his actions,
13 his lies, his fraud. So in my opinion -- you want
14 to know my opinion?

15 Q. I want to know your expert opinion.
16 There's a difference from you as a party who is a
17 fact witness who has been involved in the case
18 versus how you are offering expert opinions where
19 you're entitled to say that because of your
20 expertise, Here is my opinion on why this is right
21 or wrong.

22 MR. HALVERSEN: Brian, we'd be happy to
23 reconvene the deposition. To the extent he's
24 going to offer any expert opinions at trial,
25 we'll certainly disclose what those specific

1 opinions are in advance of trial, and you
2 certainly have the right to take his
3 deposition in that capacity.

4 MR. DUFFY: I'd like to do that, at
5 least get some disclosure of what it's going
6 to be, because that entails different
7 discovery. So I need some time for that.

8 MR. HALVERSEN: Sure thing.

9 THE WITNESS: I've got to take another
10 break.

11 (The deposition went off the record.)

12 BY MR. DUFFY:

13 Q. Mr. Whitfield, at your last deposition
14 I'm pretty sure we talked about a suggestion you
15 had at that time of the bank actions tortiously
16 interfering with prospective contractual
17 relations. But I just -- explaining myself for a
18 second. But I think -- at least my records show
19 that wasn't added as an actual claim until shortly
20 after the deposition. So have you -- do you have
21 any recollection or understanding of potential
22 buyers for your properties or renters of the
23 properties that you didn't identify in your
24 earlier deposition -- any new information about
25 that or remember anything that would have

1 identified a renter or a buyer who was a
2 prospective one of these properties that are
3 involved in the lawsuits?

4 MR. HALVERSEN: Object to the form.

5 A. Well, I think I covered most of that in
6 the prior deposition, first dealing with the
7 Harbor National Bank properties, because all of
8 them were rented at the time the foreclosure
9 process started and the default on the renewal
10 contract by the bank. Then, at that point in
11 time, sometime after that, I was forced after all
12 the extortion by Harbor National Bank, demanding
13 cross-collateral, substitution of collateral,
14 additional collateral -- it's all there spelled
15 out for you -- and I had to put the houses up for
16 sale. I had to let, for example, good tenants
17 move. I had to give them notice to move if they
18 didn't buy the houses. And then when they came up
19 for renewal, I had to say they had to move so I
20 could sell the houses. So I lost nine -- no --
21 eight tenants, excuse me -- eight tenants right
22 there.

23 And then the damages go on and on, by
24 interfering with my rentals, sales, all caused by
25 the bank because I had to deviate from my business

1 -- my normal business practices, which was to sell
2 houses to tenants, not put them out there vacant
3 and lose money and have to pay payments on houses,
4 which I had to do with other houses that still had
5 mortgages on them.

6 Q. So your contention is that the houses
7 that you ultimately elected to sell, you would
8 have been able to keep renting until the renters
9 were able to buy; is that right?

10 A. Or I put them up for sale when -- if the
11 tenant moved, I put it up to sell or rent,
12 whatever came first, so I would lose the least
13 amount of money. But that's just one element of
14 all the damages caused.

15 Q. I just want to talk specifically about
16 identifiable prospective buyers or renters of your
17 properties that were interfered with, in your
18 contention. And so you've talked about the
19 renters who were in properties that you ultimately
20 sold.

21 A. Yes.

22 Q. Anybody else?

23 A. But let's go back to the Harbor National
24 Bank properties. I tried to mitigate the damages
25 and pay Harbor National Bank off. And I had

1 offers on houses, but they were coming in low
2 because Harbor National Bank slandered me by
3 filing foreclosures and attaching lis pendens to
4 my properties. So the word gets around in the
5 business that someone like me that's been in the
6 business for that many years, 45 years, and have
7 done hundreds and hundreds of transactions -- I
8 had a lot of people I mentored; they came to me
9 for advice and they wanted to pick my brain and I
10 helped them out. So when they see that I'm under
11 foreclosure, it's like all the vultures come out
12 too, and they want to try to buy your property for
13 50 cent on the dollar or less. So that's a major
14 interference, by filing foreclosures on me for no
15 reason, just pure -- for extortion purposes.

16 Then when Mr. Bernstein was asked, What
17 would you accept for payoff so I can get these
18 sold? Because I had offers --

19 Q. I'm sorry. When you say "these," what
20 are you referring to?

21 A. Harbor National Bank's.

22 Q. These properties that are in
23 foreclosure?

24 A. Yeah. I'm talking specifically about
25 those right now. We went to Mr. Bernstein, and

1 he -- kind of opposite of a short-sale. This is
2 an extreme in the opposite direction. He demanded
3 14 percent default interest on the payoff and all
4 his attorney fees or they wouldn't accept a
5 payoff. So, therefore, I couldn't make sales. I
6 couldn't come -- I'm not going to come out of my
7 pocket to pay a 14 percent default rate.

8 But this is the deal. He says, Okay,
9 here is our other choice. You drop your
10 counterclaims, and we'll give you the 4.75 percent
11 interest we promised on 6/21 and drop all these
12 other -- no, he didn't say we'd drop all the other
13 demands. He didn't say we would not require my ex
14 to sign a mortgage or anything or any of the
15 other. He just said that they'd cut -- that he'd
16 cut the interest rate down to 4.75. He still
17 charges attorney fees. And all the other demands
18 were still on the table. So how am I supposed to
19 sell a house like that?

20 Q. You're talking about efforts to sell the
21 properties that were already in foreclosure?

22 A. No. Even before the foreclosure.

23 Q. So you didn't have counterclaims yet.
24 And Mr. Bernstein was --

25 A. Not yet, no. I tried to sell them.

1 After everything fell apart and he kept
2 continuing, trying to extort these terms out of
3 me, I said, I've got to get rid of the houses, pay
4 them off and be done with them, Harbor National
5 Bank. They wouldn't allow it. Bernstein demanded
6 a 14 percent default interest and his attorney
7 fees.

8 Q. Couldn't you have substituted collateral
9 for the Black Rush property?

10 A. I could have done a lot of things. But
11 that wasn't the agreement. I'm not going to hurt
12 my business more just to satisfy extortion demands
13 from the bank.

14 Q. But you mentioned --

15 A. But I couldn't -- I couldn't afford to
16 use more unencumbered properties to replace Black
17 Rush. Black Rush was not supposed to be paid off
18 until 2015. It didn't have to be paid off until
19 2015. It's right there in the divorce decree. Do
20 you want me to get it out and read it to you?

21 Q. You could have substituted that
22 collateral --

23 A. I could have done a lot of things. I
24 could have jumped off a cliff. But, no, I was not
25 required to, and I'm not going to cave in to

1 demands that were unreasonable demands, that were
2 unnecessary if they'd just went through with the
3 renewal like they promised.

4 Q. You talked about --

5 A. I've already answered that question
6 again. I'm not going to answer it again. You
7 asked me that at the last deposition. Don't ask
8 it again. Thank you. Do not ask it again. I've
9 already answered that question.

10 Q. You talked about efforts to mitigate the
11 damages --

12 A. Yes. I just said that. I already said
13 that in the prior deposition, too, I'm pretty
14 sure.

15 Q. Well, you brought it up again.

16 A. Well, I just told you it again, so I'm
17 not going to answer the question anymore. I'm not
18 going to answer the question anymore. I've
19 already answered it.

20 Q. What did you do in efforts to mitigate
21 damages other than try to sell the properties that
22 -- where your loans were already in default?

23 A. That question doesn't make any sense.
24 Why don't you reword it?

25 Q. You said you tried to mitigate

1 properties (sic), and you brought up that you
2 tried to sell, and then you said Bernstein made
3 you drop counterclaims, but then it turned out you
4 didn't have counterclaims at that point. So that
5 takes you back to closer to --

6 A. Well, I guess I misspoke myself.
7 Because, you know, it's been five years, Mr.
8 Duffy. And if I said counterclaims existed, then,
9 obviously, it happened after you sued me.

10 Q. I'm trying to find out when it happened.

11 A. There you go. How about that? You can
12 find the record yourself if you'd quit trying to
13 trip me up because of dates.

14 Q. I'm just asking you when it happened.

15 A. Well, obviously, it happened after the
16 counterclaims. It doesn't take a rocket scientist
17 to figure that out. Why don't you pull up the
18 letters? Why don't you pull up -- do you people
19 do any history on this, or you don't know anything
20 about this case, do you?

21 Q. You brought it up.

22 A. Go pull up the Bernstein letters,
23 because I have all of them, all nine --

24 Q. Okay. And --

25 A. And it says the same thing: Drop the

1 counterclaim.

2 MR. SLOTCHIVER: Guys, we're speaking
3 over each other again.

4 THE WITNESS: Sorry.

5 MR. SLOTCHIVER: It's just the court
6 reporter can't take it down.

7 A. Go look up the letters.

8 BY MR. DUFFY:

9 Q. So your testimony is, that your efforts
10 at mitigation would be shown in the letters with
11 Mr. Bernstein after the closing didn't go through?

12 MR. SLOTCHIVER: Objection.
13 Mischaracterizes testimony.

14 MR. DUFFY: He won't let me ask the
15 question. He's referring to letters. He can
16 either answer the question or refer --

17 A. You're trying to say the letters --
18 you're trying to put words in my mouth. That's
19 pretty tricky. You're really tricky there. You
20 must have got gold stars when you were in law
21 school for trickery. But the fact is, I tried to
22 mitigate as soon as I found out I was having a
23 problem.

24 Q. I want to know what you did.

25 A. I tried to sell out. I could not rent

1 them. I had to let tenants move. I had to tell
2 them they had to move if they didn't buy the
3 houses. That's what caused part of the problems
4 and the damages.

5 Q. Why did they have to move?

6 A. Because I can't sell -- I've already
7 answered that question. I'm not answering --

8 Q. (Inaudible.)

9 A. Here you go. I've answered that
10 question. I'm not answering it again.

11 Q. Couldn't they have stated --

12 A. I've already answered that --

13 Q. (Inaudible.)

14 A. No. I've already answered that --

15 THE COURT REPORTER: I'm sorry. You've
16 got to let him get the question out and then
17 answer. I can't take both of you down.

18 THE WITNESS: I'm sorry.

19 A. Okay. Asked and answered.

20 Q. You just mentioned that you told tenants
21 they had to move.

22 A. I've already answered that question.

23 Q. I haven't asked it yet.

24 A. I've already answered it at the last
25 deposition.

1 Q. When you bring things up and talk about

2 --

3 A. You're asking me questions that you're
4 not supposed to be asking me.

5 Q. If you bring it up in response to
6 questions of mine, I get to ask you what you mean
7 by it.

8 A. Don't ask me questions, because that's
9 -- I think that's grossly unethical. That's
10 another reason why I really need to file a Bar
11 action on you. Gosh, you're unethical. Do you
12 know anything ethical?

13 MR. DUFFY: Move to strike.

14 A. Move on.

15 Q. You mentioned efforts to mitigate
16 included trying to sell the properties after the
17 closing didn't -- the closing for the renewals
18 didn't occur, correct?

19 A. I stand by whatever I said before. But
20 I think that's what I said. As soon as I knew
21 there was a problem. And I wasn't going to kick
22 out good tenants. But when -- initially, when
23 they went vacant, I didn't try to re-rent them
24 because I needed to sell them. And then when we
25 got into the foreclosure, then I had to tell good

1 tenants -- I didn't renew their leases, if you
2 look at the transcript before. It's pretty bad
3 when you lose a tenant that's been a good tenant
4 for two years and wants to buy the house, and they
5 can't get -- their credit is not good enough, and
6 you have to tell them they have to move because I
7 have to sell the house and you're not qualified to
8 buy.

9 Q. Couldn't the house have gone into
10 foreclosure and they still rent it?

11 A. How am I supposed to mitigate if I've
12 got somebody in there that can't buy?

13 Q. Well, you told them they had to leave,
14 but you didn't sell them, did you?

15 A. I couldn't sell them. Because of --

16 Q. Why did you tell them they had --

17 A. Because of all --

18 Q. -- to leave?

19 MR. SLOTCHIVER: Just one at a time,
20 guys.

21 A. I couldn't sell them. I've already told
22 you why I couldn't sell them.

23 Q. Why did you tell the tenants they had to
24 leave?

25 A. Because I had to have them vacant to

1 sell.

2 Q. Okay.

3 A. I've already told you that before. You
4 keep trying to get a different answer.

5 Q. I just don't understand it.

6 A. You don't understand anything about real
7 estate, so don't ask me stupid questions, then.
8 Have you ever owned any rental property before,
9 Mr. Duffy, or you do you just sit in a fat-cat
10 office, collecting 5 or \$600 an hour from a bank?
11 That's a pretty easy job, isn't it? Do you ever
12 get out there and sweat? Did you ever serve in
13 the military? No. Probably never.

14 MR. DUFFY: Move to strike.

15 A. Not a minute, did you? Did you ever get
16 shot at before?

17 MR. DUFFY: Move to strike.

18 Q. Okay. So do you have any identifiable
19 prospective buyers or renters that you haven't
20 told me about in whatever your answers have been
21 in the last ten minutes since I started asking
22 that question?

23 A. I don't know what you're asking. That
24 question doesn't make any sense.

25 Q. Who can you say you would have sold

1 property to or rented property to that you weren't
2 able to because of what you say the bank did?

3 A. Look, it's been five years, Mr. Duffy.
4 Do you expect me to have a list of everybody that
5 tried to rent property or buy my property and made
6 offers on my property?

7 Q. It's fine with me if you don't have it.

8 A. You've already asked me before, and I
9 gave you an MLS printout. Why don't you go back
10 to the exhibits in the discovery responses and
11 look at those, will you? Look at all the MLS
12 records I gave you --

13 Q. (Inaudible.)

14 MR. SLOTCHIVER: Objection to the
15 harassment at this point. If you can just ask
16 him the question.

17 MR. DUFFY: It's not --

18 MR. SLOTCHIVER: "It's fine with me if
19 you don't have them"?

20 MR. DUFFY: I'll let you all know again
21 that I'm likely going to be moving for my fees
22 for the wasted time of just receiving insult
23 after insult, while the attorneys over here
24 are laughing and, you know --

25 THE WITNESS: You've been laughing the

1 whole way through, Mr. Duffy. You were
2 smirking a minute ago.

3 MR. DUFFY: Move to strike.

4 THE WITNESS: Everything you want to
5 move to strike is to your advantage. But you
6 don't want to present to the Court how you
7 think it's amusing to be suing me for five
8 years and trying to kill me. Because if
9 you're not trying to kill me, you're trying to
10 bankrupt me.

11 MR. DUFFY: Move to strike.

12 THE WITNESS: "Move to strike"; "move to
13 strike."

14 BY MR. DUFFY:

15 Q. So is it safe to say you, sitting here
16 today, can't identify a prospective buyer or
17 renter of your properties beyond the existing
18 renters that were in place when these -- in June
19 of 2012?

