

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
In The Circuit Court

Brian Gibbons, Circuit Court Judge
William C. Tindal, Special Referee

Appellate Case No. 2018-001823

First Citizens Bank & Trust Company,

Respondent,

v.

Linda P. Faulkner a/k/a Linda Faulkner,
Founders Federal Credit Union, and
CACH, LLC,
of whom Linda P. Faulkner is the

Appellant.

APPENDIX

John Martin Foster
Post Office Box 106
Rock Hill, S. C. 29731-6106
803 324-8100
Attorney for Petitioner

J. Kershaw Spong
Mary McDonald Campolong
Sowell Gray Robinson Stepp & Lafitte, LLC
Post Office Box 11449
Columbia. SC 29211
Attorneys for Respondent

RECEIVED

AUG 20 2021

S.C. SUPREME COURT

INDEX

Order denying Rehearing	1
Petition for Rehearing	3
Decision of Court of Appeals	10
Brief of Appellant	14
Brief of Respondent	28
Reply Brief of Appellant	45
Record on Appeal	57

[Those documents comprising the Record on Appeal are indexed as indicated therein.]

The South Carolina Court of Appeals

First-Citizens Bank & Trust Company, Respondent,

v.

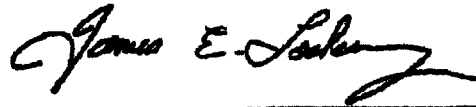
Linda P. Faulkner a/k/a Linda Faulkner, Founders
Federal Credit Union, and CACH, LLC, Defendants,

Of whom Linda P. Faulkner is the Appellant.

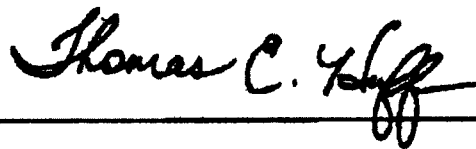
Appellate Case No. 2018-001823

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.



J.



J.

Columbia, South Carolina

cc:

John Martin Foster, Esquire

Joseph Kershaw Spong, Esquire

FILED
Jul 20 2021

Mary McDonald Campolong, Esquire
The Honorable Brian M. Gibbons

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

May 27 2021

APPEAL FROM LANCASTER COUNTY
In The Circuit Court

SC Court of Appeals

Brian Gibbons, Circuit Court Judge
William C. Tindal, Special Referee

Appellate Case No. 2018-001823

First Citizens Bank & Trust Company,

Respondent,

v.

Linda P. Faulkner a/k/a Linda Faulkner,
Founders Federal Credit Union, and
CACH, LLC,
of whom Linda P. Faulkner is the

Appellant.

PETITION FOR REHEARING

The Appellant as Petitioner petitions for a rehearing of the matter above under Rules 221(a) and 240, S.C.A.C.R.

This Appeal is from the Orders of the Circuit Court striking the jury request and referring the case to a Special Referee. The Appeal was dismissed by Order of this Court in its Unpublished Opinion No. 2021-UP-162, filed May 12, 2021.

BACKGROUND

The Respondent First Citizens Bank & Trust Company has filed to foreclose the Appellant. Among other defenses, Mrs. Faulkner has plead express and implied waiver based upon that Respondent's draft of payments from 2011 through 2016, and after maturity of the debt. This is the second attempt at foreclosure on the part of the Respondent. Its previous

action, filed as Civil Case No: 2014-CP-29-00954, was subject to the same defense and was dropped by the Respondent.

WAIVER AND ESTOPPEL

This Court concludes that Faulkner's claims of express and implied waiver were not compulsory legal counterclaims that would have entitled her to a jury trial. [ORDER filed Mary 12, 2021, p.2, 1st Para.1]

First, even if the said claims are characterized as defenses rather than counterclaims, they are still for a jury's determination and cannot be referred. In *Jones v. Barco, Inc.*, 159 S.E.2d 279, 250 S.C. 522 (1968), our Supreme Court, in discussing the effect of the former Code Section 10-1402, affirmed a party's right to a jury trial on legal issues in an equitable action.

Second, the defense of waiver is clearly compulsory. Rule 8(c), S.C.R.C.P states, in relevant part:

(c) Affirmative Defenses; Reply. In pleading to a preceding pleading, a party shall set forth affirmatively the defenses: . . . waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper designation.

[*Id.*, *emphasis added.*]

The Order of May 12th also concludes that such claims of waiver are equitable rather than legal. [ORDER filed Mary 12, 2021, p.2, 1st Para.1] This conclusion is contrary to precedent. The commentators of AMERICAN JURISPRUDENCE 2D state:

Ordinarily, the question of waiver is one of fact for the a jury. That is to say, where the evidence concerning waiver, or an element or requisite thereof, is conflicting or disputed, or where more than one reasonable inference may be drawn from the evidence, the question of waiver is one for the trier of facts. . . . So too, the sufficiency of the evidence relating to waiver is ordinarily for the jury.

[28 AM.JUR.2D *Estoppel and Waiver* § 174 (1994); *footnotes omitted.*]

This conclusion is backed by the leading South Carolina case of *Planters' Bank v. Lummus Cotton Gin Co.*, 132 S.C. 16, 128 S.E. 876, 41 A.L.R. 592 (125). That case involved the question of whether a bank had knowingly waived, or was estopped from maintaining, its lien on certain machinery. Having reviewed the record, our Supreme Court affirmed the Appellant's right to take the question of the Bank's intention in its action – and thus the question of waiver -- to the jury. The Bank's intention in knowingly accepting payments after maturity of the mortgage is precisely the question raised by the pleadings in this case.

Considered as an estoppel, the conclusion is the same. Again, the commentators of AMERICAN JURISPRUDENCE 2D state:

Generally speaking, the existence of an estoppel in pais is a mixed question of law and fact. Where the trial is one by jury and the evidence is susceptible of different reasonable inferences, it is the duty of the court to charge and define the law applicable to estoppel, but it is the province of the jury to say whether the facts of the particular case constitute estoppel as defined by the Court. It is a firmly settled principle that the question of the existence of an estoppel is a question to be settled by the triers of facts – that is, the jury in the event of a jury trial, or the trial court in the event the proceedings involve trial without a jury – where there is a dispute as to the facts involving estoppel.

[28 AM.JUR.2D *Estoppel and Waiver* § 174 (1994); footnotes omitted, citing *Southern Ry. Co. v. Day*, 140 S.C. 388, 138 S.E. 870 (1926).]

TRUTH IN LENDING

The Order of May 12th, 2021 further concludes as follows:

Although Faulkner requested actual and statutory damages as well as attorney's fees on her claim for truth in lending violations, this request is not dispositive on the question of whether the claim was legal or equitable. . . . Because the truth in lending violations allegedly occurred in 2008, they could not be the basis for any affirmative relief; rather, Faulkner could assert them only if she alleged an "equitable defense of recoupment." See 15 U.S.C.A. § 1640(e) (Supp. 2020) (stating "an action alleging a violation of federal truth in lending laws "may be brought in any United States district court, or in any other court of competent

jurisdiction, within one year from the date of the occurrence of the violation . . . "); *id.* (allowing assertion of a "violation of this subchapter in an action to collect [a] debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law"); *Toluka [sic, for Tuloka] Affiliates, Inc. v. Moore*, 275 S.C. 199, 202, 268 S.E.2d 293, 295 (1980) (stating section 1640(e) "may not be used to defeat the equitable defense of recoupment" but "may be interposed to bar an affirmative counterclaim or set-off").

The Court accurately states the dates involved in the case and concludes that the Appellant's claim is one of recoupment. It accurately recites that such a claim made after the Truth in Lending statute of limitation is one of recoupment. Thus, the United States Supreme Court has held:

[R]ecoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's cause of action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely.

[*United States v. Dalm*, 494 U.S. 596, 599, 110 S.Ct. 1361, 1370, 109 L.Ed.2d 548 (1990), quoting *Bull v. United States*, 295 U.S. 247, 55 S.Ct. 695, 79 L.Ed. 1421 (1935).]

The Appellant acknowledges that in *Tuloka Affiliates, Inc. v. Moore*, 275 S.C. 199, ___, 268 S.E.2d 293, 295 (1980) our Supreme Court characterized such a claim as "the equitable defense of recoupment." This fact, however, does not settle the issue of the Appellant's right to a jury trial.

In *Curtis v. Loether*, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974), the United States Supreme Court was faced with the right to a jury trial in a matter of discrimination in housing under a Federal Statute. That Court held:

As the Court of Appeals [in the case below] observed, however, we have considered the applicability of the constitutional right to jury trial in actions enforcing statutory rights 'as

a matter too obvious to be doubted.' 467 F.2d, at 1114. Although the Court has apparently never discussed the issue at any length, we have often found the Seventh Amendment applicable to causes of action based on statutes. See, e.g., *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477, 82 S.Ct. 894, 899, 8 L.Ed.2d 44 (1962) (trademark laws); *Hepner v. United States*, 213 U.S. 103, 115, 29 S.Ct. 474, 479, 53 L.Ed. 720 (1909) (immigration laws); cf. *Fleitmann v. Welsbach Street Lighting Co.*, 240 U.S. 27, 36 S.Ct. 233, 60 L.Ed. 505 (1916) (antitrust laws), and the discussion of *Fleitmann* in *Ross v. Bernhard*, 396 U.S. 531, 535-536, 90 S.Ct. 733, 736-737, 24 L.Ed.2d 729 (1970). Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law. [*Id.*, 415 U.S. 194, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974); footnotes omitted; matter in brackets added for clarity.]

The Appellant contends the holding of *Curtis* is clear: a claim under a Federal statute for damages entitles the claimant to the right to a jury trial on issues of damages.

In application of this right, in *Mosley v. National Finance Co., Inc.*, 440 F.Supp. 621 (M.D. N.C. 1977), that Federal Court found that a determination of damages under the Truth in Lending Act could be submitted to a jury, and thus allowed the Defendant's jury request.

Further, in *Barber v. Kimbrell's Inc.*, 577 F.2d 216 (4th Cir. 1978), cert. denied, 439 U.S. 934, 99 S.Ct. 329, 58 L.Ed.2d 330 (1978), the Fourth Federal Circuit upheld the Defendant's demand for a jury trial in a class action Truth in Lending Act suit.

In *Gnossos Music v. Mitken, Inc.*, 653 F.2d 117, 211 U.S.P.Q. 841 (4th Cir. 1981), the Fourth Circuit concluded that the reasoning of the United States Supreme Court in *Curtis* and of its earlier decision in *Barber* required the allowance of a jury trial in a claim under the Truth in Lending Act.

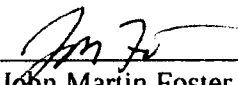
The Appellant is entitled to a determination of her damages under the Truth in Lending Act by a jury. The status of her claim as recoupment has no effect upon that right.

CONCLUSION

The Appellant timely plead for a jury determination of her affirmative defenses and counterclaims. The Order of the Circuit Court overruling that plea, and its referral of all issues to the Special Referee was improper.

For all the reasons set out and referenced herein, the Appellant as Petitioner requests that this matter be reheard by the Court of Appeals, that the Order of May 21st, 2021 be reversed, and for any other relief to which they may be entitled in law or equity.

Respectfully submitted,



John Martin Foster
Post Office Box 106
Rock Hill, S.C. 29731-6106
Attorney for Petitioner/Appellant

December 17, 2019

Rock Hill, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
In The Circuit Court

Brian Gibbons, Circuit Court Judge
William C. Tindal, Special Referee

Appellate Case No. 2018-001823

First Citizens Bank & Trust Company,

Respondent,

v.

Linda P. Faulkner a/k/a Linda Faulkner,
Founders Federal Credit Union, and
CACH, LLC,
of whom Linda P. Faulkner is the

Appellant.

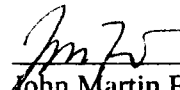
CERTIFICATE OF SERVICE

I certify that I have served the Petition for Rehearing, dated May 27, 2021, on the following counsel or persons of record on the date stated below by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below;

J. Kershaw Spong
Mary McDonald Campolong
Sowell Gray Robinson Stepp & Lafitte, LLC
Post Office Box 11449
Columbia, SC 29211
Attorneys for Respondent

May 27, 2021

Rock Hill, South Carolina


John Martin Foster
Attorney for Petitioner/Appellant
SC Bar No. 2086
Post Office Box 106
Rock Hill, S.C. 29731
803 324-8100
803 324-8109: Fax
jmfoster@comporium.net

RECEIVED

May 27 2021

SC Court of Appeals

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

First Citizens Bank & Trust Company, Respondent, v.
Linda P. Faulkner a/k/a Linda Faulkner, Founders Federal
Credit Union, and CACH, LLC, Defendants,

Of whom Linda P. Faulkner is the Appellant.

Appellate Case No. 2018-001823

Appeal From Lancaster County
Brian M. Gibbons, Circuit Court Judge

Unpublished Opinion No. 2021-UP-162
Submitted March 1, 2021 - Filed May 12, 2021

AFFIRMED

John Martin Foster, of Rock Hill, for Appellant.

Joseph Kershaw Spong and Mary McDonald Campolong,
both of Robinson Gray Stepp & Laffitte, LLC, of Columbia
for Respondent.

PER CURIAM: Linda P. Faulkner appeals a circuit court order striking her demand for a jury trial in a foreclosure action filed against her by First Citizens Bank & Trust Company (FCB) and an order issued by the Lancaster County Clerk of Court referring the matter to a special referee. Faulkner argues she did not receive timely service of the motions requesting the orders and was entitled to a jury trial on

issues raised in her responsive pleading. We affirm.

FCB filed this action in 2017 to foreclose on two mortgages given by Faulkner to its predecessor in interest. In her responsive pleading, Faulkner demanded a jury trial and alleged express and implied waivers by FCB to any claim of default, several violations in 2008 by FCB of federal truth in lending laws, unfair debt collection practices by persons acting on behalf of FCB, and breach by FCB of a duty of good faith. Subsequently, FCB filed motions for an order of reference in the matter and an order striking Faulkner's jury trial demand. No hearings took place, and both the order granting the motion to strike the jury trial and the order of reference were filed.

Rule 39(a), SCRCF, provides for a jury trial on all issues for which a jury trial has been demanded "unless . . . the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues does not exist." There is no requirement in the rule that the court must hold a hearing before deciding a jury trial is not warranted. Furthermore, a clerk of court can refer some or all of the causes of action in a foreclosure case to a master or referee. Rule 53(b), SCRCF; *see also Orders of Reference in Foreclosure Cases*, 2010-07-15-01 (S.C. Sup. Ct. dated July 15, 2010) (noting clerks of court, as well as circuit court judges, are authorized to sign orders of reference pursuant to Rule 53(b), SCRCF, in foreclosure actions).

To the extent that orders were issued without adequate notice to Faulkner of FCB's motions, we note Faulkner was served with the motions and was also ultimately heard on the motions when she moved to alter or amend the orders; thus, any error resulting from alleged lack of notice was cured, and Faulkner failed to show prejudice from the alleged procedural irregularity. *See Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 73, 492 S.E.2d 62, 74 (1997) ("Although the Court condemns *ex parte* communication, it has refused to adopt a *per se* rule automatically reversing rulings which result from *ex parte* communications. Instead, the Court considers whether prejudice results from the *ex parte* contact."); *S.C. Nat'l Bank v. Cent. Carolina Livestock Mkt, Inc.*, 289 S.C. 309, 313, 345 S.E.2d 485, 488 (1986)

("Due process does not mandate any particular form of procedure. Instead, due process is a flexible concept, and the requirements of due process in a particular case are dependent upon the importance of the interest involved and the circumstances under which the deprivation may occur.").

We further agree with the circuit court that Faulkner's claims of express and implied waivers were not compulsory legal counterclaims that would have entitled her to a jury trial. *See Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 329, 755 S.E.2d 437, 441 (2014) ("If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the

counterclaim."). The only relief Faulkner requested from these claims was dismissal of FCB's foreclosure action; thus, the claims were in the nature of defenses rather than counterclaims. See Rule 8(a), SCRCP (noting a counterclaim, like an original claim, must include "a prayer or demand for judgment for the relief to which [the pleader] deems himself entitled"); Rule 8(b), SCRCP (requiring a defendant to "state in short and plain terms the facts constituting his defenses to each cause of action asserted"). Furthermore, such claims are equitable rather than legal. See *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 345, 415 S.E.2d 384, 388 (1992) ("Estoppel and waiver are protective only, and are to be invoked as shields, and not as offensive weapons."); *id.* (further prohibiting the assertion of waiver and equitable estoppel "in a complaint as offensive weapons").

Although Faulkner requested actual and statutory damages as well as attorney's fees on her claim for truth in lending violations, this request is not dispositive on the question of whether the claim was legal or equitable. See *Thomerson v.*

DeVito, 430 S.C. 246, 259, 844 S.E.2d 378, 385 (2020) ("A request for monetary relief should not be viewed in isolation to convert what is otherwise an equitable claim to a legal claim."); *id.* at 260, 844 S.E.2d at 385 ("[M]onetary relief is not properly characterized as legal if the source for its recovery lies solely in a principle of equity. The claim—and the remedy—are still equitable because the recovery does not exist at law but is provided solely to avoid injustice in a court of equity."). Because the truth in lending violations allegedly occurred in 2008, they could not be the basis for any affirmative relief; rather, Faulkner could assert them only if she alleged an "equitable defense of recoupment." See 15 U.S.C.A.

§ 1640(e) (Supp. 2020) (stating "an action alleging a violation of federal truth in lending laws "may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation . . . "); *id.* (allowing assertion of a "violation of this subchapter in an action to collect [a] debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law"); *Toluka Affiliates, Inc. v. Moore*, 275 S.C. 199, 202, 268 S.E.2d 293, 295 (1980) (stating section 1640(e) "may not be used to defeat the equitable defense of recoupment" but "may be interposed to bar an affirmative counterclaim or set-off"). Thus, Faulkner's allegations of truth in lending violations could be asserted only as equitable defenses to the foreclosure action and did not entitle her to a jury trial.

Therefore, we hold the circuit court correctly upheld both its prior order striking Faulkner's jury trial demand and the order of reference issued by the clerk of court.¹

¹ Faulkner does not assert on appeal that her claims for breach of duty of good faith

AFFIRMED.¹

LOCKEMY, C.J., and HUFF and HEWITT, JJ., concur.

and for unfair debt collection practices were compulsory legal counterclaims; therefore, we do not address the question of whether she would have been entitled to a jury trial on these causes of action.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

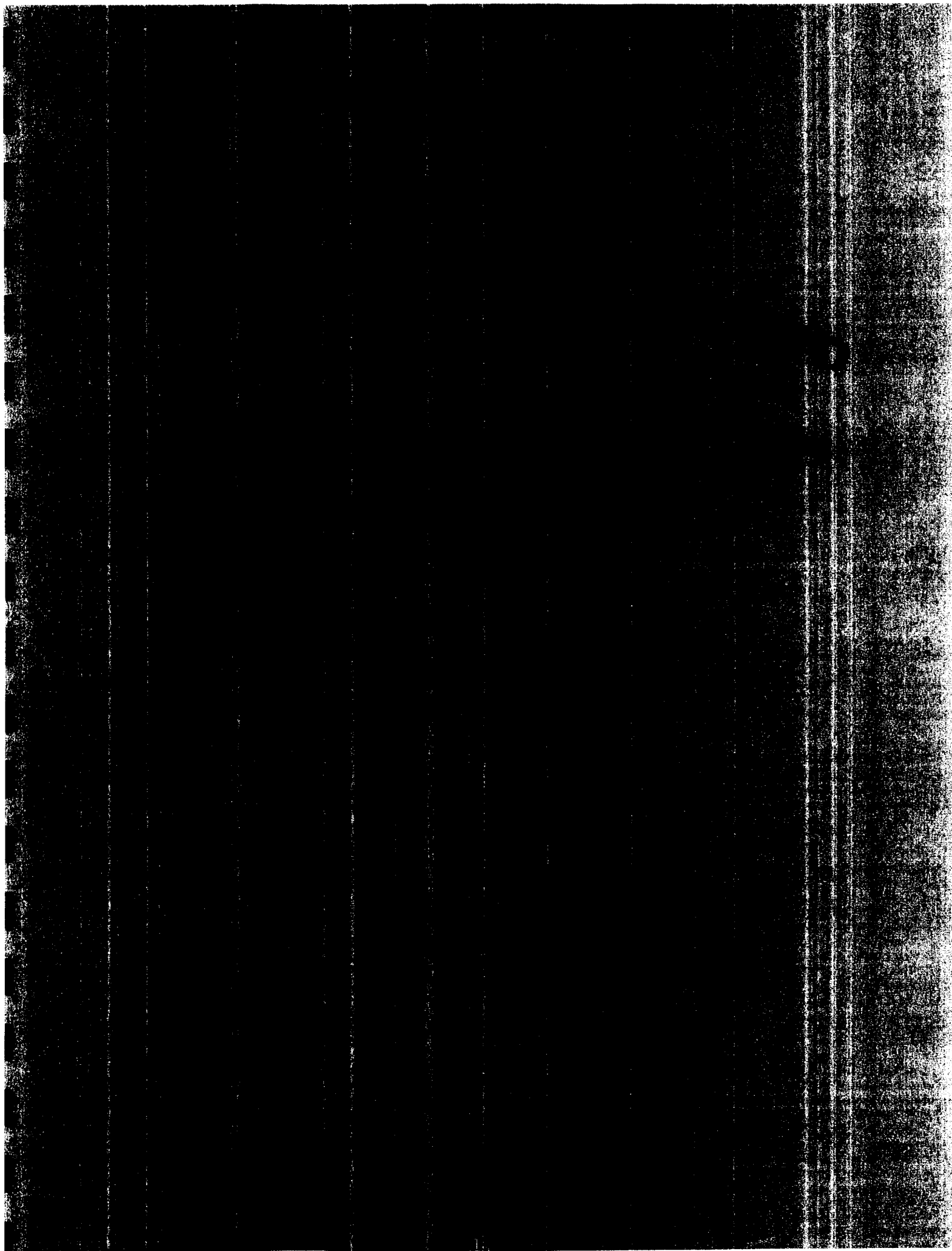


TABLE OF CONTENTS

Table of Authorities	2
Statement of Issues on Appeal	5
Statement of the Case	5
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

CASES: SOUTH CAROLINA SUPREME COURT

<i>Southern R. Co. v. Day</i> , 140 S.C. 388, 138 S.E. 870 (1926)	9
<i>Southern Railway-Carolina Div. v. Howell</i> , 89 S.C. 391, 71 S.E. 972 (1911)	8
<i>Townes v. City Council of Augusta</i> , 29 S.C. 851, 52 S.E. 396 (1898)	8
<i>Wachovia Bank National Association v. Blackburn</i> , 407 S.C. 321, 755 S.E.2d 437 (2014)	6

CASES: SOUTH CAROLINA COURT OF APPEALS

<i>Gardner v. Travis</i> , 316 S.C. 315, 450 S.E.2d 54, (Ct.App. 1994)	7
--	---

CASES: UNITED STATES SUPREME COURT

<i>Dowling v. National Exch. Bank of Boston</i> , 145 U.S. 512, 36 L.Ed. 795, 12 S.Ct. 928 (1892)	9
<i>Leather Manuf'rs' Nat. Bank v. Morgan</i> , 117 U.S. 96, 29 L.Ed. 811, 6 S.Ct. 657 (1886) ..	9
<i>Pence v. Langdon</i> , 99 U.S. 578, 25 L.Ed. 420 (1878)	8
<i>Thompson v. First Nat. Bank of Toledo, Ohio</i> , 111 U.S. 529, 29 L.Ed. 507, 4 S.Ct. 689 (1884)	9

CASES: ALABAMA

<i>EX PARTE Fletcher</i> , 429 So.2d 1041 (Ala. 1982)	9
---	---

CASES: GEORGIA

<i>Aycock v. Household Finance Corp. of Georgia</i> , 142 Ga.App. 207, 235 S.E.2d 578 (1977)	9
<i>Hughes v. Cobb</i> , 195 Ga. 213, 23 S.E.2d 701 (1942)	9
<i>Rieves v. Smith</i> , 184 Ga. 657, 192 S.E. 372, 112 A.L.R. 368 (1937)	9

FEDERAL STATUTES

15 U.S.C. § 1640(e)	9
---------------------------	---

RULES OF CIRCUIT COURT: SOUTH CAROLINA

Rule 5(a), S.C.R.C.P.	6
Rule 6(d), S.C.R.C.P.	6
Rule 13(a), S.C.R.C.P.	7

OTHER AUTHORITIES:

28 AM.JUR.2D <i>Estoppel and Waiver</i> § 227 (2002)	8,9
--	-----

STATEMENT OF ISSUES ON APPEAL

- I. PROPER PROCEDURE ON MOTIONS REQUIRES TIMELY SERVICE UPON EXISTING PARTIES, AS WELL AS THE OPPORTUNITY TO BE HEARD.
- II. COMPULSORY COUNTERCLAIMS TO EQUITABLE ACTIONS ALLOW A PARTY THE RIGHT TO JURY TRIAL.
- III. WAIVER AND ESTOPPEL ARE COMPULSORY COUNTERCLAIMS.
- IV. A SETOFF CLAIM UNDER TRUTH IN LENDING IS A COMPULSORY COUNTERCLAIM.

STATEMENT OF THE CASE

This foreclosure action was filed by the Respondent FIRST CITIZENS BANK & TRUST COMPANY on August 9, 2017. On January 2, 2018, the Appellant LINDA FAULKNER filed her Answer and Counterclaim advancing counterclaims and defenses for express and implied waiver by reason of accepting payments, Truth in Lending violations, violations of the Fair Debt Collections Act, and breach of good faith. She requested a jury trial.

A Motion to Strike Jury Demand and an Order granting that Motion were both filed January 31, 2018. No previous communication was received and no hearing was noticed for the Motion. The Certificate of Service for this Motion is dated January 29, 2018 and filed January 31, 2018.

A Motion to refer the case to a Special Referee and an Order granting that Motion were both filed February 2, 2018. No previous communication was received and no hearing was noticed for the Motion. The Certificate of Service for this Motion is dated January 29, 2018 and filed February 2, 2018.

Both Motion above were granted, and served on Appellant with a Certificate of Service dated February 7, 2018 and filed February 9, 2018.

On February 20, 2018, FAULKNER served her Motion under Rule 59, S.C.R.C.P. to set aside the Order striking the jury request and referring the case to a Special Referee. After hearing, the Circuit Court issued its Order filed October 2, 2018 denying Rule 59 relief. This appeal followed.

ARGUMENT

I. PROPER PROCEDURE ON MOTIONS REQUIRES TIMELY SERVICE UPON EXISTING PARTIES, AS WELL AS THE OPPORTUNITY TO BE HEARD.

Rule 5(a), S.C.R.C.P. states the proper procedure on notice of Motions. In relevant part, it states:

(a) Service: When Required. Unless otherwise ordered by the court because of numerous defendants or other reasons, all . . . (3) written motions, other than ones which may be heard *ex parte*; . . . shall be served upon each of the parties of record.

As of her Answer and Counterclaim filed January 2, 2018, the Appellant, by her counsel, was a party of record. The Motions to refer and to strike her jury request were not served upon her prior to their consideration and approval by the Circuit Court.

Rule 6(d), S.C.R.C.P. states the time for hearings on Motions. In relevant part, it states:

(d) For Motions--Affidavits. A written motion other than one which may be heard *ex parte*, and notice of the hearing thereof, shall be served not later than ten days before the time specified for the hearing, unless a different period is fixed by these rules or by an order of the court. Such an order may for cause shown be made on *ex parte* application.

The Motions in question were not served ten days prior to a hearing. There was no notice of any hearing. No order setting a different period exists. No application for *ex parte* status exists. To counsel's knowledge, those Motions are nowhere designated as capable of being submitted *ex parte*. The resulting Orders were improperly heard and granted.

II. COMPULSORY COUNTERCLAIMS TO EQUITABLE ACTIONS ALLOW A PARTY THE RIGHT TO JURY TRIAL.

The Supreme Court has stated in *Wachovia Bank National Association v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014) the controlling law as to jury trial requests:

“(1) If both the complaint and the counterclaim are in equity, the entire matter is triable

by the court.

(2) If both are at law, the issues are triable by a jury.

(3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.

(4) If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim. . . . "

[*Id.*, 407 S.C. at 329-30, 755 S.E.2d at 441.]

Compulsory counterclaims are defined in Rule 13(a), S.C.R.C.P., which states in relevant part:

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

III. WAIVER AND ESTOPPEL ARE COMPULSORY COUNTERCLAIMS.

The language of Rule 13(a) obviously covers the claims of waiver, the TILA violation claim and the claim of bad faith, all of which arose out of the mortgage and its administration by the Respondent.

The Appellant FAULKNER has raised defenses to this foreclosure action which are both permissive and compulsory in nature. *See, e.g., Gardner v. Travis*, 316 S.C. 315, 450 S.E.2d 54, (Ct.App. 1994). Under our precedent, she is entitled to a jury trial as having advanced compulsory defenses; any Order striking her jury demand is improper to that extent. As the *Gardiner* Court stated in its ruling:

Where a defendant in an equitable action asserts a compulsory counterclaim that alleges actions at law, both the plaintiff and the defendant have a right to have a jury trial on the issues raised by the compulsory legal counterclaim. *Johnson [v. South Carolina Nat'l Bank]*, 292 S.C. at 54, 354 S.E.2d at 896. If there are factual issues common to both the legal and equitable claims, the legal claim, "absent the most imperative circumstances," must be tried, that is, disposed of, first. *Id.* at 56, 354 S.E.2d at 897. *See Harkey v. Texas*

Employers' Ins. Ass'n, 146 Tex. 504, 208 S.W.2d 919, 922 (1948) (holding issues are not "tried" merely by hearing the testimony); *People v. Bleecker St. & F.F. R.R.*, 67 Misc. 582, 124 N.Y.S. 786, 787 (1910) (holding the word "tried," as used in Code of Civil Procedure § 976, is synonymous with the words "disposed of").

[*Id.*, 316 S.C. ___, 450 S.E.2d 56; *matter in brackets added for clarity.*]

FAULKNER has plead express and implied waiver based upon the Respondent's draft of payments from 2011 through 2016, and after maturity of the debt. This is the second attempt at foreclosure on the part of the Respondent. Its previous action, filed as Civil Case No: 2014-CP-29-00954, was subject to the same defense and was dropped by the Respondent.

Equitable estoppel or waiver is a mixed question of law and fact. In *Southern Railway-Carolina Div. v. Howell*, 89 S.C. 391, 71 S.E. 972 (1911), our Supreme Court held, citing *Townes v. City Council of Augusta*, 29 S.C. 851, 52 S.E. 396 (1898):

When the facts relied on to create an estoppel are admitted, or undisputed, or ascertained by the proper tribunal, then whether such facts create an estoppel is a question of law for the decision of the judge; but when the facts relied on to create an estoppel are disputed, then the case must go to the jury, under proper instructions from the court as to what constitutes an estoppel, leaving it to the jury to determine whether the evidence establishes or not the facts necessary to create an estoppel.

[*Id.*, 52 S.C. at 855, 29 S. E. at 408; citation in text of *Southern Ry. v. Howell*, *supra*, is reversed.]

28 AM.JUR.2D *Estoppel and Waiver* § 227 (2002) states the same principle:

Ordinarily, the question of waiver is one of fact for a jury. That is to say, where the evidence concerning waiver, or an element or requisite thereof, is conflicting or disputed, or where more than one reasonable inference may be drawn from the evidence, the question of waiver is one of fact for the trier of facts. [Ftn.53 citing, *inter alia*, *Pence v. Langdon*, 99 U.S. 578, 25 L.Ed. 420 (1878).] In determining if a waiver has in fact occurred, a court must examine the acts, words or conduct of the parties.

[*Id.*; footnotes omitted except as cited.]

It is firmly settled that the question of the existence of an estoppel or waiver is to be settled by the trier of fact where there is a dispute as to the facts involving those doctrines. See *Southern R. Co. v. Day*, 140 S.C. 388, 138 S.E. 870 (1926); 28 AM.JUR.2D *Estoppel and Waiver* § 227 (2002). See, also, *Dowling v. National Exch. Bank of Boston*, 145 U.S. 512, 36 L.Ed. 795, 12 S.Ct. 928 (1892); *Leather Manuf'rs' Nat. Bank v. Morgan*, 117 U.S. 96, 29 L.Ed. 811, 6 S.Ct. 657 (1886); *Thompson v. First Nat. Bank of Toledo, Ohio*, 111 U.S. 529, 29 L.Ed. 507, 4 S.Ct. 689 (1884); *Hughes v. Cobb*, 195 Ga. 213, 23 S.E.2d 701 (1942); and *Rieves v. Smith*, 184 Ga. 657, 192 S.E. 372, 112 A.L.R. 368 (1937).

IV. A SETOFF CLAIM UNDER TRUTH IN LENDING IS A COMPULSORY COUNTERCLAIM.

On the TILA claim, FAULKNER would note that 15 U.S.C. § 1640(e) specifically provides:

This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law.

In this case, FAULKNER has plead her TILA claims as a set-off. 15 U.S.C. § 1640(e) specifically provides, in relevant part:

[A]ny action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation . . . ¹

The Georgia Court of Appeals, in *Aycock v. Household Finance Corp. of Georgia*, 142 Ga.App. 207, 208, 235 S.E.2d 578, 580 (1977), in line with other Courts which have dealt with the issue, found that in a suit on a debt any truth-in-lending claims must be raised as compulsory counterclaims. Here, FAULKNER has thus raised that issue. See, also, *EX PARTE Fletcher*, 429 So.2d 1041 (Ala. 1982).

The alleged TILA violations, insofar as they plead for monetary damages and are dependent upon statutory interpretation, are legal in nature. Thus, the foreclosure complaint is

¹ The omitted portion of the cited Statute contains an exception as to claims under 15 U.S.C. § 1639, which has no application in this case.

equitable and the TILA counterclaim is legal and compulsory; under the standard as set out in category No. 4 of *Wachovia Bank National Association v. Blackburn, supra*, FAULKNER has the right to a jury trial of her counterclaim.

CONCLUSION

The Orders striking the Appellant's jury demand and granting a referral were improperly served and improperly granted.

FAULKNER timely advanced compulsory defenses and counterclaims to the Respondent Bank's equitable claim for foreclosure, following category no. 4 in the list of possibilities set out in *Wachovia Bank National Association v. Blackburn, supra*. She is entitled to a jury trial of her counterclaims.

Respectfully submitted,



John Martin Foster
Post Office Box 106
Rock Hill, SC 29731-6109
(803) 324-8100
Attorney for Appellant

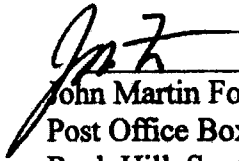
December 30, 2019

Rock Hill, South Carolina

CERTIFICATE OF COUNSEL

The undersigned certifies that this final Brief of Appellants complies with Rule 211(b),
S.C.A.C.R.

December 30, 2019



John Martin Foster

Post Office Box 106

Rock Hill, South Carolina 29731-6106

(803) 324-8100

Attorney for Appellant

RECEIVED
JAN 03 2020
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
In The Circuit Court

Brian Gibbons, Circuit Court Judge
William C. Tindal, Special Referee

Appellate Case No. 2018-001823

RECEIVED
JAN 03 2020
SC Court of Appeals

First Citizens Bank & Trust Company,

Respondent,

v.

Linda P. Faulkner a/k/a Linda Faulkner,
Founders Federal Credit Union, and
CACH, LLC,
of whom Linda P. Faulkner is the

Appellant.

CERTIFICATE OF SERVICE

I certify that, on the date below, I have served the final Brief of Appellant on the following counsel of record:

J. Kershaw Spong
Mary McDonald Campolong
Sowell Gray Robinson Stepp & Lafitte, LLC
Post Office Box 11449
Columbia, SC 29211
Attorneys for Respondent

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; of if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. all pursuant to Rule 262, S.C.A.C.R.

December 31. 2019



John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731
(803) 324-8100
Attorney for Appellant

JOHN MARTIN FOSTER

Attorney at law

The Guardian Building	PO Box 106	803 324 8100
223 East Main Street Suite 520	Rock Hill SC	803 324 8109 Fax
Rock Hill South Carolina 29730	29731-8106	jmfoster@comporium.net

December 31, 2019

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

Re: First Citizens Bank & Trust Company, Inc.
v. Linda P. Faulkner, *et al.*
Case No.: 2017-CP-29-00872
Appellate Case No. 2018-001823

RECEIVED
JAN 03 2020
SC Court of Appeals

Dear Ms. Kitchings:

Enclosed herewith please find the original and fifteen (15) copies of both the Appellant's final Brief and Reply Brief, together with Certificates of Service for the same in the above referenced case.

By copy of this letter, I am serving the attorneys for the Respondent with copies of the said final Brief and Reply Brief, as evidenced by the Certificates of Service.

Please return the extra conformed copy to my office in the enclosed self-addressed, stamped envelope. As always, thank you, and your staff, for your assistance in these matters.

Sincerely,


John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731
803 324-8100
Attorney for Appellant.

jmf/
enclosures

cc: J. Kershaw Spong
Mary McDonald Campolong
Sowell Gray Robinson Stepp & Lafitte, LLC
P.O. Box 11449
Columbia, S.C. 29211
Attorneys for Respondent
803 929-1400

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY

In the Circuit Court
Brian Gibbons, Circuit Court Judge
William C. Tindal, Special Referee

Appellate Case No. 2018-001823

Lower Court Case No. 2017-CP-29-00872

RECEIVED

NOV 22 2018

SC COURT OF APPEALS

First Citizens Bank & Trust Company Respondent,

v.

Linda P. Faulkner a/k/a Linda Faulkner
Founders Federal Credit Union, and CACH, LLC
Of whom Linda P. Faulkner is the Appellant.

BRIEF OF RESPONDENT

JOHN MARTIN FOSTER

John Martin Foster (SC Bar No. 2086)
Post Office Box 106
Rock Hill, South Carolina

Attorney for Appellant Linda P. Faulkner

ROBINSON GRAY STEPP & LAFFITTE, LLC

J. Kershaw Spong (SC Bar No. 5289)
Mary McDonald Campolong (SC Bar No. 102317)
1310 Gadsden Street
Post Office Box 11449
Columbia, SC 29211

Attorneys for Respondent First Citizens Bank & Trust Company

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY
In the Circuit Court
Brian Gibbons, Circuit Court Judge
William C. Tindal, Special Referee

Appellate Case No. 2018-001823

Lower Court Case No. 2017-CP-29-00872

First Citizens Bank & Trust Company Respondent,

v.

Linda P. Faulkner a/k/a Linda Faulkner
Founders Federal Credit Union, and CACH, LLC
Of whom Linda P. Faulkner is the Appellant.

BRIEF OF RESPONDENT

JOHN MARTIN FOSTER

John Martin Foster (SC Bar No. 2086)
Post Office Box 106
Rock Hill, South Carolina

Attorney for Appellant Linda P. Faulkner

ROBINSON GRAY STEPP & LAFFITTE, LLC

J. Kershaw Spong (SC Bar No. 5289)
Mary McDonald Campolong (SC Bar No. 102317)
1310 Gadsden Street
Post Office Box 11449
Columbia, SC 29211

*Attorneys for Respondent First Citizens Bank & Trust
Company*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
STANDARD OF REVIEW	4
ARGUMENT	5
I. Do the defenses to foreclosure raised in Appellant's Answer entitle Appellant to a jury trial?	5
II. Is the issue of equitable estoppel properly before this Court when it was neither raised to nor ruled upon by the circuit court?	7
III. Is the issue of timely service upon Appellant properly before this Court given that the Court reconsidered its initial orders and issued a subsequent order after a full hearing?	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES

<i>First South Bank v. Rosenberg</i> , 418 S.C. 170, 790 S.E.2d 919 (Ct. App. 2016)	5
<i>Hayne Fed. Credit Union v. Bailey</i> , 327 S.C. 242, 489 S.E.2d 472 (1997)	4
<i>I'On, L.L.C. v. Town of Mt. Pleasant</i> , 338 S.C. 406, 526 S.E.2d 716 (2000).....	7
<i>Townes Assocs., Ltd. v. City of Greenville</i> , 266 S.C. 81, 221 S.E.2d 773 (1976)	4
<i>Tuloka Affiliates, Inc. v. Moore</i> , 275 S.C. 199 268 S.E.2d 293 (1980)	6
<i>Universal Benefits, Inc. v. McKinney</i> , 349 S.C. 179, 561 S.E.2d 659 (Ct. App. 2002)	8
<i>Verenes v. Alvanos</i> , 387 S.C. 11, 690 S.E.2d 771 (2010)	4
<i>Wachovia Bank Nat. Ass'n v. Blackburn</i> , 407 S.C. 321, 755 S.E.2d 437 (2014).....	4, 5

STATUTES

15 U.S.C. §§ 1601 – 1667 (2018)	2
15 U.S.C. § 1640(e) (2018)	6
15 U.S.C. § 1640(k)(1) (2018).....	6
15 U.S.C. § 1692 (2018)	2

RULES

Rule 8, SCRCP	5
Rule 12(b)(6), SCRCP	3
Rule 39(a), SCRCP	7, 8
Rule 53, SCRCP	7
Rule 71(a), SCRCP	7

OTHER AUTHORITY

12 C.F.R. § 226 (2019).....	2
<i>Orders of Reference in Foreclosure Cases</i> , 2010-07-15-01 (July 15, 2010).....	8

STATEMENT OF THE ISSUES ON APPEAL

- I. Do the defenses to foreclosure raised in Appellant's Answer entitle Appellant to a jury trial?
- II. Is the issue of equitable estoppel properly before this Court when it was neither raised to nor ruled upon by the circuit court?
- III. Is the issue of timely service upon Appellant properly before this Court given that the Court reconsidered its initial orders and issued a subsequent order after a full hearing?

STATEMENT OF THE CASE

Respondent, First-Citizens Bank & Trust Company (“FCB”) filed a summons and complaint on August 9, 2017, seeking to foreclose on two properties in Lancaster County secured by mortgages given by Appellant Linda P. Faulkner (“Faulkner”) to First Citizens Bank and Trust Company, Inc., to which FCB is a successor in interest. (R. pp. 11-52). One mortgage was executed in 2005, and the other mortgage was executed in 2008. (R. pp. 2, 4). The 2005 mortgage was given as security for loan documents executed the same day as that mortgage, May 20, 2005, and the 2008 mortgage, as well as the 2005 mortgage, acted as security for loan documents executed on December 27, 2010. (R. pp. 1-4).

Faulkner filed an “Answer and Counterclaim Jury Trial Demanded” on December 29, 2017 (the “Answer”).¹ (R. pp. 53-61). As defenses to the complaint, Faulkner alleged FCB expressly waived any claim of default under “said mortgage;”² FCB’s actions created an implied waiver of any claim of default under “said mortgage;” FCB violated the Truth in Lending Act, 15 U.S.C. §§ 1601 – 1667 (2018), and Federal Reserve Board Regulation Z, 12 C.F.R. § 226 (2019), and FCB is liable to Faulkner for damages from this violation; third parties hired by FCB violated the Unfair Debt Collection Act, 15 U.S.C. § 1692 (2018); and FCB breached a duty of good faith to Faulkner. (*Id.*). Faulkner did not allege in her Answer that FCB was equitably estopped from foreclosing.³

¹ As to the other defendants, Founders Federal Credit Union filed an Answer on August 22, 2017, admitting it is the holder of an unpaid judgment and asking the Court for notice of proceedings going forward. CACH, LLC filed no Answer in the case and on January 29, 2018, J. Kershaw Spong, attorney for FCB, filed an Affidavit of Default with respect to CACH, LLC. (R. pp. 75-77).

² It is unclear from the document which mortgage Faulkner is referring to.

³ FCB filed a Reply to Counterclaim, denying every defense not expressly admitted, arguing the statute of limitations precludes Faulkner from asserting a counter-claim under the Truth in Lending Act, asserting FCB does not meet the definition of debt collector in the Unfair Debt Collections Act and has no knowledge of the actions of any alleged third parties, denying any breach of a

FCB sought to strike Faulkner's jury demand and have the foreclosure matter referred to a special referee. On January 29, 2018, FCB mailed to the Lancaster County Clerk of Court (1) a Motion for Order of Reference and Certificate of Service and (2) a Motion to Strike Jury Demand and Certificate of Service. (R. p. 75). The Motion to Strike Jury Demand was filed on January 31, 2018, and that same day, the Circuit Court ordered that Faulkner's Jury Demand was stricken. (R. pp. 66-69, 75; R. p. 1). The Motion for Order of Reference was filed on February 2, 2018 and that same day, the Lancaster County Clerk of Court referred the matter to William C. Tindal as Special Referee. (R. pp. 70-75; R. p. 2-3). No hearing was held on either of FCB's motions.

On February 22, 2018, Faulkner moved to alter or amend both the Order Striking Jury Demand and the Order of Reference.⁴ (R. pp. 78-84). Faulkner alleged: she had raised defenses which entitled her to a jury trial; because she was entitled to a jury trial, the foreclosure suit should not have been referred to a special referee; and the motions by FCB were decided without notice to her and without opportunity to be heard. (R. p. 79). On September 25, 2018, the circuit court held a hearing on the motion to alter or amend—which was attended and argued by both counsel for Faulkner and FCB. (R. pp. 91-99). On October 2, 2018, the circuit court filed an order denying Faulkner's motion to alter or amend its two orders. (R. pp. 5-10). Thus, the jury demand was stricken and the matter was referred to the special referee.

Faulkner filed a Notice of Appeal with this Court on October 11, 2018, appealing the circuit court's orders striking Faulkner's jury demand and referring the matter to the special referee. (R.

covenant of good faith and fair dealing, and claiming Faulkner failed to state facts to support any cause of action and asking the Court to dismiss Faulkner's claims pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. (R. pp. 62-65)

⁴ Faulkner actually filed a "Motion to Alter or Amend Judgment Pursuant to: Rule 59(a), S.C.R.P." However, all parties and the court treated such motion as one made under Rule 59(e) of the South Carolina Rules of Civil Procedure.

100). In her brief before this Court, Faulkner alleges: (1) that she was not timely served with FCB's motions to strike the jury demand or to refer the case to the special referee and (2) that the defenses of waiver, equitable estoppel, and violation of the truth in lending act are compulsory counterclaims and, thus, entitled to a jury trial. Faulkner's allegations are misleading because (a) Faulkner's allegations of waiver, equitable estoppel, and violation of the Truth in Lending Act are defenses, and thus are not entitled to a jury trial; (b) Faulkner never raised the issue of equitable estoppel before the circuit court; and (c) Faulkner was properly served and the circuit court properly ruled on both of FCB's motions.

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." *Wachovia Bank Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 440–41 (2014) (quoting *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997)). "In an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence." *Id.* (citing *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775–76 (1976))). "However, '[w]hether a party is entitled to a jury trial is a question of law.'" *Id.* (quoting *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010)). "Appellate courts may decide questions of law with no particular deference to the circuit court's findings." *Id.* (citing 387 S.C. at 15, 690 S.E.2d at 772–73).

ARGUMENT

I. DO THE DEFENSES TO FORECLOSURE RAISED IN APPELLANT'S ANSWER ENTITLE APPELLANT TO A JURY TRIAL?

Faulkner alleges that the circuit court's order striking her jury demand was improper because her defenses of waiver and violation of the Truth in Lending Act are entitled to a jury trial. However, Faulkner's claims cannot be entitled to a jury trial because only counterclaims, not defenses, can trigger a requirement for jury trial.

A foreclosure action is an action in equity and is not entitled to a jury trial. *Wachovia Bank Nat. Ass'n*, 407 S.C. at 328, 755 S.E.2d at 441. However, counterclaims to a foreclosure action may be entitled to a jury trial. As the court explained in *Blackburn*:

- (1) If both the complaint and counterclaim are in equity, the entire matter is triable by the court.
- (2) If both are at law, the issues are triable by a jury.
- (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.
- (4) If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim unless a valid jury trial waiver exists that encompasses the counterclaim

407 S.C. at 329-30, 755 S.E.2d at 441-42.

Faulkner claims that waiver, equitable estoppel, and violation of the Truth in Lending Act are counterclaims entitled to a jury trial, but they are actually defenses raised by Faulkner. A defense is "a defense to each cause of action asserted." Rule 8(b), SCRCP. A counterclaim shows "the pleader is entitled to relief" and includes a "prayer or demand for judgment for the relief." Rule 8(a), SCRCP. Faulkner's defenses of waiver, equitable estoppel, and violation of the Truth in Lending Act are arguments as to why Faulkner believes FCB cannot be successful in its suit against her, not counterclaims asserting any basis on which Faulkner is entitled to relief against FCB. *See First South Bank v. Rosenberg*, 418 S.C. 170, 183-84, 790 S.E.2d 919, 926-27 (Ct. App. 2016)

(comparing defenses to counterclaims and determining negligence and breach of contract were both counterclaims).

First, in her prayer for relief as to waiver, Faulkner only asks the Court to dismiss the claims FCB has against Faulkner. (R. p. 59, ¶ C). Faulkner does not ask for any relief independent of FCB's action.

Second, as to Faulkner's Truth in Lending Act allegations, these also must be classified as a defense and not a counterclaim. Under the Truth in Lending Act, a claim for violation of the Act may only be brought "within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e). Faulkner alleges FCB's violation of the Truth in Lending Act occurred in March 2008, eleven (11) years ago. (R. p. 56, ¶ 21). Since the statute of limitations for claims under the Truth in Lending Act (the "Act") has run, Faulkner cannot assert a counterclaim for a violation of the Act.

However, Faulkner may still assert a defense under the Truth in Lending Act. In a foreclosure action, "a consumer may assert a violation by a creditor" of certain parts of the Act, "as a matter of *defense by recoupment or setoff* without regard for the time limit on a private action for damages under subsection (e)." 15 U.S.C. § 1640(k)(1) (emphasis added). The statute allowing Faulkner to assert a violation of the Truth in Lending Act, section 1640(k)(1), defines Faulkner's Truth in Lending allegation as a defense, not a counterclaim. Additionally, in *Tuloka Affiliates, Inc. v. Moore*, 275 S.C. 199, 202, 268 S.E.2d 293, 295 (1980), the Supreme Court of South Carolina found—prior to the enactment of section 1640(k)(1)—a "defense and counter-claim" under the Act in response to a foreclosure action after the one year statute of limitations had expired was an equitable defense, not a counter-claim. Thus, it is clear Faulkner's Truth in Lending Act allegations are a defense and no jury trial is appropriate.

II. IS THE QUESTION OF WHETHER THE DEFENSE OF EQUITABLE ESTOPPEL IS ENTITLED TO A JURY TRIAL PROPERLY BEFORE THIS COURT WHEN IT WAS NEITHER RAISED TO OR RULED UPON BY THE CIRCUIT COURT?

Appellant, for the first time on appeal, raises a defense of equitable estoppel. A party "must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Preservation rules are "meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. *Id.* Here, the circuit court had no opportunity to consider the facts, law, or arguments regarding equitable estoppel. Faulkner did not raise the issue of equitable estoppel in her Answer. Faulkner did not raise the issue of equitable estoppel in her motion for reconsideration. Faulkner did not raise the issue of equitable estoppel in the hearing before the circuit court. As this issue was never raised before the circuit court, it cannot now be presented for the first time on appeal.

III. IS THE ISSUE OF TIMELY SERVICE UPON APPELLANT PROPERLY BEFORE THIS COURT GIVEN THAT THE COURT RECONSIDERED ITS INITIAL ORDERS AND ISSUED A SUBSEQUENT ORDER AFTER A FULL HEARING?

A court is entitled to strike a jury demand "upon motion or its own initiative" if it finds that a right to a jury trial on any or all issues does not exist. Rule 39(a), SCRPC. After striking a jury demand, a court is entitled to refer a foreclosure matter to a master in equity or a special referee. "Actions to foreclose liens . . . shall ordinarily be referred to a master pursuant to Rule 53" of the South Carolina Rules of Civil Procedure. Rule 71(a), SCRPC. Rule 53(b) provides: "In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit court judge or the clerk of court." In an administrative order issued in 2010, former Chief Justice Toal

expressly found either a circuit court judge or a clerk of court could sign an Order of Reference in foreclosure actions. *Orders of Reference in Foreclosure Cases*, 2010-07-15-01 (July 15, 2010).

Here, FCB mailed its motions to strike the jury demand and to refer the matter to a special referee to the clerk of court to be filed. (R. p. 75; R. pp. 66-74). Simultaneously, FCB served notice to Faulkner via mail of the same. (R. p. 69; R. P. 71). However, notwithstanding Faulkner's motions, the Rules of Civil Procedure would have (a) allowed the circuit court to strike the jury demand upon its own initiative, Rule 39(a), SCRCF, and (b) after the jury demand was stricken, allowed either the circuit court or the clerk of court to refer the matter to a special referee, Rules 71(a) and 53(b), SCRCF. Though Faulkner complains that the court ruled on both motions without allowing Faulkner an opportunity to respond and without a hearing, this was not an error. Upon motion or upon its own initiative a circuit court may strike a jury demand, and in a foreclosure matter, a clerk of court may refer the case to a special referee.

Further, though Faulkner complains that the circuit court ruled on FCB's motions to strike the jury demand and for order of reference prior to Faulkner actually receiving the notice or having an opportunity to respond, any error was cured by Faulkner's motion to alter or amend both orders. *See* (R. pp. 78-80). In *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183-84, 561 S.E.2d 659, 661-62 (Ct. App. 2002), this Court determined that when the plaintiff was afforded written notice of an order dismissing its action and the opportunity to move for reconsideration, even when the plaintiff may not have received notice of the initial hearing, there was no denial of due process. Here, Faulkner was heard on the issues raised in her Rule 59 motion to reconsider the orders. After Faulkner's motion, each party submitted memoranda on the issues, (R. pp. 81-84; R. pp. 85-90), and the circuit court held a hearing on September 25, 2018, which was attended by counsel for both Faulkner and FCB, (R. pp. 91-99). Thus, Faulkner had the opportunity to be heard before the

circuit court at a hearing on both the motion to strike and the motion to refer the matter to a special referee.

CONCLUSION

Faulkner raises many issues and facts in her appellate brief which are misleading or were not raised before the circuit court. Faulkner's appeal should be denied because the circuit court properly ruled on FCB's motions to strike the jury demand and to refer the case to a special referee. Faulkner's claims of waiver, equitable estoppel, and violation of the Truth in Lending Act are all defenses—rather than counter-claims—and thus, Faulkner was not entitled to a jury trial and the circuit court's order striking Faulkner's jury demand was proper. Additionally, Faulkner's claim of equitable estoppel was not raised to or ruled on by the circuit court and, thus, is not preserved for review by this Court. Finally, Faulkner's claim that she was not timely served with the notice of FCB's motions is misleading as (1) the circuit court acted within its discretion to both strike Faulkner's jury demand and refer the matter to a special referee, and (2) any service issues were resolved by the hearing before the circuit court on Faulkner's Rule 59(e) motion. For the foregoing reasons, Faulkner's appeal should be denied, and the orders of the circuit court should be affirmed.

Signature Page to Follow

Respectfully submitted,

ROBINSON GRAY STEPP & LAFFITTE, LLC

By: 

J. Kershaw Spong (Bar No. 5289)
Mary M. Campolong (Bar No. 102317)
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 227-1101
kspong@robinsongray.com
mcampolong@robinsongray.com

Attorneys for Respondent First-Citizens Bank &
Trust Company

Columbia, South Carolina
November 22, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY

In the Circuit Court
Brian Gibbons, Circuit Court Judge
William C. Tindal, Special Referee

RECEIVED

NOV 22 2019

SC Court of Appeals

Appellate Case No. 2018-001823

Lower Court Case No. 2017-CP-29-00872

First Citizens Bank & Trust Company.....Respondent,

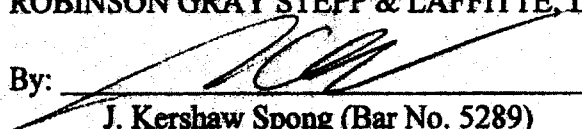
v.

Linda P. Faulkner a/k/a Linda Faulkner
Founders Federal Credit Union, and CACH, LLC
Of whom Linda P. Faulkner is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief complies with Rule 211(b), SCACR.

ROBINSON GRAY STEPP & LAFFITTE, LLC

By: 

J. Kershaw Spong (Bar No. 5289)
Mary M. Campolong (Bar No. 102317)
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 227-1101
kspong@robinsongray.com
mcampolong@robinsongray.com

Attorneys for Respondent First Citizens Bank &
Trust Company

November 21, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY
In the Circuit Court

Brian Gibbons, Circuit court Judge
William C. Tindal, Special Referee

Appellate Case No. 2018-001823

Lower Court Case No. 2017-CP-29-00872

RECEIVED
NOV 22 2019
SC Court of Appeals

First Citizens Bank & Trust Company Respondent,

v.

Linda P. Faulkner a/k/a Linda Faulkner
Founders Federal Credit Union, and CACH, LLC
Of whom Linda P. Faulkner is the Appellant.

PROOF OF SERVICE

I certify that on November 22, 2019 I have served the Brief of Respondent, on the following counsel or persons of record:

John Martin Foster
Post Office Box 106
Rock Hill, SC 29731
Attorney for Appellant

By depositing the same with the United States mail, with sufficient first-class postage attached, properly addressed to the respective last known address of the attorney set out above, pursuant to Rule 262(b), S.C.A.C.R.

November 22 2019

ROBINSON GRAY STEPP & LAFFITTE, LLC.

By: 

J. Kershaw Spong [SC Bar # 5289]

Mary M. Campolong [SC Bar #102317]

ROBINSON GRAY STEPP & LAFFITTE, LLC

P.O. Box 11449

Columbia, SC 29211

(803) 929-1400

Email: kspong@robinsongray.com

mcampolong@robinsongray.com

Attorneys for Respondent First Citizens Bank & Trust
Company

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
In The Circuit Court

Brian Gibbons, Circuit Court Judge
William C. Tindal, Special Referee

Appellate Case No. 2018-001823

RECEIVED

JAN 03 2020

SC Court of Appeals

First Citizens Bank & Trust Company,

Respondent,

v.

Linda P. Faulkner a/k/a Linda Faulkner,
Founders Federal Credit Union, and
CACH, LLC,
of whom Linda P. Faulkner is the

Appellant.

REPLY BRIEF OF APPELLANT

John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731
(803) 324-8100
Attorney for Appellant

TABLE OF CONTENTS

Table of Authorities	3
Statement of the Case	4
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

CASES: SOUTH CAROLINA SUPREME COURT

<i>Harvey v. Philadelphia Life Ins. Co. Of Philadelphia</i> , 131 S.C. 405, 127 S.E. 836 (1925)	8
<i>Rush v. Thompson</i> , 203 S.C. 106, 26 S.E.2d 411 (1943)	5
<i>Smith v. Williams</i> , 141 S.C. 265, 139 S.E. 625 (S.C., 1927)	6-7
<i>Wachovia Bank National Association v. Blackburn</i> , 407 S.C. 321, 755 S.E.2d 437 (2014)	4,6

CASES: SOUTH CAROLINA COURT OF APPEALS

<i>Keels v. Pierce</i> , 315 S.C. 339, 433 S.E.2d 902 (Ct.App. 1993)	5
--	---

CASES: NEW HAMPSHIRE

<i>Horn v. Cole</i> , 51 N.H. 287, 12 Am.Rep. 111 (1873)	7
--	---

CASES: NORTH CAROLINA

<i>IN RE Gilliland</i> , 248 N.C. 517, 103 S.E.2d 807 (1958)	5
<i>Tarlton v. Stidham</i> , 122 N.C. App. 77, 469 S.E.2d 38 (1996), rev. denied, 343 N.C. 311, 471 S.E.2d 81 (1996)	7

RULES OF CIRCUIT COURT: SOUTH CAROLINA

Rule 13(a), S.C.R.C.P.	5
-----------------------------	---

OTHER AUTHORITIES:

F

28 AM.JUR.2D <i>Estoppel and Waiver</i> § 27 (09/2002)	7
Pomeroy EQUITY JURISPRUDENCE 4 th Ed.	7

STATEMENT OF THE CASE

This foreclosure action was filed by the Respondent FIRST CITIZENS BANK & TRUST COMPANY on August 9, 2017. On January 2, 2018, the Appellant LINDA FAULKNER filed her Answer and Counterclaim advancing counterclaims and defenses for express and implied waiver by reason of accepting payments, Truth in Lending violations, violations of the Fair Debt Collections Act, and breach of good faith. She requested a jury trial.