20 A. That question is not even reasonable. I
21 can't answer a question that's all over the board.
22 I don't keep a list of everybody that makes
23 contact with me. I have hundreds of calls every
24 day -- hundreds, and I have to weed through all of
25 them. I don't keep a list of them. After a

1 while, I don't even keep a list of prospects. I
2 tell them what I have, and I tell them to get back
3 to me. If I can get a sale, I get a sale. But I
4 don't keep a list of everybody I deal with. I've
5 been doing this for 45 years.

6 Q. Do you have a list of anyone who you
7 think you would have sold to?

8 A. Hundreds. But then, you know, you were
9 forcing me -- your client, to sell these houses
10 prematurely at a loss so I could pay to defend
11 myself against this malicious lawsuit. So I had
12 to sell them at a loss. Read my damages from Mr.
13 Albrecht. They're going to be updated.

14 Q. When will they be updated?

15 A. Prior to trial.

16 Q. Well, I'd like to depose him again after
17 they're updated. So have you had communications
18 with Mr. Albrecht --

19 A. No, I haven't.

20 Q. -- since his last deposition?

21 MR. HALVERSEN: Wait until the end.

22 A. No, I haven't.

23 Q. When do you anticipate sending Mr.
24 Albrecht new records?

25 A. Probably when we're really close to

1 trial.

2 MR. DUFFY: Well, I'd just request that

3 Counsel do that at some point in advance --

4 A. We're not getting close to trial unless
5 you start producing documents, Mr. Duffy.

6 MR. DUFFY: -- that in advance of trial
7 that I have an opportunity to depose him.

8 MR. HALVERSEN: Of course.

9 THE WITNESS: Sure.

10 MR. HALVERSEN: I don't think we have a
11 trial date yet.

12 MR. DUFFY: If we want to get ready for
13 trial, we ought to get things updated and take
14 depositions and get them done.

15 MR. HALVERSEN: I agree.

16 (Deposition Exhibit No. 22, Plaintiff's
17 First Set of Requests for Admissions to Defendant
18 Anthony M. Whitfield, was marked for
19 identification.)

20 (Deposition Exhibit No. 23, Defendant's
21 Answers to Plaintiff's First Set of Requests for
22 Admission, was marked for identification.)

23 BY MR. DUFFY:

24 Q. All right, Mr. Whitfield. I'm going to
25 hand you what has been marked as Exhibits 22 and

1 23 to your deposition. Please let me know once
2 you've had a chance to review these exhibits.

3 MR. HALVERSEN: Do you have a copy of
4 all the documents in Request for Admission 2?

5 MR. DUFFY: Not for this deposition, no.

6 A. You've got to be kidding me, Mr. Duffy.
7 You've got numbers here, and you expect me to
8 identify the documents? That's pretty clever.

9 BY MR. DUFFY:

10 Q. Did I ask you that?

11 A. That's what you just said. You just
12 said you want to ask me to identify documents by a
13 number.

14 Q. No, no.

15 A. Okay. What is your question?

16 Q. Mr. Whitfield, have you seen those
17 documents before?

18 A. I don't have any idea what documents
19 they are.

20 Q. No, no, no. Exhibits 22 and 23, the
21 ones sitting right in front of you.

22 A. Oh, these, yeah, I guess I have if they
23 got filed by my attorneys. Yeah, I guess I got
24 copies of them.

25 Q. Okay. Were you involved with looking at

1 the documents we requested to admit were true and
2 authentic documents involving you and the certain
3 banks involved? Were you involved in determining
4 whether they were authentic?

5 A. Good grief. Did you have fun with this?
6 Violating my privacy? Pretty good, huh? Wow. I
7 can't swear. And then I look at every one of
8 these documents, there could be an error in there
9 somewhere. But, yeah, I had a lot of loans with
10 SunTrust, a lot of loans with CresCom. Yeah, a
11 lot. And you're the one who subpoenaed them. You
12 probably need to pull out every one of them and
13 say -- have them send them to me.

14 Q. I did that. And I want to know whether
15 you were involved in denying that they were --
16 that you could tell whether they were true or
17 authentic?

18 MR. HALVERSEN: Object to the form. It
19 calls for a legal conclusion.

20 A. I'm not going to try --

21 MR. DUFFY: No, it doesn't.

22 A. I'm not going to try to identify it.
23 There could be a typo in here. You'd love to
24 catch one of these numbers off. Because obviously
25 the numbers could be -- it's signed by you, and

1 you don't check numbers. There were a bunch of
2 numbers that you got wrong on here (indicating).
3 So, gosh dang, Mr. Duffy, you expect me to rely on
4 you giving me the proper numbers? So I'll tell
5 you what, you get me the documents. And you can
6 also, while you're at it, get all the SunTrust
7 documents that we subpoenaed that we've provided
8 you. And if we don't have them, then we'll send
9 you over a little -- what you call a thumb drive,
10 and you can go through all of those to see how
11 many times Mr. Rivers has been defrauding me and
12 defrauding Fannie Mae and Freddie Mac. But you
13 didn't want to get into all of that, did that?
14 But every one of those are frauds, but you don't
15 want to talk about them.

16 Q. Mr. Whitfield --

17 A. So the question -- the answer is, unless
18 I see the documents, I can't say for sure.

19 Q. Let me just explain something. We sent
20 the documents along with -- or at least we sent
21 the references to documents that have been
22 produced in this case to your attorneys to say,
23 Admit these are true and authentic copies of these
24 bank records. Were you involved with the
25 responses to say, I can't tell you if they were or

1 weren't?

2 MR. HALVERSEN: Again, you're asking him
3 about exhibits we -- you did not identify
4 before the deposition.

5 MR. DUFFY: You all can talk about it.
6 It's fine.

7 MR. HALVERSEN: If you're going to keep
8 asking questions about it.

9 MR. DUFFY: I'm asking a simple
10 question.

11 MR. SLOTCHIVER: We're happy to talk
12 about it, and we will talk about it. But,
13 first, we need to see the exhibits in order to
14 talk about it.

15 MR. DUFFY: No. The exhibits are 22 and
16 23. They were Requests for Admissions that
17 were served and your responses. Was he
18 involved in helping prepare these responses?
19 Did he look at these and help respond? That's
20 all I want to know. Simple. If you all want
21 to take a break, please, go ahead.

22 MR. SLOTCHIVER: We do.

23 (The deposition went off the record.)

24 MR. SLOTCHIVER: Mr. Whitfield is
25 prepared, I believe, to answer the question to

1 the best of his ability. I do want to place
2 an objection on the record insomuch as the
3 questions would pertain to any communications
4 between Mr. Whitfield and counsel. That would
5 be attorney-client privilege. However, if you
6 want to ask him directly about his knowledge
7 without going into the attorney-client
8 privileged information, you're welcome to do
9 it, and he will answer to the best of his
10 ability.

11 BY MR. DUFFY:

12 Q. Mr. Whitfield, were you involved in
13 reviewing the documents identified on Exhibit 22
14 to your deposition to determine whether or not
15 they were true and authentic copies?

16 A. Well, they looked like they were, when
17 this was answered. But I can't identify them
18 without you showing me one of the documents that
19 represents the Bates number and ask me specific
20 questions about it. Because I don't know --

21 Q. And I appreciate that.

22 A. Because I don't have my files to compare
23 it.

24 Q. I appreciate that limitation to what I'm
25 asking you. But what I'm asking you is pretty

1 superficial. Were you involved with determining
2 whether they were authentic or not? Were you a
3 part of the process? Do you remember that?

4 A. Well, I looked at the huge box, and I'm
5 sure I went through and looked at them to see if
6 they were properties of mine. But without
7 seeing -- you know, comparing them to my records,
8 as far as authenticity goes, I can only assume
9 that they were the right documents. But you need
10 to show me one in particular, every one, and ask
11 me a question specifically about the Bates number.
12 You don't even have account numbers on here. So I
13 mean, the answer right here I stand by.

14 Q. So do I understand that you looked at
15 the documents, thought these generally looked like
16 the right things, "but unless, I compare them
17 precisely to my similar pages, I'm not willing to
18 say they're true and authentic"; is that fair?

19 A. Yeah, without comparing.

20 Q. Since your last deposition, Mr.
21 Whitfield, are there any new medical issues or
22 medical damages that you contend that Harbor
23 National Bank is the cause of for you?

24 A. Boy. Um, I have complications all the
25 time because of my congestive heart condition and

1 the anxiety and stress associated with this case.

2 Yeah, the damages -- yeah, my health has
3 deteriorated.

4 Q. And that's related to your congestive
5 heart failure; is that right?

6 A. Congestive heart failure and stress and
7 anxiety caused by this case. Of course, that puts
8 pressure on the heart from the stress caused by
9 this case.

10 Q. Okay. And listed as a medical damages
11 expert is a Dr. Geo (sic).

12 A. Giove.

13 Q. Giove. When did you start seeing Dr.
14 Giove?

15 A. I don't recall. But he was my wife's
16 doctor, and I started going to him when I needed a
17 doctor, when I started getting a little older, to
18 take care of any issues that I had.

19 Q. Would that have been after this case
20 started or before?

21 A. Oh, I was seeing him before. Because I
22 needed a general physician for a number of
23 reasons. And after the stress started getting
24 worse, when -- the harassment from Harbor National
25 Bank, then -- I was seeing him more, and he was

1 giving me medicines, trying to see what would stop
2 my anxiety. And he has it on the record, and he's
3 testified. You can read his deposition.

4 Q. I apologize. I don't have the reference
5 in front of me, but I recall there was another
6 doctor that you had listed at some point. Do you
7 recall that?

8 A. I've had a lot of doctors. There were
9 Dr. Chow (ph) or Tauw (ph) -- I don't know how you
10 pronounce it -- over at the V.A. She was my
11 primary doctor. Then I had a cardiologist over
12 there. And then I switched -- I was with Roper,
13 who did the heart operation to put the pacemaker
14 in. I can't remember his name offhand because I
15 changed doctors. I went to the V.A. because it
16 was costing too much money, and I was entitled to
17 V.A. benefits because of not only being a veteran
18 for 18 years, but also being a Vietnam Vet. So I
19 went to them for help.

20 Then when I turned 65 and qualified for
21 Medicare, then I went back to MUSC. And I have
22 MUSC doctors taking care of me now, including the
23 cardiologist department with Dr. Leman, downtown,
24 who monitors my pacemaker, and then the doctors
25 over at MUSC facility over there off of

1 Hungryneck.

2 Q. And which doctors do you contend that --
3 the treatment sought by those doctors was caused
4 by Harbor National Bank's actions?

5 A. Whatever the doctor said. I think Dr.
6 Giove contributed it to the stress as being the
7 cause for my congestive heart failure. And all
8 the other records show that I was under a lot of
9 stress.

10 Q. Okay. Just to be fair, you listed a lot
11 of doctors. I want to know, are there --

12 A. I don't consult them. I don't say, Hey,
13 I'm under all this stress because of Harbor
14 National Bank. They just treat me when I'm about
15 to die every time I show up. Like I've had to go
16 in the hospital, emergency room, because my pulse
17 rate dropped off or my blood pressure, and they
18 had to revive me, basically. At one time they had
19 to drain 16 pounds of water off of me. Do you
20 know how much 16 pounds of water is? That's all
21 around your organs. So where do you think it came
22 from? It didn't come out of the blue. It came
23 from stress. There's nothing else stressing me,
24 except Harbor National Bank.

25 Q. I'm just getting to the question, which

1 is, I'm just trying to find out which doctors you
2 would claim damages -- for their treatment,
3 invoices, bills or whatever -- for seeing them,
4 that you would ask for Harbor National Bank to
5 pay?

6 A. I don't think we were asking for medical
7 expenses.

8 Q. Okay. What damages, if any, do you seek
9 related to your contention that Harbor National
10 Bank has caused or contributed to your health?

11 A. Why don't you read off the damages that
12 are in the pleadings and we'll go over those if
13 you'd like? But I'm not going to sit here and
14 guess all the types of damages. You know what
15 they are. They're right there. Why are you
16 asking me a trick question? Just pull out the
17 Fifth Amended Complaint. And why don't you pull
18 out -- somewhere in there there's an answer in
19 discovery that lists all the medical issues. Read
20 them and ask me about them if you want to, but
21 don't sit there and say, What are your damages for
22 medical? What other damages do you think are
23 associated with the stress? It's pled. It's
24 pled. I stand by the previous.

25 Q. You said you're not asking for --

1 A. I'm not asking for --

2 THE COURT REPORTER: I'm sorry?

3 Q. What money are you asking for related to
4 your medical -- alleged medical damages?

5 A. Well, emotional distress, to start with,
6 anxiety, everything that's pled in there, what you
7 caused, and my heart failure; my permanent damage
8 to my physical well-being; my life cut short. You
9 want to look up congestive heart disease? Why
10 don't you find out what the life expectancy is for
11 someone with congestive heart disease? Why don't
12 you look that up? Do you know I lost two family
13 members -- do you know why I'm a little irritated?
14 -- last week: My sister-in-law on my wife's side
15 and my sister-in-law, my brother's wife. And you
16 know what they died of last week?

17 Q. I'm sorry to hear that.

18 A. Congestive heart disease. So do you
19 think that puts me in a good mood? Because I have
20 problems sleeping; I have a problem getting fluid
21 off; I have problems with my blood pressure. I
22 take all kinds of medicines to stay alive. And
23 you don't think I'm a little upset? You don't
24 think your bank caused these damages and cut my
25 life short?

1 Q. No, if you want to ask my opinion. No,
2 I don't think so. But what I'm asking you is --

3 A. Of course that's what you're going to
4 say. But we'll see what the jury has to say about
5 it.

6 Q. What I'm asking you is, what money are
7 you asking for? And you've mentioned pain and
8 suffering. I get it; you want an award for that.
9 You also mentioned shortened life expectancy. Are
10 you seeking damages for a shortened life
11 expectancy? And, if so, what evidence do you
12 intend to present about that?

13 A. I can't say -- I think that's -- has to
14 be determined by our experts in the case.

15 Q. So your medical experts, you understand,
16 would opine about a shortened life expectancy?

17 A. I think you could probably look it up in
18 Google. You can Google anything.

19 Q. Google doesn't work for court.

20 A. On Google you find medical reports and
21 medical opinions, and they're by licensed doctors,
22 experts in the field.

23 Q. Right. But you're not an expert, are
24 you?

25 A. No. No. But we're going to rely on

1 professional information -- professional reports.

2 Q. Okay. Could I -- could you send me the
3 reports you're talking about?

4 A. We can pull them up; I'll be glad to do
5 that.

6 Q. Okay. To the extent you're contending
7 there's some shortened life expectancy, there's a
8 note here, I want any evidence you have of that or
9 any opinions, any direction of an expert who is
10 going to opine on that.

11 Is it your understanding that your
12 unfair trade practice claim is based in part on a
13 bank policy about what rate gets charged?