A Motion to Strike Jury Demand and an Order granting that Motion were both filed January 31, 2018. No previous communication was received and no hearing was noticed for the Motion. The Certificate of Service for this Motion is dated January 29, 2018 and filed January 31, 2018.

A Motion to refer the case to a Special Referee and an Order granting that Motion were both filed February 2, 2018. No previous communication was received and no hearing was noticed for the Motion. The Certificate of Service for this Motion is dated January 29, 2018 and filed February 2, 2018.

Both Motion above were granted, and served on Appellant with a Certificate of Service dated February 7, 2018 and filed February 9, 2018.

On February 20, 2018, FAULKNER served her Motion under Rule 59, S.C.R.C.P. to set aside the Order striking the jury request and referring the case to a Special Referee. After hearing, the Circuit Court issued its Order filed October 2, 2018 denying Rule 59 relief. This appeal followed.

ARGUMENT

I. COMPULSORY COUNTERCLAIMS TO EQUITABLE ACTIONS ARE INDISTINGUISHABLE TO MATTERS ASSERTED AS AFFIRMATIVE DEFENSES.

The Respondent argues that the holding of *Wachovia Bank National Association v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014) and other cases on compulsory counterclaims has no application to the causes asserted by the Appellant and designated as Defenses.

To repeat, *Wachovia Bank* and accompanying authority affirms the right to a jury trial where a compulsory legal counterclaim is asserted by a defendant to an equitable complaint. *Id.*, 407 S.C. at 329-30, 755 S.E.2d at 441.

Compulsory counterclaims are defined in Rule 13(a), S.C.R.C.P., which states in relevant part:

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

The Appellant first notes that the distinction drawn by the Respondent – between a legal counterclaim and a legal defense – would deny anyone asserting a defense or affirmative defense the right to a jury trial. This distinction cannot be supported by South Carolina precedent.

In *Keels v. Pierce*, 315 S.C. 339, 433 S.E.2d 902 (Ct.App. 1993), this Court dealt with an Appellant asserting permissive counterclaims. The Court held that permissive counterclaims could be severed and tried separately. The Court went on to state:

The right of trial by jury is highly favored, and waivers of the right are always strictly construed and not lightly inferred or extended by implication. *IN RE Gilliland*, 248 N.C. 517, 103 S.E.2d 807 (1958). In absence of an express agreement or consent, a waiver of the right to a jury trial will not be presumed. *Id.*

[*Id.*, 315 S.C. ___, 433 S.E.2d 904.]

Earlier, in *Rush v. Thompson*, 203 S.C. 106, 26 S.E.2d 411 (1943), in discussing severance of equitable and legal issues, our Supreme Court stated:

If the matters set up in the equity complaint had been pleaded defensively to the law complaint, we would of course have had but one action, and although involving both legal and equitable issues, [the Defendant] Rush could not have thus been deprived of his right to a jury trial on the legal issues.

[*Id.*, 203 S.C. ___, 26 S.E. 413; underlining added; words in brackets added for clarity.]

The Appellant notes that the language used above, as well as that in Rule 13(i), S.C.R.C.P. on severance of trials, references the “claims” advanced, and is not limited to counter-claims.

In *Wachovia Bank National Association v. Blackburn* itself, *supra*, the Supreme Court set out procedure for the handling of mortgage litigation involving legal and equitable issues, in the context of a waiver, stating:

If such a waiver does not exist, the proper procedure for handling the counterclaims is as follows:

(a) The trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.

(b) If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.

(c) If the claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the equitable claims, but the jury's determination of common factual issues shall be binding upon the court.

[*Wachovia Bank National Association v. Blackburn*, 407 S.C. ___, 755 S.E.2d 442.; underlining added.]

A logical reading of South Carolina precedent, as well as Rule 13, S.C.R.C.P., clearly shows that our Courts have made no distinction between legal counterclaims and defenses with regard to the right to a jury trial.

III. THE APPELLANT HAS EFFECTIVELY AND TIMELY INVOKED THE DOCTRINE OF EQUITABLE ESTOPPEL.

The Appellant's Second and Third Defense are denominated "Express Waiver" and "Implied Waiver" in their headings. RECORD ON APPEAL, p.54-55. In her Rule 50 Memorandum, she used the term "equitable estoppel". RECORD ON APPEAL, p.82-83. The Respondent objects to this language as referencing an issue "neither raised or passed upon" by the Circuit Court.

Equitable estoppel was discussed, and acknowledged, by the Supreme Court in *Smith v. Williams*, 141 S.C. 265, 139 S.E. 625 (S.C., 1927), as follows:

In the footnote to the quoted section of Pomeroy [EQUITY JURISPRUDENCE 4th Ed.] (volume 2, pp. 1636-1639) the author makes particular reference to the admirable and accurate presentation of the equitable conception of estoppel from conduct (as a rule of property, contract, or remedy, rather than a mere rule of evidence), as given in the famous opinion of Chief Justice Perley in *Horn v. Cole*, 51 N.H. 287, 289 (12 Am.Rep. 111), where it is said:

"Equitable estoppels are admitted on the * * * ground of promoting the equity and justice of the individual case *by preventing a party from asserting his rights under a general technical rule of law*, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. * * * As in other cases of fraud and dishonesty, the circumstances out of which the question may arise are of infinite variety; * * * and in equity, the doctrine has been liberally applied *to suppress fraud and enforce honesty and fair dealing*, without any attempt to confine the doctrine within the limits of a strict definition."
(*Italics ours.*)

[Id., 141 S.C. ___, 139 S.E. 630; matter in brackets added for clarity.]

The commentators of AMERICAN JURISPRUDENCE 2D state the relation of equitable estoppel to estoppel as follows:

The terms "estoppel in pais" and "equitable estoppel" are now generally used interchangeably as applicable to all estoppels other than those by record, deed, or bond. Equitable estoppels operate in their own field as effectively as technical estoppels do in theirs. Since, however, the principle which underlies equitable estoppel in its proper sense runs throughout all the transactions and contracts of civilized life; such estoppels cannot be subjected to fixed and settled rules of universal application, like legal estoppels, or hampered by the narrow confines of a technical formula. In other words, each case of estoppel must in the nature of things stand on its own bottom—that is, the facts and circumstances of the particular case. It is thus a flexible doctrine.

[28 AM.JUR.2D *Estoppel and Waiver* § 27 (09/2002); footnotes omitted but citing, e.g., *Tarlton v. Stidham*, 122 N.C. App. 77, 469 S.E.2d 38 (1996), *rev. denied*, 343 N.C. 311, 471 S.E.2d 81 (1996).]

In the leading case of *Harvey v. Philadelphia Life Ins. Co. Of Philadelphia*, 131 S.C. 405, 127 S.E. 836 (1925), the Supreme Court stated:

Although "waiver" and "estoppel" are often loosely used interchangeably in the law of insurance, they are not convertible terms. 27 R.C.L. 905, § 2. A waiver is an intentional relinquishment of a known right, while the essential elements of estoppel are the ignorance of the party who invokes the estoppel, representations, or conduct of the party estopped which mislead, and an innocent and deleterious change of position in reliance on such representations or conduct.

[*Id.*, 131 S.C. ___, 127 S.E. 838.]

The Answer of the Appellant clearly alleges as follows:

11. The Defendant FAULKNER relied on the said waiver, acknowledgment and acquiescence of Plaintiff in ordering her affairs, which ordering will be to their detriment if the causes of action set out in the Complaint and relating to collection and foreclosure are now prosecuted.

[RECORD ON APPEAL, p.55.]

The Appellant has adequately plead estoppel, under whatever name. The the was raised to the Circuit Court by its use in the Memorandum of the Appellant. RECORD ON APPEAL, p.82-83. The use of the term was not waived in argument at the Rule 59 hearing. RECORD ON APPEAL, p.91-99.

The claim that the term was not "passed on" by the Circuit Court is disingenuous: the argument before the Circuit Court was on Appellant's Rule 59 Motion. That Motion was filed – as is effectively admitted by the Respondent – owing to it failure to give proper notice of its earlier Motions.

Procedure does not allow filing a Rule 59 Motion in response to a ruling on a Rule 59 Motion: if the Court failed to address the term "equitable estoppel", the only solution is this appeal. The Respondent cannot assert a grounds of a lack of ruling caused by its own failure to follow procedure.

CONCLUSION

FAULKNER timely advanced compulsory defenses and counterclaims to the Respondent Bank's equitable claim for foreclosure, including grounds for equitable estoppel and following the list of possibilities set out in *Wachovia Bank National Association v. Blackburn, supra*. She is entitled to a jury trial of the legal defenses raised by her.

Respectfully submitted,



John Martin Foster
Post Office Box 106
Rock Hill, SC 29731-6109
(803) 324-8100
Attorney for Appellant

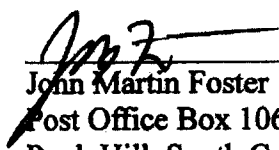
December 30, 2019

Rock Hill, South Carolina

CERTIFICATE OF COUNSEL

The undersigned certifies that this final Reply Brief of Appellants complies with Rule 211(b), S.C.A.C.R.

December 30, 2019


John Martin Foster

Post Office Box 106

Rock Hill, South Carolina 29731-6106

(803) 324-8100

Attorney for Appellant

RECEIVED
JAN 03 2020
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
In The Circuit Court

Brian Gibbons, Circuit Court Judge
William C. Tindal, Special Referee

Appellate Case No. 2018-001823

RECEIVED
JAN 03 2020
SC Court of Appeals

First Citizens Bank & Trust Company,

Respondent,

v.

Linda P. Faulkner a/k/a Linda Faulkner,
Founders Federal Credit Union, and
CACH, LLC,
of whom Linda P. Faulkner is the

Appellant.

CERTIFICATE OF SERVICE

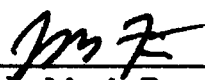
I certify that, on the date below, I have served the final Reply Brief of Appellant on the following counsel of record:

J. Kershaw Spong
Mary McDonald Campolong
Sowell Gray Robinson Stepp & Lafitte, LLC
Post Office Box 11449
Columbia, SC 29211
Attorneys for Respondent

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; of if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. all pursuant to Rule 262, S.C.A.C.R.

December 31, 2019



John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731
(803) 324-8100
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
In The Circuit Court

Brian Gibbons, Circuit Court Judge
William C. Tindal, Special Referee

Appellate Case No. 2018-001823

RECEIVED
NOV 14 2019
SC Court of Appeals

First Citizens Bank & Trust Company,

Respondent,

v.

Linda P. Faulkner a/k/a Linda Faulkner,
Founders Federal Credit Union, and
CACH, LLC,
of whom Linda P. Faulkner is the

Appellant.

RECORD ON APPEAL

John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731
(803) 324-8100
Attorney for Appellant

J. Kershaw Spong
Mary McDonald Campolong
Sowell Gray Robinson Stepp & Lafitte, LLC
Post Office Box 11449
Columbia, SC 29211
Attorneys for Respondent

INDEX

Order Striking Jury Demand filed 01/31/2018	1
Order of Reference filed 02/02/2018	2
Certificate of Service of both above filed 02/09/2018	4
Order denying Rule 59 Relief filed 10/02/2018	5
Summons and Complaint filed 08/09/2017	11
Answer and Counterclaim of Appellant filed 01/02/2018	53
Certificate of Service of above filed 01/02/2018	61
Reply to Counterclaim filed 02/05/2018	62
Motion to Strike Jury Demand filed 01/31/2018	66
Certificate of Service of above filed 01/31/2018	69
Motion for Order of Reference filed 02/02/2018	70
Certificate of Service of above filed 02/02/2018	74
Letter transmitting Motions above, with Affidavit of Default on Cach, LLC	75
Rule 59 Motion to Alter or Amend Judgment filed 02/22/2018	78
Certificate of Service of above filed 02/22/2018	80
Memo in Support of Rule 59 Motion filed 09/24/2018	85
Transcript of Hearing on September 25, 2018, p.2 – 10	91
Notice of Appeal	100
Certificate of Counsel	103

TATE OF SOUTH CAROLINA)

COUNTY OF LANCASTER)

IN THE COURT OF COMMON PLEAS

First-Citizens Bank & Trust Company,)

Plaintiff,)

v.)

Linda P. Faulkner a/k/a Linda Faulkner,)
Founders Federal Credit Union, and)
CACH, LLC,)

Defendants.)

Case No. 2017-CP-29-00872

ORDER
(Striking Jury Demand)

Upon motion of Plaintiff, it is hereby

ORDERED that the jury demand of Defendant Linda P. Faulkner a/k/a Linda Faulkner is
stricken due to the contractual waiver of a right to a jury trial in the loan documents. Wachovia
Bank v. Blackburn, 407 S.C. 321, 755 S.E.2d 437 (2014).

IT IS SO ORDERED.

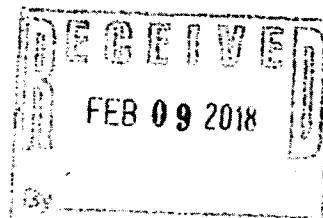


Presiding Judge
Sixth Judicial Circuit

Lancaster, South Carolina.

1/31, 2018

2018 JAN 31 AM 11:56
CLERK OF COURT
LANCASTER, SC



STATE OF SOUTH CAROLINA)

COUNTY OF LANCASTER)

First-Citizens Bank & Trust Company,)

Plaintiff,)

v.)

Linda P. Faulkner a/k/a Linda Faulkner,)
Founders Federal Credit Union, and)
CACH, LLC,)

Defendants.)

IN THE COURT OF COMMON PLEAS

Case No. 2017-CP-29-00872

**ORDER OF REFERENCE
AND SETTING COMPENSATION OF
SPECIAL REFEREE
(Foreclosure)**

FILED
LANCASTER
FEB -2 PM 2:16

IT APPEARING that the above entitled action for foreclosure of a mortgage on real property situated in Lancaster County, South Carolina, is a proper matter to refer to William C. Tindal, as Special Referee; therefore, upon motion of J. Kershaw Spong, Esquire of the law firm of Sowell Gray Robinson Stepp & Laffitte, LLC, attorneys for Plaintiff, it is

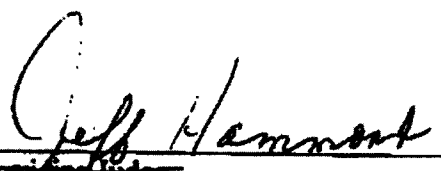
ORDERED that the above entitled action be, and the same hereby is, referred to William C. Tindal, as Special Referee to make findings of fact and conclusions of law; dispose of any and all issues and enter a final judgment in the case; order a judicial sale on any day, not just the regular judicial sale day; hear and dispose of any issues after sale or judgment, including, but not limited to, issuance of a Writ of Assistance and any issues involving appraisal under Code Section 29-3-680, et seq.

Any appeal from the decision of the Special Referee shall be made directly to the Appellate Court, as provided in Rule 203, SCACR.

The Court is further informed that the custom and usage of the Lancaster County Bar is to allow a fee of Two Hundred and 00/100 Dollars (\$200.00) in routine default foreclosures plus the fee allowed by Subsection 15-39-770 and Section 14-11-310 of the 1976 Code of Laws of South Carolina if sold by the Special Referee.

NOW, THEREFORE, pursuant to Rule 53(d) of the South Carolina Rules of Civil Procedure, it is FURTHER ORDERED that the Plaintiff pay to William C. Tindal, Special Referee, the sum of Two Hundred and 00/100 Dollars (\$200.00), plus the one (1%) percent of the gross sale price up to a maximum of Two Thousand Five Hundred and 00/100 Dollars (\$2,500.00), as allowed by Subsection 15-39-770 and Section 14-11-310, if sold by the Special Referee.

IT IS SO ORDERED.


Presiding Judge
Sixth Judicial Circuit

Lancaster, South Carolina.

FEBRUARY 2, 2018

I CONSENT:

W. Tindal

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

First-Citizens Bank & Trust Company,

Plaintiff,

v.

Linda P. Faulkner a/k/a Linda Faulkner,
Founders Federal Credit Union, and
CACH, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO. 2017-CP-29-00872

CERTIFICATE OF SERVICE
BY MAIL

This is to certify that I, Melissa H. White, a Paralegal with the law firm of Sowell Gray Robinson Stepp & Laffitte, LLC, have caused to be served upon the persons named below the Order (Striking Jury Demand) and Order of Reference and Setting Compensation of Special Referee in the foregoing matter by placing copies of same in the United States Mail, postage prepaid, in envelopes addressed as follows:

John Martin Foster, Esquire
Post Office Box 106
Rock Hill, SC 29731

Philip E. Wright, Esquire
Law Office of Philip E. Wright, P.A.
408 North Main Street
Lancaster, SC 29720

Edward H. Overcash, Jr., Esquire
Law Office of Edward H. Overcash, Jr.
37 Villa Road, Suite 507
Greenville, SC 29615

Dated this 7th day of February, 2018 at Columbia, South Carolina.


Melissa H. White

FILED
OFFICE OF CLERK
OF COURT
2018 FEB -9 PM 2:10
CLERK OF COURT
LANCASTER, SC

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER	)	
First-Citizens Bank & Trust Company,	)	CASE NO. 2017-CP-29-00872
	)	
Plaintiff,	)	
	)	ORDER DENYING DEFENDANT'S
v.	)	RULE 59 MOTION TO ALTER OR
	)	AMEND
Linda P. Faulkner a/k/a Linda Faulkner,	)	
Founders Federal Credit Union, and	)	
CACH, LLC,	)	
	)	
Defendants.,	)	

Pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, the Defendant Linda P. Faulkner ("Defendant Faulkner") moved to alter or amend this Court's Order dated January 31, 2018, striking Defendant Faulkner's jury demand and the Clerk of Court's Order dated February 2, 2018, referring this foreclosure action to William C. Tindal as Special Referee. Defendant Faulkner argued altering the Order is appropriate because she (1) is entitled to a jury trial as to certain defenses and (2) it was improper to refer this case to a Master in Equity or Special Referee. This Court disagrees and finds it is not necessary for this Court to Alter or Amend the two Orders.

BACKGROUND

Plaintiff, First-Citizens Bank & Trust Company ("FCB"), filed a Summons and Complaint on August 9, 2017, seeking for foreclose on two mortgages given by Defendant Faulkner to First Citizens Bank and Trust Company, Inc., to which FCB is a successor in interest. The first mortgage was executed in 2005, and the second mortgage was executed in 2010.

Defendant Faulkner filed an "Answer and Counterclaim Jury Trial Demanded" on December 29, 2017, which Plaintiff received on January 3, 2018.¹ As defenses to the Complaint, Defendant Faulkner alleged FCB expressly waived any claim of default under "said mortgage;"² FCB's actions created an implied waiver of any claim of default under "said mortgage;" FCB violated the Truth in Lending Act, 15 U.S.C. § 1601 *et al.*, and Federal Reserve Board Regulation Z, 12 C.F.R. § 226, and FCB is liable to Defendant Faulkner for damages from this violation; third parties hired by FCB violated the Unfair Debt Collection Act, 15 U.S.C. § 1692 *et al.*; and FCB breached a duty of good faith to Defendant Faulkner.

FCB filed a Reply to Counterclaim, denying every defense not expressly admitted, arguing the statute of limitations precluded Defendant Faulkner from asserting a counter-claim under the Truth in Lending Act; asserting FCB did not meet the definition of debt collector in the Unfair Debt Collections Act and had no knowledge of the actions of third parties; denying any breach of a covenant of good faith and fair dealing; and claiming Defendant Faulkner failed to state facts to support any cause of action and asking the Court to dismiss Defendant Faulkner's claims pursuant to Rule 12(b)(6).

On January 29, 2018, FCB moved for the case to be referred to a Special Referee and on January 31, 2018, FCB moved to strike Defendant Faulkner's jury demand. The Court granted both motions. On February 20, 2018, Defendant Faulkner moved to alter or amend both orders, and on September 24, 2018, Defendant Faulkner filed a Memorandum on her motion. On September 25, 2018, this Court held a hearing on the motions. In attendance for FCB was its

¹ As to the other defendants, Founders Federal Credit Union filed an Answer on August 22, 2017, admitting it is the holder of an unpaid judgment and asking the Court for notice of proceedings going forward. CACH, LLC filed no Answer in the case and on January 29, 2018, J. Kershaw Spong, attorney for FCB, filed an Affidavit of Default with respect to CACH, LLC.

² It is unclear from the document which mortgage Defendant Faulkner is referring to.

attorney, J. Kershaw Spong, and for Defendant Faulkner was her attorney, John Martin Foster. After carefully considering the briefs and the arguments of both attorneys, I deny Defendant Faulkner's motion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court denies the motion by Defendant Faulkner, affirms the orders striking Defendant Faulkner's demand for a jury trial, and finds referring the matter to the Special Referee was proper. The order striking Defendant Faulkner's demand for a jury trial was proper because the matter is a foreclosure case where there are no counter-claims. The order referring the matter to the Special Referee is proper because the Court complied with Rules 53 and 70 of the South Carolina Rules of Civil Procedure.

1. Order Striking Demand for Jury Trial

A foreclosure action is in equity, so the parties are not entitled to a jury trial. *Wachovia Bank National Association v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014). However, counterclaims may be entitled to a jury trial. As the court explained in *Blackburn*:

- (1) If both the complaint and counterclaim are in equity, the entire matter is triable by the court.
- (2) If both are at law, the issues are triable by a jury.
- (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.
- (4) If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim unless a valid jury trial waiver exists that encompasses the counterclaim

407 S.C. at 329-30, 755 S.E.2d at 441-42.

Defendant Faulkner claims, with the exception of the Unfair Trade Practices Act defense, that all of her raised defenses were in fact counter-claims. A defense is "a defense to each cause of action asserted." Rule 8, SCRCF. A counter-claim shows "the pleader is entitled to relief"

and includes a “prayer or demand for judgment for the relief.” Rule 8, SCRCP. Waiver, implied waiver, and breach of duty of good faith are clearly defenses and not counter-claims. Each of these defenses allege why Defendant Faulkner believes FCB cannot recover against her, not an argument as to why Defendant Faulkner is entitled to relief. *See First South Bank v. Rosenberg*, 418 S.C. 170, 183-84, 790 S.E.2d 919, 926-27 (Ct. App. 2016) (comparing defenses to counter-claims and determining negligence and breach of contract were both counter-claims). In her prayer for relief for all three defenses, Defendant Faulkner only asks the Court to dismiss the claims of FCB against Defendant Faulkner.

Additionally, Defendant Faulkner’s Truth in Lending Act allegations must be classified as a defense and not a counter-claim. Under the Truth in Lending Act, a claim for violation of the Act may only be brought “within one year from the date of the occurrence of the violation.” 15 U.S.C. § 1640(e). Defendant Faulkner claims FCB’s violation of the Truth in Lending Act occurred in March 2008, ten years ago. (Def’s Ans. & Counter-Claim ¶ 21). So, Defendant Faulkner cannot assert a counter-claim for a violation of the Truth in Lending Act. However, in a foreclosure action, “a consumer may assert a violation by a creditor” of certain parts of the Act, “as a matter of defense by recoupment or setoff without regard for the time limit on a private action for damages under subsection (e).” 15 U.S.C. § 1640(k)(1). The statute allowing Defendant Faulkner to assert a violation of the Truth in Lending Act defines the assertion as a defense, not a counter-claim. Further, in *Tuloka Affiliates, Inc. v. Moore*, 275 S.C. 199, 202, 268 S.E.2d 293, 295 (1980), the Supreme Court of South Carolina found—prior to the enactment of section 1640(k)(1)—a “defense and counter-claim” under the Act in response to a foreclosure action after the one-year statute of limitations had expired was an equitable defense, not a

counter-claim. Thus, it is clear Defendant Faulkner's Truth in Lending Act allegations are a defense, equitable in nature, and therefore, no jury trial is appropriate.

2. Order Referring the Case to the Special Referee

The order referring the case to the Special Referee was appropriate because "[a]ctions to foreclose liens . . . shall ordinarily be referred to a master pursuant to Rule 53" of the South Carolina Rules of Civil Procedure. Rule 70(a), SCRCP. Rule 53(b) provides: "In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit court judge or the clerk of court." Here, after striking the jury demand made by Defendant Faulkner, this Court referred a foreclosure action to a special referee. This is consistent with its powers under the Rules of Civil Procedure and appropriate.

Further, Defendant Faulkner argues the Order was not proper because she is entitled to a jury trial. However, as discussed above, this is not the case. None of Defendant Faulkner's defenses or counter-claims entitle her to a jury trial.

NOW, THEREFORE:

For the reasons discussed above, this Court denies Defendant Faulkner's Rule 59 motion, affirms the Order Striking Demand for Jury Trial, and affirms the Order Referring the Case to a Special Referee.

AND IT IS SO ORDERED.

SIGNATURE PAGE TO FOLLOW



Lancaster Common Pleas

Case Caption: First-Citizens Bank & Trust Company VS Linda P Faulkner ,
defendant, et al
Case Number: 2017CP2900872
Type: Order/Amend

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge

Electronically signed on 2018-10-01 23:32:44 page 6 of 6

Received 8/17/17 @ 9:45
Did not have to sign for it.

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

First-Citizens Bank & Trust Company
Plaintiff(s)

v.

Linda P. Faulkner a/k/a Linda Faulker,
Founders Federal Credit Union, and CACH,
LLC
Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2017-CP-29- 00872

FILED
CLERK OF COURT
LANCASTER, SC
2017 AUG -9 PM 1:20

Submitted By: J. Kershaw Spang
Address: Sowell Gray Robinson Stenn & Laffitt
LLC
P.O. Box 11442
Columbia, SC 29211

SC Bar #: 5289
Telephone #: (803) 929-1400
Fax #: (803) 929-0300
E-mail: kspong@sowellgray.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|---|---|---|
| Contracts <ul style="list-style-type: none">☐ Construction (100)☐ Debt Collection (110)☐ General (130)☐ Breach of Contract (140)☐ Fraud/Bad Faith (150)☐ Failure to Deliver/Warranty (160)☐ Employment Discrim (170)☐ Employment (180)☐ Other (199) _____ | Torts - Professional Malpractice <ul style="list-style-type: none">☐ Dental Malpractice (200)☐ Legal Malpractice (210)☐ Medical Malpractice (220)Previous Notice of Intercase #
20 -NI- _____☐ Notice/Fil Med Mal (230)☐ Other (299) _____ | Torts - Personal Injury <ul style="list-style-type: none">☐ Conversion (310)☐ Motor Vehicle Accident (320)☐ Premises Liability (330)☐ Products Liability (340)☐ Personal Injury (350)☐ Wrongful Death (360)☐ Assault/Battery (370)☐ Slander/Libel (380)☐ Other (399) _____ | Real Property <ul style="list-style-type: none">☐ Claim & Delivery (400)☐ Condemnation (410)☒ Foreclosure (420)☐ Mechanic's Lien (430)☐ Partition (440)☐ Possession (450)☐ Building Code Violation (460)☐ Other (499) _____ |
| Inmate Petitions <ul style="list-style-type: none">☐ PCR (500)☐ Mandamus (520)☐ Habeas Corpus (530)☐ Other (599) _____ | Administrative Law/Relief <ul style="list-style-type: none">☐ Reinstatement Driver's License (800)☐ Judicial Review (810)☐ Relief (820)☐ Permanent Injunction (830)☐ Forfeiture-Petition (840)☐ Forfeiture-Consent Order (850)☐ Other (899) _____ | Judgments/Settlements <ul style="list-style-type: none">☐ Death Settlement (700)☐ Foreign Judgment (710)☐ Magistrate's Judgment (720)☐ Minor Settlement (730)☐ Transcript Judgment (740)☐ Lie Pendens (750)☐ Transfer of Structured Settlement Payment Rights Application (760)☐ Confession of Judgment (770)☐ Petition for Workers Compensation Settlement Approval (780)☐ Other (799) _____ | Appeals <ul style="list-style-type: none">☐ Arbitration (900)☐ Magistrate-Civil (910)☐ Magistrate-Criminal (920)☐ Municipal (930)☐ Probate Court (940)☐ SCDOT (950)☐ Worker's Comp (960)☐ Zoning Board (970)☐ Public Service Comm. (990)☐ Employment Security Comm (991)☐ Other (999) _____ |
| Special/Complex /Other <ul style="list-style-type: none">☐ Environmental (600)☐ Automobile Arb. (610)☐ Medical (620)☐ Other (699) _____☐ Sexual Predator (510)☐ Permanent Restraining Order (680) | <ul style="list-style-type: none">☐ Pharmaceuticals (630)☐ Unfair Trade Practices (640)☐ Out-of State Depositions (650)☐ Motion to Quash Subpoena in an Out-of-County Action (660)☐ Pre-Suit Discovery (670) | | |

Submitting Party Signature:

Date:

June 23, 2017

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

First-Citizens Bank & Trust Company,

Plaintiff,

v.

Linda P. Faulkner a/k/a Linda Faulker,
Founders Federal Credit Union, and
CACH, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2017-CP-29-

00872

**CERTIFICATE OF
EXEMPTION / WITHDRAWAL
FROM ARBITRATION /
MEDIATION**

FILED
OFFICE OF CLERK
OF COURT
CLERK OF COURT
LANCASTER, SC

2017 AUG -9 PM 1:20

I CERTIFY THAT THIS ACTION IS EXEMPT FROM ARBITRATION BECAUSE

- ☐ monetary relief requested in this case exceeds \$25,000.00;
☐ this is a class action;
☐ there is a substantial claim for injunction or declaratory relief in this case;
☒ this case involves (check one or more of the following)
☐ title to real estate;
☐ wills, trusts and decedents' estates;
☒ mortgage foreclosure;
☐ partition;
☐ this is a special proceeding or action seeking extraordinary relief such as mandamus, habeas, corpus, or prohibition;
☐ monetary relief requested in this case is unspecified but exceeds \$25,000;
☐ this case is a companion or related to similar actions pending in other courts with which the action might be consolidated but for lack of jurisdiction or venue;
☐ this action is appellate in nature;
☐ this is a post-conviction relief matter;
☐ this is a forfeiture proceeding brought by the State; or
☐ this is a contempt of court proceeding.

June 23, 2017

J. Kershaw Spong [SC Bar # 5289]

SOWELL GRAY ROBINSON STEPP & LAFITTE, LLC

P.O. Box 11449

Columbia, SC 29211

(803) 929-1400

Email: kspong@sowellgray.com

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA)

COUNTY OF LANCASTER)

First-Citizens Bank & Trust Company,)

Plaintiff,)

v.)

Linda P. Faulkner a/k/a Linda Faulker,)
Founders Federal Credit Union, and)
CACH, LLC,)

Defendants.)

IN THE COURT OF COMMON PLEAS

Case No.: 2017-CP-29-

00872

FILED
CLERK OF COURT
LANCASTER, SC
2017 AUG -9 PM 1:20

NOTICE OF FORECLOSURE INTERVENTION

(Pursuant to Administrative Order No. 2011-05-02-01 of the
South Carolina Supreme Court)

NOTICE OF MORTGAGOR'S RIGHT TO FORECLOSURE INTERVENTION FOR THE
PURPOSE OF SEEKING A RESOLUTION OF THIS FORECLOSURE ACTION BY LOAN
MODIFICATION OR OTHER MEANS OF LOSS MITIGATION.

TO EXERCISE THIS RIGHT, CONTACT THE UNDERSIGNED IN WRITING WITHIN
THIRTY (30) DAYS OF THE SERVICE OF THIS NOTICE.


J. Kershaw Spong [SC Bar # 5289]
SOWELL GRAY ROBINSON STEPP & LAFFITTE, LLC
P.O. Box 11449
Columbia, SC 29211
(803) 929-1400
Email: kspong@sowellgray.com

June 29th, 2017

THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION
OBTAINED WILL BE USED FOR THAT PURPOSE.

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

)
) IN THE COURT OF COMMON PLEAS
)

First-Citizens Bank & Trust Company,
Plaintiff,

Case No. 2017-CP-29- 00872

v.

Linda P. Faulkner a/k/a Linda Faulker,
Founders Federal Credit Union, and CACH,
LLC,

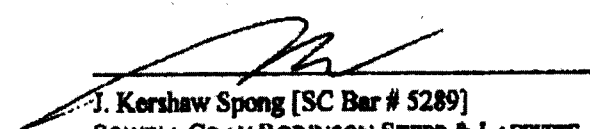
SUMMONS
(Mortgage Foreclosure)
(Deficiency Judgment Demanded)
Non-Jury

Defendants.

TO: THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in the above entitled action, copy of which is herewith served upon you, and to serve copy of your answer upon the undersigned at their offices, Sowell Gray Robinson Stepp & Laffitte, LLC, P.O. Box 11449, Columbia, South Carolina 29211, within Thirty (30) days after service hereof upon you, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment will be rendered against you for the relief demanded in the Complaint.

YOU WILL ALSO TAKE NOTICE that the undersigned attorney on behalf of the Plaintiff herein, will seek the agreement and stipulation of all parties not in default for an Order of Reference to a Special Referee for Lancaster County stipulating that said Special Referee may enter a final judgment in this case.


J. Kershaw Spong [SC Bar # 5289]

SOWELL GRAY ROBINSON STEPP & LAFFITTE, LLC
P.O. Box 11449
Columbia, SC 29211
(803) 929-1400
Email: kspong@sowellgray.com

Attorneys for the Plaintiff

Columbia, South Carolina

June 23rd 2017

FILED
CLERK OF COURT
LANCASTER, SC
2017 AUG -9 PM 1:20

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

First-Citizens Bank & Trust Company,

Plaintiff,

v.

Linda P. Faulkner a/k/a Linda Faulker,
Founders Federal Credit Union, and
CACH, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No.: 2017-CP-29- 00872

COMPLAINT

(Mortgage Foreclosure)

(Deficiency Judgment Demanded)

Non-Jury

CLERK OF COURT
LANCASTER, SC

2017 AUG -9 PM 1:20

FILED
CLERK OF COURT
LANCASTER, SC

The Plaintiff above named, complaining of the Defendants herein, alleges that:

1. Plaintiff, First-Citizens Bank & Trust Company, successor in interest to First Citizens Bank and Trust Company, Inc., is a banking institution duly organized and existing under and by virtue of the laws of the United States.

2. Upon information and belief, the Defendant Linda P. Faulkner is a resident and citizen of the County of Lancaster, State of South Carolina, and that the subject of this action is real property located in the County of Lancaster, State of South Carolina.

FOR A FIRST CAUSE OF ACTION
LOAN 6108

3. Heretofore, under date the 20th day of May, 2005, Defendant Linda P. Faulkner made, executed, and delivered to First Citizens Bank and Trust Company, Inc. a certain Home Equity Line of Credit Agreement ("Agreement") in writing, wherein and whereby she promised to pay to First Citizens Bank and Trust Company, Inc. the principal sum of Two Hundred Thirty-four Thousand and 00/100 Dollars (\$234,000.00), together with variable interest per annum on the unpaid balance; said principal and interest being payable in monthly

installments on terms as set forth therein until said note is fully paid. A true copy of the Agreement is attached as Exhibit A.

4. In order to secure the payment of the Agreement, James E. Faulkner and Defendant Linda P. Faulkner a/k/a Linda Faulkner did on the same date, to-wit, the 20th day of May, 2005 make, execute, and deliver to First Citizens Bank and Trust Company, Inc., its successors and assigns, a certain Mortgage covering real property located in the County and State aforesaid and in said Mortgage described as will more fully appear by reference to Exhibit B attached hereto and made a part hereof. James E. Faulkner conveyed any and all interest he had in the real property to Linda P. Faulkner by deed dated August 1, 2017 recorded August 2, 2011 in Deed Book 627 at Page 75, subject to Plaintiff's mortgage.

5. Thereafter, on the 25th day of May, 2005, said Mortgage was recorded in the Office of the Register of Deeds for Lancaster County in Book 1343 at page 215. Plaintiff has reviewed the Administrative Order issued by the Supreme Court of South Carolina on May 22, 2009 concerning the foreclosure sale of any property arising out of a loan owned or guaranteed by Federal National Mortgage Association ("Fannie Mae") or Freddie Mac or held by a servicer who has signed an agreement to participate in the Home Affordable Modification Program (HMP). That, after review and consultation of the Administrative Order and the loan file of the within foreclosure action, Plaintiff has determined that it has complied with said Administrative Order.

6. In and by the terms of said Agreement and the Mortgage securing same, it is provided, among other things, that on failure to pay any installment of either principal or interest or any portion thereof when due, or if any of the conditions and requirements in the Mortgage securing the same be not complied with, then the whole principal sum and accrued interest shall

at the option of the legal holder thereof become at once due and payable without notice, and collectible by foreclosure.

7. In and by the terms of the said Agreement it is further provided that the makers thereof shall pay a reasonable sum as and for an attorney's fee if the said note be placed in the hands of an attorney for collection after default.

8. The installments of principal and interest falling due from and after the September 20, 2015, have not been paid although demand for the payment thereof has been made and the Plaintiff, as the holder of the said Agreement and Mortgage, has and does hereby elect to declare the entire balance of said principal and interest due and payable at once; that there is now due and owing and unpaid upon the said Agreement and Mortgage the full and just principal sum of Two Hundred Thirty-four Thousand Four Hundred Fifty-seven and 39/100 Dollars (\$234,457.39), together with interest thereon at the current rate of 3.75% per annum from August 20, 2015, together with a reasonable sum as attorney's fees for the collection thereof and the costs of this action.

FOR A SECOND CAUSE OF ACTION
LOAN 8463

9. The allegations stated above are herein restated.

10. Heretofore, under date the 27th day of December, 2010, Defendant Linda P. Faulkner made, executed, and delivered to First Citizens Bank and Trust Company, Inc. a certain Promissory Note ("Note") in writing, wherein and whereby she promised to pay to First Citizens Bank and Trust Company, Inc. the principal sum of Seventy-seven Thousand Nine Hundred Three and 37/100 Dollars (\$77,903.37), together with interest at 5.00% per annum on the unpaid balance; said principal and interest being payable in monthly installments on terms as set forth therein until said note is fully paid. A true copy of the Note is attached as Exhibit C. The Note was modified on several occasions as the request of the Defendant. The Note was last

modified on December 17, 2012. A true copy of the Consumer Note Modification Agreement is attached as Exhibit D.

11. In order to secure the payment of the Note, the said Defendant Linda P. Faulkner did on the 7th day of March, 2008 make, execute, and deliver to First Citizens Bank and Trust Company, Inc., its successors and assigns, a certain Mortgage covering real property located in the County and State aforesaid and in said Mortgage described as will more fully appear by reference to Exhibit E attached hereto and made a part hereof.

12. Thereafter, on the 12th day of March, 2008, said Mortgage was recorded in the Office of the Register of Deeds for Lancaster County in Book 1888 at page 108. Plaintiff has reviewed the Administrative Order issued by the Supreme Court of South Carolina on May 22, 2009 concerning the foreclosure sale of any property arising out of a loan owned or guaranteed by Federal National Mortgage Association ("Fannie Mac") or Freddie Mac or held by a servicer who has signed an agreement to participate in the Home Affordable Modification Program (HMP). That, after review and consultation of the Administrative Order and the loan file of the within foreclosure action, Plaintiff has determined that it has complied with said Administrative Order.

13. In and by the terms of said Note and the Mortgage securing same, it is provided, among other things, that on failure to pay any installment of either principal or interest or any portion thereof when due, or if any of the conditions and requirements in the Mortgage securing the same be not complied with, then the whole principal sum and accrued interest shall at the option of the legal holder thereof become at once due and payable without notice, and collectible by foreclosure.

14. In and by the terms of the said Note it is further provided that the makers thereof shall pay a reasonable sum as and for an attorney's fee if the said note be placed in the hands of an attorney for collection after default.

15. The installments of principal and interest falling due from and after May 30, 2013, have not been paid although demand for the payment thereof has been made and the Plaintiff, as the holder of the said Note and Mortgage, has and does hereby elect to declare the entire balance of said principal and interest due and payable at once; that there is now due and owing and unpaid upon the said Note and Mortgage the full and just principal sum of Seventy-three Thousand Two Hundred Sixty-one and 41/100 Dollars (\$73,261.41), together with interest thereon at the rate of 5.00% per annum from April 30, 2013, together with a reasonable sum as attorney's fees for the collection thereof and the costs of this action.

16. Upon information and belief, said information having been obtained from the records of Lancaster County, South Carolina, the Defendants below named have or may claim to have some interest in or lien upon the subject premises by virtue of the matters and things hereinbelow alleged but that any such interest in or lien upon the said premises is junior and subordinate to Plaintiff's said mortgage, to-wit:

(a) The Defendant Founders Credit Union by virtue of a judgment obtained against Linda P. Faulkner in the amount of \$7,580.00 filed in the office of the Clerk of Court for Lancaster County on July 10, 2014, and preserved therein in Judgment Roll No. 2014-CP-29-026.

(b) The Defendant CACH, LLC by virtue of a judgment obtained against Linda Faulkner in the amount of \$4,178.14 filed in the office of the Clerk of Court for Lancaster County on June 28, 2016, and preserved therein in Judgment Roll No. 2016-CP-29-00202.

17. The Plaintiff does not waive but specifically demands judgment against the Defendant Linda P. Faulkner for the full amount found to be due to Plaintiff on the Agreement, Note, and Mortgages held by Plaintiff, with the right to enter personal judgment against the Defendant Linda P. Faulkner at the same time the Court orders a sale of the mortgaged premises and requests the money judgment so rendered be entered and docketed in the Clerk's office pursuant to §29-3-650 SC Code of Laws (1976 amended).

WHEREFORE, Plaintiff prays judgment that:

(a) The amount due upon the said Agreement, Note, and Mortgage held by the Plaintiff be ascertained and determined under the direction of this Court, together with attorney's fees and costs of this action.

(b) Plaintiff's mortgages be declared a first lien and that Plaintiff have judgment of foreclosure for the amount so found to be due and owing thereon, together with any taxes or insurance premiums which may be due or which may be or have been paid by Plaintiff, with a reasonable sum as attorney's fees, and for the costs of this action.

(c) The mortgaged premises be sold according to law and the practice of this Court, the equity of redemption be barred, and that the proceeds of sale be applied as follows:

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

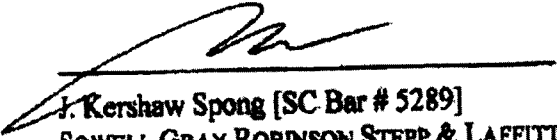
Second, to the payment and discharge of the amount due on Plaintiff's Agreement, Note, and Mortgages, together with attorney's fees as aforesaid; and

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

(d) Plaintiff have judgment entered immediately pursuant §29-3-650 SC Code of Laws (1976 amended) against the Defendant Linda P. Faulkner for the full amount found to be due Plaintiff on the note and mortgage, to be credited toward said personal judgment against the

Defendant Linda P. Faulkner for the amount paid to the Plaintiff from the proceeds of the sale of the mortgage premises.

(e) For such other and further relief as may be just and proper.



J. Kershaw Spong [SC Bar # 5289]
SOWELL GRAY ROBINSON STEPP & LAFFITTE, LLC
P.O. Box 11449
Columbia, SC 29211
(803) 929-1400
Email: kspong@sowellgray.com

Attorneys for the Plaintiff

Columbia, South Carolina

June 23, 2017

**NOTICE UNDER THE
FAIR DEBT COLLECTION
PRACTICES ACT, (THE ACT)
15 U.S.C. SECTION 1601 AS AMENDED**

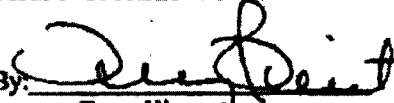
1. The amount of the debt is that as stated in the complaint attached hereto.
2. The Creditor is the Plaintiff as named in the summons and complaint attached hereto.
3. The debt described in the complaint attached hereto will be assumed to be valid by the Creditor's law firm unless you, the debtor, within thirty (30) days after the receipt of this notice, dispute, in writing, the validity of the debt or some portion thereof.
4. If you, the debtor, notify the Creditor's law firm in writing within thirty (30) days of the receipt of this notice that the debt or any portion thereof is disputed, the Creditor's law firm will obtain a verification of the debt and a copy of the verification will be mailed to you, the debtor, by the Creditor's law firm.
5. If the Creditor named in the attached Complaint is not the original Creditor, and if you make a written request to the Creditor's law firm within the thirty (30) days from the receipt of this notice, the name and address of the original Creditor will be mailed to you by the Creditor's law firm.
6. Written requests should be addressed to Written requests should be addressed to J. Kershaw Spong, Esquire, Sowell Gray Robinson Stepp & Laffitte, LLC, P.O. Box 11449, Columbia, SC 29211.
7. This notice is an attempt to collect a debt and information obtained will be used for that purpose.

STATE OF NORTH CAROLINA)
)
COUNTY OF WAKE)

VERIFICATION

PERSONALLY appeared before me, Tracy Hinnant, who being duly sworn, deposes and says that she is a representative of First-Citizens Bank & Trust Company, and is authorized to make this Affidavit on its behalf; that she is familiar with the account and loan documents forming the basis for the within action and has read the foregoing pleadings ; that all of the matters alleged therein are true of her own knowledge, except for those alleged upon information and belief, and as to those, she believes them to be true; that no part of said sum sued for has been paid by discount or otherwise.

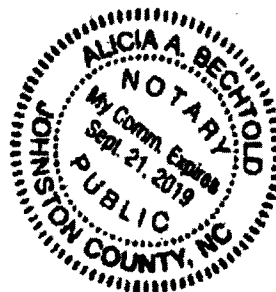
FIRST-CITIZENS BANK & TRUST COMPANY

By: 
Tracy Hinnant

Its: Sr. Real Estate Resolution Specialist

SWORN to before me this
20 day of July, 2017.

 (L.S.)
Notary Public for North Carolina
My Commission Expires: September 21, 2019



(Faulkner)

Exhibit A

HOME EQUITY LINE OF CREDIT AGREEMENT

Backpack: **Shane P. Frazier**
1545 ORANGE HILL ROAD
Fort OSG, MO 65718-0534

London FIRST ENTERTAINMENT AND TRUST COMPANY, INC.
 First ENT Office
 1401 New York Street
 New York, N.Y. 10004

CREDIT LIMIT: \$234,000.00

DATE OF AGREEMENT: May 20, 2001

In addition, The Home Equity Line of Credit Agreement ("Agreement") governs your use of credit line "Cash Line" at the Account. Most Home Equity Lines of Credit are provided by FIRST CITIZENS BANK AND TRUST COMPANY, INC. In the Agreement, the words "Borrower," "you," "yourself," "jointly" mean you and every person who signs the Agreement, including all persons named above. The words "we," "us," "our," "ourselves" mean FIRST CITIZENS BANK AND TRUST COMPANY, INC. You agree to the following terms and conditions:

Planned to Pay. The promise to pay FIRST CITIZENS BANK AND TRUST COMPANY, INC., is either: the total of all locally originated and purchased mortgages, together with all costs and expenses for which we are responsible under this Agreement or under the "Assignment or Sale of Trust" option scenario you credit Line. We will pay your Credit Line according to the payment terms and terms below. If there is more than one borrower, each is jointly and severally liable on this Agreement. This option for you requires no payment to any of the lenders that under this Agreement, including credit services used by any borrower. Each borrower understands any other borrower, on behalf of his respective lender, to credit the Credit Line to support and transfer credit advantages, and in the event other lenders advance to carry out the terms of this Agreement, we will reduce any borrower's total responsibility under this Agreement.

[illegible]

Minimum Payment. Your "Regular Payment" will equal the amount of your scheduled FINANCE CHARGES ("Your Payment Minimum"). You will make 120 of these payments. Your payments will be due monthly. Your "Minimum Payment" will be the Regular Payment, plus any amount due and all other charges. An increase in the ANNUAL PERCENTAGE RATE may increase the amount of your Regular Payment.

After completion of the First Payment Period, your "Regular Payment" will be based on a percentage of your balance at the start of the payment period as shown below ("Second Payment Period"). Your payments will be \$100 monthly.

Stress si Depresia **Tratament si Prevenție** **Tratament Depresiei**

All Subjects

知

2.000

Your "Minimum Payment" will be the Regular Payment, plus any interest and fees due and all other charges.

A charge to the ANNUAL PERCENTAGE RATE can cause the balance to be repaid more quickly or more slowly. When rates decrease, less interest is due, so more of the payment repays the principal balance. When rates increase, more interest is due, so less of the payment repays the principal balance. If this happens, we may adjust your payments to follow. For best payment you may be increased.

In any event, if your Credit Line balance falls below \$15.00, you agree to pay your balance in full. You agree to pay not less than the Minimum Payment on or before the due date indicated on your monthly billing statement.

New Year Payments Are Applied. Loans otherwise agreed or reserved by applicable law, payments and other credits will be applied to the outstanding balance, which includes unpaid principal balance, finance charges, insurance premiums, late charges and other charges.

Receipt of Payments. All payments must be made by a check, certified check, draft, electronic funds transfer, money order, or other instrument in U.S. dollars and must be received by us at the remittance address shown on your periodic billing statement. Payments received at that address by any business may not be credited to your Credit Line as of the date received.

Credit Limit: This Agreement covers a presetting due of credit for the principal amount of Two Hundred Thirty-four Thousand & Eighty-ONE Dollars (\$234,081.00) payable to your "Credit Limit" under the Agreement. During the Draw Period you will submit your request for credit advances subject to the Master's rules on Lender's Rules. You have no other credit line with the Credit Line. Funds may be used for any purpose.

discovered will be the property of the Credit Union. You may have access to the Credit Union, but only as part of the account, loan, and other services that you have with the Credit Union. Your Credit Union is the maximum amount you may have outstanding at any one time. Your Credit Union will not be responsible for or extend a credit advance that will make you Credit Union Account balance exceed your Credit Union. Your Credit Union will not be responsible for any overdraft on your Credit Union Account. If you exceed your Credit Union, you agree to return immediately the Credit Union and will not be covered by the overdraft or limit of Credit Union. Any Credit Union is subject to the overdraft or limit of Credit Union.

[illegible]

Credit Advances: After the Effective Commencement Date of this Agreement, you may obtain credit advances under your Credit Line as follows:

Montana is a state in the northwestern United States. It is the largest state in the country by area, covering 147,040 square miles. The state is bordered by Canada to the north, Idaho to the west, Wyoming to the south, and North Dakota to the east. Montana is known for its vast natural resources, including its forests, rivers, and mountains. The state is also home to a variety of wildlife, including bison, elk, and deer. Montana is a popular destination for tourists, who come to enjoy its scenic views, outdoor recreation, and rich history.

Requests in Person. Requesting a credit advance in person at any of our authorized locations.

South Cold Storage. Using your "Market Daily VISA Gold Card" to make cash advances or to make purchases.

Electrode Funds Transfer. Electrode Funds Transfer includes, but is not limited to, transfer collected through a personal telephone and
 transfers obtained by using telephone reader-funds, which includes, but is not limited to, transfers obtained through a personal telephone and

It there is more than one person authorized to use the Cash Line Account, you agree not to give or authorize transactions, such as are hereby being set out to give advantage to the other.

Notations on the Use of Checks. We reserve the right not to honor Money Order LDC Checks in the following circumstances:

Check this selection. Your Check Link has been or will be removed by posting the Home Equity LOC Check.

Partial Check: Your Home Equity LOC Check is partial. If a partial Home Equity LOC Check is sold and as a result any other check is returned to you, you are not responsible.

Station Checks. Your Home Safety LOC Checks have been reported last or status.

Unauthorized Signature. Your Name Expiry LOC Check is not signed by an "Authorized Signer" as defined below.

Verification of Receipt: Your Credit Line has been reactivated or suspended as provided in this Agreement, or noted by a pay-off the funds to your LOC Check.

Other Revisions: You are authorized in natural order, as in breach of the terms of the Agreement.

If you say these Harley LOE's under these conditions, you must agree to transfer to applicable laws, i.e. the amount of the funds

Learn the

Conclusions

Responsible Use of Credit Cards: We reserve the right not to honor MasterCard, VISA, Gold Cards in the following circumstances:

State Cash Card: Your Home Depot, Ltd. Cash Card can be used to purchase any Home Depot product.

Unsubstantiated Allegations: Four Florida police VISA Gold Cards have been reported lost or stolen.

Unauthorized Signature: Your Name Under VISA Gold Card is not used by an "Authorized Signer" as defined below.

Cost Line change.

Other Signature. You are otherwise in default under, or in breach of, the terms of this Agreement.

We may use information received by one of the Home Equity VELA Card Cardholder Name Cardholders, to assist in our efforts to collect on the debt, for the purpose of the advance. The advance Cardholder will be responsible for your debt so to agree with this Agreement. Our liability to you, for the amount of any advance is limited to your credit limit. Damages for any report as provided in this Agreement to put through the courts, Your use of the Home Equity VELA Card Card will be subject to your payment statement in a credit advance.

Check Line Usage Rights: LEO Check Limitations. The following restrictions will apply to your Check Line and LEO Checks.

Other Transactions (to be completed): Your cannot use a Home Equity (CO Check to pay any amount you owe under this Agreement

The following graduation restrictions will apply to your Credit Line and using a Credit Card:

Other Transaction Requirements. ATM withdrawals may be made up to a total of \$600 per calendar day. If no deposit is received on the day of withdrawal, the limit may be reduced to \$300. If you exceed the limit, the ATM will decline the transaction. If you exceed the limit, the ATM will decline the transaction. If you exceed the limit, the ATM will decline the transaction.

In Person Request and Electronic Funds Transfer Limitations. There are no beginning limitations for requesting an advance in person, depending on other methods.

Indebted signers. The words "Authorized Signer" on Home Equity LOC Checks and Home Equity Visa Gift Cards as used in this Agreement mean and include each person who is given the authorization for this Credit Line. At any time this Agreement, or the Plan attached, a signature of a person authorized card for the Credit Line Account.

Call Home Equity LOC Checks and Home Equity VISA Gold Cards. If you have your Home Equity LOC Checks or Home Equity VISA Gold Cards and are not using them without your permission, you agree to act to order immediately. The fastest way to notify us is by calling us at 800-868-8876. You also can notify us at Last Credit Line Checks/VISA Card Notification PO Box 28, Mail Center, Sparks, NV 89411 or 702-222-0228.

offer for Unimarked Visa Credit Card Transactions. Tell us AT ONCE if you believe your bank may not have met or stable as if any
unimarked transactions. Your liability for UNIMARKED use of your credit card ends the Visa sign when it reads as a Visa credit card to
cancel this limit. Limit will not exceed ten dollars (\$100). We may require you to provide a written authorized change
canceling Visa credit card transactions.

[illegible]

RA is a registered trademark of The International

Only for Manufacturer Use. You will not be liable for unauthorized use of your Visa access device if you notify us in our designated or authorized law enforcement PO Box 23, Mail Code 97017, Columbia, SC 29702-0023 within 613-4444, orally or in writing, of the loss of, or possible unauthorized use of, your Visa access device.

[illegible]

Check Line Service. Your selection for this Credit Line also serves as a request to cancel any new service (such as money orders) that may be available at your Money Line on the of our service in connection with this Credit Line. You understand that this request is irrevocable and that you may receive any of these new services at any time you so desire. You further understand that the terms and conditions of this Agreement will govern any transactions made pursuant to any of these new services.

The administration of this Agreement is subject to the following official statistics in the country concerned, listed herein, all the data and statistics of which are hereby incorporated and made a part of this Agreement:

County of the State of _____ to an oil and gas lease to _____ of the State of _____

Source and informants are being provided under a Security Agreement providing the following conditions:

10. You may obtain insurance on the Property following the Agreement that is separately collectible by you. You may obtain property loss through any company of your choice that is not a subsidiary of us. You have the option of providing any insurance required by the Agreement through an existing policy or a policy independently obtained and paid for by you, subject to our right, for reasonable future profit is retained, to cancel any insurance provided by you. Subject to applicable law, if you fail to obtain or maintain insurance coverage for the mortgage or deed of trust, we may purchase insurance to protect our own interest, and the proceeds to your benefit, parties and beneficiaries, shall be in full, or only one of, one of those risks.

On Statements. If you have a balance owing on your Cash Line Account at the end of each month, we will send you a periodic statement, listing what you owe, and what you have paid. You will also receive a statement showing the amount of your cash line balance at the end of each month. You will also receive a statement showing the amount of your cash line balance at the end of each month.

FRANCE CREDIT begins to answer. Finally **FRANCE CREDIT** for credit advances under your Credit Line will begin to answer on the credit advance by posted in your Credit Line. There is no "yes or no" which would allow you to make a **FRANCE CREDIT** on your credit advance.

and Used by Refunding the Balance on Which the FINANCE CHARGE will be Computed. A full FINANCE CHARGE will be imposed on all payments made under your Credit Line Agreement from the date of each month advance based on the "daily balance" method. To get the balance, we take the beginning balance of your Credit Line Agreement each day, add any new advances and subtract any payments or payments made to the "daily balance".

of 10. By receiving the Amount of FINANCE CHARGES, Any FINANCE CHARGE is quantified by applying the "Periodic Rate" to the balance owed herein. Thus you will together the periodic FINANCE CHARGES for each day in the billing cycle. This is your FINANCE CHARGE

Loss Note

Page 5

calculated by applying a Poisson-type

[illegible]

The Public Rate and the corresponding ANNUAL PERMITTEE RATE on your Credit Line will increase or decrease as the future increase or decrease from time to time. Any increase in the Public Rate will also result in a higher Public permit. Accordingly, the Public Rate and the corresponding ANNUAL PERMITTEE RATE cannot be set in stone. The Public Rate will take effect on the first day of each month based on the index as published on the first business day of the following month. It is our goal to set the corresponding ANNUAL PERMITTEE RATE to be no more than the higher of 2.00% or the maximum rate allowed by applicable law. For the Public Rate, the increase and decrease of the Public Rate and the corresponding ANNUAL PERMITTEE RATE on your Credit Line will be as stated below.

Rates During the Diamond Period

The lists of the elements listed in 4 paragraphs.

During the discount period, the ANNUAL PERCENTAGE RATE will be the ANNUAL PERCENTAGE RATE stated above. Your financing will be subject to the Credit Review and APR schedule indicator in the specified number of "Automatic" loan "payments" being a partial or potentially monthly billing cycle, regardless of whether you elect to pay your credit balance, have an outstanding balance, or make any payment in the past. After the discount period, the ANNUAL PERCENTAGE RATE may change based on the then current bank rates and the APR schedule indicator, subject to the applicable end cap.

Current Non-disrupted Rates for the Standard Physical Exam

<u>Bridge of Balance or Confidence</u>	<u>ANNUAL PERCENTAGE RATE</u>	<u>Daily Periodic Rate</u>
All Subjects	5.75%	0.0159%

Notwithstanding any other provision of this Agreement, we will not charge interest on any undischarged loan proceeds, principal or any fee incurred during the Term of this Agreement.

Foreign Note Investments. If we target an ANNUAL PERCENTAGE RATE increase, of the kind of a rate adjustment we may reduce to the full extent when this occurs.

Coordinate Under Which Other Charges May Be Incurred. You agree to pay all the other fees and charges related to your CDSM Line as set forth below:

Mail/Fax/Email Postmarking. If you request a copy of any document, we may charge your Credit Line Account the cost of copies of Statements, Credits and other information not routinely provided to you. If this information is requested for the line it pertains to, please, copy, and mail the document to you. If your request is related to a billing error (see "Your Billing Rights" notice) and an error is found, we will waive any administrative charges.

Late Charge: Your payment will be late if it is not received by us within 10 days after the "Payment Due Date" shown on your periodic statement. If your payment is late we may charge you the greater of \$1.00 or 1.00% of the unpaid amount of your payment due to us (not to exceed \$14.00). Therefore, we may charge the maximum delinquency charge authorized by law so it may be increased during the term of this plan.

Check Line Credit Posting Errors. Your Credit Line Account may be charged the wrong rate, if allowed by law.