14 A. That's --

15 MR. HALVERSEN: Object to the form.

16 A. -- one of them.

17 Q. When did you first learn of that?

18 A. I cannot discuss all the evidence we
19 have we're going to put up, because it deals with
20 the -- also with the modification files, which is
21 attorney-client privilege, because I assisted my
22 attorneys in accordance with the court order,
23 which you tried to hold me in contempt for. And
24 there's a lot of files in there that have evidence
25 that are very damaging -- very severely damaging

1 to your client.

2 Q. I'll ask you now to produce them,
3 because you told the Court you were looking at
4 that as an expert, and I get to see what you do as
5 an expert. So I look forward to seeing all of
6 those files.

7 A. You have all those files.

8 Q. You just said you can't produce them
9 because they're attorney-client privilege, and I'm
10 telling you they're not.

11 A. I said I'm not answering questions. I
12 didn't say not to produce. You have them, don't
13 you? Or did Mr. Whitaker lose them? He's the one
14 that got them all together for us.

15 Q. I'll make another request, that I've
16 made a number of times, that the files that you
17 presented to Mr. Whitfield (sic) that were
18 attorneys' eyes only, that you send them to me so
19 I can see what you sent and how you redacted them.

20 A. You deal with that with my attorneys.

21 Q. I am. I'm putting that on the record
22 again.

23 A. Okay.

24 Q. And I also want to see any
25 communications you had as an expert with the

1 lawyers involved in the case related to those
2 things. But we'll get to that when you're doing
3 your expert disclosure in deposition.

4 So my question to you was, when did you
5 become aware of this bank policy that you
6 understand is part of your unfair trade practices
7 claim?

8 A. When I read your bank policy.

9 Q. I thought that might be it, but I want
10 to know when that was.

11 A. Well, I don't know. I've read 10,000
12 documents that you produced. And you normally
13 just throw them all in a box, so it takes a while
14 to sort them. There's a loan policy; there's a
15 bank policy manual, all kind of policy manuals.
16 And it shows that they were deviating from the
17 policy.

18 Q. Does it --

19 A. I'm answering the question, if you don't
20 mind, please. So you (sic) seem to think that
21 they can deviate whenever they want to, only for
22 the benefit of their shareholders and investors
23 and officers. But not --

24 THE COURT REPORTER: I'm sorry. I need
25 you to slow down.

1 THE WITNESS: Okay. I'm sorry.

2 MR. DUFFY: Move to strike.

3 Nonresponsive.

4 BY MR. DUFFY:

5 Q. The question is, when did you first
6 become aware of that bank policy? And I believe
7 you started to say -- the answer is -- I'll put it
8 this way -- I'll rephrase it.

9 Did you first become aware of that bank
10 policy that you contend is part of the unfair
11 trade practices claim sometime during this
12 lawsuit?

13 A. Yeah, I'd say.

14 Q. Do you have an understanding of what
15 insurance is currently held for the Black Rush
16 property?

17 A. Yeah. I maintain it.

18 Q. And can you tell me who it's with?

19 A. I believe -- yeah, it's USAA. As a
20 matter of fact, it just came up for renewal. I
21 have to pay it again.

22 Q. Do you have an understanding of the
23 estimated market value today of the Black Rush
24 property?

25 A. Yeah. Over a hundred thousand dollars

1 from 2012, when you gave me those lowball
2 appraisals, your pals at Harbor National Bank.

3 Q. Can you tell me what the number is?

4 A. \$100,000 more than I paid for it. I
5 paid around 395. It's over 500,000 now.

6 Q. And what is your understanding of the
7 general condition of the Black Rush property?

8 A. I don't know. I don't see my ex-wife,
9 but I'm sure she's maintaining it.

10 Q. Do you understand that the 98 Willow
11 Lane property is vacant?

12 A. I sure do.

13 Q. What is your understanding of the
14 current condition of the 98 Willow Lane property?

15 A. It's no worse or better than it was when
16 you foreclosed on me.

17 Q. Have you had any communication with any
18 federal or state regulators since your last
19 deposition concerning this case?

20 A. I've had contacts with several of them,
21 but that's confidential. Because when you get a
22 complaint filed for Harbor National Bank, you'll
23 be getting a copy of it.

24 Q. Okay. So you're making a complaint to
25 which agency?

1 A. It's going to go out probably to half a
2 dozen.

3 Q. Do you have an anticipated timeframe of
4 lodging your complaint with the regulators?

5 A. No. Because I get more juicier stuff
6 every day from you all, and I can't wait to see
7 the next group of files. We're going to have to
8 get those declassified or else the government is
9 going to have to Subpoena them directly.

10 Q. How many closings would you estimate
11 you've had with Mark Weeks or his firm?

12 A. Did you ask me that last time? I think
13 you did.

14 Q. It's a new day.

15 A. Well, I'll put it this way, I don't do
16 any more closings with him. I have another firm
17 that does my closings for my sales.

18 Q. What contact have you had with Mr. Weeks
19 about the lawsuit since your last deposition?

20 A. Contacts? I don't have contact with
21 him.

22 Q. Which, for reference, since the last
23 deposition he's offered a supplemental affidavit.
24 Did you talk to him at all about that?

25 A. My attorney did.

1 Q. So you've had no contact with Mr. Weeks?

2 A. I don't talk with him directly.

3 Q. How about anyone at his office?

4 A. No.

5 Q. Some of the properties listed on the
6 exhibits that we looked at earlier -- I believe
7 it's 19, 20 and 21 -- did you buy any of those out
8 of foreclosures?

9 A. I don't remember how I bought which one
10 of them, but I buy them from the government
11 sometimes; I buy them through MLS. I buy them all
12 different ways.

13 Q. Mr. Whitfield, do you believe it was
14 unfair for Judge Goodstein to hear your case in
15 Dorchester County?

16 A. Absolutely.

17 Q. And you believe that Mr. Swanson and the
18 bank representatives conspired against you to harm
19 you?

20 A. Would you be a little more specific on
21 that question? That's a pretty general question
22 there. I think I've already answered about
23 conspiracy and fraud and everything. So is there
24 a specific question there?

25 Q. I think it's pretty clear. I'll let it

1 go.

2 A. Good idea.

3 Q. You mentioned you thought someone
4 recruited Mr. Swanson into the conspiracy.

5 A. I didn't say "someone." Did I? I
6 thought I said specifically.

7 Q. Okay. Well, who was it specifically?

8 A. Well, I've already answered that
9 question earlier. Why don't you read it? Read
10 the transcript.

11 Q. Answer it, please.

12 A. I already said it.

13 Q. Great. Well, say it again.

14 A. I'm going to have to -- we'll have to
15 request -- go back to the question.

16 Q. No. Who do you think recruited Mr.
17 Swanson into a conspiracy?

18 A. A lot points to you.

19 Q. Oh, I thought it was going to be Mr.
20 Bernstein.

21 A. Well, I already mentioned Bernstein,
22 didn't I?

23 Q. That's what I'm trying to find out. Who
24 do you think recruited Mr. Swanson into a
25 conspiracy?

1 A. He didn't just go walk in the door and
2 knock on the door downstairs and say, Hey,
3 Charlie, let's go get some drinks. You need some
4 help in this case? It looks like you're really in
5 a bad way.

6 Q. Okay. So you contend that I and Mr.
7 Bernstein recruited Mr. Swanson into a conspiracy?

8 A. I'd say he had some help concocting his
9 lies in his deposition, and the phone call that
10 never existed. And it was really farfetched, to
11 tell you the truth. Boy, I'll tell you. You
12 could have come up with a better idea than
13 subordination of equity that doesn't exist. I
14 don't know. He must have thought we were stupid
15 or something and didn't know what the law was.

16 Q. Do you believe that Mr. Swanson
17 concocted an equitable subordination theory?

18 A. Yes, absolutely.

19 Q. And how do you --

20 A. It doesn't apply.

21 Q. How do you have the legal understanding
22 that equitable subordination was made up by Mr.
23 Swanson?

24 A. Because it doesn't exist as it relates
25 to my case. I could deed 99 percent of that

1 house, as long as I had possession of one percent,
2 and the bank would still foreclose, without any
3 problems with the first mortgage on it.

4 Q. You don't think your wife would have
5 raised any issues with the bank foreclosing?

6 A. Hmm?

7 Q. You don't think Ms. Whitfield would have
8 raised any issues with the bank foreclosing?

9 A. You know, it's funny you ask that. Mr.
10 Bernstein was in such a hurry to serve my ex-wife,
11 to light a fire under my ass -- do you remember
12 that e-mail? -- he had a slip in the box. When he
13 did serve her, he called her up and made contact
14 so that she would be a witness for Harbor National
15 Bank. Did you know that?

16 Q. That wasn't my question.

17 MR. SLOTCHIVER: We've got to take a
18 break.

19 THE WITNESS: Okay. Let's take a break.

20 (The deposition went off the record.)

21 BY MR. DUFFY:

22 Q. Before we broke, we were talking about
23 things that you contend people had done wrong or
24 unfairly to you. Deposition Exhibit 11 is an
25 e-mail we looked at before from Scott Warren to

1 Teresa Farley and Felicia Pringle where he
2 references calling "bank council." And I know you
3 don't think that was an accurate representation.

4 And I want to ask you about Exhibit 10,
5 that was just before that, which was Ms. Farley's
6 e-mail to Mr. Warren of June 26, 2012, which
7 indicates that we will need to sign -- Ms.
8 Whitfield needs to sign the Charleston County
9 mortgage. Do you recall that, those two there?

10 A. I recall seeing it after the fact, but I
11 never saw it or heard anything about this before
12 the closing date.

13 Q. And I just want to be clear. Do you
14 believe that Ms. Farley or anyone in the Weeks
15 firm was involved in the conspiracy that you've
16 described at the bank and Mr. Swanson and others
17 were a part of?

18 A. I just think Mark Weeks should have been
19 a little more aggressive in saying that there
20 wasn't any endorsement required, so it didn't get
21 this far.

22 Q. But you don't think that Ms. Farley
23 indicating that Ms. Whitfield needs to sign on the
24 mortgage is part of this --

25 A. I don't think she's qualified to say

1 that. She's not an attorney.

2 Q. But you don't think she's part of the
3 conspiracy?

4 A. No.

5 Q. Do you believe it was unfair to you for
6 Ms. Whitfield not to sign an acknowledgment of the
7 mortgage?

8 MR. SLOTCHIVER: Calls for a legal
9 conclusion.

10 A. Excuse me?

11 MR. DUFFY: No. I'm asking if he thinks
12 it's unfair to him.

13 MR. SLOTCHIVER: His personal opinion?

14 MR. DUFFY: Yeah.

15 A. For her not to do what?

16 Q. She was asked to sign off on the
17 mortgage. She didn't. Do you think that was
18 unfair to you?

19 A. If she was required to. But she wasn't
20 required to. There was no mortgage for her to
21 sign. She wasn't even asked to come and attend
22 the closing. Her attorney told her not to sign.

23 Q. Okay. Do I understand you correctly
24 that you believe Mr. Stanley Claypoole was unfair
25 to you?

1 A. Yes.

2 Q. And do I understand correctly that you
3 believe Ms. Pratt was unfair to you as the
4 receiver and profited --

5 A. Whatever was said was said, I agree
6 with.

7 Q. Okay. And do I understand correctly
8 that you believe the, quote, thieving printer, end
9 quote, who printed Harbor National's loan
10 documents were unfair to you?

11 A. I don't understand what the question
12 was.

13 Q. Earlier in your testimony you were
14 talking about Harbor National's loan documents
15 that you think were improperly ordered, I suppose,
16 or in the wrong order. And you said a "thieving
17 printer" --

18 A. I don't remember saying that.

19 Q. Okay. Well, do you believe the printer
20 of those loan documents did something that was
21 unfair to you?

22 A. Which loan documents?

23 Q. The ones you signed or say -- you claim
24 you didn't sign, that are involved with the Harbor
25 National mortgages.

1 A. That's a question -- I can't answer
2 that. You're not making any sense.

3 Q. Okay. Well, you're the one that
4 described the "thieving printer."

5 A. I don't remember saying that. If you
6 want to show me where I said that.

7 MR. DUFFY: Can you please look up, Eve,
8 the "thieving printer" reference?

9 A. "Thieving printer"? Did I say that?
10 (The court reporter played back audio of
11 previous testimony on pages 91 and 92.)

12 Q. Do you recall your reference to the
13 "thieving printer"?

14 A. I was referring to whoever prepared
15 those loan documents for Harbor National Bank when
16 they first got in the business.

17 Q. Okay. Did that result into some --

18 A. They were not consumer loan documents
19 for consumer loans either.

20 Q. Did the printer do something wrong that
21 ended up causing some harm to you?

22 A. The printer? No. That's not what I
23 meant.

24 Q. What did you mean by "thieving printer"?

25 A. I just -- whoever printed those

1 documents knew what they were doing. And the bank
2 knew what they wanted, and they wanted an
3 agreement where the borrower was put in a hole
4 with set-off clauses and cross-collateral.

5 Q. So you contend that the printer of those
6 documents knew that they were doing something that
7 was going to --

8 A. No. They did what the bank told them to
9 do.

10 Q. -- that they were going to result in
11 something that was unfair to a borrower?

12 A. They'll print whatever documents the
13 bank wants.

14 Q. You just said they knew; I'm trying to
15 understand what you contend.

16 A. I don't know what I meant by that. All
17 I know is -- what I meant is that the documents
18 were -- I was supposed to be provided by Mr.
19 Rivers, as promised.

20 Q. And you believe Angie Bell intentionally
21 misled you and tricked you in the initial loan
22 transactions?

23 A. I think we've gone over that, yeah.

24 Q. And you believe Charlie Rivers
25 intentionally misled you and tricked you?

1 A. Yeah. Yes. I do. I think I've already
2 said that.

3 MR. DUFFY: That's all I have for right
4 now. I know Steve had a couple of things, and
5 I'll take a look at my notes.

6 EXAMINATION

7 BY MR. KROPSKI:

8 Q. Mr. Whitfield, my name is Steve Kropski.
9 I stepped in for David Overstreet.

10 A. Oh, you're the Kropski guy. Okay.

11 Q. You've heard my name before?

12 A. Well, I saw it briefly on something.

13 Q. On the pleadings or something?

14 A. Nice to meet you.

15 Q. I'm the attorney for David Swanson in
16 this matter. Is it easier -- can I ask from here,
17 or would you like me to move over to where Mr.
18 Duffy is?

19 A. I think as long as I can hear. My
20 hearing is not that great from flying jets for a
21 lot of years. But if I can't make out your
22 question, I'll just get you to speak up and repeat
23 it.