Security Interest Charges. You agree to pay all security interest charges related to your Credit Line as set forth below:

Filed Cert to Post American Flood Data
-Bureau-

18.05

Leader's Note: Under this Agreement, we have the following duties:

Termination and Assignment. We can terminate your Credit Account and require you to pay to the credit outstanding balance in one payment, and charge you credit fees, if any of the following occurs: (a) You commit fraud or make a material misrepresentation of any fact in connection with this Credit Agreement; (b) You fail to pay to us any amount due within the time specified in the Credit Agreement; (c) You do not meet the minimum terms of this Credit Agreement; (d) Your payment or performance is materially affected by a change in your financial condition; (e) You are declared bankrupt or insolvent, or a receiver is appointed for you or your assets, or you are charged for the sale of your assets in the ordinary course of business, or you are declared a defunct or insolvent, or your business is discontinued or the assets, sold to pay claims, other than the payment of the balance of the debt, or the sale of the business, assets of a stock or on the winding up of the partnership, partnership, or the sale of another firm, or the sale or liquidation of the business for purposes hereunder; (f) You fail to pay to us the balance of the debt, or the sale of the business, assets of a stock or on the winding up of the partnership, partnership, or the sale of another firm, or the sale or liquidation of the business for purposes hereunder.

Disclaimer is Acknowledged. In addition to any other rights we may have, we can demand additional satisfaction of credit or release your Credit Card Number and we reserve the right to use any of the following as to effects:

(1) The sum of your property's adjusted value less property's carrying value for purposes of this Credit Loss Account. This includes, for example, a double value that the latter difference between the Credit Limit and the available equity is reduced by fifty percent and then halved a second time, depending on the actual value of the property.

(2) We recommend that you call to advise your personal attorney and your Credit Card Authorizer of a change in your marital status.

3. "You live in Mexico under the control and supervision of the Credit Line Account. We consider all of your information to be material and important and maintain complete records of the details thereof under supervision and administration. We pay him and always maintain and keep in the records of your information, statements, accounts, and records to use of the property or proceeds, and we will pay and provide the terms of any other debt of our, ourselves or those of the property, statements in order of our to provide information or information to us such as current financial information, statements to identify and complete your book in order to maintain and keep records of any records. We believe that we will be able to obtain a copy of the book to you, as you are interested in the book to be done."

(c) We are prohibited by government action from waiving the ANNUAL PERCENTAGE RATE provided for under the Agreement.

Effective Date: 5/25/05

Loan No:

IE EQUITY LINE OF CREDIT AGREEMENT
(Continued)

Page 8

BILLING ERROR RIGHTS

YOUR BILLING RIGHTS

KEEP THIS NOTICE FOR FUTURE USE

This notice contains important information about your rights and our responsibilities under the Fair Credit Billing Act.

Notify us in case of errors or questions about your bill.

If you think your bill is wrong, or if you need more information about a transaction on your bill, write us on a separate sheet of paper.

Prod Chicago
Regd Code 284617

Reference: 04 00203-0020

by at the address listed on your bill. Write us up at once in pencil. We will have you up on your toes after 100 days after we spot you the bill on both the side or problem approach. You can imagine us, but doing so will not motivate your agent.

In your letter, give us the following information:

Your name and account number:

The dollar amounts of the suggested award.

Circle the error and explain, if you can, why you believe there is an error. If you need more information, describe the data you are not sure about.

If you have authorized us to pay your bill automatically from your savings or checking account, you can stop the payment at any time without penalty or charge. To stop the payment, your bank must be notified. Once all business days before the automatic payment is scheduled to occur.

Your rights and our responsibilities after we receive your written notice.

We must acknowledge your letter within thirty (30) days, unless we keep confidential the letter by state. Within ninety (90) days, we must either submit the order or explain why we believe the bill will impact.

After we receive your letter, we cannot try to collect any money you owe us, or report you as delinquent. We can continue to bill you for the amount you owe us, including finance charges, and we can report our unpaid account against your credit file. You do not have to pay any overdue amount until we are communicating, but you are still obligated to pay the part of your bill that we are in question.

It is true that you deposit a signature on your bill, you will not have to pay any finance charges related to any overextended account. If we don't make a mistake, you may have to pay finance charges, and you will have to make up any amount physically on the overextended account. In other words, you will need your signature of the signature you owe and be able to obtain it.

IF YOU fail to pay the amount, that we think you owe, we may report you as delinquent. However, if our information does not satisfy us and you wish to go within ten (10) days telling us that you did receive it, you, we must tell anyone we report you in that you have a question about your bill. But, we must tell you the name of anyone we reported you to. We shall tell anyone we report you to that the matter has been settled between us and it stays is.

If we don't follow these rules, we can't collect the first 400 of the questioned amount, even if your bill was correct.

Social Rule for Credit Card Purchases

If you have a problem with the quality of property or services that you purchased with a credit card, and you have tried in good faith to correct the problem with the merchant, you may have the right not to pay the remaining amount due on the property or services. There are two limitations on this right:

- (b) The purchase price must have been more than \$50.00.

These limitations do not apply if we own or operate the machine, or if we collect you the advertisements of the property or vendor.

Exhibit B

STATE OF SOUTH CAROLINA

COUNTY OF Lancaster

THIS MORTGAGE IS DATED May 20, 2005

0002993 Sh: 01343 Pg: 215

MORTGAGE ON REAL ESTATE

(NOT RECORDED)
RECORDED IN
BOOK 11,000 PAGE 4,10
DATE 5/20/05
OFFICE OF THE
CLERK OF COURT,
LANCASTER COUNTY, SC

THIS MORTGAGOR(S) as related to in this Mortgage is (are) James E. Faulkner and Linda P. Faulkner, a/k/a Linda Faulkner

THE MORTGAGEE, First Citizens Bank and Trust Company, Inc. will be related to herein as "Lender." Lender's address is 1401 Hwy 160 West, Fort Mill, SC 29715

WHEREAS, Mortgagor(s) Linda P. Faulkner

is/are indebted to Lender in the principal amount of \$ 234,000.00 pursuant to the note, note agreement, loan agreement or revolving loan agreement (hereinafter referred to as the "Note") dated May 20, 2005

The Note includes all documents receiving, extending, or modifying it and/or evidencing future advances. The Note has a final maturity of May 20, 2020

The amount of debt secured by this Mortgage, including the outstanding amount of the Note and all Future Advances under paragraph 10, shall at no time be more than double the principal amount of the Note or \$ 234,000.00 whichever is greater, plus interest, reasonable attorney's fees and court costs incurred in collection of amounts due hereunder and expenditures by Lender under Paragraph 5 below. Interest under the Note will be deferred, accrued, or capitalized, but Lender shall not be required to defer, accrue or capitalize any interest except as provided in the Note.

THIS MORTGAGE is given to secure the Lender the repayment of the following amounts, with interest: (A) the indebtedness evidenced by the Note; (B) any Future Advances made under paragraph 10 below; (C) expenditures by Lender under paragraph 5 below; and (D) attorney's fees, court costs and other amounts which may be due under the Note and the Mortgage. In consideration of the above indebtedness and for other valuable consideration which Mortgagor acknowledged receiving, Mortgagor does hereby mortgage, grant and convey to Lender, its successors and assigns the following described property (hereinafter sometimes referred to as the "Property").

(SEE EXHIBIT 'A' ATTACHED FOR LEGAL DESCRIPTION)

Together with all singular rights, members, hereditaments and appurtenances belonging or in any way incident or appertaining thereto; all improvements, now or hereafter situated thereon; and all fixtures (including, but not limited to, appliances, additions, improvements, and all things and material attached to or used in connection with the described Property) now or hereafter attached thereto; all easements, rights-of-way, gores of land, streets, ways, alleys, passages, downspouts, waters, water courses, water rights, and powers, and all estates, rights, interests, privileges, liberties, and tenements, whatsoever and in any way belonging, relating or appertaining to any of the property here described, or which hereafter shall in any way belong, relate or be appertaining thereto, whether now owned or hereafter acquired by Mortgagor, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, property, possession, claim and demand whatsoever of law as well as in equity, of Mortgagor of, in and to the same, including but not limited to all judgments, awards of damages and settlements hereafter made resulting from condemnation proceedings or the taking of the property or any part thereof under the power of eminent domain, or for any damage (whether caused by such taking or otherwise) to the property or to any rights, appurtenances thereto, and all proceeds of any sales or other dispositions of the property or any part thereof (collectively hereinafter referred to as the "Property"; and all of the same being deemed part of the Property and included in the reference thereto).

MORTGAGEBOR further covenants and agrees with Lender as follows:

(C) failure of Mortgagor to observe or perform any covenant or agreement set forth in this Mortgage or in any loan agreement entered into between the Mortgagor and Lender with respect to the indebtedness hereby secured within ten (10) days following the giving of notice by Lender to Mortgagor to observe or perform the same.

18. **Appointment of Receiver.** Upon the occurrence of a Default as hereinafter defined Lender shall be entitled to the appointment of a receiver to take upon and take and maintain full control of the Property in order to perform all such necessary and appropriate for the operation and maintenance thereof including, but not limited to, the acquisition, preservation or modification of leases, the making of repairs to the Property and the execution or termination of contracts providing for the management or maintenance of the Property, all on such terms as are deemed best to protect the security of this Mortgage. The receiver shall be entitled to receive a reasonable fee for so managing the Property. All rents paid to protect the security of this Mortgage. The receiver shall be entitled to the assets of taking control of and managing the Property and collecting the rents, including but not limited to owner's fees, receiver's fees, premiums on receiver's bonds, costs of repairs to the Property, premiums on insurance policies, taxes, assessments and other charges on the Property, and the costs of recovering any obligation of liability of Mortgagee or lender or beneficiary of the Property and there to be paid or claimed by this Mortgage. Lender or the receiver shall have access to the books and records used in the operation and maintenance of the Property and shall be liable to account only for those rents actually received. Lender shall not be liable to Mortgagee, against claimant under or through Mortgagee, or anyone having an interest in the Property for reason of anything done or left undone by Mortgagee under this paragraph. If the rents of the Property are not sufficient to meet the cost of taking control and managing the Property and collecting the rents, Lender, at its sole option, may advance funds to meet the costs. Any funds expended by Lender for such purposes shall become indebtedness of Mortgagee to Lender secured by this Mortgage. Unless Lender and Mortgagee agree in writing to other terms of payment, such amounts shall be payable upon notice from Lender to Mortgagee specifying payment thereof and shall bear interest from the date of disbursement at the rate stated in the Note. This granting upon and taking and maintaining of control of the Property by Lender or the receiver and the application of rents as provided herein shall not cure or waive any default hereunder or constitute any other right or remedy of Lender hereunder.

12. **Costs of Appraisal.** Mortgagor shall pay any and all costs of providing to Lender, as it may request from time to time, a current appraisal of the market value of the property prepared by an appraiser acceptable to Lender, in its sole discretion. If Mortgagor fails to pay such costs, Lender may advance the cost on the Mortgagor's behalf and add the amount of such advance to the principal under the Note, which shall bear interest at the rate as provided in the Note, and shall be due and payable on demand. Mortgagor's failure to pay the cost of any such appraisal, plus all accrued interest, in full, within ten (10) days of the date of such demand shall constitute an event of default under the Note and shall be deemed the maturity of all debts secured by the Mortgage, as set forth by law.

14. **Notices.** Any notice given by either party hereto to the other party shall be by writing and shall be signed by the party giving notice. Any notice or other document to be delivered to either party hereto by the other party shall be deemed delivered if mailed postage prepaid in the party to whom directed at the latest address of such party known to the party sending the same. This paragraph shall not be deemed to prohibit any other manner of delivering a notice or other document.

[illegible]

State of South Carolina
County of Lancaster

To
First Citizens Bank and Trust Company, Inc.

Mortgage of Real Estate
Filed at _____ o'clock _____ M.
this _____ day of _____
and recorded in Mortgage Book _____
Page _____
R.M.C. or Clerk of Court U.S. & S.C.
County, S.C.

18. Waiver by Mortgagor. The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a parcel judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.

IN WITNESS WHEREOF, Mortgagor has executed this Mortgage the day and year first above written.

Signed, sealed and delivered

In the presence of:

[Signature]
[Signature]

Mortgagor
X [Signature]
X [Signature]

Probate

STATE OF SOUTH CAROLINA
County of York

Before me, the undersigned Notary Public, personally appeared the undersigned witness who, being duly sworn, deposed and said the (s)he saw Linda P. Faulkner James E. Faulkner
sign, seal and deliver the foregoing Mortgage and that (s)he, together with the other witness witnessed the execution thereof.

Subscribed to and subscribed
before me this 20th day
of May, 2005
[Signature] (SEAL)
Notary Public for South Carolina
My commission expires: 9-1-2010

[Signature]

EXHIBIT 'A'

All that certain piece, parcel or lot of land containing .47 acres, more or less, lying being and situate in Indian Land Township, Lancaster County, South Carolina, being described as follows: BEGINNING at a point in the center of Silver Run Road, said point being .8 miles northeast of the juncture of S. C. Highway 160 and running thence N 78-54-51 W, 213.04 feet to a point; thence N 63-32-00 E, 105.15 feet; N 63-59-44 E, 209.51 feet to a point on Silver Run Road; thence with Silver Run Road, S 21-0518 W, 118.15 feet; S 22-28-15 W, 75.56 feet to the point of beginning, all of which is more accurately shown on a plat of property of J. E. Faulkner prepared by Bradford M. Hooks, RLS, on June 29, 1982, and recorded herewith as Plat No. 14101 in the Register of Deeds Office for Lancaster County, South Carolina.

Being the identical property conveyed to James E. Faulkner and Linda Faulkner by Deed of John J. Miller, et al. recorded November 9, 1993 in Deed Book U-11 Page 245 in the Register of Deeds Office for Lancaster County, South Carolina

ALSO: All that certain piece, parcel or lot of land situate, lying, and being in the State of South Carolina, County of Lancaster, in Indian Land Township, with improvements thereon, being more particularly described as follows: BEGINNING at a point in the center of Silver Run Road (No. 2-29-336) said road being a County Road which leads to S. C. Highway No. 160, and running thence with the center of said Silver Run Road S 7-17 W 210 feet; thence S 64 W 210 feet to a point; thence N 7-16 E 210 feet to a point; thence N 64 E 210 feet to a point in the center of said Silver Run Road, the point of beginning, containing .84 acre, more or less, and being bounded on the South by land of Lester Miller and on the North and West by land of W. L. Blackwelder and as shown on map made by Reese F. McRorie, Surveyor, recorded in Plat Book 12, at Page 111, Register of Deeds Office for Lancaster County, South Carolina.

Being a portion of the property conveyed to Linda P. Faulkner by Deed of J. E. Faulkner recorded September 5, 2000 in Deed Book 93 Page 15 in the Register of Deeds Office for Lancaster County, South Carolina.

all of tax map 5-58

H
18

Exhibit C



PROMISSORY NOTE

Principal	Loan Date	Maturity	Loan No	Call / Out	Account	Officer	Initials
\$77,903.37	12-27-2010	12-28-2011				WBAQ1	

References in the terms above are for Lender's use only and do not limit the applicability of this document to any particular loan or loan.
Any item above containing "****" has been omitted due to redaction requirements.

Borrower: LINDA P FAULKNER
8843 CALVIN HALL ROAD
FORT MILL, SC 29716-9630

Lender: FIRST CITIZENS BANK AND TRUST COMPANY, INC
Tech Office
815 E Liberty St
York, SC 29746

Principal Amount: \$77,903.37 **Interest Rate:** 5.000% **Date of Note:** December 27, 2010

PROMISE TO PAY. ("Borrower") promises to pay to FIRST CITIZENS BANK AND TRUST COMPANY, INC ("Lender"), or order, in lawful money of the United States of America, the principal amount of Seventy-seven Thousand Nine Hundred Three & 37/100 Dollars (\$77,903.37), together with interest on the unpaid principal balance from December 31, 2010, at an interest rate of 5.000% per annum, until paid in full. The interest rate may change under the terms and conditions of the "INTEREST AFTER DEFAULT" section.

PAYMENT. I will pay this loan in one principal payment of \$77,903.37 plus interest on December 28, 2011. This payment due on December 28, 2011, will be for all principal and all accrued interest not yet paid. In addition, I will pay regular monthly payments of all accrued unpaid interest due as of each payment date, beginning February 12, 2011, with all subsequent interest payments to be due on the same day of each month after that. Unless otherwise agreed or required by applicable law, payments will be applied to the account as billed if I receive a periodic billing invoice or in the order of late charges, insurance charges, interest, principal and other charges for loans that have a payment coupon. I will pay Lender at Lender's address shown above or at such other place as Lender may designate in writing.

PREPAYMENT. I may pay without penalty all or a portion of the amount owed earlier than it is due. Early payments will not, unless agreed to by Lender in writing, relieve me of my obligation to continue to make payments under the payment schedule. Rather, early payments will reduce the principal balance due. I agree not to seek Lender payments marked "paid in full", "without recourse", or similar language. If I send such a payment, Lender may accept it without losing any of Lender's rights under this Note, and I will remain obligated to pay any further amount owed to Lender. All written communications concerning disputed amounts, including any check or other payment instrument that indicates that the payment constitutes "payment in full" of the amount owed or that is tendered with other conditions or limitations or as full satisfaction of a disputed amount must be mailed or delivered to: First Citizens, Loan Operations MC 984033, PO Box 28 Columbia, SC 29202.

LATE CHARGE. If a payment is 11 days or more late, I will be charged 5.000% of the unpaid portion of the regularly scheduled payment.

INTEREST AFTER DEFAULT. Upon default, including failure to pay upon final maturity, the total sum due under this Note will continue to accrue interest at the interest rate under this Note.

DEFAULT. I will be in default under this Note if any of the following happen:

Payment Default. I fail to make any payment when due under this Note.

Other Defaults. I break any promise made to Lender or fail to perform promptly at the time and strictly in the manner provided in this Note or in any agreement related to this Note, or in any other agreement or loan I have with Lender.

Fraud Statements. Any representation or statement made or furnished to Lender by me or on my behalf, or made by Guarantor, or any other guarantor, endorser, surety, or accommodation party, under this Note or the related documents in connection with the obtaining of the loan evidenced by this Note or any security document directly or indirectly securing repayment of this Note is false or misleading in any material respect, either now or at the time made or furnished.

Death or Incapacity. Any Borrower dies or becomes incompetent; a receiver is appointed for any part of my property; I make an assignment for the benefit of creditors; or any proceeding is commenced either by me or against me under any bankruptcy or insolvency law.

Taking of the Property. Any creditor or governmental agency tries to take any of the property or any other of my property in which Lender has a lien. This includes taking of, garnishing of or levying on my accounts with Lender. However, if I dispute in good faith whether the claim on which the taking of the property is based is valid or reasonable, and if I give Lender written notice of the claim and furnish Lender with copies of a court judgment satisfactory to Lender to satisfy the claim, then this default provision will not apply.

Defective Collateralization. This Note or any of the related documents ceases to be in full form and effect including failure of any collateral document to create a valid and perfected security interest in favor of Lender at any time and for any reason.

Collateral Damage or Loss. Any collateral securing this Note is lost, stolen, substantially damaged or destroyed and the loss, theft, substantial damage or destruction is not covered by insurance.

Events Affecting Guarantor. Any of the preceding events occurs with respect to any Guarantor, or any other guarantor, endorser, surety, or accommodation party of any of the indebtedness or any Guarantor, or any other guarantor, endorser, surety, or accommodation party dies or becomes incompetent, or receiver or disputes the validity of, or liability under, any guaranty of the indebtedness evidenced by this Note.

Insecurity. Lender in good faith believes itself insecure.

Cure Provisions. If any default, other than a default in payment is curable and if I have not been given a notice of a breach of the same provision of this Note within the preceding twelve (12) months, it may be cured if I, after Lender sends written notice to me demanding cure of such default: (1) cure the default within twenty (20) days or (2) if the cure requires more than twenty (20) days, immediately initiate steps which Lender deems in Lender's sole discretion to be sufficient to cure the default and thereafter continue and complete all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practicable.

LENDER'S RIGHTS. Upon default, Lender may declare the entire unpaid principal balance under this Note and all accrued unpaid interest immediately due, and then I will pay that amount.

ATTORNEY'S FEES; EXPENSES. Lender may hire or pay someone else to help collect this Note if I do not pay. I will pay Lender that amount. This includes Lender's reasonable attorney's fees in an amount not less than fifteen percent (15%) of the amount owing on this Note and Lender's legal expenses whether or not there is a lawsuit, including reasonable attorney's fees and legal expenses for bankruptcy proceedings including efforts to modify or vacate any automatic stay or injunction, and appeals. If not prohibited by applicable law, I also will pay any court costs, in addition to all other sums provided by law.

GOVERNING LAW. This Note will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of South Carolina without regard to its conflicts of law provisions. This Note has been accepted by Lender in the State of South Carolina.

RIGHT OF SETOFF. To the extent permitted by applicable law, Lender reserves a right of setoff in all my accounts with Lender (whether checking, savings, or some other account). This includes all accounts I had jointly with someone else and all accounts I may open in the future. However, this does not include any IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. I authorize Lender, to the extent permitted by applicable law, to charge or setoff all sums owing on the indebtedness against any and all such accounts.

COLLATERAL. I acknowledge this Note is secured by First mortgage on real estate located at 8844 Calvin Hall Road, Fort Mill, Lancaster County, South Carolina, which is more fully described in mortgage dated 3-3-2008 and that mortgage on real estate and improvements located at 8843 Calvin Hall Road, Fort Mill, Lancaster County, South Carolina, which is more fully described in mortgage dated 5-28-2008.

FINANCIAL STATEMENTS. I agree to provide Lender with such financial statements and other related information at such frequencies and in such detail as Lender may reasonably request.

PROMPT CREDITING OF PAYMENTS. All payments must be made in U.S. dollars and must be received by us on or before the date any payment instrument provided on or with your invoice or coupon falls to 5:00 PM Eastern Time to receive credit for the payment on the date we receive it. If paying at a branch or by mail, payments must include the loan and payment coupon. In addition, if paying by mail, payment must be mailed to the specific address designated by us. Payments received at any of our ATMs; payments received on a business day after 5:00 PM Eastern Time; payments received at a branch or by mail without an invoice stub or coupon; and payments received on a day that is not a Bank Business Day will be credited to your account no later than the next Bank Business Day.

RETURNED PAYMENT FEE. If you make any payment on this account by check, draft or other item that is dishonored for any reason, you agree to pay Lender's reasonable charge as allowed by law. This charge will be in addition to any NSF or similar charge which may be assessed.

OMISSORY NOTE
(Continued)

Page 2

against the account held by the paying bank.

SUCCESSOR INTERESTS. The terms of this Note shall be binding upon me, and upon my heirs, personal representatives, successors and assigns, and shall inure to the benefit of Lender and its successors and assigns.

NOTIFY US OF INACCURATE INFORMATION WE REPORT TO CONSUMER REPORTING AGENCIES. I may notify Lender if Lender reports any inaccurate information about my account to a consumer reporting agency. My written notice describing the specific inaccuracy should be sent to Lender at the following address: First Citizens Loan Operations SAC 994533 PO Box 39 Columbia, SC 29203.

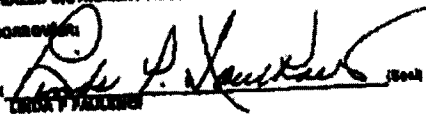
GENERAL PROVISIONS. If any part of this Note cannot be enforced, this fact will not affect the rest of the Note. Lender may delay or large extending any of its rights or remedies under this Note without notice to me. I and any other person who signs, guarantees or endorses this Note, to the extent allowed by law, waive prosecution, demand for payment, and notice of default. Upon any change in the terms of this Note, and unless otherwise expressly stated in writing, no party who signs this Note, whether as maker, guarantor, accommodation maker or endorser, shall be released from liability. All such parties agree that Lender may renew or amend (repeatedly and for any length of time) this loan or release any party or guarantor or collateral or deposit, full or partial upon or perfect Lender's security interest in the collateral. All such parties also agree that Lender may modify this loan without the consent of or notice to anyone other than the party with whom the modification is made. The obligations under this Note are joint and several. This means that the words "I", "me", and "my" mean each and all of the persons signing below.

PRIOR TO SIGNING THIS NOTE, I READ AND UNDERSTOOD ALL THE PROVISIONS OF THIS NOTE. I AGREE TO THE TERMS OF THE NOTE.

I ACKNOWLEDGE RECEIPT OF A COMPLETED COPY OF THIS PROMISSORY NOTE.

THIS NOTE IS GIVEN UNDER SEAL AND IT IS INTENDED THAT THIS NOTE IS AND SHALL CONSTITUTE AND HAVE THE EFFECT OF A SEALED INSTRUMENT ACCORDING TO LAW.

BORROWER:


Linda F. Walker

(Seal)

Exhibit D

First Citizens

CONSUMER NOTE MODIFICATION AGREEMENT

(2/17/2012)

Date of Agreement

1-1-1-00

Loan Account Number

Borrower(s): LINDA P FAULKNER

The Borrower(s) is/are indebted to First Citizens Bank and Trust Company, Inc. ("Bank") by Note with original terms as follows:

Original Note Date: 12/27/2010

Original Principal Amount of Loan: \$77,903.37

Original Contract Interest Rate: 5.00 %

The obligation currently has an outstanding balance, including interest and any charges due, of \$ 575,659.34 with

final maturity date of 9/28/2012

All parties now desire to modify the Note. This is not a refinancing, substitution, replacement or novation of the Note, but a modification of the Note with all terms and conditions of the Note and related documents remaining in full force and effect except as modified herein. The Note, as modified, continues to be secured by that Mortgage filed in Lancaster County at Book 1828 & 01343 Page 0108 & 00215. Therefore, for value received, it is the intent of all parties to modify the said Note as follows: (Complete Sections 1 and 2 entitled "Interest Rate" and "Payment Terms" in all cases. Subsections not completed are deleted. Section 3 applies only if completed.)

1. Interest Rate (Complete Section A or B.)

A. At the simple, fixed interest rate of 5.1 percent per annum.

B. At the variable interest rate of _____ percentage points above (or below, if checked) the Prime Rate established from time to time by The Wall Street Journal (the "Index Rate"). However, the interest rate will not at any time exceed the maximum rate of _____ percent per annum (or the maximum rate permitted by applicable law, whichever is less), or fall below the minimum rate of _____. The interest rate as of the date of this Agreement stated in simple interest terms is _____ percent per annum. The interest rate is subject to change on a monthly basis with changes becoming effective on the first banking day following the 1st of the month.

2. Payment Terms (Complete Section A, B or C.)

A. Single Payment Loan. The outstanding principal balance and all accrued interest shall be payable in one single payment on _____ (hereafter referred to as "Maturity").

B. Amortizing Payments. The outstanding principal balance and accrued interest shall be payable in _____ equal consecutive _____ (monthly, quarterly, etc.) payments of _____ each commencing on _____ (the "Regular Payment Commencement Date") and on the same day of each such calendar period thereafter and one final payment of the entire balance due on _____ (hereafter referred to as "Maturity"), unless sooner paid. The periodic payment amount specified includes principal and interest.

C. Principal Payment Terms. The outstanding balance shall be: (Complete 1 or 2.)

1) Payable in one single payment (exclusive of interest) on 05/20/2013 (hereafter referred to as "Maturity").

2) Payable in _____ equal consecutive _____ (monthly, quarterly, etc.) payments of _____ commencing on _____ and on the same day of each such calendar period thereafter and one final payment of the entire balance due on _____ (hereafter referred to as "Maturity")

Interest Payment Terms. In addition to the principal payment(s) identified above, interest on the outstanding principal balance shall be: (Check 1 or complete Section 3.)

1) ☐ Payable in full at Maturity.

2) Payable Monthly _____ (monthly, quarterly, etc.) beginning 1/14/2013 and consecutively on the same day of each calendar period thereafter, with any accrued but unpaid interest due and payable in full at Maturity.

3. Fees. Loan fees as follows are due and payable to Lender upon this Agreement.

☒ Modification Fee	\$ 150.00	☐ Paid in Cash	☒ Added to Loan Balance
☐ Flood Re-Certification Fee	\$	☐ Paid in Cash	☐ Added to Loan Balance
☐ Intangible Recording Tax	\$	☐ Paid in Cash	☐ Added to Loan Balance
☐ GRMA	\$	☐ Paid in Cash	☐ Added to Loan Balance
☐ Recording Fee	\$	☐ Paid in Cash	☐ Added to Loan Balance
☐ Appraisal Fee	\$	☐ Paid in Cash	☐ Added to Loan Balance

Notes: For any Real Estate Secured loan containing a walled, roofed structure, a \$4.00 fee for Flood Insurance Re-Certification must be paid. This fee is in addition to the Modification Fee. If the property is determined to be in a flood zone, you will be provided the Flood Hazard Notice and will be required to obtain proof of adequate flood coverage before signing this Modification Agreement. Intangible Recording Tax may only be applicable when real estate collateral is located in the State of Georgia.

4. Credit Insurance Cancellation Notice. I understand and acknowledge that if the loan being modified has credit life and/or accident and health insurance, the existing coverage will be discontinued as of the effective date of this Modification Agreement.

Borrower and each Guarantor signing below understands and agrees that in modifying the existing indebtedness, Bank is relying upon Borrower's representations, warranties, and agreements, as set forth in the provisions of the original Note. Except as expressly modified pursuant to this Consumer Note Modification Agreement, the terms of the original Note (including renewals and modifications thereto) remain unchanged and in full force and effect. Bank's agreement to modifications of the existing indebtedness pursuant to this Consumer Note Modification Agreement in no way shall obligate Bank to make any future modifications to the indebtedness. Nothing in this Consumer Note Modification Agreement shall constitute a satisfaction of the indebtedness. It is the intention of Bank and Borrower to retain as liable parties all makers, endorsers, and guarantors of the original Note (including renewals and modifications thereto), unless the party is expressly released by Bank in writing. No maker, endorser, or guarantor will be released by virtue of this Consumer Note Modification Agreement.

Bank has advised Borrower and each Guarantor signing below to review this Consumer Note Modification Agreement with legal counsel of their choice and Borrower and each Guarantor signing below acknowledges that they have done so, to the extent they deemed necessary.

This Modification Agreement amends but does not replace or satisfy the original note. All other provisions of said Note are to remain in full force and effect and unaltered hereby.

Witness

Borrower

Witness

Co-Borrower

Witness

Guarantor

Witness

Guarantor

First Citizens Bank and Trust Company, Inc.

By

Its

I/We acknowledge receipt of a copy of this Modification Agreement as a third party not obligated on the note.

Mortgagee/Grantor

Mortgagee/Grantor

Bank Use Only

Encure Number 355991 Lender WILLIAM ARTHUR Debtors Code 0 Loan Grade 3D Status 5

Form 603 (Multi-State) (07/11)

Exhibit E

After Recording Return To:
WALTER L. HEINSCH

REGISTRATION REQUESTED BY:
FIRST CITIZENS BANK AND TRUST COMPANY, INC
PO Box 29
Columbia SC 29202

WHEN RECORDED MAIL TO:
First Citizens
Loan Operations MC994033
PO Box 29
Columbia SC 29202

SEND TAX NOTICES TO:
LINDA P FAULKNER
9943 CALVIN HALL RD
FORT MILL SC 29707-8830

2008003462

MORTGAGE
RECORDING FEE \$13.00

03-12-2008 02:08 PM

JOHN BARR
RECORDING CLERK
BY: CAMDIE KIRKLEY DEPUTY

BK:MORT 1888

PG:108-114

SPACE ABOVE THIS LINE IS FOR RECORDER'S USE ONLY

STATE OF SOUTH CAROLINA

COUNTY OF Lancaster

MORTGAGE OF REAL ESTATE

THIS MORTGAGE is dated 03/07/2008

THE MORTGAGOR(S) as referred to in this Mortgage is (are) LINDA P. FAULKNER

THE MORTGAGEE, First Citizens Bank and Trust Company, Inc. will be referred to herein as "Lender". Lender's address is PO Box 29, MC994033, Columbia, SC 29202.

WHEREAS, Borrower(s) LINDA P FAULKNER

is (are) indebted to Lender in the principal amount of \$ \$75,000.00 pursuant to the note, note agreement, loan agreement or revolving loan agreement (hereinafter referred to as the "Note") dated 03/07/2008. The Note includes all documents renewing, extending, or modifying it and/or evidencing future advances. The Note has a final maturity of 03/07/2010.

The amount of debt secured by this Mortgage, including the outstanding amount of the Note and all Future Advances under paragraph 13, shall at no time be more than double the principal amount of the Note or \$ \$75,000.00 whichever is greater, plus interest, reasonable attorney's fees and court costs incurred in collection of amounts due hereunder and expenditures by Lender under Paragraph 5 below. Interest under the Note will be deferred, accrued, or capitalized, but Lender shall not be required to defer, accrue or capitalize any interest except as provided in the Note.

THIS MORTGAGE is given to secure the Lender the repayment of the following amounts, with interest: (A) the indebtedness evidenced by the Note; (B) any Future Advances made under Paragraph 13 below; (C) expenditures by Lender under Paragraph 5 below; and (D) attorney's fees, court costs and other amounts which may be due under the Note and this Mortgage. In consideration of the above indebtedness and for other valuable consideration

which Mortgagor acknowledges receiving, Mortgagor does hereby mortgage, grant and convey to Lender, its successors and assigns the following described property (hereinafter sometimes referred to as the "Property"):

The Real Property is located at:

9844 Calvin Hall Road, Fort Mill, SC 29715 (Lancaster)

See Exhibit A

Together with all singular rights, easements, hereditaments and appurtenances belonging or in any way incident or appertaining thereto; all improvements, now or hereafter situated thereon; and all fixtures (including, but not limited to, appliances, additions, improvements, and all items and material attached to or used in connection with the described Property) now or hereafter attached thereto; all covenants, rights-of-way, gaps of land, streets, ways, alleys, passages, sewer rights, wetlands, water courses, water rights, and powers; and all estates, rights, titles, interests, privileges, liberties, and tenements, whatsoever and in any way belonging, relating or appertaining to any of the property herein above described, or which hereafter shall in any way belong, relate or be appurtenant thereto, whether now owned or hereafter acquired by Mortgagor; and the reversibility and reversions, remainder and remainders, rents, issues, and profits thereof; and of the estate, right, title, interest, property, possession, claim and demand whatsoever at law as well as in equity of Mortgagor of, in and to the same, including but not limited to all judgments, awards of damages and settlements hereafter made resulting from condemnation proceedings or the taking of the property or any part thereof under the power of eminent domain, or for any damage (whether caused by such taking or otherwise) to the property or to any rights, appurtenant thereto; and all proceeds of any sales or other dispositions of the property or any part thereof (collectively hereafter referred to as the "Property"; and all of the same being deemed part of the Property and included in the reference thereto).

TO HAVE AND TO HOLD all and singular the Property unto Lender and the successors and assigns of Lender forever.

MORTGAGOR covenants that Mortgagor is lawfully seized of the Property in fee simple absolute, that Mortgagor has good right and is lawfully authorized to sell, convey or encumber the same, and that the Property is free and clear of all encumbrances except as expressly provided in Paragraph 18 and otherwise herein. Mortgagor covenants to warrant and forever defend all and singular the Property unto Lender and the successors or assigns of Lender from and against Mortgagor and all persons whatsoever lawfully claiming the same or any part thereof.

PROVIDED ALWAYS, nevertheless, and it is the true intent and meaning of Mortgagor and Lender, that if Mortgagor pays or causes to be paid to Lender the debt secured hereby, the estate hereby granted shall cease, determine and be utterly null and void; otherwise said estate shall remain in full force and effect.

IT IS AGREED that Mortgagor shall be entitled to hold and enjoy the Property until a Default as herein defined has occurred.

MORTGAGOR further covenants and agrees with Lender as follows:

1. **Assignment of Rents and Profits.** As further security for all sums secured by this Mortgage, Mortgagor assigns to Lender all rents and profits arising from the Property; provided, however, that so long as no Default, as hereinafter defined, has occurred, Mortgagor shall be entitled to collect and retain all such rents and profits as the sole property of Mortgagor without accounting to Lender therefore.

2. **Care of Property.** Mortgagor will maintain the Property in good condition and repair and will neither permit nor allow waste thereof. Mortgagor will promptly repair or replace any portion of the Property which is damaged or destroyed by any cause whatsoever and will promptly pay when due all costs and expenses of such repair or restoration. Mortgagor will not remove or demolish any improvement or fixture which is now or hereafter part of the

Property and will cut no timber on the Property without the express written consent of Lender. Lender shall be entitled to specific performance of the provisions of this paragraph.

3. Insurance. (A) Mortgagor shall at its sole expense obtain for, deliver to, and maintain for the benefit of Lender, during the life of this Mortgage, insurance policies in such amounts as Lender may require, in no event less than the full insurable value, insuring the Property against fire, extended coverage and such other insurable hazards, casualties and contingencies as Lender may require including flood damage, and shall pay promptly, when due, any premiums on such insurance policies and on any renewals thereof. The form of such policies, the companies issuing them and the coverages provided shall be acceptable to Lender and shall contain a noncontributory mortgage endorsement making losses payable to Lender. At least thirty (30) days prior to the expiration date of all such policies, renewals thereof satisfactory to Lender shall be delivered to Lender. Mortgagor shall deliver to Lender receipts evidencing the payment of all premiums of such insurance policies and renewals. In the event of loss, Mortgagor will give written notice to Lender, and Lender may make proof of loss if not made promptly by Mortgagor. In the event of foreclosure of this Mortgage or any other transfer of title to the Property in extinguishment of the indebtedness and other sums secured hereby, all rights title and interest of Mortgagor in and to all insurance policies and renewals thereof then in force shall pass to the grantees. Upon the failure of Mortgagor to obtain and maintain insurance satisfactory to Lender, Lender may at its own discretion procure and substitute for any and all of the insurance so held as aforesaid, such other policy or policies in insurance, in such amount as Lender, acting in its sole discretion, may determine; all without prejudice to its right to foreclose hereunder should Mortgagor fail or refuse to keep said premises so insured.

(B) Mortgagor hereby assigns to Lender all proceeds from any insurance policies, and Lender is hereby authorized and empowered in its reasonable discretion, to adjust or compromise any loss under any insurance policies on the Property, and to collect and receive the proceeds from any such policy or policies. Each insurance company is hereby authorized and directed to make payment for all such losses directly to Lender alone and not to Mortgagor and Lender jointly. After deducting from such insurance proceeds any expenses incurred by Lender in the collection or handling of such funds, Lender, acting in its sole discretion, may apply the net proceeds (1) to the payment of any sum secured by this Mortgage in such order as Lender may determine; or (2) to the replacement, repair, or restoration of the portion of the Property damaged or destroyed in a manner determined by Lender; or any release said net proceeds to the Mortgagor upon such conditions as Lender shall determine; or may apply said net proceeds for any combination of the foregoing; all without affecting the lien of this Mortgage for the full amount secured hereby before such payment took place. If Lender elects to restore the improvements, any balance of such monies after restoration shall either be applied toward the reduction of indebtedness and any other sums secured hereby or shall be paid to Mortgagor. Lender shall not be responsible for any failure to collect any insurance proceeds due under the terms of any policy regardless of the cause of such failure.

(C) Mortgagor shall, at its sole expense, obtain for, deliver to, and maintain for the benefit of Lender, during the life of this Mortgage, liability insurance policies relating to the Property, in such amounts, with such companies and in such form as may be reasonably required by Lender. Lender may require such policies to contain an endorsement, in form satisfactory to Lender, naming Lender as an additional insured thereunder. Mortgagor shall pay promptly, when due, any premiums on such insurance policies and renewals thereof.

4. Taxes and Assessments. Mortgagor will pay all taxes, assessments and other charges which constitute or are secured by a lien upon the Property which is superior to the lien of this Mortgage and will deliver to Lender proof of payment of the same not less than ten (10) days prior to the date the same become delinquent; provided, however, that Mortgagor shall be entitled by appropriate proceedings to contest the amount or validity of such tax, assessment or charge so long as the collection of the same by foreclosure of the lien upon the Property is stayed during the pendency of such proceedings; and Mortgagor deposits with the authority to which such tax, assessment or charge is payable or with Lender appropriate security for payment of the same together with any applicable interest and penalties, should the same be determined due and owing.

5. Expenditures by Lender. If Mortgagor fails to make payment for restoration or repair of the Property (including any improvements to bring the Property in compliance with federal, state or local laws, ordinances or regulations), for insurance premiums or for taxes, assessments or other charges as required in the Mortgage, Lender may, but shall not be obligated to, pay for the same. Any such payment by Lender will be secured by this Mortgage and have the same rank and priority as the principal debt secured hereby and bear interest from the date of payment at the rate payable from time to time to outstanding principal under the Note. Payments made for taxes by Lender shall be a first lien on the Property to the extent of the taxes so paid with interest from the date of payment, regardless of the rank and priority of this Mortgage. Mortgagor will pay to Lender in cash on demand an amount equal to any payment made by Lender pursuant to this paragraph plus interest thereon as herein provided.

6. Condemnation. Lender shall be entitled to be made a party to and to participate in any proceeding, whether formal or informal, for condemnation or acquisition pursuant to power of eminent domain of any portion of the Property. Mortgagor hereby assigns to Lender the right to collect and receive any payment or award to which Mortgagor would otherwise be entitled by reason of condemnation or acquisition pursuant to the power of eminent domain of any portion of the Property. Any such payment or award received by Lender may, at the option of Lender, (1) be applied to payment of any sums secured by this Mortgage in such order as Lender may determine; or (2) be applied in a manner determined by Lender to the replacement of the portion of the Property taken and to the repair or restoration of the remaining portion of the Property; or (3) be released to Mortgagor upon such conditions as Lender may determine; or (4) be used for any combination of the foregoing purposes. No portion of an indemnity payment which is applied

to replacement, repair or restoration of any portion of the Property or which is released to Mortgagee shall be deemed a payment against any sums secured by this Mortgage.

7. **Due on Sale or Transfer of Property.** At the option of Lender, the indebtedness secured by this Mortgage shall become due and payable if, without the written consent of Lender, Mortgagee shall convey away the mortgages privilege, or if the title shall become vested in any other person in any manner whatsoever, (to include a Sales Contract) other than by death of Mortgagee. It is understood and agreed that it is consideration for the consent of Lender to any transfer of title to the mortgaged premises, Lender, at its option, may change a loan transfer fee and/or require changes in the rate of interest, term of loan, monthly payments of principal and interest and other terms and conditions of this Mortgage and/or the Note secured hereby.

8. **Default.** The occurrence of any of the following events shall be deemed a Default under this Mortgage:

- (A) any default by Mortgagee as described in the Note;
- (B) failure of Mortgagee to pay any other sum secured by this Mortgage when due;
- (C) failure of Mortgagee to observe or perform any covenant or agreement set forth in this Mortgage or any loan agreement entered into between Mortgagee and Lender with respect to the indebtedness hereby secured within ten (10) days following the giving of notice by Lender to Mortgagee to observe or perform the same.

9. **Remedies.** Upon the occurrence of a Default as hereinabove defined, Lender may, without notice to Mortgagee unless otherwise required by law, declare all sums secured by this Mortgage immediately due and payable and may commence proceedings to collect such sums, foreclose this Mortgage and sell the Property. At the foreclosure, Lender shall be entitled to bid and to purchase the Property and shall be entitled to apply the debt secured hereby, or any portion thereof, in payment for the Property. The remedies provided to Lender in this paragraph shall be in addition to and not in lieu of any other rights and remedies provided in this Mortgage or by law, all of which rights and remedies may be exercised by Lender simultaneously or consecutively in any order without being deemed to have waived any right or remedy previously or not yet exercised.

10. **Appointment of Receiver.** Upon the occurrence of a Default as hereinabove defined Lender shall be entitled to the appointment of a receiver to enter upon and take and maintain full control of the Property in order to perform all acts necessary and appropriate for the operation and maintenance thereof including, but not limited to, the execution, cancellation or modification of leases; the making of repairs to the Property; and the execution or termination of contracts providing for the management or maintenance of the Property, all on such terms as are deemed best to protect the security of this Mortgage. The receiver shall be entitled to receive a reasonable fee for so managing the Property. All rents collected pursuant to this paragraph shall be applied first to the costs of taking control of and managing the Property and collecting the rents, including, but not limited to attorney's fees, receiver's fee, premiums on receiver's bonds, costs or repairs to the Property, premiums on insurance policies, taxes, assessments and other charges on the Property, and the costs of discharging any obligation of liability of Mortgagee as lessor or landlord of the Property and then to the sums secured by this Mortgage. Lender or the receiver shall have access to the books and records used in the operation and maintenance of the Property and shall be liable to account only for those rents actually received. Lender shall not be liable to Mortgagee, anyone claiming under or through Mortgagee, or anyone having an interest in the Property by reason of anything done or left undone by Mortgagee under this paragraph. If the rents of the Property are not sufficient to meet the cost of taking control and managing the Property and collecting the rents, Lender, at its sole option, may advance funds to meet the costs. Any funds expended by Lender for such purposes shall become indebtedness of Mortgagee to Lender secured by this Mortgage. Unless Lender and Mortgagee agree in writing to other terms of payment, such amounts shall be payable upon notice from Lender to Mortgagee requesting payment thereof and shall bear interest from the date of disbursement at the rate stated in the Note. The arising upon and taking and maintaining of control of the Property by Lender or the receiver and the application of rents so provided herein shall not cure or waive any default hereunder or invalidate any other right or remedy of Lender hereunder.

11. **Waiver by Lender.** Lender may, in its sole discretion, from time to time waive or forbear from enforcing any provision of this Mortgage, and no such waiver or forbearance shall be deemed a waiver by Lender of any right or remedy provided herein by law or be deemed a waiver of the right at any later time to enforce strictly all provisions of this Mortgage and to exercise any and all remedies provided herein and by law.

12. **Costs of Appraisals.** Mortgagee shall pay any and all costs of providing to Lender, at its request from time to time, a current appraisal of the market value of the Property prepared by an appraiser acceptable to Lender, in its sole discretion. If Mortgagee fails to pay such costs, Lender may advance the cost on the Mortgagee's behalf and add the amount of such advance to the principal under the Note, which shall bear interest at the rate as provided in the Note, and shall be due and payable on demand. Mortgagee's failure to pay the cost of any such appraisal, plus all secured interest, in full, within ten (10) days of the date of such demand shall constitute an event of default entitling the Lender to accelerate the maturity of all debts secured by the Mortgage, as allowed by law.

13. **Future Advances.** Lender, at its option, may make Future Advances to Mortgagee. Such Future Advances, with interest at the rate payable from time to time on the outstanding principal under the Note, shall be secured by this Mortgage when evidenced by the Note or by any other note stating that it is secured by this Mortgage or when advanced under the terms of this Mortgage. Lender may make but is not obligated to make such Future Advances (A) at the request of Mortgagee, whether or not there is an obligation to make Future Advances; (B) pursuant to advance of funds provided for

himself or (C) to pay, with or without the consent or request of Mortgagor, any amounts which may be due under any other mortgage or lien affecting the Property.

14. **Notices.** Any notice given by either party hereto to the other party shall be in writing and shall be signed by the party giving notice. Any notice or other document to be delivered to either party hereto by the other party shall be deemed delivered if mailed postage prepaid to the party to whom directed at the listed address of such party that is known to the party sending the same. This paragraph shall not be deemed to prohibit any other manner of delivering a notice or other document.

15. **Miscellaneous.**

- (A) The agreements herein shall bind and inure to the benefit of the Mortgagor, Lender and their respective heirs, successors and assigns.
- (B) Whenever in this Mortgage one of the parties herein is named or referred to, the heirs, legal representatives, successors and assigns of such parties shall be included and all covenants and agreements contained in this Mortgage by or on behalf of Mortgagor or by or on behalf of Lender shall bind and inure to the benefit of their representatives, heirs, successors and assigns, whether so expressed or not.
- (C) The headings of the sections, paragraphs and subdivisions of this Mortgage are for the convenience of reference only, are not to be considered a part hereof and shall not limit or otherwise affect any of the terms hereof.
- (D) If any provision of this Mortgage conflicts with applicable law, such conflict shall not affect other provisions of this Mortgage which can be given effect without the conflicting provision, and to this end the provisions of this Mortgage are declared to be severable.
- (E) Lender may make or cause to be made reasonable entries upon and inspections of the Property upon giving Mortgagor prior notice.
- (F) All covenants of Mortgage shall be joint and several.
- (G) This Mortgage shall be governed by, construed and enforced in accordance with the laws of South Carolina.
- (H) If this is not a first mortgage, Mortgagor has provided Lender with an attorney's opinion (or the instrument) setting out in detail any and all prior mortgages or liens including the date of the existing mortgage liens and the original amounts.
- (I) If the Mortgagor is not obligated on the debt which this Mortgage secures, then the Mortgagor acknowledges that Note was made in consideration for this transaction and the owner of the Property agrees to be bound by all terms and conditions of the Note and the Mortgage.
- (J) **Construction Mortgage.** If this is a construction loan, this Mortgage is a "construction mortgage" for the purposes of Sections 8-334 and 2A-308 of the Uniform Commercial Code, as those sections have been adopted by the State of South Carolina.

16. **Compliance with Environmental Laws.** Mortgagor agrees to indemnify, defend and save Lender and its successors and assigns harmless from and against all claims, actions, administrative proceedings, fines, costs, liabilities, attorney's fees and costs or the like that arise directly or indirectly from the presence or release of hazardous materials, substances, waste or other environmentally regulated substances on the Property. Mortgagor shall also indemnify and hold Lender harmless from and against any and all damages, penalties, fines, claims, liens, suits, liabilities, costs (including cleanup costs), judgments and expenses (including attorney's, consultant's or expert's fees or expenses) of any kind and nature suffered by state or federal, which requires the elimination, removal, or transfer of any hazardous material, substances, waste or other environmentally regulated substances. Mortgagor's obligations hereunder to Lender shall not be limited in any extent by the term of the Note, as to any act or occurrence prior to payment in full and satisfaction of the Note which gives rise to the liability hereunder, shall continue to survive and remain in full force and effect not withstanding payment in full and satisfaction of the Note and Mortgage, or foreclosure under the Mortgage, or delivery of a deed in lieu of foreclosure. A default hereunder may, at the option of the Lender, be treated as a default under the documents evidencing and securing the loans. Hazardous materials, substances, waste or other environmentally regulated substances, as those terms are used herein, shall have the meanings specified in the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), as amended, the Resource Conservation Recovery Act, as amended, the Clean Air Act, the Clean Water Act, or any federal, state or local statute, law, ordinance, code, rule, regulation, order or decree as may now or at any time hereafter be in effect.

17. **Environmental Assessments Costs.** The Mortgagor shall pay the cost of providing to Lender, at Lender's request, a current environmental site assessment, audit, or survey ("Assessment") of the Property, which Assessment shall be prepared by a person or company acceptable to Lender, in Lender's sole discretion. If Mortgagor fails to pay the costs of the Assessment, Lender may pay such cost and the same shall constitute an advance under the Note to be secured by the Property, and shall be due and payable on demand. Mortgagor's failure to pay such amount with all accrued interests in full within ten (10) days of date of such demand shall constitute an event of default and entitle Lender to accelerate the maturity of any and all debts secured by the Property, as allowed by law. The Mortgagor acknowledges that the Lender disclaims any duty or obligation to the Mortgagor or any third party in regard to these assessments and is acting solely in compliance with its lending practices. The Mortgagor is advised to seek technical and/or legal advice in regard to any environmental concerns associated with the Property.

51

EXHIBIT A

ALL THAT CERTAIN piece, parcel or lot of land lying, being and situate in the State of South Carolina, County of Lancaster, on Calvin Hall Road, containing 1.07 acres, more or less, as shown on a plat thereof prepared by Hucks and Associates, PC, dated October 10, 1996, recorded in Plat Book 96, page 131, Office of the Clerk of Court for Lancaster County, South Carolina, which plat is incorporated herein by this reference and having such metes, bounds, courses and distances as by reference to said plat will more fully appear.

DERIVATION: This being the same property conveyed unto the Mortgagor herein by Deed of J. B. Faulkner dated August 28, 2000, recorded September 5, 2000 in Record Book 93, page 15, Office of the Clerk of Court of Lancaster County, South Carolina. For further reference, see Deed recorded in Record Book I-14, page 251, aforesaid County and State.

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

IN THE COURT OF COMMON PLEAS

SIXTH JUDICIAL CIRCUIT

FIRST CITIZENS BANK &
TRUST COMPANY, INC.,

Plaintiff,

vs.

LINDA P. FAULKNER
a/k/a Linda Faulkner,
FOUNDERS FEDERAL CREDIT UNION,
and CACH, LLC.,

Defendants.]

ANSWER

AND COUNTERCLAIM

JURY TRIAL DEMANDED

Civil Case No: 2017-CP-29-00872

Comes now the Defendant LINDA P. FAULKNER (hereafter also also "the Defendant", "Defendant FAULKNER", and "the Counter-Plaintiff", and for her responsive pleading herein would allege as follows:

FOR A FIRST DEFENSE

1. Each and every allegation of the Plaintiff's Complaint not admitted, denied or explained herein is denied and strict proof demanded therefor.
2. As to the allegations of the Complaint herein as to:

venue,

corporate identity of any parties,

the existence and terms of the mortgage and note sought to be foreclosed herein,

the existence of any breach on the part of the Defendant LINDA P. FAULKNER,

the expenditure of monies by the Plaintiff(s) in order to preserve its rights,

the rights of Plaintiff as to recovery of any monies expended or the liability of the Defendant for such monies,

the existence and priority of recorded liens senior and/or junior to that of the said Defendant FAULKNER,

FILED
CLERK OF COURT
LANCASTER, SC
2017 JAN -2 PM 2:07

or any other matter alleged or referenced in the Complaint herein, he said Defendant FAULKNER:

admits all matters herein which are evidenced by public record, and alleges that she is without sufficient information, knowledge or belief as to the remaining factual allegations to respond and therefore denies the same and demand strict proof thereof.

FOR A SECOND DEFENSE
EXPRESS WAIVER

3. All allegations stated or referenced elsewhere in this pleading and relevant to this defense are hereby realleged by this reference to them.
4. On knowledge and information, Plaintiff did not maintain the factual claims of default it now advances as a basis for its right to foreclose the said mortgage until this year.
5. During the period after December, 2011 though at least February, 2016, the Plaintiff gave no notice of any factual claims of default or of its right to seek foreclosure of the mortgage as now advanced in its Complaint.
6. On knowledge and information, no condition existed during the period from December, 2011 or the due date recited on the Defendant's Note, until at least February, 2016 which would have prevented the Plaintiff from giving notice of its change of position or reason for disclaiming its position that the Defendant might continue her regular interest payments on the said mortgage and note debt.
7. No notice or complaint, written or otherwise, was made to the Defendant FAULKNER by or on behalf of the Plaintiff alleging a possible invocation of the alleged default or of its intent to seek foreclosure until the filing of this civil action.
8. During the said period since December, 2011, and through at least February, 2016, the Plaintiff continued to draft the Defendant FAULKNER's mortgage payments from her banking account.
9. On knowledge and information, the Plaintiff's referenced actions constitute and evidence, and its inaction constitutes and evidences, an intention on the part of the Plaintiff to waive any claim of default under the said mortgage and note as to collection or the right to foreclose.

10. On knowledge and information, the Plaintiff's referenced actions constitute and evidence, and its inaction constitutes and evidences, an external act on the part of the Plaintiff by which its intention, to waive any claim for default or its right to seek foreclosure was made clear.
11. The Defendant FAULKNER relied on the said waiver, acknowledgment and acquiescence of Plaintiff in ordering her affairs, which ordering will be to their detriment if the causes of action set out in the Complaint and relating to collection and foreclosure are now prosecuted.
12. On knowledge and information, the Plaintiff's actions constitute and evidence, and its inaction constitutes and evidences, as set out and referenced herein, an express waiver of any claim to default under, or collection of, the said mortgage and note by Plaintiff against Defendant FAULKNER and based upon the factual matter set out and referenced in the pleadings of the parties herein.

**FOR AN THIRD DEFENSE
IMPLIED WAIVER**

13. All allegations stated or referenced elsewhere in this pleading and relevant to this defense are hereby realleged by this reference to them.
14. On knowledge and information, the Plaintiff's actions constitute and its inaction (as referenced herein) constitutes, an implied waiver of any claim to default under the said note and mortgage and of any right it may have to foreclosure the same.

**FOR A FOURTH DEFENSE AND SETOFF
TRUTH IN LENDING VIOLATIONS**

15. All allegations stated or referenced elsewhere in this pleading and relevant to this defense are hereby realleged by this reference to them.
16. The Counter-Plaintiff FAULKNER is an individual resident of Lancaster County, South Carolina.
17. The Counter-Defendant FIRST CITIZENS BANK AND TRUST COMPANY, INC. (hereafter also" the Counter-Defendant", "the Counter-Defendant FIRST CITIZENS",

"FIRST CITIZENS" and "the Plaintiff") is a banking corporation organized under the laws of the State of South Carolina.

18. The Counter-Plaintiff FAULKNER institutes this cause of action for actual damages, statutory damages, attorney's fees, and the costs of this action against Plaintiff for multiple violations of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, (hereinafter TILA), and Federal Reserve Board Regulation Z, 12 C.F.R. § 226, promulgated pursuant thereto.
19. The jurisdiction of this court for this cause of action is invoked pursuant to the Truth in Lending Act, 15 U.S.C. § 1640(e).
20. At all times relevant hereto, the Counter-Defendant FIRST CITIZENS regularly extended or offered to extend consumer credit for which a finance charge is or may be imposed or which, by written agreement, is payable in more than four installments, and is the person to whom the transaction which is the subject of this action is initially payable, making defendant a creditor within the meaning of TILA, 15 U.S.C. § 1602(t) and Regulation Z § 226.2(a)(17).
21. In or about March, 2008, the Counter-Defendant FIRST CITIZENS, by its agents, servants and employees, contacted the Counter-Plaintiff LINDA P. FAULKNER about obtaining credit to finance real property, which property was used for the Counter-Plaintiffs' personal, family and household purposes.
22. In the course of this consumer credit transaction, the Counter-Plaintiff FIRST CITIZENS failed to deliver all "material" disclosures required by TILA and Regulation Z, including the following:
 - I. By failing to clearly and accurately disclose the "finance charge", using that term, in violation of Regulation Z § 226.18(b) and 15 U.S.C. § 1638(a)(3);
 - II. By failing to clearly and accurately disclose the "annual percentage rate", using that term, in violation of Regulation Z § 226.18(e) and 15 U.S.C. § 1638 (a)(4);
 - III. By failing to clearly and accurately disclose the "total of payments", using that term in violation of Regulation Z § 226.18(h) and 15 U.S.C. § 1638(a)(5).
23. As a result of the Counter-Defendant FIRST CITIZEN's failure to observe the TILA requirements, the Counter-Plaintiff FAULKNER has suffered actual damages, has been forced to engage the services of the counsel named below, and has incurred legal costs.

24. By reason of the aforesaid violations of the Act and Regulation Z, and specifically pursuant to 15 U.S.C. § 1640(a), the Counter-Defendant FIRST CITIZENS is liable to the Counter-Plaintiff FAULKNER in the amount equal to the sum of twice the finance charge, actual damages to be established at trial, statutory damages, and attorneys fees and costs in accordance with 15 U.S.C. 1640.

**FOR A FIFTH DEFENSE
UNFAIR DEBT COLLECTION PRACTICES**

25. All allegations stated or referenced elsewhere in this pleading and relevant to this defense are hereby realleged by this reference to them.

26. 15 U.S.C. § 1692C(a)(2) provides, in relevant part:

(a) Communication with the consumer generally

Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt—

...

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; . . .

27. On knowledge and information, the Counter-Plaintiff FAULKNER is a consumer within the meaning of 15 U.S.C. § 1692a(3) and as applicable to the Code Section quoted above.

28. On knowledge and information, persons defined as debt collectors for the Counter-Defendant Bank within the meaning of the Fair Debt Collection Practices act have been employed by and acted for the Plaintiff.

29. Persons acting as debt collectors have communicated with the Counter-Plaintiff FAULKNER or her husband without the express permission of a court of competent jurisdiction.

30. Those persons so acting as debt collectors knew, or are chargeable with the knowledge,

that the Counter-Plaintiff FAULKNER is, and at all relevant times was, represented by the attorney undersigned.