24 Q. Perfect. You made a reference earlier
25 in response to Mr. Duffy's question concerning a

1 Wayne Freeman. Do you recall Wayne Freeman?

2 A. Uh-huh (indicating an affirmative
3 response).

4 Q. And you referred to him as Swanson's
5 "henchman." Do you recall that?

6 A. Yeah, I guess so.

7 Q. And I believe that you testified that he
8 served you a Rule to Show Cause?

9 A. Yes.

10 Q. Are you aware of any other activity that
11 Mr. Freeman did for Mr. Swanson other than as a
12 process server?

13 A. Did for Mr. Swanson?

14 Q. You said Swanson's "henchman."

15 A. I didn't say anything about Freeman. He
16 did it for Seibert.

17 Q. He did it for Seabrook (sic)?

18 A. Yeah.

19 MR. SLOTCHIVER: I think it's Seibert.

20 A. Seibert.

21 Q. So if there's a reference to Swanson's
22 "henchman," you meant Seibert?

23 A. Yeah, Seibert. Actually, he was doing a
24 favor for Bernstein too.

25 Q. Mr. Swanson was not involved in that?

1 A. No. I misspoke.

2 Q. Mr. Duffy asked you earlier about expert
3 opinions or expert testimony. Do you intend to
4 give expert testimony concerning legal issues?

5 A. No. I don't think so.

6 Q. So you wouldn't be giving an expert
7 opinion about what constitutes abuse of process
8 from a legal standpoint?

9 A. No. I think that's up to my attorneys
10 to present that.

11 Q. Have you -- and you don't expect to give
12 an expert opinion concerning the legal standard
13 for civil conspiracy, do you?

14 A. Not the legal term. But just the facts
15 that I know of.

16 Q. You're not going to testify to what the
17 legal standard of a civil conspiracy is?

18 A. No. That's not my position to do that.

19 Q. Okay. Perfect. We're going quick. You
20 also referred to medical damages. Have you
21 consulted or hired an expert -- a medical expert
22 to determine the specific medical damages that are
23 caused by David Swanson's abuse of process?

24 A. No, I haven't yet.

25 Q. Do you intend to?

1 A. Whatever my attorney and experts say --
2 my attorneys advise me on that. So, obviously,
3 what Mr. Swanson did caused problems with my
4 health.

5 Q. But you do not have, at this time, an
6 opinion as to -- or information concerning the
7 specific medical damages that you've suffered as a
8 result of David Swanson's abuse of process?

9 A. Are you talking about medical damages,
10 or are you talking about damages to my health?
11 It's two different things. My mental and my
12 physical health.

13 Q. Okay.

14 A. That's what I'm after Mr. Swanson for,
15 as well as Harbor National Bank. I'm not after
16 the expenses. I paid those. I've got some
17 benefit from the Veterans' Administration, and
18 then Medicare has picked up. So, I mean, I'm
19 paying insurance for my basic Medicare and my
20 Medicare Plus, but I'm not asking for any of that.

21 Q. Can you identify the mental damages that
22 are specifically attributed to David Swanson's
23 abuse of process versus the other wrongs that you
24 do not allege against David Swanson?

25 A. I don't quite understand the question.

1 Q. Sure. Can you identify to me the
2 specific mental damages that you've suffered that
3 resulted from David Swanson's abuse of process as
4 opposed to the other wrongs you allege against
5 different parties?

6 MR. HALVERSEN: Object to the form.

7 A. He contributed, just like Harbor
8 National did, because he conspired with Harbor
9 National Bank. So he's all lumped in there in
10 contributing to my health and mental issues,
11 because he was involved in the conspiracy and
12 abuse of process and fraud and perjury.

13 Q. Mr. Duffy asked you a question about
14 Mark Weeks, and you testified that you have not
15 used him for a closing in a long time. You said
16 there's another firm that does your closings now.

17 A. Right.

18 Q. Who is that firm?

19 A. Butler & College.

20 Q. And you testified that you believe that
21 Mr. Bernstein and Mr. Duffy recruited Mr. Swanson
22 to join the conspiracy?

23 A. Well, it looks awful (sic) like that,
24 yeah. The circumstantial evidence points to that.
25 I don't have any proof that they actually had

1 conversations and meetings and all of that. But
2 it's a little suspicious.

3 Q. Is there anyone else that recruited Mr.
4 Swanson?

5 A. Well, let's see. We've got to have
6 Harbor National Bank involved.

7 Q. Which person at Harbor National Bank?

8 A. Well, his longtime childhood buddy, I'm
9 sure, Mr. Rivers, was involved.

10 Q. Anyone else?

11 A. No telling how many people from Harbor
12 National Bank were involved, because they had a
13 big conference room table, and they got together
14 and figured out how to concoct the lies.

15 Q. Do you know the date that conference
16 occurred?

17 A. If I did, you'd know about it.

18 Q. You don't have any documentary proof?

19 A. Well, I'll put it this way: Mr.
20 Swanson's name never came up until the 13th of
21 November 2013. So they were desperate to find
22 somebody to help them out, and Mr. Swanson
23 volunteered when he was approached.

24 Q. And we don't need to go through this
25 whole document, what is marked as Exhibit 1.

1 A. What are you talking about?

2 Q. What is marked as Exhibit 1, this is
3 something --

4 A. I'd better get mine out, then.

5 Q. You read this into the record earlier?

6 A. Yeah.

7 Q. So we don't need to go through this.
8 But is it fair to say this is an accurate
9 explanation of what you allege Mr. Swanson did
10 wrong and motives for his wrong?

11 A. That's a pretty good -- what do you call
12 it? -- analysis of what I've seen as far as the
13 facts go. But I think there's probably a few
14 other things I probably forgot to put on here.

15 Q. What are those?

16 A. I thought of something earlier, but then
17 I didn't write it down. I'll have to think about
18 it. Is there anything else?

19 Q. I had asked you what else -- what else
20 you believe was not included in this Exhibit 1?

21 A. I thought I answered that question. I
22 said I don't recall off the top of my head, but my
23 mind is always thinking. I thought of a couple of
24 things, but I'd have to go back and refresh my
25 memory.

1 Q. But you can't tell me now?

2 A. Not right now.

3 Q. And you earlier testified in response to
4 Mr. Duffy that you believe Mr. Swanson concocted
5 an equitable subordination theory?

6 A. Yeah -- yes.

7 Q. When do you believe that Mr. Swanson
8 concocted that theory?

9 A. He didn't do it June 28th, 2012, because
10 we never heard anything -- Mr. Swanson, nor did my
11 closing attorney nor anybody. So it had to be on
12 or about the time that Mr. Bernstein was getting
13 some heat for being the bank counsel, which he
14 swore in an affidavit that he had nothing to do
15 with it, after Mr. Rivers said he did it. So Mr.
16 Bernstein was already going to be named as a
17 witness, because he was involved in so many things
18 and e-mails and things, that he had to be made a
19 witness. So Mr. Bernstein couldn't be around him
20 much longer so another attorney had to be
21 recruited, and then Swanson had to be recruited.
22 It's amazing to me that Mr. Duffy and Mr. Swanson
23 came into the picture about the same time.

24 Q. Okay. And that equitable subordination
25 theory you allege was concocted sometime after

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?

1 A. Yeah. A big difference.

2 Q. Now, bank "counsel" with an "E" on it is
3 lawyers, right?

4 A. Yes.

5 Q. And a bank "council," that's a committee
6 of people that come together to make decisions?

7 A. Correct.

8 Q. I'm looking at the e-mail that's been
9 referenced repeatedly or the -- it's Exhibit 11 on
10 the second page. It says, "I called bank" -- I'm
11 looking at the top of the second page of the
12 e-mail from Scott Warren to Teresa, which has been
13 referenced repeatedly today. And it says, "I
14 called bank council to get some advice on how to
15 handle it." Is that an -I-L or an -E-L?

16 A. -I-L.

17 Q. Does it say in that document who was
18 spoken to?

19 A. No.

20 Q. Does it say in that document if anybody
21 was spoken to?

22 A. No. It just says he called.

23 Q. That a call was made?

24 A. Called "council." That could be town
25 council, for all I know.

1 Q. And it doesn't say if anybody was spoken
2 to or what was said?

3 A. No.

4 Q. You've testified as recently as a few
5 minutes ago that you believe that Swanson was
6 recruited, correct?

7 A. Correct.

8 Q. Would you agree with me as to who did
9 the recruiting, that's speculative? You've got
10 circumstantial evidence, but you don't know who
11 recruited him, do you?

12 A. No. I don't have definitive proof, no.
13 Just speculation based on circumstantial evidence,
14 timelines, and what was said when and what e-mails
15 and --

16 Q. You believe it was Harbor National Bank,
17 though, because they had something to gain?

18 A. Yeah, obviously.

19 Q. But the accusation or the allegation
20 that it was done by Mr. Bernstein and Mr. Duffy,
21 that's just purely circumstantial; there's no
22 evidence that you have other than circumstantial
23 evidence to support that?

24 MR. DUFFY: Object to the form.

25 A. No. The only -- my answer to that is I

1 believe firmly that there had to be lawyers
2 involved with concocting the scheme with Swanson.

3 Q. But once again, that's a belief based on
4 speculation. You believe there was recruiting,
5 but you don't know who did it?

6 A. I'm not positive, no.

7 Q. What bothers you is the coincidental
8 timing that it took place?

9 A. Very coincidental that bothers me.

10 Q. When people came in and became involved
11 and things started to change?

12 A. Yes.

13 Q. New names became involved?

14 A. Yes.

15 Q. One more thing, and then I'll be done.
16 Earlier in the testimony that was taken from you
17 by Mr. Duffy, he was talking to you about some
18 SouthTrust loan documents.

19 A. I've got them right here.

20 Q. And it appeared to me that you had some
21 things you wanted to talk about with regard to
22 owner-occupied loans, and I wanted to give you an
23 opportunity to tell me what you wanted to say on
24 the record.

25 A. Well --

1 Q. And if we need to mark anything as an
2 exhibit, just show them to me one at a time and I
3 can mark them as an exhibit.

4 A. I'm not sure which comment I made or
5 answer regarding owner-occupant that you're
6 talking about. But I was referring to these
7 documents, because these are consumer loan
8 documents that Mr. Swanson was using for investor
9 loans like mine.

10 Q. Now, when you refer to "these," are you
11 referring to a packet of documents that are
12 contained in that envelope, or is it the whole
13 stack of documents?

14 A. Well, these are some of the documents.

15 MR. KROPSKI: I'm going to object to the
16 form.

17 A. These are some of the documents which I
18 want to go over, which I wasn't given an
19 opportunity, for these properties that I took out
20 SouthTrust loans with Rivers' approval.

21 Q. Why don't we do this, just so we know
22 what we're referring to: If you can tell me the
23 property address, we can mark it as an exhibit,
24 and then we can talk about it.

25 A. Okay. Let's do the first one since I've

1 got it in my mind. It is 106 Peppertree Lane.

2 MR. SLOTCHIVER: Mark it first as an
3 exhibit.

4 A. Are we going to put on the record what
5 all is in here?

6 Q. You don't need to stick the whole stack
7 in there. If there are things in there that you
8 don't believe are relevant to the action, let's
9 pull them out and not talk about them at all.

10 A. Well, I think what I pulled out is
11 probably relevant.

12 Q. Why don't you start by telling me --
13 let's mark them, and why don't you tell me why you
14 believe they're relevant?

15 A. Yeah, I think so. Okay. Let's do this
16 order.

17 (Deposition Exhibit No. 24, Documents
18 regarding 106 Peppertree, was marked for
19 identification.)

20 A. I want to state for the record that this
21 is not the complete file. We subpoenaed records
22 from Wells Fargo and Wachovia, I believe. And
23 that was the SouthTrust original loans, which were
24 sold to Wachovia and then to Wells Fargo. And
25 somewhere along the line it went to Fannie Mae,

1 but I think Wells Fargo and Wachovia were only
2 servicing the loans, while Fannie Mae bought them,
3 and they went into a trust and securitized.

4 Q. Tell me how it relates to the claim that
5 you have.

6 A. All right. This is a Waiver of Product
7 Guidelines.

8 Q. When you say "this," you have to refer
9 to what page you're referring to. The first page?

10 A. The first page of the package.

11 Q. What exhibit number is this?

12 A. 24. Exhibit 24 is 106 Peppertree, some
13 of the loan files. I may have some other files
14 that came in, because we did a QWR also on the
15 loans, as well as the subpoena.

16 MR. KROPSKI: I don't want to jump in.
17 Are there numbers on that so we can make sure
18 that they're in order?

19 MR. DUFFY: There are no Bates numbers
20 on them.

21 THE WITNESS: There's no order.

22 MR. KROPSKI: Could you say the title?

23 THE WITNESS: I just said "Waiver of
24 Product Guidelines." We'll be a long time if
25 you keep interrupting me. We've already been

1 here a long time.

2 A. Anyway, this was signed by Charles
3 Rivers. This was regarding the Peppertree loan,
4 and he identifies it as "cash-out investor loan."
5 What basically that is, is property I buy, I fix
6 up, and then I go get a loan, and I get some of my
7 cash back. I didn't usually borrow anywhere near
8 the max required. I borrowed anywhere from 50 to
9 75 percent. It says this case was a 72 percent
10 LTV. And he just comments, "Great history with
11 borrower. Credit dings are errors. Income
12 acceptable as calculated. Good deposit
13 relationship."

14 Q. Whose signature is that?

15 A. Charlie Rivers'.

16 Q. And he's talking about you?

17 A. Yes, talking about me.

18 Q. What is the date of that document?

19 A. May 30th of 2003. Now, this is about
20 25, 30 loans into the -- the SouthTrust loans.
21 Because the first loan, I believe, was around 1997
22 with SouthTrust. And Mr. Rivers is the CEO that
23 approved all my loans. That's a very important
24 fact.

25 Now, Mr. Rivers and SouthTrust

1 apparently engaged in a few things that were not
2 quite legal. First of all, he gave me 34 loans.
3 And according to what I see, he classified them as
4 consumer loans so that Fannie Mae would buy them.

5 Q. Are you referring to this exhibit again,
6 or is this an exhibit -- an example of one of
7 those loans?

8 A. I'm referring to a number of exhibits.
9 This one doesn't have the mortgage. I don't know
10 why it doesn't have the mortgage. But the others
11 have a mortgage and they're all the same. Let me
12 just refer to a mortgage on another one because
13 the mortgage is not in here. But we'll get to
14 this other file in a minute.

15 Q. Are we done with this first exhibit,
16 just for clarity?

17 A. No. We're not done with these. But I
18 need to reference the mortgage because the
19 mortgage is not in there. Okay. The mortgage --

20 MR. DUFFY: I object to referencing
21 different property documents for the benefit
22 of --

23 A. They're all the same; they're all the
24 same mortgage. Okay. There are applications also
25 in the other files -- I may have one in these

1 other files -- that were signed at closing, which
2 is kind of unorthodox. You don't normally do an
3 application and have it signed by the borrower at
4 closing. You do an application before. In my
5 case, with Harbor National Bank, there were no
6 applications. And I think Mr. Rivers said -- not
7 Mr. Rivers -- Ms. Bell said, Oh, the
8 application was -- the financial statement was in
9 a tax return. I said, That's not an application.

10 There are applications for every one of
11 these loans with SouthTrust. And in the
12 applications, I believe it's clear that my
13 residence is not the properties. But these to be
14 sold on the secondary market, they have to be
15 consumer loans. Because there's no way I was
16 going to get -- they were going to sell my houses
17 or get a Fannie Mae loan if I was an investor. I
18 owned too many properties.

19 What was interesting, when I was looking
20 through here, under "Occupancy," paragraph 6 on
21 the mortgages, it says, "Borrower shall occupy,
22 establish and use the property as borrower's
23 principal residence within 60 days after execution
24 of this security instrument, and shall continue to
25 occupy the property as borrower's principal

1 residence for at least one year after the date of
2 occupancy, unless lender otherwise agrees in
3 writing," which consent has to be with Fannie Mae,
4 because you're representing to Fannie Mae that I'm
5 using it as the principal residence. Fannie Mae
6 didn't know that I was an investor. And they
7 bought these loans and sold them to investors
8 through the mortgage-backed security program and
9 misled them into believing that they were
10 investing in consumer loans, not investor loans.

11 MR. DUFFY: I move to strike that answer
12 as not responsive to the question and to the
13 extent it is legal accusations from someone
14 who has opined that he himself is not a legal
15 expert.

16 MR. SLOTCHIVER: I would say the
17 response is to a question I asked, but I
18 appreciate the motion.

19 BY MR. SLOTCHIVER:

20 Q. How many of the loans that you have fell
21 under the category of requiring you to live in the
22 home at the same time?

23 A. Every one. So I was living in 34 homes,
24 according to Mr. Rivers and his bunch.

25 Q. Is this a pattern that continued from

1 SouthTrust to Harbor National Bank?

2 A. No. Because the gig was up. When he
3 opened Harbor National Bank, first of all, the
4 Feds started getting involved with all the
5 securitization and illegal stuff going on, and
6 they pounced on these banks that were doing this.

7 So when I got aware of it is when
8 Wachovia bought SouthTrust. And my loan officer,
9 Jim Peeves (ph), at SouthTrust said, We can't loan
10 you any more money. I said, Why? Because I had
11 an open limit. I didn't have to sign any guidance
12 line over there; there was no such thing as a
13 guidance line. It was a handshake. Rivers said
14 -- I asked him, How much will you give me? Or,
15 How much can I borrow? Because I'm not going to
16 buy houses unless I know I can get financing. He
17 said, We'll start off with 3 million. So I wasn't
18 up to 3 million, because I don't borrow the whole
19 75 percent. And all of a sudden I'm being told
20 that my line was cut off, and then I had to go
21 find some other financing.

22 But then I went to Community First Bank,
23 did about 30 loans with them until they said they
24 couldn't do any more. And then I went to
25 SunTrust, and I had the same thing happen to me

1 about after 18 to 20 loans. Then I was looking
2 for some more financing, and when Harbor National
3 Bank -- I was notified that Charlie Rivers was
4 starting it, I said, Well, I'll just go back to
5 Charlie Rivers and see if he can give me the same
6 financing as he gave me at SouthTrust.

7 Q. The same Charlie Rivers who wrote that
8 note about you in that exhibit that we just
9 referred to saying that you --

10 A. Right. And these were the notes he was
11 supposed to give me. These documents -- I
12 specifically asked him -- the same Fannie
13 Mae/Freddie Mac documents, and these documents, as
14 I stated earlier --

15 Q. You're still looking at the same
16 Exhibit, which is No. 24?

17 A. Right. 106 Peppertree.

18 Q. You're looking -- what is the top of
19 that page you're referring to?

20 A. This is the Adjustable Rate Note, dated
21 August 29th, 2001.

22 Q. This is what he told you he would give
23 you?

24 A. This is what I was supposed to get.
25 Now, this note -- I don't know where it came from,

1 but the interesting part about this note, it shows
2 that SouthTrust Mortgage was immediately selling
3 these notes to SouthTrust Bank. There's the
4 stamp. Now, what gets me is there's no initials
5 on these two pages on the note.

6 Q. What two pages are you referring to?

7 A. The first two pages of the Adjustable
8 Rate Note. There's three pages. There's no
9 initials. Now, there's another note for this --
10 let's go back to that file. I don't want to get
11 it mixed up.

12 Q. You were referring to a different file
13 that's been marked as --

14 A. We were looking at the mortgage at 68
15 Princeton, but the same mortgage existed for all,
16 I think, 34 files. So let me see here. There's
17 another fixed rate -- Adjustable Rate Note. This
18 one has all the initials on it, and this one is
19 dated June 12, 2003. And the interest on this one
20 went to 5.5 percent when the initial interest two
21 years earlier was 7.125 percent. Now, I know I
22 had them go back and lower the rates for me, and I
23 didn't have to go through any hassles at all.

24 Q. Now let me ask you this -- I know you
25 want to talk about them -- how does this relate to

1 the claims that you're making against the bank
2 today, other than the fact that it shows a
3 historical relationship between you and Mr.
4 Rivers, and it shows historical mistakes made or
5 inadvertent -- (inaudible) -- by the bank, in your
6 opinion --

7 A. Because I --

8 THE COURT REPORTER: I didn't hear --

9 Q. -- as it applied to loans?

10 A. Because I was defrauded on the type of
11 loans I was supposed to get and the type of loan
12 documents I was supposed to have. That's number
13 one.

14 Q. But the claims you're making, they're
15 not against SouthTrust; they're against Harbor
16 National Bank?

17 A. No. But these documents are used to
18 discredit Mr. Rivers, who has lied the whole way
19 through about what he was supposed to give me.
20 This shows that -- these are the documents that we
21 agreed he was going to use when he coerced me to
22 come and do business with him and offered me a 1
23 and a half million credit line to start with and
24 then upped it to 2 million. Now, why would you up
25 it to 2 million unless you thought I was a great

1 customer? Which I was; I've always been a great
2 customer. I've never missed a payment on
3 thousands of mortgage payments. Gosh dammit, it
4 was probably more than that. 10,000, 100,000
5 payments? I don't know. Never missed a lick, not
6 one in 45 years in the business. And I don't know
7 how many payments I make a year. Sometimes 80.
8 So that adds up real fast.

9 Q. Do the other file documents you have --
10 I'm not trying to move you along. Do the other
11 file documents you have basically confirm the same
12 type of loans that you're referring -- that you've
13 referred to in your testimony?

14 A. Yes.

15 Q. So they're just other examples -- and I
16 believe earlier, when Mr. Duffy asked you, you
17 said these are four random examples. Is that just
18 what these are, is random examples of other
19 scenarios where the same thing happened?

20 A. Yes. I only brought some of the -- four
21 files out of 34. Now, another document in here is
22 the Truth-in-Lending Disclosure. Now, I had a
23 Truth-in-Lending Disclosure on every one of the
24 loans. Now, why wasn't I given a Truth-in-Lending
25 at Harbor National Bank on my nine loans over

1 there, especially the consumer loan, 1055 Black
2 Rush?

3 Q. Is the knowledge that you have today
4 about loans and loan requirements and mortgages,
5 is it the same knowledge you had back at the same
6 time of this -- that the issue arose at Harbor
7 National Bank with Black Rush?

8 A. Well, I had a lot of knowledge before,
9 but I've accumulated probably five times more
10 knowledge since this case started. But, for
11 example, a Truth-in-Lending is supposed to give
12 you an APR. They never provided me an APR; that's
13 an annual percentage rate, based on all their fees
14 that they collected. And also, it says on here,
15 the new T-11 (ph) identifies a balloon payment.
16 Right there in bold under Frank Dodzack (ph), this
17 one just says -- it says "Payable on Demand" and
18 you have to check the block. And you have to
19 check it if the obligation is payable on demand.
20 That means you've got to pay me now, time is up.

21 If not, it's amortized like this and --
22 the first one, payment October 1st, 2001, and it
23 doesn't end until the last payment, September 1st,
24 2031. That's a 30-year amortized loan, paid off
25 at the end of the 30-year period, if you didn't

1 add any principal and accelerate the payoff.

2 So my loans -- I'm going to get to the
3 other loans because some of them are five --
4 they're called 5-1 ARMs. And in case you're not
5 familiar with that, there are 3-1, 5-1 ARMs.

6 Q. I know. If it's relevant, tell me. But
7 if it's just an example of other problems, we can
8 talk about it, but I --

9 A. What I'm saying is, there were never
10 balloons, but they may start it off fixed and then
11 they convert to an adjustable. And as an
12 investor, you have to kind of keep an eye on what
13 is going on and rely on your bank not lying to you
14 about where interest rates are going, which Angie
15 Bell and Harbor National Bank knew exactly where
16 they were going. There are all sorts of --

17 THE COURT REPORTER: I'm sorry. I
18 really need you to slow down a little bit.

19 THE WITNESS: I'm sorry.

20 Q. Is it your position, to some extent,
21 that he knew -- that Mr. Swanson (sic) knew the
22 way you banked, he knew the operation you had, he
23 knew what your desires were?

24 MR. KROPSKI: Object to the form.

25 Q. And he knew what your expectancies were

1 -- what you expected?

2 A. Correct.

3 Q. Rivers. I'm sorry.

4 A. So, anyway, I've got no Truth-in-Lending
5 statements for anything, but I've got
6 Truth-in-Lending statements for 34 investor
7 properties. I didn't even get one for Black Rush,
8 which was a consumer loan. I never got RESPA
9 documents, Regulation Z documents. And then I
10 have in here where they conveniently lost all the
11 mortgages when it came time to sell them. And
12 they used robo signers to sign these fraudulent
13 lost mortgage satisfactions and -- satisfactions.
14 Or they stamp the mortgage -- a copy of the
15 mortgage, and they don't return the original
16 mortgage, which they're required to do. I don't
17 know when they stopped doing that. That's because
18 when they got the securitization going on after
19 1999, they went full-blown. They'd just stamp a
20 copy of the mortgage and say the loan is paid off,
21 and the note is still floating around there in
22 la-la land.

23 Okay. So let's do the next one. We've
24 got this stamp. So we've got to staple this stuff
25 together. Did we put a sticker on it? Yeah, 24.

1 Now let's go here to Princeton, 68 Princeton.

2 MR. KROPSKI: Object to the form to the
3 whole line, considering it's not a response to
4 a question.

5 Q. Well, the question -- I believe it is,
6 and I'll ask the question again. Would you tell
7 me -- using the exhibits in front of you, if
8 necessary, to assist you, would you tell me how
9 this assists you in determining or proving your
10 damages or proving the historical knowledge --

11 MR. DUFFY: I object. And also, I don't
12 think any of those are exhibits that you
13 referenced.

14 MR. SLOTCHIVER: We just marked one of
15 them as an exhibit.

16 THE WITNESS: We're marking this one
17 right now as Exhibit 25.

18 MR. DUFFY: Tell me what the exhibit
19 number is.

20 THE WITNESS: Well, it's going to be
21 Exhibit 25.

22 MR. SLOTCHIVER: Let's mark the second
23 packet as Exhibit 25.

24 (Deposition Exhibit No. 25, Documents
25 regarding 68 Princeton, was marked for

1 identification.)

2 A. Going back to your question, was that
3 these documents, and with the practices of
4 SouthTrust, goes towards proving fraud in the
5 Harbor National cases because they frauded me then
6 and they frauded me again. These documents are
7 all based on fraud, to the government and to the
8 borrowers. Because they aren't what they were
9 supposed to be, and he gave me loans that Fannie
10 Mae could come back or the government come back
11 and say I lied.

12 Q. Is it your position that this is a
13 pattern of conduct that this illustrates?

14 A. Yes. And not just for my 34 loans. He
15 probably did thousands of them over there at
16 SouthTrust, and I don't know how many he did at
17 Harbor National Bank, as not being a registered
18 licensed originator of consumer loans and not
19 telling the borrowers that, We're really not the
20 originators; we're just going to be the servicers.
21 And if we can't ship them over to Silverton or
22 Bankers' Bank, then we'll just classify them or
23 set them up, as Mr. Stout said, as a commercial
24 loan and fraud the borrowers that way. They think
25 they're getting a consumer loan, but they get no

1 disclosures and no protection under the consumer
2 rights.

3 So let's go over here to the -- this is
4 the mortgage I was referring to. This is 68
5 Princeton.

6 Q. It's a different packet?

7 A. Yeah, a different packet.

8 Q. Let's mark this one if we're going to
9 talk about it.

10 A. We marked it. It's 25 -- Exhibit 25.
11 This is -- because -- I found this because their
12 records that they sent us are all kind of
13 piecemeal.

14 Q. Whose records?

15 A. Some documents are in there and some
16 documents aren't. But this one is interesting.
17 It's called Loan Information Report, and it's for
18 68 Princeton. And what I like about this one, it
19 goes in there and talks about the terms, the
20 amount, and it says -- and then what I like, it
21 says, "Investment property. Not owner occupied."
22 But a conventional PMI, first mortgage, loan
23 acquired, Freddie Mac.

24 Q. What year was that?

25 A. Freddie Mac bought this. This was dated

1 August 26, '14. All those loans were bought by
2 Freddie Mac -- Fannie Mae or Freddie Mac under
3 false pretenses. Because they had to -- Mr.
4 Rivers' bunch had to tell Fannie Mae in the
5 documents that I was a homeowner of 34 properties
6 -- I was living in 34 properties.

7 Q. What bank were you at at this point?

8 A. At this point?

9 Q. Yes. When this document was created
10 right there that you're talking about.

11 A. SouthTrust was doing these loans.

12 Q. Still SouthTrust. Okay.

13 A. When this document -- let's see. The
14 date of this note was August 29, 2001. The
15 mortgage -- the mortgage -- the note was changed
16 or there was a different note because they
17 modified it. And there's another issue I have.
18 Why would you give me another note and not show me
19 a payoff of the first one? Somehow they doubled
20 up; they sold my note twice. And there's no
21 reason to believe that they weren't
22 double-dipping.

23 So why wouldn't you show me a payoff and
24 stamp the original note paid in full, verify it's
25 the original note, before you issued another note?

1 They're just floating paper and collecting all
2 this money. They just got rich over it. Then
3 again over at Harbor National Bank, did it all
4 over again. But this paper was created on August
5 26, 2014. This came in probably in the records
6 that we subpoenaed from -- who bought this? They
7 all went to Wells Fargo as far as servicing, but
8 they went to either Freddie Mac or Fannie Mae.
9 That's where they were all sold. They went to
10 SouthTrust Bank and then to Fannie Mae and Freddie
11 Mac. I think I have some reference to Fannie Mae
12 buying -- or Freddie Mac buying --

13 Q. What else in that file represents other
14 indications or evidence of prior conduct?

15 MR. DUFFY: Object to the form.

16 A. More fraud. These assignments of
17 mortgages are assigned by robo signers. I
18 verified Brian Bly as a robo signer, Vilma Castro
19 as a robo signer, and Dhurata Doko.