31. On knowledge and information, the said attorney's name and address were known to those persons acting as debt collectors, or they are chargeable with such knowledge.
32. At no time did the said attorney for the Counter-Plaintiff FAULKNER fail to respond, or respond within a reasonable period, to any communication from any person acting as a debt collector for the Counter-Defendant Bank.
33. At no time has the said attorney for the Counter-Plaintiff FAULKNER consented to direct communication between the debt collectors and the Counter-Plaintiff FAULKNER.
34. The Counter-Plaintiff FAULKNER has suffered actual damage by reason of the Counter-Defendant's actions.
35. On knowledge and information, the Counter-Plaintiff FAULKNER is entitled to a declaratory judgment that the actions of the Counter-Defendant Bank amount to a violation of the Federal Fair Debt Collection Practices Act.
36. On knowledge and information, the Counter-Plaintiff FAULKNER is entitled to her actual damages and to those statutory damages allowed pursuant to 15 U.S.C. § 1692k.
37. On knowledge and information, the Counter-Plaintiff FAULKNER is entitled to her Costs and reasonable attorney's fees pursuant to 15 U.S.C. §§ 1692k.

FOR A SIXTH DEFENSE
BREACH OF DUTY OF GOOD FAITH

38. All allegations stated or referenced elsewhere in this pleading and relevant to this defense are hereby realleged by this reference to them.
39. On knowledge and information, the contract and dealings between the Plaintiff and Defendant imply a duty of good faith and fair dealing between the parties to the mortgage transaction, and a duty of co-operation on the part of both parties.
40. On knowledge and information, the actions and inaction of Counter-Defendant FIRST CITIZENS referenced herein and in the Complaint are in breach of its contract and dealings with the Counter-Plaintiff FAULKNER as evidenced by the allegations herein, and the same are also in breach of its obligation of good faith.
41. On knowledge and information, the lack of good faith on the part of the Counter-Defendant FIRST CITIZENS deprives it of the right to any relief from this Court by

reason of the Counter-Plaintiff FAULKNER's alleged default under the subject note and mortgage.

WHEREFORE the said Defendant and Counter-Plaintiff FAULKNER prays:

AS TO THE PLAINTIFF'S ACTION FOR FORECLOSURE HEREIN:

- A) That this Court inquire into and determine all matters set out in the Amended Complaint herein, including, but not limited to, all questions relating to the seniority of recorded liens on the subject real property, and
- B) That the orders of the Court herein accord the said Defendant all protections normally accorded to persons in the position of the said Defendant.

AS TO THE SECOND AND THIRD DEFENSES:

- C) Dismiss the action brought by the Plaintiff herein by reason of its waiver or implied waiver of the grounds for collection and foreclosure;

AS TO THE THIRD DEFENSE AND SET-OFF (TRUTH IN LENDING):

- D) Award the Counter-Plaintiff FAULKNER her actual damages against the Counter-Defendant FIRST CITIZENS, to be established at trial pursuant to 15 U.S.C. § 1640(a)(1);
- E) Award statutory damages to the Counter-Plaintiff FAULKNER in the amount of twice the finance charge in accordance with 15 U.S.C. § 1640(a)(2)(i), or not less than \$400 or greater than \$4,000 in accordance with 15 U.S.C. § 1640(a)(2)(iv);
- F) Award the Counter-Plaintiff FAULKNER her costs and reasonable attorney's fees in accordance with 15 U.S.C. § 1640;

AS TO THE FOURTH DEFENSE (VIOLATION OF FDCPA)

- G) Issue its Declaratory judgment that defendants' conduct has violated the Federal Debt Collection Practices Act;

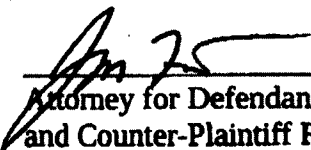
- H) Award the Counter-Plaintiff her actual damages by reason of the Counter-Defendant's violation of the FDCPA;
- I) Award the Counter-Plaintiff her statutory damages by reason of the Counter-Defendant's violation of the FDCPA pursuant to 15 U.S.C. § 1692k;
- J) Award the Counter-Plaintiff her costs and reasonable attorney's fees by reason of the Counter-Defendant's violation of the FDCPA pursuant to 15 U.S.C. §§ 1692k;

AS TO THE FIFTH DEFENSE(BREACH OF DUTY OF GOOD FAITH):

- K) Dismiss the Plaintiff's Complaint as to the Counter-Plaintiff FAULKNER as barred by its breach of the duty of good faith;

AS TO ALL DEFENSES. COUNTERCLAIMS AND CROSSCLAIMS:

- L) Include a prayer for any other relief to which the Defendant and Counter-Plaintiff FAULKNER may be authorized under other causes of action; and
- M) Award or allow the Defendant and Counter-Plaintiff FAULKNER such other and further relief as this Court may deem just and proper.


Attorney for Defendant
and Counter-Plaintiff FAULKNER

The Guardian Building
223 East Main Street, Suite 520
Rock Hill, S. C. 29730
Post Office Box 106
Rock Hill, S. C. 29731-6106

803 324-8100
803 324-8109 Fax
jmfooster@comporium.net

December 29, 2017

Rock Hill, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

FIRST CITIZENS BANK &
TRUST COMPANY, INC.,

Plaintiff,

vs.

CERTIFICATE OF SERVICE

LINDA P. FAULKNER
a/k/a Linda Faulkner,
FOUNDERS FEDERAL CREDIT UNION,
and CACH, LLC.,

Civil Case No: 2017-CP-29-00872

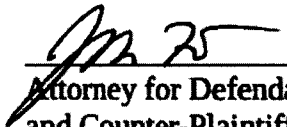
Defendants.]

I certify that I have served the Answer and Counterclaim of Defendant and Counter-Plaintiff Linda P. Faulkner dated December 29, 2017 on the following counselor persons of record:

J. Kershaw Spong
Sowell Gray Robinson Stepp & Lafitte, LLC.
Attorneys for Plaintiff
Post Office Box 11449
Columbia. SC 29211

by causing one (1) copy of the same to be deposited in the United States mail, postage prepaid, on the date set out below, addressed to counselor opposing party's respective last known addressees) as set out above, or, if no address is known, by leaving the same with the Clerk of Court, as indicated above, pursuant to Rule 5(b)(1), S.C.R.C.P.; or

by personally delivering one (1) copy of the same to the said attorney(s) of record at his, her or their office at the address(es) above, on the date set out below.


Attorney for Defendant
and Counter-Plaintiff FAULKNER

The Guardian Building
223 East Main Street, Suite 520
Rock Hill, S. C. 29730
Post Office Box 106
Rock Hill, S. C. 29731-6106

803 324-8100
83 324-8109 Fax
jmfoster@comporium.net

December 29, 2017

Rock Hill, South Carolina

FILED
OFFICE OF CLERK
OF COURT
2018 JAN -2 PM 2:07
CLERK OF COURT
LANCASTER, SC

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

First-Citizens Bank & Trust Company,

Plaintiff,

v.

Linda P. Faulkner a/k/a Linda Faulker,
Founders Federal Credit Union, and
CACH, LLC

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2017-CP-29-00872

REPLY TO COUNTERCLAIM OF
DEFENDANT LINDA P. FAULKNER
A/K/A LINDA FAULKNER

The Plaintiff, in response to the Counterclaims raised in the Answer and Counterclaim of Defendant Linda P. Faulkner dated December 29, 2017 and replies and follows:

FOR A GENERAL DEFENSE

Plaintiff denies each and every allegation of the Defendant Faulkner's Counterclaim not hereinafter expressly admitted, denied, or otherwise addressed or explained.

FOR A FIRST DEFENSE
(STATUTE OF LIMITATIONS)

RECEIVED
FEB 05 2018

1. The previous paragraph is restated and incorporated by reference.
2. On information and belief, Plaintiff admits paragraph 16. As to paragraph 17, Plaintiff asserts that First Citizens Bank & Trust Company is a bank organized under the laws of the State of North Carolina.
3. Responding to paragraphs 18 to 20, the allegations contained therein are statements or conclusions of law to which no response is needed. To the extent a response is deemed needed, the allegations are denied.
4. Responding to paragraph 21, Plaintiff admits it entered into a credit agreement with Defendant Faulkner, the terms of which are set forth in the credit documents, attached to Plaintiff's complaint. Plaintiff denies any and all allegations in the counterclaim which seek to vary the terms

of the credit agreement set forth in the credit documents or that allege Plaintiff violated any state or federal laws.

5. Responding to paragraphs 22 to 25, Plaintiff denies that Defendant Faulkner has a claim under the Truth in Lending Act or Federal Reserve Board Regulation Z.

6. Further responding to paragraphs 22 to 25, Plaintiff asserts that the statute of limitations in 15 U.S.C. § 1640(e) has run on any claim Defendant Faulkner has under the Truth in Lending Act.

FOR A SECOND DEFENSE
(UNFAIR DEBT COLLECTION PRACTICES)

7. The previous paragraphs are restated and incorporated by reference.

8. Responding to the allegations contained in paragraphs 26 through 28, the allegations contained therein are statements or conclusions of law to which no response is needed. To the extent a response is deemed needed, the allegations are denied.

9. Responding to paragraphs 29 to 33, Plaintiff is not a debt collector as defined in the Unfair Debt Collections Act, 15 U.S.C. § 1692(a).

10. Further responding to paragraphs 29 to 33, Plaintiff is without information or belief as to the actions of third-party debt collectors and specifically denies knowledge of any actions that violate the Unfair Debt Collection Practices Act.

FOR A THIRD DEFENSE
(DUTY OF GOOD FAITH)

11. The previous paragraphs are restated and incorporated by reference.

12. Responding to paragraph 39, the allegations contained in paragraph 39 are statements or conclusions of law to which no response is needed. To the extent a response is deemed needed, the allegations are denied.

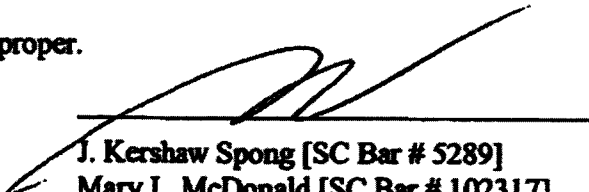
13. Responding to paragraphs 40 to 41, Plaintiff denies any breach of contract and further maintains Defendant Faulkner cannot maintain an action for breach of contract because Defendant Faulkner has not performed her part of the contract or been able, ready, or willing to perform.

14. Further responding to paragraphs 40 to 41, Plaintiff denies any breach of the implied covenant of good faith and fair dealing because, by filing this lawsuit, Plaintiff has simply done what the provisions of the contract expressly gave Plaintiff the right to do. Additionally, Plaintiff has at all times acted in good faith by, among other things, reviewing Defendant Faulkner's application and request for a loan modification, which was ultimately denied.

FOR A FOURTH DEFENSE
(FAILURE TO STATE A CLAIM)

15. Additionally, Defendant Faulkner, through her counterclaims, has failed to state facts sufficient to constitute a cause of action and pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, Plaintiff's claims should be dismissed.

WHEREFORE, having replied to Defendant Faulkner's counterclaims, Plaintiff requests they be dismissed with prejudice, that the prayer of Plaintiff's complaint be granted, foreclosure ordered, and Plaintiff be awarded its attorney's fees and costs of this action, and for such other and further relief the court deems just and proper.



J. Kershaw Spong [SC Bar # 5289]
Mary L. McDonald [SC Bar # 102317]
SOWELL GRAY ROBINSON STEPP & LAFFITTE, LLC
P.O. Box 11449
Columbia, SC 29211
(803) 929-1400
Email: kspong@sowellgray.com
Email: mmcdonald@sowellgray.com

Attorneys for the Plaintiff

Columbia, South Carolina
February 1, 2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER	)	
First-Citizens Bank & Trust Company,	)	CASE NO. 2017-CP-29-00872
	)	
Plaintiff,	)	
	)	
v.	)	CERTIFICATE OF SERVICE
	)	BY MAIL
Linda P. Faulkner a/k/a Linda Faulkner,	)	
Founders Federal Credit Union, and	)	
CACH, LLC,	)	
	)	
Defendants.	)	

This is to certify that I, Melissa H. White, a Paralegal with the law firm of Sowell Gray Robinson Stepp & Laffitte, LLC, have caused to be served upon the persons named below the Reply to Counterclaim of Defendant Linda P. Faulkner a/k/a Linda Faulkner in the foregoing matter by placing copies of same in the United States Mail, postage prepaid, in envelopes addressed as follows:

John Martin Foster, Esquire
Post Office Box 106
Rock Hill, SC 29731

Philip E. Wright, Esquire
Law Office of Philip E. Wright, P.A.
408 North Main Street
Lancaster, SC 29720

Edward H. Overcash, Jr., Esquire
Law Office of Edward H. Overcash, Jr.
37 Villa Road, Suite 507
Greenville, SC 29615

Dated this 1st day of February, 2018 at Columbia, South Carolina.



Melissa H. White

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

First-Citizens Bank & Trust Company

☐ Plaintiff

v.

Linda P. Faulkner a/k/a Linda Faulkner, Founders
Federal Credit Union, and CACH, LLC

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2017-CP-29-00872

MOTION AND ORDER INFORMATION FORM
AND COVER SHEET

Plaintiff's Attorney:

J. Kershaw Spong, Bar No. 5289

Address: 1310 Gadsden Street, PO Box 11449
Columbia, SC 29211

phone: (803) 929-1400 fax: (803) 929-0300

e-mail: kspong@sowellgray.com other:

Defendant's Attorney:

John Martin Foster, Bar No.

Address: Post Office Box 106

Rock Hill, SC 29731-6106

phone: (803) 324-8100 fax: (803) 324-6109

e-mail: jmfoster@comporium.net other:

☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Order of Reference

Estimated Time Needed: 15 minutes Court Reporter Needed: ☐ YES / ☒ NO

SECTION II: Motion Type

☒ Written motion attached

☐ Form Motion/Order --

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

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

January 29, 2018

Date submitted

SECTION III: Motion Fee

☒ **PAID - AMOUNT: \$25.00**

☐ **EXEMPT:** ☐ Rule to Show Cause in Child or Spousal Support

(check reason) ☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ **MOTION FEE COLLECTED:** _____

☐ **CONTESTED - AMOUNT DUE:** _____

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

First-Citizens Bank & Trust Company,

Plaintiff,

v.

Linda P. Faulkner a/k/a Linda Faulkner,
Founders Federal Credit Union, and CACH,
LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2017-CP-29-00872

**PLAINTIFF'S MOTION TO STRIKE
JURY DEMAND OF DEFENDANT
LINDA P. FAULKNER
A/K/A LINDA FAULKNER**

TO: JOHN MARTIN FOSTER, ATTORNEY FOR DEFENDANT LINDA P. FAULKNER
A/K/A LINDA FAULKNER:

Plaintiff moves to strike the jury demand of the Defendant Linda P. Faulkner a/k/a Linda Faulkner. Defendant contractually waived her right to a jury trial. This Motion is based on the verified complaint and exhibits attached thereto, the answer and counterclaim from Defendant and such other and further memoranda as may be submitted.


J. Kershaw Spong [SC Bar # 5289]
SOWELL GRAY ROBINSON STEPP & LAFFITTE, LLC
P.O. Box 11449
Columbia, SC 29211
(803) 929-1400
Email: kspong@sowellgray.com

Attorneys for the Plaintiff

Columbia, South Carolina

January 29, 2018

FILED
JAN 31 AM 11:56
CLERK OF COURT
LANCASTER COUNTY
SOUTH CAROLINA

TATE OF SOUTH CAROLINA	)	
COUNTY OF LANCASTER	)	IN THE COURT OF COMMON PLEAS
First-Citizens Bank & Trust Company,	)	Case No. 2017-CP-29-00872
Plaintiff,	)	
v.	)	ORDER
Linda P. Faulkner a/k/a Linda Faulkner,	)	(Striking Jury Demand)
Founders Federal Credit Union, and	)	
CACH, LLC,	)	
Defendants.	)	

Upon motion of Plaintiff, it is hereby

ORDERED that the jury demand of Defendant Linda P. Faulkner a/k/a Linda Faulkner is stricken due to the contractual waiver of a right to a jury trial in the loan documents. Wachovia Bank v. Blackburn, 407 S.C. 321, 755 S.E.2d 437 (2014).

IT IS SO ORDERED.

Presiding Judge
Sixth Judicial Circuit

Lancaster, South Carolina.

_____, 2018

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

First-Citizens Bank & Trust Company,

Plaintiff,

v.

Linda P. Faulkner a/k/a Linda Faulkner,
Founders Federal Credit Union, and CACH,
LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No.: 2017-CP-29-00872

CERTIFICATE OF SERVICE BY MAIL

This is to certify that I, Melissa H. White, a Paralegal with the law firm of Sowell Gray Robinson Stepp & Laffitte, LLC, have this day caused to be served upon the person(s) named below ~~Plaintiff's Motion To Strike Jury Demand~~ in the foregoing matter by placing copies of same in the United States Mail, postage prepaid, in envelope(s) addressed as follows:

John Martin Foster, Esquire
Post Office Box 106
Rock Hill, SC 29731

Philip E. Wright, Esquire
Law Office of Philip E. Wright, P.A.
408 North Main Street
Lancaster, SC 29720

Edward H. Overcash, Jr., Esquire
Law Office of Edward H. Overcash, Jr.
37 Villa Road, Suite 507
Greenville, SC 29615

FILED
JAN 31 AM 11:56
CLERK OF COURT
LANCASTER COUNTY, SC

Dated at Columbia, South Carolina this 29th day of January, 2018.


Melissa H. White

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

First-Citizens Bank & Trust Company

☐ Plaintiff

v.

Linda P. Faulkner a/k/a Linda Faulkner, Founders
Federal Credit Union, and CACH, LLC

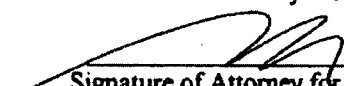
☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2017-CP-29-00872

MOTION AND ORDER INFORMATION FORM
AND COVER SHEET

Plaintiff's Attorney: J. Kershaw Spong, Bar No. 5289 Address: 1310 Gadsden Street, PO Box 11449 Columbia, SC 29211 phone: (803) 929-1400 fax: (803) 929-0300 e-mail: kspong@sowellgray.com other:		Defendant's Attorney: John Martin Foster, Bar No. Address: Post Office Box 106 Rock Hill, SC 29731-6106 phone: (803) 324-8100 fax: (803) 324-6109 e-mail: jmfoster@comporium.net other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Motion to Strike Jury Demand Estimated Time Needed: 15 minutes Court Reporter Needed: ☐ YES / ☒ NO			
SECTION II: Motion Type			
☒ Written motion attached ☐ Form Motion/Order -- I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for ☒ Plaintiff / ☐ Defendant		January 29, 2018 Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE CODE: _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____		Date Filed: _____	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

First-Citizens Bank & Trust Company,

Plaintiff,

v.

Linda P. Faulkner a/k/a Linda Faulkner,
Founders Federal Credit Union, and
CACH, LLC,

Defendants.

)
) IN THE COURT OF COMMON PLEAS
)

) Case No. 2017-CP-29-00872
)
)

) **MOTION FOR**
) **ORDER OF REFERENCE**
)
)
)

The Plaintiff hereby moves pursuant to Rules 53 and 71, SCRPC, to refer the above
foreclosure action to William C. Tindal as Special Referee for Lancaster or such other Special
Referee as the Court deems proper.


J. Kershaw Spong [SC Bar # 5289]
SOWELL GRAY ROBINSON STEPP & LAFFITTE, LLC
P.O. Box 11449
Columbia, SC 29211
(803) 929-1400
Email: kspong@sowellgray.com

Attorneys for Plaintiff

Columbia, South Carolina

January 29th, 2018

FILED - 2 PM 3:18
LANCASTER, SC

STATE OF SOUTH CAROLINA)

COUNTY OF LANCASTER)

First-Citizens Bank & Trust Company,)

Plaintiff,)

v.)

Linda P. Faulkner a/k/a Linda Faulkner,)
Founders Federal Credit Union, and)
CACH, LLC,)

Defendants.)

IN THE COURT OF COMMON PLEAS

Case No. 2017-CP-29-00872

**ORDER OF REFERENCE
AND SETTING COMPENSATION OF
SPECIAL REFEREE
(Foreclosure)**

IT APPEARING that the above entitled action for foreclosure of a mortgage on real property situated in Lancaster County, South Carolina, is a proper matter to refer to William C. Tindal, as Special Referee; therefore, upon motion of J. Kershaw Spong, Esquire of the law firm of Sowell Gray Robinson Stepp & Laffitte, LLC, attorneys for Plaintiff, it is

ORDERED that the above entitled action be, and the same hereby is, referred to William C. Tindal, as Special Referee to make findings of fact and conclusions of law; dispose of any and all issues and enter a final judgment in the case; order a judicial sale on any day, not just the regular judicial sale day; hear and dispose of any issues after sale or judgment, including, but not limited to, issuance of a Writ of Assistance and any issues involving appraisal under Code Section 29-3-680, et seq.

Any appeal from the decision of the Special Referee shall be made directly to the Appellate Court, as provided in Rule 203, SCACR.

The Court is further informed that the custom and usage of the Lancaster County Bar is to allow a fee of Two Hundred and 00/100 Dollars (\$200.00) in routine default foreclosures plus the fee allowed by Subsection 15-39-770 and Section 14-11-310 of the 1976 Code of Laws of South Carolina if sold by the Special Referee.

NOW, THEREFORE, pursuant to Rule 53(d) of the South Carolina Rules of Civil Procedure, it is FURTHER ORDERED that the Plaintiff pay to William C. Tindal, Special Referee, the sum of Two Hundred and 00/100 Dollars (\$200.00), plus the one (1%) percent of the gross sale price up to a maximum of Two Thousand Five Hundred and 00/100 Dollars (\$2,500.00), as allowed by Subsection 15-39-770 and Section 14-11-310, if sold by the Special Referee.

IT IS SO ORDERED.

Presiding Judge
Sixth Judicial Circuit

Lancaster, South Carolina.

_____, 2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER	)	
First-Citizens Bank & Trust Company,	)	CASE NO. 2017-CP-29-00872
	)	
Plaintiff,	)	
	)	
v.	)	CERTIFICATE OF SERVICE
	)	BY MAIL
Linda P. Faulkner a/k/a Linda Faulkner,	)	
Founders Federal Credit Union, and	)	
CACH, LLC,	)	
	)	
Defendants.	)	

This is to certify that I, Melissa H. White, a Paralegal with the law firm of Robinson, McFadden & Moore, P.C., have caused to be served upon the persons named below Plaintiff's Motion for Order of Reference in the foregoing matter by placing copies of same in the United States Mail, postage prepaid, in envelopes addressed as follows:

John Martin Foster, Esquire
Post Office Box 106
Rock Hill, SC 29731

Philip E. Wright, Esquire
Law Office of Philip E. Wright, P.A.
408 North Main Street
Lancaster, SC 29720

Edward H. Overcash, Jr., Esquire
Law Office of Edward H. Overcash, Jr.
37 Villa Road, Suite 507
Greenville, SC 29615

FILED
JAN 31 2018
CLERK OF COURT
LANCASTER, SC

Dated this 29th day of January, 2018 at Columbia, South Carolina.



Melissa H. White



**SOWELL GRAY
ROBINSON**

Litigation + Business

J. KERSHAW SPONG

DIRECT 803 227.1101 DIRECT FAX 803 744.1543

kspong@sowellgray.com

January 29, 2018

The Honorable Jeff L. Hammond
Lancaster County Clerk of Court
Post Office Box 1809
Lancaster, SC 29721-1809

Re: First-Citizens Bank & Trust Company v. Linda P. Faulkner a/k/a Linda
Faulkner, Founders Federal Credit Union, and CACH, LLC
Case No. 2017-CP-29-00872
Our File No. 30935-0023

Dear Mr. Hammond:

Enclosed for filing please find the following:

1. Motion for Order of Reference, Certificate of Service, Motion form,
proposed Order, and \$25.00 filing fee;
2. Motion to Strike Jury Demand, Certificate of Service, Motion form, proposed
Order, and \$25.00 filing fee; and
3. Affidavit of Default as to Defendant CACH, LLC.

Please file same and return clocked copies in the envelope provided.

Thank you for your assistance in this matter.

Sincerely,

SOWELL GRAY ROBINSON STEPP & LAFFITTE, LLC



J. Kershaw Spong

/mhw

Enclosures

1

2

1

1

1

1

1

1

1

—

1

1

1

1

1

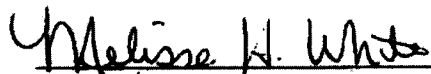
1

1



J. Kershaw Spong [SC Bar # 5289]
SOWELL GRAY ROBINSON STEPP & LAFFITTE, LLC
P.O. Box 11449
Columbia, SC 29211
(803) 929-1400
Email: kspong@sowellgray.com

SWORN to before me this
29th day of January, 2018.

 (L.S.)
Name: Melissa H. White
Notary Public for South Carolina
My Commission Expires: 10/16/19

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

FIRST CITIZENS BANK &
TRUST COMPANY, INC.,

Plaintiff,

vs.

LINDA P. FAULKNER
a/k/a Linda Faulkner,
FOUNDERS FEDERAL CREDIT UNION,
and CACH, LLC.,

Defendants.

NOTICE and MOTION:
TO ALTER OR AMEND JUDGMENT

Pursuant to:
RULE 59(a), S.C.R.C.P.

C.A. No: 2017-CP-29-00872

FILED
OFFICE OF CLERK
OF COURT
2018 FEB 22 PM 1:44
CLERK OF COURT
LANCASTER, SC

To: J. Kershaw Spong
Sowell Gray Robinson Stepp & Lafitte, LLC.
Attorneys for Plaintiff
Post Office Box 11449
Columbia, SC 29211

You or your attorney should appear before this Court to present evidence or argument, if any you have, relating to the Motion herein, as follows:

DATE AND TIME: To be set by the Clerk of the Court, or as soon thereafter as counsel may be heard.

PLACE: Lancaster County Courthouse
104 North Main Street
Lancaster, South Carolina 29720,
or at such other place as the Court or Clerk may designate

Pursuant to Rule 59, S.C.R.C.P., the Defendant FAULKNER, by and through her attorney, moves this Court:

For an Order reopening the Orders dated January 31, 2018 and February 2, 2018 respectively received by the Defendant on February 9, 2018, amending the findings of fact and conclusions of law or making new findings and conclusions, and directing the entry of a new Order; and

For such other and further relief as this Court may deem just and proper.

on the grounds that the Order of the Court is contrary to law and the evidence as proven at trial, on the following bases:

1. The Defendant FAULKNER has raised defenses to this Foreclosure action which are, respectively, permissive and mandatory in nature. *See, e.g., Gardner v. Travis*, 316 S.C. 315, 450 S.E.2d 54, (Ct.App. 1994). She is entitled to a jury trial as to those defenses and the Order striking her jury demand is improper to that extent.
2. For the same reason, the Order referring the case is improper for the above reason, and due to the lack of a motion or agreement by counsel for the Movant.
3. With respect to the Court, the said Motions were decided without notice to counsel for Movant and without the opportunity to be heard.

Counsel for the Movant is not required to attempt in good faith to resolve the matter contained in this Motion by reason of the dispositive nature thereof and due to the *pro se* status of the Plaintiff.

The basis for this Motion is the applicable law and rules of procedure, the above-cited Rules and Statutes, the records of these civil actions, and any Supporting Memorandum which the Movants may submit herein.

Respectfully submitted,



John Martin Foster
Attorney for Defendant

The Guardian Building
223 East Main Street, Suite 520
Rock Hill, SC 29730

Post Office Box 106
Rock Hill, SC 29731-6109

803 324-8100
803-324-8109: Fax
jmfoster@comporium.net

February 20, 2018

Rock Hill, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

FIRST CITIZENS BANK &
TRUST COMPANY, INC.,

Plaintiff,

vs.

LINDA P. FAULKNER
a/k/a Linda Faulkner,
FOUNDERS FEDERAL CREDIT UNION,
and CACH, LLC.,

Defendants.

CERTIFICATE OF SERVICE

C.A. No: 2017-CP-29-00872

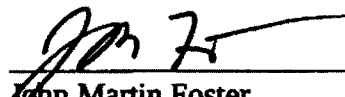
The undersigned, counsel for Defendant FAULKNER in the civil action above, hereby certifies that on February 20, 2018 he served copies of the following pleadings or documents in the above-captioned and numbered civil action, the original of which were sent to be filed with the Clerk of the Court for the Court named above,:

Notice and Motion to Alter or Amend Judgment Pursuant to Rule 59(a), S.C.R.C.P.; and
This Certificate of Service

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; or if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 6(b), S.C.R.C.P.

J. Kershaw Spong
Sowell Gray Robinson Stepp & Lafitte, LLC.
Attorneys for Plaintiff
Post Office Box 11449
Columbia. SC 29211


John Martin Foster
Attorney for Defendant FAULKNER
The Guardian Building
223 East Main Street, Suite 520
Rock Hill, SC 29730
Post Office Box 106
Rock Hill, SC 29731-6109
803 324-8100
803-324-8109: Fax
jmfoster@comporium.net

February 20, 2018

Rock Hill, South Carolina

FILED
OFFICE OF CLERK
OF COURT
2018 FEB 22 PM 1:44
CLERK OF COURT
LANCASTER, SC

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

FIRST CITIZENS BANK &
TRUST COMPANY, INC.,

Plaintiff,

vs.

LINDA P. FAULKNER
a/k/a Linda Faulkner,
FOUNDERS FEDERAL CREDIT UNION,
and CACH, LLC.,

Defendants.

IN THE COURT OF COMMON PLEAS

SIXTH JUDICIAL CIRCUIT

MEMORANDUM ON MOTION:
TO ALTER OR AMEND JUDGMENT

Pursuant to:
RULE 59(a), S.C.R.C.P.

C.A. No: 2017-CP-29-00872

PROCEDURAL BACKGROUND

On January 2, 2018, the Defendant LINDA FAULKNER filed her Answer and Counterclaim in this foreclosure action. This pleading advanced claims of express and implied waiver by reason of accepting payments, Truth in Lending violations, violations of the Fair Debt Collections Act, and breach of good faith. She requested a jury trial.