20 Q. Okay.

21 A. And there are all kinds of robo signed
22 documents in all the files, where they were
23 defrauding people on the securitization. And when
24 the Feds came after them, the robo signers went
25 wild. They had them sitting in a room signing all

1 these documents, speed signing. I had four files.
2 Where did the other one go?

3 I need to talk about that one. I've got
4 that one. I've talked about those two. And this
5 is Exhibit 25, right? Let's look at 100 Coachman.
6 This was marked as Exhibit 17 earlier. Okay.
7 This is certified true copy, according to the
8 stamp at the bottom. So I was never returned --
9 when this property was sold, I was never returned
10 the original note and mortgage, by the way, on any
11 of these that I've sold. And of those 34 with
12 SouthTrust Mortgage that were eventually sold to
13 Wells Fargo, I sold all but eight. Or paid off --
14 either paid them off or sold them. And not one
15 original note and mortgage was returned to me. I
16 got some lost mortgage satisfaction or a phony
17 robo signed satisfaction.

18 Q. From SouthTrust Bank?

19 A. Actually, it came from the last person
20 that serviced it, Wells Fargo.

21 Q. Okay.

22 A. But the satisfactions -- God knows where
23 they came from, because they were all robo signed.
24 It didn't even make reference to an official --
25 there was a reference to Wells Fargo -- let me see

1 if I have one in here. Here we go. Here is
2 another Affidavit of Lost Mortgage. I love it,
3 every one of them. Just lost those mortgages and
4 lost those notes. But they don't ever say they
5 lost the note. They just say they lost the
6 mortgage. The mortgage and note are supposed to
7 go together. Once you separate it, they're not
8 legal.

9 This robo signer -- how could you sign
10 an Affidavit of Lost Mortgage by a representative
11 of SouthTrust Mortgage when you've sold the note
12 twice?

13 MR. DUFFY: I object to the continued
14 discussion of SouthTrust banking practices.

15 Q. Let's go to the last document.

16 A. Anyway, that's -- that's 17. Okay.
17 This one here. We need to mark this one as 26,
18 8206 Holly Knoll, K-N-O-L-L.

19 THE COURT REPORTER: Do you want it
20 marked?

21 MR. SLOTCHIVER: Yes.

22 (Deposition Exhibit No. 26, Documents
23 regarding 8206 Holly Knoll, was marked for
24 identification.)

25 Q. What does this file show, separate and

1 distinct from the others -- what does this one
2 show that the other ones did not show?

3 A. I don't know. I'd have to look for a
4 second. They all have the same adjustable rate
5 notes, but the notes may be different by the
6 number of years. Like this one is a 30-year.
7 It's originated on September 17, 2003, and
8 amortizes until January 1st, 2032. So if you made
9 every payment according to the amortization
10 schedule, you'd pay it off.

11 Q. Is it a Fannie Mae?

12 A. And this is a Fannie Mae. All of them
13 are Fannie Mae.

14 Q. So all the Fannie Maes are all ARMs?

15 A. Uniform instruments. I didn't have to
16 be concerned about whether there were any quirks
17 or these set-off and cross-collateral, all
18 these --

19 Q. Just to tie it all in, part of the
20 purpose of the four exhibits we've just referred
21 to is they all -- they're all indicative and
22 exemplary of the type of loans that you've had
23 with Charlie Rivers, and that's what you thought
24 you were getting when you went to Harbor National?

25 MR. DUFFY: Object to the form.

1 A. And these notes had to be approved by
2 the government for Fannie Mae documents and to be
3 bought by Fannie Mae and put in their system --
4 secondary market system and sold as trust -- into
5 trust, which was securitized. And Fannie Mae had
6 to be bailed out by billions of dollars when the
7 bottom fell out, if you all recall that. All
8 right. So anyway, this was a 30-year, there's no
9 -- none of them have balloon payments in it.
10 They're either 15 or 30 years, and some of them
11 are 5-year ARMs. Here is another assignment of
12 the mortgage. It doesn't have reference to the
13 book and page; the signature is missing. It's all
14 fraud.

15 Q. If I was going to have you bring all the
16 other files that you've talked about -- the other
17 30 or so files, would they all be generally the
18 same types of issues you've discussed with these
19 four?

20 A. Yeah. Yeah. I think so. They should
21 be -- but sometimes, like here -- here is a --
22 another lost mortgage satisfaction. This is
23 pretty consistent. How do you lose that many
24 mortgages? This is just unbelievable. First of
25 all, how do you lose a mortgage? Because a

1 mortgage is recorded. That's the only thing
2 recorded. Notes aren't recorded, so the banks can
3 just sell them like bonds. They just sell them
4 and then issue new notes and sell those too, and
5 have the borrowers have their neck out for twice
6 as many loans.

7 So I have two loans on the same property
8 with no satisfaction of the first mortgage --
9 first note. And you know what? And the reason
10 why that's important is because Harbor National
11 Bank was issuing new notes on the renewal and not
12 paying them off, the original notes. So my
13 question is, where are the original notes?
14 Because those are not the original notes. Those
15 are forgeries. They're not proper documents. Why
16 weren't you -- why didn't you use the original
17 notes, if they were really originals, and renew
18 the original notes?

19 Q. I've got -- unless there's nothing
20 unique and different about the rest of it, I want
21 to wrap this up, if Mr. Duffy promises not to ask
22 any more questions.

23 MR. DUFFY: Can't do that.

24 A. Oh, wait a minute. I did find something
25 different in here. There's something unique in

1 this file.

2 Q. Please.

3 A. I found a Modification Agreement. How
4 is that? Wow. Signed by the vice president of
5 SouthTrust Mortgage. So we modified this
6 mortgage, and this is all I had to sign. There
7 was no appraisal, no title search, no attorney
8 closing. What else? What else am I missing?

9 Q. Was Charlie Rivers at SouthTrust Bank at
10 the time this modification took place?

11 A. Yes.

12 Q. And was the modification he did here
13 essentially the same type of modification you were
14 doing with the other properties subject to the
15 lawsuit?

16 A. All we're doing is changing the interest
17 rate, the payment amount. Actually, they didn't
18 even have to change the payment amount. They just
19 changed the interest rate and the -- put in the
20 balance of the mortgage and the new payment. So
21 that's all I really needed. If you reflect the
22 payment, you're reflecting the interest rate as
23 well. And, see, that's the reduced mortgage,
24 because the original mortgage was 75. Now it's
25 73,789 after the principal payments were made for

1 a couple of years.

2 So there you go; there's another one.

3 And then there's the Truth-in-Lending again. All
4 of them have Truth-in-Lendings. I signed -- I was
5 given Truth-in-Lendings, RESPAs, Regulation Z's,
6 just like a consumer loan, which was kind of
7 interesting.

8 MR. HALVERSEN: Put the exhibit sticker
9 on top.

10 MR. SLOTCHIVER: Thank you, Mr.
11 Whitfield. I've got no further questions.

12 EXAMINATION

13 BY MR. DUFFY:

14 Q. Mr. Whitfield, were you complaining or
15 finding it odd that you got consumer loan
16 documents on those SouthTrust transactions?

17 A. No. Because I didn't have any idea.
18 They were supposed to be investor loans.

19 Q. Is there anything you didn't understand
20 about the documents that you signed when you
21 signed them?

22 A. No. Because they were straight Fannie
23 Mae documents, and I had signed those before. And
24 the language was never changed on every one of
25 them. They were all the same standard language,

1 and they have to be used out there for all Fannie
2 Mae loans. So there wasn't any quirks.

3 Q. Of all the things you just complained
4 about with the SouthTrust Bank, did you suffer any
5 damages associated with the practices that you
6 criticized?

7 A. I didn't suffer any damages. I'm just
8 showing that Mr. Rivers and the SouthTrust bunch
9 were engaged in fraud, just to prove that they
10 engaged in fraud with me on the Harbor National
11 Bank loans. So if they engaged in fraud -- and
12 fortunately for them and fortunately for Fannie
13 Mae -- and the federal government had to bail out
14 Fannie Mae -- I was an honest, solid investor, and
15 I never defaulted on any loans.

16 Q. You testified earlier that you had
17 essentially exhausted the lending at a particular
18 bank and then saw that Mr. Rivers had moved to
19 Harbor National and decided to go talk to him
20 about getting the loans?

21 A. Yes.

22 Q. You also testified that Mr. Rivers
23 coerced you to come do business with him?

24 A. Yes. He even offered to sell me stock.
25 I think it was about \$100,000.

1 Q. Okay. Tell me how he coerced you to
2 come do business with him after you went and asked
3 to do business with him.

4 A. Well, when I asked him to do business,
5 he coerced me by telling me he would give me the
6 same financing deals that he did the 34 times at
7 SouthTrust. So why would I believe he wouldn't
8 treat me the same way if that's what he -- if he
9 had represented to me, Oh, sorry, I can't do that;
10 can't do this, can't do that. You're going to
11 have to have a balloon payment. We can rip you
12 off whenever we feel like it. We can have
13 set-off --

14 Q. I won't ask you more about that --

15 A. That's a good idea.

16 Q. -- if you'll quit talking about it. If
17 you keep talking, I'm going to ask.

18 MR. DUFFY: Done. Okay.

19 (The deposition concluded at 5:45 p.m.)

20

21

22

23

24

25

1 C E R T I F I C A T E

2 STATE OF SOUTH CAROLINA:

3 COUNTY OF CHARLESTON:

4 I, EVE WILBANKS, Registered Professional
5 Reporter and Notary Public, State of South Carolina
6 at Large, certify that I was authorized to and did
7 stenographically report the foregoing deposition;
8 and that the transcript is a true record of the
9 testimony given by the witness.

10 I further certify that I am not a
11 relative, employee, attorney or counsel of any of
12 the parties, nor am I a relative or employee of any
13 of the parties' attorney or counsel connected with
14 the action, nor am I financially interested in the
15 action.

16 WITNESS MY HAND AND OFFICIAL SEAL this
17 16th day of June, 2017, in the City of Charleston,
18 County of Charleston, State of South Carolina.

19
20 

21 Eve Wilbanks
22 Registered Professional Reporter
and Notary Public



23 My commission expires:
24 November 18, 2024
25

1 ERRATA SHEET

2 I have read the transcript of my deposition
3 and find that no changes are necessary.

4
5 _____
6 ANTHONY WHITFIELD

7 Having read the transcript of my deposition, I
8 wish to make the following corrections (Please
9 state reason):

10 Page ____ Line :

11 Page Line :

12 Page Line :

13 Page Line :

14 Page Line :

15 Page Line :

16 Page Line :

17 Page Line :

18 Page Line :

19 Page Line :

20

21 _____
22 ANTHONY WHITFIELD

23 Sworn to and subscribed before me this
24 day of , 2017, County,
25 S.C.

26 _____
27 Notary Public
28 My commission expires

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1 (The following proceedings were held
2 March 21, 2018, Charleston County, South Carolina,
3 @ 10:36 a.m.)

4 THE COURT: On position No. 45 we have
5 additional motions and it is Harbor National Bank
6 versus Anthony Whitfield and we have several
7 motions. Have any of them been resolved other than
8 the Defendant's motion to alter and amend the order
9 that I show has been completed. Any other
10 resolution?

11 MR. KROPSKI: Your Honor, Steve Kropski
12 for David Swanson. We had a motion to compel some
13 damages information. That was our motion to
14 compel. I believe that we have resolved this. Mr.
15 Halversen agrees, what we talked about before.

16 THE COURT: So that is --

17 MR. KROPSKI: That is a motion to
18 compel. We also have a motion to deem requests to
19 have been admitted and respond to interrogatories
20 in a more complete way. So we had essentially two
21 discovery motions. One of them is resolved.

22 THE COURT: Okay. Got it. It the
23 Defendant's motion so let's go to the request to
24 admit.

25 MR. KROPSKI: Your Honor, we are -- we

1 represent David Swanson. He is an attorney with
2 Haynsworth Sinkler Boyd here. I'm not sure if Your
3 Honor remembers, I believe you're a bit familiar
4 with this case. There are six foreclosure actions
5 pending against Mr. Whitfield, three in Dorchester,
6 two in Berkeley, one in Charleston. The Defendant,
7 Mr. Whitfield, brought a number of counter-claims
8 against the bank and later added Mr. Swanson into
9 the case also under abuse of process and civil
10 conspiracy cause of action.

11 Judge Nicholson granted summary
12 judgment on abuse of process so all we have left is
13 civil conspiracy against Mr. Swanson. If the Court
14 recalls, the allegations against Mr. Swanson are
15 that about a year and-a-half ago foreclosures
16 began. There was a deposition of a bank individual
17 who said I called our counsel, our attorney said
18 that we needed to get a title endorsement for a
19 piece of property that's in Charleston County and
20 that they couldn't get a title endorsement and all
21 of the loans ended up not being renewed and the
22 foreclosure resulted out of that.

23 Mr. Swanson testified later yes, he
24 called me. I told him that they needed to get a
25 title endorsement. It was about a ten-minute call.

1 That was what I said. I didn't know anything about
2 the case. I didn't know anything -- that was what
3 I said to them.

4 The causes of action allege that there
5 are no records of this phone call and that Mr.
6 Warren, the bank's representative, and Mr. Swanson
7 got together and decided they were going to
8 formulate false deposition testimony in order to
9 create a defense to Mr. Whitfield's counter-claims
10 under a theory of advice of counsel. So those are
11 the allegations in the claims against Mr. Swanson.

12 One of the difficulties that we have
13 had, and this has been pending for about two years,
14 is a moving target of what the actual theory of
15 liability against Mr. Swanson is.

16 My understanding is that the claims
17 against Mr. Swanson or damages against -- for Mr.
18 Whitfield against Mr. Swanson would arise out of
19 whatever harm has come from defending against an
20 advice of counsel defense. If the conspiracy was
21 to create an advice of counsel defense, my
22 understanding is that the damages would be whatever
23 he has incurred to Defendant's advice of counsel
24 defense. It has not been entirely clear to us
25 throughout this entire process whether or not this

1 is some sort of attempt to back door any illegal
2 malpractice claim against Mr. Swanson even though
3 Mr. Whitfield was not Mr. Swanson's client.

4 So we asked in the request to admit --
5 the date that the loans were supposed to close or
6 be renewed was June 28th, 2012. So we asked admit
7 that the damages that you seek against Mr. Swanson
8 occurred on or before June 28th, 2012. That was
9 one of our requests to admit. The other one was
10 admit that the damages that you seek against Mr.
11 Swanson arose on or after June 28th, 2012, and Mr.
12 Whitfield did not respond to either of those with
13 an admit or deny. The answers are evasive. And it
14 appears to us that one of those would have to be
15 admitted or denied given the allegations in this
16 case.

17 There is a number of different
18 instances in these requests to admit where the same
19 type of thing applies. We have asked request to
20 admit that the allegations of improper conduct by
21 Mr. Swanson all occurred after the foreclosures
22 began or they occurred before the foreclosures.
23 Again these weren't answered. In our opinion one
24 of them would have to be true. One of them would
25 have been false since they are completely

1 contradicting requests to admit.