On February 9, 2018, counsel for FAULKNER received simultaneously a Motion to Strike the Jury Demand (dated January 29, 2018) and the Order granting that Motion (dated January 31, 2018). No previous communication was received and no hearing was noticed for the Motion.

The Plaintiff asserts that its Motion to refer the case to a Special Referee was also made January 29, 2018 and granted.

On February 20, 2018, FAULKNER served her Motion under Rule 59, S.C.R.C.P. to set aside the Order striking the jury request.

ANALYSIS

The Plaintiff accurately cites the law as stated in *Wachovia Bank National Association v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014). Our Supreme Court there set out the controlling law

as to jury trial requests:

- “(1) If both the complaint and the counterclaim are in equity, the entire matter is triable by the court.
- “(2) If both are at law, the issues are triable by a jury.
- “(3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.
- “(4) If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim. . . .”

407 S.C. at 329-30, 755 S.E.2d at 441.

Compulsory counterclaims are clearly defined in Rule 13(a), S.C.R.C.P., which states in relevant part:

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

The rule as here stated obviously covers the claims of waiver, the TILA violation claim and the claim of bad faith, all of which arose out of the mortgage and its administration by the Plaintiff.

The Defendant FAULKNER has raised defenses to this Foreclosure action which are, respectively, permissive and mandatory in nature. *See, e.g., Gardner v. Travis*, 316 S.C. 315, 450 S.E.2d 54, (Ct.App. 1994). She is entitled to a jury trial as to those defenses and the Order striking her jury demand is improper to that extent.

FAULKNER claims express and implied waiver based upon the Plaintiffs draft of payments from 2011 through 2016, and after maturity of the debt. This Court can take notice that this is the second attempt at foreclosure on the part of the Plaintiff. Its previous action, filed as Civil Case No:

2014-CP-29-00954, was subject to the same defense and was dropped by the Plaintiff.

Equitable estoppel or waiver is a mixed question of law and fact. *Southern Railway-Carolina Div. v. Howell*, 89 S.C. 391, 71 S.E. 972 (1911); 28 AM.JUR.2D *Estoppel and Waiver* § 149 (1994). It is firmly settled that the question of the existence of an estoppel or waiver is to be settled by the trier of fact where there is a dispute as to the facts involving those doctrines. *Southern R. Co. v. Day*, 140 S.C. 388, 138 S.E. 870 (1926); 28 AM.JUR.2D *Estoppel and Waiver* § 149 (1994).

On the TILA claim, FAULKNER would note that 15 U.S.C. § 1640(e) specifically provides:

This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law.

In this case, FAULKNER has plead her TILA claims as a set-off.

The Georgia Court of Appeals, in *Aycock v. Household Finance Corp. of Georgia*, 142 Ga.App. 207, 235 S.E.2d 578 (1977), in line with other Courts which have dealt with the issue, found that in a suit on a debt any truth-in-lending claims must be raised as compulsory counterclaims. Here, FAULKNER has so raised the issue.

FAULKNER contends that the alleged TILA violations, insofar as they plead for monetary damages and are dependent upon statutory interpretation, are legal in nature.

Finally and in general terms, the Orders striking the jury request and referring the case are improper as entered with out proper notice or hearing.

REMEDIES

Allowing that FAULKNER has timely advanced compulsory defenses and counterclaims to the equitable claim for foreclosure, i.e., Number 4 in the list of possibilities set out in *Wachovia Bank National Association v. Blackburn*, *supra*. The same case sets out specific parameters for the Court in trying such matters:

(a) The trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.

(b) If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.

(c) If the claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the equitable claims, but the jury's determination of common factual issues shall be binding upon the court.

The Movant would only comment that her defenses and Counterclaims must, in logic, be decided prior to the issuance of any order that might allow the Plaintiff the relief of a foreclosure. How this Court wishes to organize that result is a matter for its discretion.

Respectfully submitted,

/s/ John Martin Foster

Attorney for Defendant LINDA P. FAULKNER

The Guardian Building
223 East Main Street, Suite 520
Rock Hill, SC 29730

Post Office Box 106
Rock Hill, SC 29731-6109

803 324-8100
803-324-8109: Fax
jmfoster@comporium.net

September 24, 2018

Rock Hill, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER	)	
First-Citizens Bank & Trust Company,	)	CASE NO. 2017-CP-29-00872
	)	
Plaintiff,	)	
	)	
v.	)	PLAINTIFF'S RESPONSE IN
	)	OPPOSITION TO DEFENDANT'S
Linda P. Faulkner a/k/a Linda Faulkner,	)	MOTION TO ALTER OR AMEND
Founders Federal Credit Union, and	)	JUDGMENT
CACH, LLC,	)	
	)	
Defendants.	)	

Pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, the Defendant Linda P. Faulkner moved to alter or amend this Court's order, dated January 31, 2018, striking the Faulkner's jury demand and this Court's order, dated February 2, 2018, referring this foreclosure action to William C. Tindal as Special Referee. Faulkner argued altering the Orders is appropriate because she (1) is entitled to a jury trial as to certain defenses and (2) it was improper to refer this case to a Master in Equity or Special Referee. Faulkner's arguments are flawed, and it is not necessary for this Court to Alter or Amend the two Orders.

BACKGROUND

Plaintiff, First-Citizens Bank & Trust Company ("FCB") filed a summons and complaint on August 9, 2017, seeking for foreclose on two mortgages given by Faulkner to First Citizens Bank and Trust Company, Inc., to which FCB is a successor in interest. The first mortgage was executed in 2005, and the second mortgage was executed in 2010.

Defendant Faulkner filed an "Answer and Counterclaim Jury Trial Demanded" on December 29, 2017, which Plaintiff received on January 3, 2018.¹ As defenses to the complaint,

¹ As to the other defendants, Founders Federal Credit Union filed an Answer on August 22, 2017, admitting it is the holder of an unpaid judgment and asking the Court for notice of proceedings going forward. CACH, LLC filed no

Faulkner alleged FCB expressly waived any claim of default under "said mortgage;"² FCB's actions created an implied waiver of any claim of default under "said mortgage;" FCB violated the Truth in Lending Act, 15 U.S.C. § 1601 *et al.*, and Federal Reserve Board Regulation Z, 12 C.F.R. § 226, and FCB is liable to Faulkner for damages from this violation; third parties hired by FCB violated the Unfair Debt Collection Act, 15 U.S.C. § 1692 *et al.*; and FCB breached a duty of good faith to Faulkner.

FCB filed a Reply to Counterclaim, denying every defense not expressly admitted, arguing the statute of limitations precludes Faulkner from asserting a counter-claim under the Truth in Lending Act; asserting FCB does not meet the definition of debt collector in the Unfair Debt Collections Act and has no knowledge of the actions of third parties; denying any breach of a covenant of good faith and fair dealing; and claiming Faulkner failed to state facts to support any cause of action and asking the Court to dismiss Faulkner's claims pursuant to Rule 12(b)(6).

On January 29, 2018, FCB moved for the case to be referred to a Special Referee and on January 31, 2018, FCB moved to strike Faulkner's jury demand. The Court granted both motions. On February 20, 2018, Faulkner moved to alter or amend both motions.

ANALYSIS

This Court's orders striking Faulkner's demand for a jury trial and referring the matter to the Special Referee were proper. The order striking Faulkner's demand for a jury trial was proper because the matter is a foreclosure case where the counter-claims are not mandatory counter-claims. The order referring the matter to the Special Referee is proper because the Court complied with Rules 53 and 70 of the South Carolina Rules of Civil Procedure.

Answer in the case and on January 29, 2018, J. Kershaw Spong, attorney for FCB, filed an Affidavit of Default with respect to CACH, LLC.

² It is unclear from the document which mortgage Faulkner is referring to.

1. Order Striking Demand for Jury Trial

A foreclosure action is in equity, so the parties are not entitled to a jury trial. *Wachovia Bank National Association v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014).

However, counterclaims may be entitled to a jury trial. As the court explained in *Blackburn*:

- (1) If both the complaint and counterclaim are in equity, the entire matter is triable by the court.
- (2) If both are at law, the issues are triable by a jury.
- (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.
- (4) If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim unless a valid jury trial waiver exists that encompasses the counterclaim

407 S.C. at 329-30, 755 S.E.2d at 441-42.

Faulkner does not specify which of her defenses she considers counter-claims. A defense is “a defense to each cause of action asserted.” Rule 8, SCRC. A counter-claim shows “the pleader is entitled to relief” and includes a “prayer or demand for judgment for the relief.” Rule 8, SCRC. Going through what Faulkner labels defenses: waiver, implied waiver, and breach of duty of good faith³ are defenses and not counter-claims. Each of these defenses provide why Faulkner believes FCB cannot recover against her, not an argument as to why Faulkner is entitled to relief. See *First South Bank v. Rosenberg*, 418 S.C. 170, 183-84, 790 S.E.2d 919, 926-27 (Ct. App. 2016) (comparing defenses to counter-claims and determining negligence and breach of contract were both counter-claims). In her prayer for relief for all three defenses, Faulkner only asks the Court to dismiss the claims of FCB against Faulkner.

Additionally, Faulkner’s Truth in Lending Act allegations must be classified as a defense and not a counter-claim. Under the Truth in Lending Act, a claim for violation of the Act may

³ In the event this Court finds breach of the duty of good faith to be a counter-claim, FCB believes it to be a permissive, not a compulsory counter-claim. Faulkner could bring a breach of contract action separate from this foreclosure action.

only be brought “within one year from the date of the occurrence of the violation.” 15 U.S.C. § 1640(e). Faulkner claims FCB’s violation of the Truth in Lending Act occurred in March 2008, ten years ago. (Def’s Ans. & Counter-Claim ¶ 21). So, Faulkner cannot assert a counter-claim for a violation of the Truth in Lending Act. However, in a foreclosure action, “a consumer may assert a violation by a creditor” of certain parts of the Act, “as a matter of defense by recoupment or setoff without regard for the time limit on a private action for damages under subsection (e).” 15 U.S.C. § 1640(k)(1). The statute allowing Faulkner to assert a violation of the Truth in Lending Act defines the assertion as a defense, not a counter-claim. Further, in *Tuloka Affiliates, Inc. v. Moore*, 275 S.C. 199, 202, 268 S.E.2d 293, 295 (1980), the Supreme Court of South Carolina found—prior to the enactment of section 1640(k)(1)—a “defense and counter-claim” under the Act in response to a foreclosure action after the one year statute of limitations had expired was an equitable defense, not a counter-claim. Thus, it is clear Faulkner’s Truth in Lending Act allegations are a defense, equitable in nature, and therefore, no jury trial is appropriate.⁴

Turning to the only counter-claim, Unfair Debt Collection Practices, this counter-claim does not entitle Faulkner to a jury trial. For Faulkner to be entitled to a jury trial, the counter-claim must be legal in nature and compulsory. A claim under the Fair Debt Collection Practices Act is not compulsory. A counterclaim is compulsory only if it “arises out of the same transaction or occurrence as the opposing party’s claims.” Rule 13(a), SCRCP. Faulkner claims a third party employed by FCB violated the Fair Debt Collection Practices Act by contacting Faulkner and her husband when Faulkner had an attorney. These allegations arise out of a separate transaction or occurrence than FCB taking two mortgages to secure two promissory

⁴ Further, even if Faulkner’s allegations are a counter-claim and not a defense, the loan documents at issue in this Case were originated in May 2005 and December 2010. Any claim related to a loan that occurred in March 2008 is from separate transaction or occurrence and thus, not a compulsory counter-claim.

notes given by Faulkner to FCB. Faulkner's interactions with any alleged third party debt collectors have no effect on FCB's right to enforce the note or foreclose on the mortgage.

In *South Carolina Community Bank v. Salon Proz, LLC*, 420 S.C. 89, 800 S.E.2d 488 (Ct. App. 2017), the court of appeals found a claim under the Unfair Trade Practices Act was legal and compulsory because that claim involved the bank's actions in allegedly reneging on promises to restructure or modify the loan being foreclosed on. As the court noted "[w]ere this allegation true, it could affect the loan's enforceability." 420 S.C. at 97, 408 S.E.2d at 492. In contract, Faulkner is alleging the actions of third party debt collectors violated the Fair Debt Collection Practices Act and these actions have no bearing on the enforceability of the either promissory note secured by the mortgages.

2. Order Referring the Case to the Special Referee

The order referring the case to the Special Referee was appropriate because "[a]ctions to foreclose liens . . . shall ordinarily be referred to a master pursuant to Rule 53" of the South Carolina Rules of Civil Procedure. Rule 70(a), SCRPC. Rule 53(b) provides: "In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit court judge or the clerk of court." Here, after striking the jury demand made by Faulkner, the court referred a foreclosure action to a special referee. This is consistent with its powers under the Rules of Civil Procedure.

Further, Faulkner argues the Order was not proper because she is entitled to a jury trial. However, as discussed above, this is not the case. None of Faulkner's defenses or counter-claims entitle her to a jury trial.

CONCLUSION

For the reasons discussed above, this Court should deny Faulkner's Rule 59 motion to reopen the Order Striking Demand for Jury Trial and the Order Referring the Case to a Special Referee.

J. Kershaw Spong [SC Bar # 5289]
Mary L. McDonald [SC Bar #102317]
SOWELL GRAY ROBINSON STEPP & LAFFITTE, LLC
P.O. Box 11449
Columbia, SC 29211
(803) 929-1400
Email: kspong@sowellgray.com
mmcdonald@sowellgray.com

Attorneys for Plaintiff

Columbia, South Carolina

March 14, 2018

1 THE COURT: All right. Gentlemen, I have the
2 pleadings. I know I told y'all to bring everything I need
3 so if y'all want to hand up everything you can. I think I
4 have everything, including the motion, my law clerk had it.
5 Anyway, this is docket 17-CP-29-872, styled First Citizens
6 Bank and Trust Company versus Linda Faulkner, also known as
7 Linda Faulkner, Founders Federal Credit Union and CACH, LLC.
8 It appears to be a foreclosure action lis pendens that was
9 filed back on August 9th of 2017. An answer and
10 counterclaim was filed by Ms. Faulkner by and through her
11 attorney, Mr. John Martin Foster, where he raises a number
12 of defenses including some counterclaims. By previous order
13 of this Court I struck the jury trial demand. There was a
14 reference order customarily signed by the clerk of court and
15 a motion was timely filed, it appears, by Mr. Foster to
16 alter or amend the order of reference, and I believe that is
17 what we're here for. Gentleman, is that correct?

18 MR. FOSTER: Yes to my understanding.

19 THE COURT: Is that correct?

20 MR. SPONG: Yes, sir, Your Honor.

21 THE COURT: All right. Well, Mr. Foster, it's your
22 motion, I will be glad to hear from you first. If you wish
23 to hand up any additional materials I'll be glad to receive
24 it.

25 MR. FOSTER: We had emailed my brief yesterday, we do

1 have the cases if I could hand this up to you and your
2 clerk.

3 THE COURT: Yes, sir.

4 MR. FOSTER: Your Honor, I'll try to be brief on the
5 matter. Basically the Court has already addressed the
6 procedural background on the matter. Mr. Spong accurately
7 quotes the law on this matter out of Wachovia Bank National.
8 And what we're dealing with in my understanding here is the
9 fourth prong, or the four possibility among the various
10 things that that case set forward which says basically, and
11 we've put it here, if the complaint is equitable and the
12 counterclaim is legal and compulsory the plaintiff or the
13 defendant has the right to a jury trial. So there are two
14 prongs that I suggest we meet on the basis of that matter.
15 We believe that our cases are compulsory -- our defenses are
16 compulsory and that they are legal. On compulsory I don't
17 spend a lot of time. We quote the Rule 13A, the matter
18 arising out of the same transaction or occurrence. I would
19 maintain that all of our defenses in question waiver
20 explicit or implied truth in lending and bad faith, or
21 breach of good faith, certainly arise out of same the
22 transaction. I will allow for the purpose of this argument
23 that a violation as alleged of the Fair Debt Collection
24 Practice Act could be conceived as not doing so, so I don't
25 address that. Assuming therefore that I meet the standards

1 for compulsory the question becomes are these defenses
2 legal. Well, on waiver we have cited several South Carolina
3 cases, some of them are the controlling cases in this
4 country according to American Jurisprudence, that basically
5 say waiver is a mixed question of law and fact, yet the
6 question of fact is for the trier of fact. It is for the
7 jury if the jury is raised. On that basis we are saying
8 waiver, or implied waiver, is a question that we have the
9 right to a jury trial on. I can dance around that issue but
10 that's basically what we understand the precedent to
11 indicate and what we believe to be the case hear. On the
12 truth and lending claim, and I possibly went outside the
13 nature of this argument because counsel has ably raised the
14 question of the fact that we have raised it after one year
15 and as a set-off, we have cited the federal statute allowing
16 us to do this. We're talking here about a statutory damage
17 and the interpretation of the statute. I can't conceive how
18 anything could be for more of a legal issue than this. We
19 have cited a case out of the Georgia Court of Appeals which
20 said that a truth in lending claim is a compulsory
21 counterclaim, once again backing up our claim. Beyond this,
22 Your Honor, assuming that the bad faith matter can be
23 debated at this point, I would return briefly to the
24 question of waiver. We have alleged that from 2011 to 2016
25 and after the note came due the bank continued to draft and

1 receive payments from my client. This point was brought up
2 before this Court in a previous action to foreclose this
3 matter, we have cited the case number here. In that case I
4 was the attorney. In that case we also raised the issue of
5 waiver and pled the fact that they had continued to take
6 payments. That case was dropped. There was an attempt to
7 return the money. I will freely admit that money sits and
8 the check uncashed in my bank -- in my case file. That
9 would raise the question I suppose if we're going to get off
10 on that angle of whether one can un-waive a matter. We
11 maintain this course of behavior, taking the money and then
12 dropping an earlier case, certainly shows the basis for a
13 colorable claim of waiver, not of the debt, we're not
14 disputing that but of the right to foreclose in this
15 instance. And as a matter of fact it raises a legal
16 question both under the doctrines of waiver and under the
17 doctrine of bad faith.

18 THE COURT: Is the issue of a jury trial still before
19 the Court, was that part of your motion as well?

20 MR. FOSTER: That is my understanding the basis of the
21 motion. We're basically saying that the Court struck,
22 indeed that is exactly what the Court did do, it issued an
23 order striking the jury demand. Now, let me go on, sir, if
24 I'm not interrupting or --

25 THE COURT: Yes, sir, go ahead.

1 MR. FOSTER: Wachovia Bank goes on to discuss what the
2 Court should do in this instance. It can try everything
3 together, it can separate the issues. We literally have no
4 position on what the Court wishes to do in that case. I
5 would point out that if we succeed on waiver that directly
6 affects the relief which the plaintiff seeks, therefore it
7 would seem to me logically that that question is prior to
8 any matter of foreclosure. But how this Court wishes to
9 structure this case, assuming it takes my arguments to be
10 what they are, is something we leave completely to this
11 Court. As I say, we've cited the language from Wachovia
12 where this is set out. Beyond that, sir, we have handed up
13 the cases that we've discussed in the brief. I have nothing
14 further at this point unless the Court I'll immediately
15 raise the question for, and I'm happy to turn things over to
16 Mr. Spong.

17 THE COURT: All right. Thank you, Mr. Foster. Yes,
18 sir?

19 MR. SPONG: Good morning, Your Honor, thank you for
20 accommodating us over here. My name is Kerk Spong from
21 Columbia. I'm with Robinson Gray, formerly known as Sowell,
22 Gray and Robinson, formerly know as Robinson, McFadden and
23 Morris, such is the state of practicing law now a days. I'm
24 happy to be here and glad to see my good friend, Martin
25 Foster. You know, I listened to Mr. Foster talk about some

1 of the history of the case, which is really not in evidence,
2 Judge, and I just sort of just say that no good deed goes
3 unpunished. We have been trying to work with the Faulkners
4 for some time when we filed this foreclosure action. Of
5 course, we entertained and considered loan modifications
6 through that process, and unfortunately given their
7 financial situation it's just not something that the bank
8 could do so we're back here at foreclosure. Mr. Foster
9 raises, I think, some interesting issues, however we're in
10 agreement, I believe, Judge, the Wachovia Blackburn case,
11 which you've got to look at, that's what's going to decide
12 what's here. I think the reference is proper. There's no
13 right to a jury trial in an equity action and a foreclosure,
14 the Court was proper to strike that and it was proper to
15 refer it to Mr. Tindal over in Lancaster. And, of course,
16 Judge, you referred that, I think, back in the first part of
17 the year, you know, and now we're here and getting close to
18 October and I'm still trying to move the case forward. So
19 Judge, Mr. Foster's arguments dealing with waiver and
20 implied waiver, these are defenses that he's raised. A
21 defense to a foreclosure action doesn't create a legal basis
22 for a jury trial, and so those cases -- the waiver is an
23 equitable remedy. I was just looking through this South
24 Carolina Equity Action book, glad to hand it up to the
25 Court, but it talks about waiver. Waiver is an equitable

1 matter, waiver is an affirmative defense, waiver is the
2 burden of proof. It talks on. Waiver should not be used as
3 an offensive weapon, but rather should be used as a shield
4 as an affirmative defense to claims or counterclaims. And
5 that's what -- I'm not arguing -- he can argue waiver,
6 that's merits, because as a procedural matter as just a
7 defense to the foreclosure action it does not create a right
8 to a jury trial. It's a defense that he can assert, or
9 really any of the defenses. He has to -- to get under the
10 Wachovia matrix or analysis he's got to allege a
11 counterclaim, and it's difficult from determining from his
12 answer what he's done, but waiver is not a counterclaim,
13 it's a defense and does not create a right. And the same
14 with the implied waiver. Now, he does have some additional
15 defenses which frankly I'll just assume that they're
16 counterclaims under the complaint. One is the Truth in
17 Lending Act. And Mr. Foster acknowledges that to bring an
18 action under the Truth in Lending Act as an affirmative
19 claim has to be brought within one year, and that's
20 established under 15-16-40 of the federal statute, and I
21 cite that in my memo, Your Honor. These loans are 2005 and
22 2010, so we're way past a year where you can bring a truth
23 in lending violation. Now he can assert them as a set off
24 or recoup, and there's a South Carolina case which discusses
25 how you can continue and the statute allows you to assert it

1 as a defense. But again, Your Honor, at that point once
2 you're past a one year statute of limitations you're talking
3 about a defense, and so that again does not create a
4 counterclaim upon which there's any basis to assert a jury
5 trial. Your Honor, in addition under the Unfair Debt
6 Collection Act, he's alleging in the complaint -- or excuse
7 me, in his answer that somehow, you know, some unfair
8 collection practices were inflicted upon his client in
9 violating that statute. Your Honor, any allegations
10 regarding -- or excuse me, the allegations regarding that
11 really are not tied to whether you can enforce the note or
12 mortgage, and that's really what the Court is looking at in
13 terms of whether it's a compulsory counterclaim. So in this
14 instance because you're dealing with collection practices
15 that occurred years after the note and mortgage were agreed
16 to is really a permissive counterclaim. So he can sue us in
17 that, he could seek a jury trial if he wanted to sue us, but
18 he chose to raise it as a defense in this action and is
19 permissive and therefore under all of those defenses or
20 counterclaims, however you want to assert them, there is no
21 right to a jury trial in this situation, Your Honor. Thank
22 you very much.

23 THE COURT: All right. Thank you. Mr. Foster?

24 MR. FOSTER: May I briefly respond?

25 THE COURT: Yes, sir.

1 MR. FOSTER: First of all let me say, counsel's
2 argument, as I understand it, comes from this: He believes
3 there is a distinction to be made under Wachovia Bank
4 between defenses and counterclaims, I am aware of no such
5 precedent. I'm aware of no such basis for distinction. As
6 to the history of the bank's action, the case I refer to and
7 cite in our brief is part of this Court's record, this Court
8 in Lancaster and as such can be taken judicial notice of.
9 Beyond that I refer the Court to the cases we've said, I can
10 only repeat myself at the risk of trying the patience of the
11 court, waiver is a mixed question period. That's what South
12 Carolina cases have said, that's what American Jurisprudence
13 Second says, that's it. That's all I have to say.

14 THE COURT: All right. Thank you. Anything else?

15 MR. SPONG: No, sir, Your Honor.

16 THE COURT: Thank you. Gentlemen, what I'm going to
17 do, y'all will have an answer by the end of the day because
18 this thing has been dragging on quite some time. I know
19 we've had several conference calls on it, which is why I
20 wanted to put everything on the record today to have a
21 record of it. And I assure you -- well, you'll have a
22 decision by lunch because I'll take these back -- I don't
23 have anything else on my docket this morning so I'm going to
24 go back downstairs in my office and I will send out an email
25 with instructions for one of you to prepare an order. Okay?

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
In The Circuit Court

Brian Gibbons, Circuit Court Judge
William C. Tindal, Special Referee

Case No. 2017-CP-20-00872

First Citizens Bank & Trust Company,

Respondent,

v.

Linda P. Faulkner a/k/a Linda Faulkner,
Founders Federal Credit Union, and
CACH, LLC,
of whom Linda P. Faulkner is the

Appellant.

RECEIVED
OCT 12 2018
SC Court of Appeals

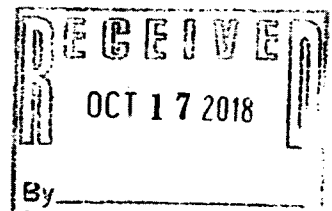
NOTICE OF APPEAL

Linda P. Faulkner appeals the following orders:

Order (Striking Jury Demand) filed January 31, 2018, by the Honorable Brian M. Gibbons;

Order of Reference and Setting Compensation of Special Referee (Foreclosure),
filed February 2, 2018, by the Clerk of Court; and

Order Denying Defendant's Rule 59 Motion to Alter or Amend, filed October 2,
2018, by the Honorable Brian M. Gibbons.



Appellant received written notice of entry of the final Order listed above on October 2, 2018.

October 11, 2018



John Martin Foster
Post Office Box 106
Rock Hill, S.C. 29731-6106
803 324-8100
Attorney for Appellant

Other Counsel of Record:

J. Kershaw Spong
Sowell Gray Robinson Stepp & Lafitte, LLC
P.O. Box 11449
Columbia, S.C. 29211
Attorneys for Respondent
803 929-1400

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
In The Circuit Court

Brian Gibbons, Circuit Court Judge
William C. Tindal, Special Referee

Case No. 2017-CP-20-00872

First Citizens Bank & Trust Company,

Respondent,

v.

Linda P. Faulkner a/k/a Linda Faulkner,
Founders Federal Credit Union, and
CACH, LLC,
of whom Linda P. Faulkner is the

Appellant.

RECEIVED
OCT 12 2018
SC Court of Appeals

PROOF OF SERVICE

I certify that I have served the Notice of Appeal dated October 11, 2018, on the following counsel or persons of record:

J. Kershaw Spong
Sowell Gray Robinson Stepp & Lafitte, LLC
P.O. Box 11449
Columbia, S.C. 29211
Attorneys for Respondent

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out above, pursuant to Rule 262(b), S.C.A.C.R.

October 11, 2018


John Martin Foster
Post Office Box 106
Rock Hill, S. C. 29731-6106
803 324-8100
Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731
(803) 324-8100
Attorney for Appellant

November 8, 2019

RECEIVED
NOV 14 2019
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
In The Circuit Court

Brian Gibbons, Circuit Court Judge
William C. Tindal, Special Referee

Appellate Case No. 2018-001823

RECEIVED
NOV 19 2019
SC Court of Appeals

First Citizens Bank & Trust Company,

Respondent,

v.

Linda P. Faulkner a/k/a Linda Faulkner,
Founders Federal Credit Union, and
CACH, LLC,
of whom Linda P. Faulkner is the

Appellant.

AMENDED PROOF OF SERVICE

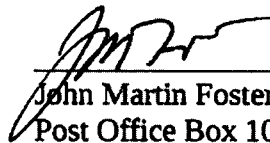
I certify that I have served one (1) copy of the Record on Appeal, on the following party of record:

J. Kershaw Spong
Mary McDonald Campolong
Sowell Gray Robinson Stepp & Lafitte, LLC
Post Office Box 11449
Columbia, SC 29211
Attorneys for Respondent

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; or if the office was closed or the person to be served has no

office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 233(b), S.C.A.C.R.



John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731
(803) 324-8100
Attorney for Appellant

November 12, 2019

JOHN MARTIN FOSTER

Attorney at law

The Guardian Building 223 East Main Street Suite 520 Rock Hill South Carolina 29730	PO Box 106 Rock Hill SC 29731-6106	803 324 8100 803 324 8109 Fax jmfoster@comporium.net
---	--	--

November 11, 2019

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

RECEIVED
NOV 19 2019
SC Court of Appeals

Re: First Citizens Bank & Trust Company, Inc.
v. Linda P. Faulkner, *et al.*
Case No.: 2017-CP-29-00872
Appellate Case No. 2018-001823

Dear Ms. Kitchings:

In accordance with Rule 210, S.C.A.C.R., enclosed herewith please find the original and seven (7) copies of the Amended Proof of Service of the Record on Appeal.

We also enclose the original and seven (7) copies of the Appellants' Motion for Extension of Time, or to File Outside Time, together with Certificate of Service for the same in the above referenced case. I also enclose our check for the Motion fee of \$50.00.

By copy of this letter, I am serving the attorneys for the Respondent with copies of these documents, as evidenced by the Certificate of Service.

Please return the extra conformed copy to my office in the enclosed self-addressed, stamped envelope. As always, thank you, and your staff, for your assistance in these matters.

Sincerely yours,


John Martin Foster

jmf/
enclosures

cc: Client File

J. Kershaw Spong
Mary McDonald Campolong
Sowell Gray Robinson Stepp & Lafitte, LLC
Post Office Box 11449
Columbia, SC 29211
Attorneys for Respondent



John Martin Foster Attorney
223 East Main St Suite 520
Post Office Box 106
Rock Hill SC 29731-6106

TO:

THE HONORABLE JENNY ABBOTT KITCHINGS
CLERK OF THE COURT OF APPEALS
POST OFFICE BOX 11629
COLUMBIA, S.C. 29211

RECEIVED
NOV 19 2019
SC Court of Appeals