2 We have tried to resolve this. We have
3 tried to have them answer these I guess in a more
4 accurate or complete way. For most of the requests
5 to admit we also had supplemental interrogatories
6 after that said if you are denying this please
7 explain what you're denying. We are here
8 requesting that request to admit four, five, six
9 and seven be deemed admitted or in the alternative
10 an order requiring them to answer them more
11 accurately.

12 And supplemental interrogatories one,
13 two and three which correspond with those requests
14 to admit, an order compelling them to respond more
15 fully to those interrogatories. I can go through
16 very quickly the requests to admit that are four,
17 five, six and seven. The request to admit four is
18 admit that you are not seeking to hold Swanson
19 liable for advising Harbor National Bank to obtain
20 a title endorsement of the Black Rush Property on
21 or before June 28th, 2012. Five is admit that your
22 civil conspiracy claim against Swanson fails if
23 Swanson testified truthfully about his conversation
24 with Scott Warren that is the subject of the
25 allegations in paragraph 65 through 82 of your

1 amended answer and defense's
2 cross-claims/counter-claims filed on January 8th,
3 2016. No answer was given to those. We did not
4 receive a complete answer and what is in the
5 response is a repeating of the allegations in the
6 answer and counter-claims. That's not within the
7 rule and it seems to be an answer to this. If it's
8 a denial it's a denial.

9 THE COURT: Okay.

10 MR. KROPSKI: Six and seven, six is
11 admit that you did not seek to hold Swanson liable
12 for any act or omission that occurred on or before
13 June 28th, 2012, and seven is admit that you do not
14 seek to hold him liable for anything after. These
15 are what I discussed before. Conceivably one of
16 them would have to be true, one of them would have
17 to be false.

18 So our request is those be deemed
19 admitted or they have to respond to them in an
20 accurate way instead of evasive.

21 THE COURT: Got it. Yes. Thanks.

22 MR. HALVERSEN: Your Honor, Brent
23 Halversen on behalf of Anthony Whitfield. They
24 served request to admissions on November 18th,
25 2017. We timely answered the request for admission

1 on December 1st, 2017. We admitted or denied each
2 request for admission. Mr. Kropski does not like
3 our answers apparently or thinks they are somehow
4 internally inconsistent. That's his position. We
5 believe we have stated fully why we believe the
6 answers are denied or admitted. He is welcome to
7 publish these requests for admissions to the jury.
8 They don't go to the jury, but case law says they
9 can be published to the jury. And I would also
10 cite the case of Commerce Center of Greenville
11 versus Powers McElveen, that's 347 S.C. 1545. And
12 it says the efficacy of admissions is akin to the
13 doctrine of judicial estoppel; an admission
14 precludes the admitting party from arguing the
15 facts at trial contrary to its responses in request
16 to admit.

17 Admissions under Rule 36 are treated as
18 admissions and pleadings in form and substance. A
19 response to request to admit is comparable to
20 admission and pleadings or stipulation of fact. So
21 essentially, Your Honor, he is saying an allegation
22 in this request for admission, we have done a
23 denial or admitted it and given an explanation. He
24 thinks it's internally inconsistent. We do not.
25 We don't know when this advice was given. The bank

1 has raised an advice of counsel defense as to why
2 it did what it did. So they said we relied on
3 Swanson. And Swanson says yeah, I said this
4 happened before June 26th, 2012. We have
5 subpoenaed the law firm. There is no documents
6 there about any advice of counsel given. Not a
7 shred over a million dollar plus transaction. We
8 subpoenaed the phone records. There's no evidence
9 that the phone call they claim took place at the
10 time took place. So we have evidence it didn't
11 happen. We sued for a civil conspiracy action
12 saying they fabricated the defense after the fact
13 because we never even heard about David Swanson for
14 a year into the litigation. Never identified as a
15 witness, never set forth as a basis for foreclosure
16 ever, anything, tried to work it out on the basis
17 of this supposed advice.

18 So we had evidence it didn't happen.
19 We moved to amend, just assert two causes of
20 action. Judge Nicholson said no, that's not an
21 abuse of process. We don't disagree with him on
22 his ruling. We haven't appealed. There is a civil
23 conspiracy action. He did find that there is
24 evidence of some evidence to support that cause of
25 action.

1 So, Your Honor, we answered it. We
2 answered it timely. We admitted or denied it. And
3 we gave our explanations. There's nothing more we
4 can do. He's welcome to raise the issues at trial
5 and argue them as best he sees fit, but a motion to
6 deem a request for admitted would be only proper if
7 you didn't answer them and even then you can
8 actually amend them under case law if you show
9 there is lack of prejudice.

10 So, Your Honor, we have answered them
11 and we believe that his motion should be denied.

12 THE COURT: Okay.

13 MR. KROPSKI: Your Honor, very briefly
14 to respond to Mr. Halversen. This is exactly the
15 reason why we are bringing this motion. If the
16 advice didn't happen which is alleged, then they
17 can admit that they are not trying to seek to hold
18 Swanson liable for anything that occurred before
19 June 20th, 2012. They won't do that. So what we
20 are faced with, we are defending against an action
21 that said you lied under oath in a deposition. Now
22 we are also facing the prospect that at trial it
23 might come in where there's argument that this
24 advice was bad, that you actually did give the
25 advice and that you screwed up all these

1 transactions.

2 The point is it's either one or the
3 other. One of them has to be admitted and one of
4 them has to be denied and they are both denied.
5 And it either happened before June 28th, 2012, and
6 it was advice that actually occurred or as they
7 allege it's advice that never happened and it was
8 all created after June 28th, 2012. That's why the
9 motion is being brought, it's evasive the way they
10 have answered it. They haven't answered these.
11 One of them is right and one of them is wrong.

12 THE COURT: Let me ask you this
13 question. It is -- it's the defense's position
14 that the advice occurred on the 28th of June?

15 MR. KROPSKI: Your Honor, our position
16 is that Mr. Swanson and Mr. Warren had a phone call
17 and Mr. Swanson on the 28th did say go get a title
18 endorsement to protect yourself.

19 THE COURT: That's -- let me just --
20 here's the problem. They don't want to give you
21 that. They don't want to give you the 28th because
22 they are maintaining that the 28th does not exist.
23 So I can tell what the problem is. The problem is
24 is that they are concerned, I have a sneaking
25 suspicion that they are concerned that if they

1 respond to the request to admit then they are
2 allowing an implicit admission that call occurred
3 on the 28th of June. I have a sneaking suspicion
4 that's actually what is occurring. So that's why
5 they want to deny giving you an explanation, right?

6 MR. KROPSKI: Your Honor, I completely
7 agree and I understand. The point is Mr. Whitfield
8 can't sue Mr. Swanson for bad advice that he gave
9 to the bank. That's why they don't want to admit
10 it because that would be grounds for dispositive
11 motion. So we need to know one or the other
12 because we might have a dispositive motion if they
13 are actually trying to sue Mr. Swanson for bad
14 advice that he gave to the bank or allegedly bad
15 advice he gave to the bank. That's the point
16 behind this. We don't know if we are defending a
17 legal malpractice claim that doesn't have standing
18 or we are defending a false deposition testimony
19 case. That's why we need to know these.

20 And I understand why they don't want to
21 do it, but I don't think it is proper under the
22 rule because we have to know what we are defending
23 against.

24 THE COURT: Okay.

25 MR. HALVERSEN: Your Honor, you are

1 correct in your perception. We don't know when
2 this advice occurred. We don't believe it happened
3 when it was claimed to have occurred. He's
4 essentially arguing that we are arguing the facts
5 over the case right now which would be in a summary
6 judgment context, it should be made at trial.
7 Bottom line is we have answered the request for
8 admissions. He thinks they're internally
9 inconsistent and we do not. And the motion should
10 be denied.

11 THE COURT: You think that it's
12 internally inconsistent because your -- just on a
13 -- this is called reflective listening, make sure
14 that I have the point. It is your position that
15 you cannot admit or deny it because implicitly then
16 you are agreeing that there was a phone call. You
17 do not believe there was a phone call.

18 MR. HALVERSEN: We don't know when the
19 phone call occurred. He is trying to corner us
20 into saying when it occurred. And we don't know
21 when it occurred. So I can't say. I legitimately
22 cannot say.

23 THE COURT: Isn't it your position that
24 it did not occur?

25 MR. HALVERSEN: We don't believe it

1 ever occurred. We don't know if they tried to talk
2 to each other. We believe that has been fabricated
3 because there's evidence it never happened.

4 THE COURT: Right.

5 MR. HALVERSEN: And he's trying to say
6 admit it happened here. I can't. I don't believe
7 it happened there. I don't even know if it ever
8 happened when it happened because we have evidence
9 it never happened. So I don't know what more we
10 can do, Your Honor.

11 THE COURT: Okay.

12 MR. KROPSKI: One more thing. The
13 reason we are trying to establish this is because
14 the loans fell apart on June 28th, 2012. If Mr.
15 Swanson did all this bad stuff after June 28th,
16 2012, he is not responsible for the loans falling
17 apart. We don't think he should be anyway.

18 This is an important thing to establish
19 and should be very clear. If all of your
20 allegations are that you guys made up a phone call
21 then it should be easy to admit that we are not
22 expecting to hold you liable for anything that
23 actually happened before.

24 THE COURT: I understand what you are
25 saying exactly. I gather -- the position as I

1 understand it of the Defendant is that if there was
2 a phone call that's a problem because there has
3 been testimony that there was a phone call. So
4 that's a problem. But as I understand the
5 Defendant's position it is a different problem than
6 any responsibility for the failure of these loans.

7 MR. HALVERSEN: The responsibility lies
8 in the civil conspiracy cause of action which
9 alleges that they made an agreement at some point
10 in time. We don't know when, but at some point in
11 time there was an agreement that this advice
12 happened. This was the whole reason they decided
13 not to close these loans.

14 THE COURT: Right.

15 MR. HALVERSEN: So we have evidence it
16 never happened, Your Honor. We have ample
17 evidence, tons of evidence it never happened.

18 THE COURT: Right. So if it didn't
19 happen, let me chase that one with you. Assume it
20 didn't happen. Mr. Swanson, he was deposed,
21 correct?

22 MR. KROPSKI: Your Honor, twice.

23 THE COURT: So that's perjury. It's a
24 criminal violation. It backs up your civil
25 conspiracy and it's a civil conspiracy to create a

1 defense. I mean there are all kind of problems
2 arguendo that occur. But if the advice did not
3 occur then vis-a-vis Mr. Swanson, while he may have
4 problems, tell me how you connect the dots between
5 the alleged untrue statement, the conspiracy which
6 goes a long way to make out your civil conspiracy
7 action, what is the connection between that and the
8 bank vis-a-vis the foreclosure. Because it seems
9 to me that while certainly the Defendant Mr.
10 Whitfield could certainly call out to the jury
11 coverup, et cetera, et cetera, aside from the other
12 allegations that the loan was improperly denied,
13 that then becomes evidence I would think you would
14 argue of a coverup, right?

15 MR. HALVERSEN: Correct, Your Honor.

16 THE COURT: Now, but isolate for me Mr.
17 Swanson because that's where this is coming from.
18 Isolate Mr. Swanson. How then does Mr. Swanson,
19 not the bank, Mr. Swanson, how does he then become
20 responsible for the failure of the bank to fund the
21 commitment? I gather you would maintain it's a
22 commitment.

23 MR. HALVERSEN: Yes, Your Honor. We
24 don't have any -- as you correctly pointed out, we
25 don't have any relationship with Mr. Swanson in

1 terms of any legal malpractice that the bank could
2 assert or might assert.

3 THE COURT: You don't care about that.

4 MR. HALVERSEN: Right. So what we have
5 alleged though is that but for that advice there
6 was absolutely no defense, they didn't close on any
7 of these loans so that the bank benefitted by going
8 forward with his foreclosure and --

9 THE COURT: That's the bank.

10 MR. HALVERSEN: Right.

11 THE COURT: All that is the bank. I'm
12 not saying -- I'm isolating the bank because
13 obviously if you are correct and you are successful
14 on your underlying cause of action that the bank
15 should have funded these projects, these loans,
16 that's on the bank. Right?

17 MR. HALVERSEN: Right.

18 THE COURT: Mr. Swanson's involvement
19 would be if you will a coverup, yes?

20 MR. HALVERSEN: Yes.

21 THE COURT: Yes. And would have been a
22 player in if you full the coverup based on your
23 theory.

24 MR. HALVERSEN: Yes.

25 THE COURT: So depending on your causes

1 of action maybe that goes to punitive damages,
2 maybe that goes to other causes of action, right?

3 MR. HALVERSEN: Yes.

4 THE COURT: But other than being a
5 witness to the -- and a participant in the coverup
6 and all of the problems that that would then create
7 for this attorney, okay, is he then responsible for
8 the underlying damages of Mr. Whitfield with
9 regards to the failure of the bank to fund the
10 loans?

11 MR. HALVERSEN: I got you. I
12 understand your question, Your Honor. The answer
13 is no. The damages that stem from our claims
14 against the bank are separate and distinct and the
15 case law under civil conspiracy is that you cannot
16 claim same causes of action that you're claiming
17 for the other actions and we are not. The
18 underlying damage as to the civil conspiracy is we
19 have alleged our damages, solely our attorney fees
20 and cost incurred in defending that defense which
21 should never have happened. That is the element of
22 damages that's --

23 THE COURT: Vis-a-vis Mr. Swanson.

24 MR. HALVERSEN: Correct.

25 THE COURT: Because with regard to the

1 bank it's a different situation.

2 MR. HALVERSEN: The damages claimed
3 against the bank are different.

4 THE COURT: Right. Assuming that that
5 occurred.

6 MR. HALVERSEN: Correct.

7 THE COURT: All right. Now, back to
8 the request to admit with that information.

9 MR. KROPSKI: Yes, Your Honor. And we
10 would be satisfied if they denied the request to
11 admit and appreciate the exchange between counsel
12 and Your Honor there. And to supplement that to
13 explain, we are not holding Swanson liable for the
14 failure of all of these loans. That's what we are
15 trying to establish. If there is a way to work it
16 out where they can supplement and explain why they
17 are denying it, they don't know if the call did or
18 did not occur, but we are not holding him
19 responsible for these loans, that's sufficient for
20 us too. But we need some way to be able to
21 establish that in the record.

22 THE COURT: You just got it. You just
23 got it. You get the transcript you just got it.
24 That was a represent -- with all due respect,
25 that's a better representation made to you than a

1 request to admit. He made it to me.

2 MR. KROPSKI: I agree, Your Honor. I'm
3 satisfied with that.

4 THE COURT: I think you get the
5 transcript and I think the request to admit is
6 appropriate. In other words, they don't think it
7 happened.

8 MR. KROPSKI: Absolutely. Yes, Your
9 Honor.

10 THE COURT: What else you got?

11 MR. KROPSKI: I think that satisfies
12 our motion.

13 THE COURT: Okay. You got one?

14 MR. SLOTCHIVER: I do, Your Honor. We
15 have one more motion to compel which is the
16 financial information of Mr. Swanson. Based on the
17 cause of action we alleged we are entitled to
18 punitive damages if we are successful. And --

19 THE COURT: On the civil conspiracy.

20 MR. SLOTCHIVER: On the civil
21 conspiracy, yes, Your Honor. So we have asked for
22 them to provide us. We have given them a list of
23 financial information so we can understand his
24 financial background. One of the issues that we
25 have is a trial scheduled now in May, Your Honor.

1 THE COURT: You know what? I love that
2 you did that for the simple reason we did this
3 yesterday. So you are telling me okay, smarty
4 pants, your decision yesterday, it is here.

5 MR. SLOTCHIVER: Well, I threw out it
6 because I know that was an issue yesterday as to
7 how long.

8 THE COURT: Didn't you think that was a
9 good resolution yesterday?

10 MR. SLOTCHIVER: It was a good
11 resolution yesterday.

12 THE COURT: So you are like okay,
13 remember that.

14 MR. SLOTCHIVER: I would like the same
15 resolution today.

16 THE COURT: I do think that's a
17 reasonable way to do it.

18 MR. SLOTCHIVER: So everything we have
19 asked for financially of Mr. Swanson was objected
20 to as being burdensome and not timely. But the
21 problem is, Your Honor, once the trial starts we
22 can't stop it in order to verify information so we
23 are asking you to order.

24 THE COURT: I understand.

25 MR. SLOTCHIVER: Thank you, Your Honor.

1 THE COURT: Now, let me ask you this
2 question. First of all, let me just hear from you.

3 MR. KROPSKI: Your Honor, I will be
4 brief. I believe these are in the record. In
5 requests to Mr. Swanson there are 26 requests about
6 financial information including Mastercard, VISA
7 card bills, partnerships, operating agreements,
8 certificates of title, bills of sale for any
9 personal property owned, evidence and location of
10 any real property owned, any safety deposit boxes,
11 evidence of any indebtedness, copies of all vehicle
12 leases or purchase agreements, copies of all
13 brokerage account statements, security holdings,
14 copies of all mortgages due you or due others, all
15 records of the estate from deceased family members
16 where you may receive an inheritance, records
17 pertaining to any other real estate you may own,
18 copies of all sales agreements for any real estate
19 you may own, copies of all deeds and mortgages and
20 liens and other indications of real property owned
21 by you, copies of all appraisals of any personal or
22 real property owned by you, any insurance policies
23 of any kind, and any settlements that you may have
24 made over the last five years, annuities, pensions,
25 profit sharing plan statements, pension profit

1 plans, retirement statements.

2 And the Supreme Court has held so this
3 should be clear law that in determining and
4 assessing punitive damages the wealth of the
5 Defendant is a relevant factor in determining the
6 Defendant's ability to pay, but only evidence of
7 net worth and extrapolations for net worth can be
8 introduced on the issue.

9 So our point and we have said if we get
10 to the punitive stage we are happy to put a
11 personal financial statement in there. We are
12 happy to give you evidence of net worth, whatever
13 we have to. These are I hope clearly overbroad.
14 It's certainly not discoverable information at a
15 punitive stage. There is no other allegations in
16 this lawsuit that would give rise to any sort of
17 personal financial information for Mr. Swanson.

18 So we are willing to provide the
19 personal net worth, statement of net worth if it
20 comes to the point of punitive damages being at
21 trial. It could be even two weeks beforehand so
22 they get a chance to look at it. We have a lot of
23 concerns about giving over financial statements in
24 this case and not to belabor the point,
25 confidentiality orders have not worked in this

1 case. Judge Nicholson has an order already where
2 Mr. Whitfield violated that.

3 MR. HALVERSEN: Your Honor, that is
4 absolutely untrue and a misstatement of the record.

5 MR. KROPSKI: Your Honor, I have the
6 order. That's the problem. We are happy to turn
7 it over if it's under seal. We can give it to the
8 trial judge in a week and then -- or give it to the
9 judge in a week and then if it comes to punitive
10 damages they can produce it. We are not trying to
11 withhold it. We are also not trying to produce
12 every statement of an annuity or retirement account
13 Mr. Swanson has. We are willing to comply with
14 what the Supreme Court has said is a requirement on
15 punitive damages.

16 THE COURT: Let me ask you this
17 question. How is -- net worth is given, but under
18 the due process clause there must be an opportunity
19 to challenge the veracity of that number. How does
20 that happen? How do you propose to allow for that?

21 MR. KROPSKI: Your Honor, I think a
22 financial statement similar to one you would give
23 to a bank to obtain a loan, something, even an
24 affidavit under oath is a fine way to deal with
25 that. Some sort of statement that shows your

1 assets and liabilities. I think that would be a
2 proper way to determine the net worth. Net worth
3 is obviously not how much money you make in a year.
4 So I agree with you that there has to be an
5 alibility to look at what those liabilities are.

6 However, asking for 26 requests for
7 production on personal financial information which
8 they would not be entitled to give to the jury,
9 real property holdings, cars.

10 THE COURT: What they are doing by
11 those requests is that they are asking for the raw
12 data to make their own determination of net worth.
13 That's what's going on and that's why they have
14 asked for both the asset as well the debt. So how
15 does that happen?

16 MR. KROPSKI: Your Honor, in terms of
17 determining that net worth --

18 THE COURT: In other words, here's my
19 concern. My concern is that the defense is
20 entitled -- excuse me -- the Plaintiff is entitled
21 to challenge the veracity of that information and
22 to make or to have their own experts make a
23 determination with regards to the net worth which
24 is why no doubt they have asked for both the assets
25 as well as the indebtedness. Some of them clearly

1 go too far. If there are obviously open estates
2 from which Mr. Swanson is a beneficiary that's one
3 thing. But that seemed to go too -- are you the
4 beneficiary under wills or trust or whatever. So
5 some of them very may well go a bit too far, but
6 clearly what the Plaintiff is asking for is the
7 Plaintiff is asking for the ability to make an
8 independent determination of the veracity of a
9 representation of net worth.

10 MR. KROPSKI: Your Honor, I understand
11 that they are entitled to do that if we are at a
12 punitive damages stage.

13 THE COURT: Unfortunately the way our
14 trials work, they don't work like they do perhaps
15 where you can try an issue and then you wait a bit
16 to finish. We keep trucking. In fact, unless you
17 make that request it will be bifurcated.

18 MR. KROPSKI: Right, Your Honor. And
19 we plan to make that request. We plan to actually
20 move to bifurcate the claim against Swanson in
21 general. What we would like to avoid is producing
22 all this information at this stage rather than
23 leading up to trial where it could be. It's a lot
24 of stuff. Mr. Swanson, he works. This is 26
25 requests and I think most of this can be -- I think

1 all of it can be taken care of with a statement of
2 your net worth which would include assets,
3 liability. Like in family court when you put down
4 a statement of what you have, we are happy to do
5 that. Happy to produce it in reasonable time
6 before trial. Producing all of the mortgages,
7 producing all of the loan documents, producing all
8 your credit card statements, producing all your
9 bank accounts, I don't think that that's necessary.
10 I don't think it's a reasonable request. And if
11 there is a sworn statement saying these are my
12 assets, these are my liabilities and here's my net
13 worth, I think that this is sufficient for a
14 punitive damages purpose. My understanding is we
15 haven't established any right to punitive damages
16 in this case.

17 THE COURT: Listen, I get that. And I
18 get that very clearly. The problem is is the way
19 that we try punitive damages issues. And when you
20 give thought to whether or not -- when you look at
21 judicial economy as opposed to the fairness of
22 disclosure, what we don't do is we don't pause
23 between the underlying case and if there is a
24 finding then even if it's bifurcated we proceed
25 right into the punitive damages part.

1 That doesn't afford for obviously the
2 remedy that you would prefer and I get it. And
3 it's a legitimate concern and it's a legitimate
4 position. It's just not the way that we do trials.
5 They have got to do their preparation before they
6 start. And absolutely we cause information to be
7 given all the time where punitive damages are not
8 an issue.

9 The reason that we do it is because of
10 the way that we run trials. What I did yesterday,
11 let me share with you what I did yesterday. There
12 was mediation that was planned. They were several
13 months out and I said that information will not be
14 given unless there is a mediation and it is
15 unsuccessful. And if there is a mediation and it
16 is unsuccessful then the information has to be
17 shared under seal to allow you an opportunity to
18 have your accountant take a look at the information
19 to verify that net worth. And so let me just ask
20 that question. Do you intend to mediate?

21 MR. KROPSKI: We have discussed it. We
22 are happy to and we would be --

23 MR. SLOTCHIVER: Your Honor, it's a
24 court ordered mediation because it's a new party.
25 But we have spoken to counsel and nobody believes

1 that mediation will be successful. In fact, the
2 idea is to do a very short telephone mediation
3 because it's not going to be a matter where it's
4 going to be successful.

5 THE COURT: I don't think lawyers ought
6 to waste their time. If you all agree to that then
7 there you have it. I'm going to -- I have got
8 other things to do. And if y'all have any other
9 motions I will hear them. What I am going to ask
10 you to do, I am going to ask you to step back and
11 just if you can by consent cull some of those
12 things. Obviously some of them you can certainly
13 cull. And then come back with the bare bones and I
14 will make a determination, okay?

15 MR. KROPSKI: Sure.

16 THE COURT: Is that the last of your
17 motions?

18 MR. KROPSKI: Yes.

19 THE COURT: Very well.

20 (Brief recess taken.)

21 MR. SLOTCHIVER: Judge, I think we have
22 resolved the issue if we can put it on the record.
23 What we discussed was 30 days before the trial
24 date. If the trial date is moved for some reason
25 30 days would obviously move with it. There is a

1 motion for continuance on the trial for a different
2 reason. But 30 days before they will provide us
3 two years of tax returns. They will provide two
4 years of bank statements that will be redacted who
5 the checks were made payable to, but we will at
6 least be able to see the flow of money in and out
7 of the accounts. And brokerage statements. They
8 will provide to us a list of all properties owned
9 by Mr. Swanson, a list of all encumbrances he has
10 on those properties. If there are they will
11 provide to us any and all financial statements that
12 have been provided to any institution, lending
13 institution or the like over the last five years.
14 If there are none they will give us a notarized
15 statement confirming there are none and they do not
16 exist. I believe that's everything that we
17 discussed.

18 MR. KROPSKI: Your Honor, the last part
19 of financial statements I think we agreed on two
20 years, that's the only part.

21 MR. SLOTCHIVER: I wrote -- it was two
22 years. I misspoke.

23 MR. KROPSKI: The rest of that is fine
24 and are subject to confidentiality for use only in
25 this litigation.

1 THE COURT: Yes. And the information
2 upon your request would be returned at the
3 conclusion of the litigation.

4 MR. KROPSKI: Yes, Your Honor. Thank
5 you.

6 THE COURT: Very well. Who is going to
7 do the order?

8 MR. KROPSKI: I can draft it up.

9 THE COURT: Thank you.

10 (These proceedings were concluded at
11 12:00 p.m., March 21, 2018, Charleston County,
12 South Carolina.)
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1 CERTIFICATE OF REPORTER
2

3 I, Ruth C. Weese, Registered Diplomat
4 Reporter for the State of South Carolina at Large,
5 do hereby certify that the foregoing transcript is
6 a true, accurate, and complete record.

7 I further certify that I am neither related
8 to nor counsel for any party to the cause pending
9 or interested in the events thereof.

10 Witness my hand, I have hereunto affixed my
11 official seal this 23rd day of April, 2018 at
12 Charleston, Charleston County, South Carolina.

13
14 

15
16 _____
17 Ruth C. Weese

18 Registered Diplomat

19 Reporter
20
21
22
23
24
25

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

Transcript of Record

B E F O R E:

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

Daniel S. Slotchiver, Esquire
Attorney for Defendant Whitfield

Record on Appeal - 1166

I N D E X

<u>Witness/Description</u>	<u>Page No.</u>
Certificate Page.	37

E X H I B I T S

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

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

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

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

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

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

12 THE COURT: All right.

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

15 THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

25 So, the other part about bifurcation that I think

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

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

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

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

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

20 THE COURT: Okay.

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

22 THE COURT: All right. Got it.

23 Yes, sir, Mr. Slotchiver.

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

25 THE COURT: I'm fine.

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

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

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

15 THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 THE COURT: Thank you, Mr. Slotchiver.

16 Yes.

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

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

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

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

9 MR. McKIE: Yes, Your Honor.

10 THE COURT: Okay.

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

13 THE COURT: Sure.

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

15 THE COURT: Sure.

16 MR. McKIE: Thank you.

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

21 THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

22 THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2 THE COURT: All right.

3 Yes, sir, Mr. Slotchiver.

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

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

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

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

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

2 Correct?

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

5 THE COURT: Yeah. Exactly.

6 MR. SLOTCHIVER: Absolutely.

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

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

13 THE COURT: Yes, yes.

14 MR. SLOTCHIVER: Yes.

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

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

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

5 THE COURT: I understand that.

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

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

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

21 THE COURT: Yeah.

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

24 THE COURT: Yes.

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

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

7 MR. SLOTCHIVER: Right.

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

9 MR. SLOTCHIVER: Sure.

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

14 MR. SLOTCHIVER: Generally, yes. Yes.

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

22 MR. SLOTCHIVER: Yes.

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

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

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

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

9 THE COURT: Some of them.

10 MR. SLOTCHIVER: If we are correct.

11 THE COURT: Yes.

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

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

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

22 THE COURT: Okay.

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

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

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

15 MR. SLOTCHIVER: Correct.

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

19 MR. SLOTCHIVER: Yes.

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

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

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

4 THE COURT: And so ---

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

7 THE COURT: If it took place.

8 MR. SLOTCHIVER: Yeah.

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

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

13 THE COURT: Okay.

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

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

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

20 THE COURT: --- different issue.

21 MR. SLOTCHIVER: Correct.

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

1 MR. SLOTCHIVER: That's correct.

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

4 MR. SLOTCHIVER: Yes.

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

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

12 THE COURT: Yes.

13 MR. SLOTCHIVER: Correct.

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

16 MR. SLOTCHIVER: Okay.

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

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

1 THE COURT: Yeah.

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

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

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

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

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

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

11 Yes, sir.

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

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

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

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

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

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

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

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

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

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

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

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

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

25 THE COURT: I'm with you.

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

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

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

13 MR. KROPSKI: Thank you, Judge.

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

17 MR. SLOTCHIVER: Yes.

18 THE COURT: All right.

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

CERTIFICATE

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

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

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

COLUMBIA, SOUTH CAROLINA

DECEMBER 31ST, 2019

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
Nov 25 2020
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

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

Attorney for Appellant

November 25, 2020
Charleston, South Carolina