No. 14-2078

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for Cooperative Bank,

Plaintiff – Appellant,

v.

RICHARD ALLEN RIPPY; JAMES D. HUNDLEY; FRANCES PETER FENSEL, JR.; HORACE THOMPSON KING, III; FREDRICK WILLETTS, III; DICKSON B. BRIDGER; PAUL G. BURTON; OTTIS RICHARD WRIGHT, JR.; OTTO C. BUDDY BURRELL, JR.,

Defendants – Appellees.

On Appeal From the Eastern District of North Carolina
No. 7:11-cv-00165-BO

JOINT APPENDIX – CORRECTED VOLUME I (UNSEALED)

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January 5, 2015

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
CERTIFICATE OF CONFIDENTIALITY, LOCAL RULE 25(c)

No. 14-2078 Caption: FDIC as Receiver for Cooperative Bank v. Rippy, et al.

Federal Deposit Insruance Corporation as Receiver for Cooperative Bank, appellant
(appellant, appellee, petitioner, respondent, other)

certifies the following information regarding sealing of the document(s) described below:

1. Identify document(s) filed (e.g., sealed appendix volume, sealed version of brief):

Sealed appendix volumes and sealed version of brief.

2. Is sealing of document(s) necessary?

☐ No
☑ Yes, to protect material sealed under the Privacy Policy for Electronic Case Files, or by statute, rule, regulation, or order

3. Date(s) of order(s) sealing the material or, if there is no order, the authority relied upon to treat the material as sealed:

May 21, 2013 (Dist. Court D.E. 71 - Order Amending Stipulated Protective Order); September 11, 2014 (Dist. Ct. D.E. 124 - Order Granting Motions to Seal and Summary Judgment).

4. Terms of order sealing the material, including who is permitted access to sealed material (if filed ex parte, document must be marked SEALED and EX PARTE):

[See Attached Sheet]

5. (For SEALED APPENDIX) Sealed record material has been separated from any unsealed record material and placed in a separate, sealed volume of the appendix.

☑ Yes

6. (For SEALED BRIEFS, SEALED DOCUMENTS) Two versions of document are filed: Sealed version with sealed material highlighted and public version with sealed material redacted.

☑ Yes

12/17/14
(date)

/s/ James Scott Watson
(signature)

14-2078
FDIC as Receiver for Cooperative Bank v. Rippy, et al.
CERTIFICATE OF CONFIDENTIALITY

[Continuation Sheet for Item 4, "Terms of the Order"]

According to the district court's amended protective order [D.E. 71], confidential material designated by the parties, including but not limited to:

(1) personal information;
(2) loan information; and
(3) FDIC-Corporate materials

was, among other things, to be filed under seal and remain under seal until subsequent court order. Material designated "Confidential" material to be sealed could be disclosed, for appropriate purposes, to:

i. the Parties;
ii. in-house and outside counsel and their staff;
iii. the Court;
iv. experts and/or consultants retained by the parties or counsel;
v. outside vendors who are necessary to assist counsel in the action;
vi. witnesses and deponents;
vii. mediators, arbitrators or other persons providing litigation support services;
viii. any other third-party as to whom the producing party agrees in writing; and
ix. other persons authorized by the Court.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 5th day of January, 2015, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system and served the following via U.S. Mail, postage prepaid:

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APPEAL,Jury Trial,USMJ Swank

U.S. District Court
EASTERN DISTRICT OF NORTH CAROLINA (Southern Division)
CIVIL DOCKET FOR CASE #: 7:11-cv-00165-BO

Federal Deposit Insurance Corporation as Receiver for Cooperative Bank v. Rippy et al
Assigned to: District Judge Terrence W. Boyle
Demand: $33,000,000
Case in other court: 4th Circuit Court of Appeals, 14-02078
Cause: 42:1986 Neglect of Duty

Date Filed: 08/10/2011
Date Terminated: 09/23/2014
Jury Demand: Both
Nature of Suit: 380 Personal Property: Other
Jurisdiction: U.S. Government Plaintiff

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NC Commissioner of Banks

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ATTORNEY TO BE NOTICED

David W. Goewey
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas E. Gilbertsen
(See above for address)
LEAD ATTORNEY
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Kacy Lynn Hunt
(See above for address)
ATTORNEY TO BE NOTICED

Meredith L. Boylan

DCD-VI

(See above for address)
ATTORNEY TO BE NOTICED

Ronald R. Glancz
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Ottis Richard Wright, Jr. — represented by

Camden R. Webb
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

David W. Goewey
(See above for address)
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Ronald R. Glancz
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Defendant

Otto C. Buddy Burrell, Jr. — represented by

Camden R. Webb
(See above for address)
LEAD ATTORNEY
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David W. Goewey
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Meredith L. Boylan
(See above for address)
ATTORNEY TO BE NOTICED

Ronald R. Glancz
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
08/10/2011	1	COMPLAINT against All Defendants, filed by Federal Deposit Insurance Corporation as Receiver for Cooperative Bank. (Allen, Ruth) (Entered: 08/10/2011)
08/10/2011	2	NOTICE by Federal Deposit Insurance Corporation as Receiver for Cooperative Bank (Attachments: # 1 Summons for Defendant Bridger, # 2 Summons for Defendant Burrell, # 3 Summons for Defendant Burton, # 4 Summons for Defendant Fensel, # 5 Summons for Defendant Hundley, # 6 Summons for Defendant King, # 7 Summons for Defendant Rippy, # 8 Summons for Defendant Willetts, # 9 Summons for Defendant Wright) (Allen, Ruth) (Entered: 08/10/2011)
08/10/2011	3	FINANCIAL DISCLOSURE STATEMENT by Federal Deposit Insurance Corporation as Receiver for Cooperative Bank (Allen, Ruth) (Entered: 08/10/2011)
08/10/2011	4	NOTICE of Appearance by Ruth M. Allen on behalf of Federal Deposit Insurance Corporation as Receiver for Cooperative Bank (Allen, Ruth) (Entered: 08/10/2011)
08/11/2011		NOTICE OF DEFICIENCY re: 2 Notice-(other). Counsel failed to sign and date the JS44 Civil Cover Sheet. Counsel should file a signed and dated Cover Sheet as soon as possible. (Heath, D.) (Entered: 08/11/2011)
08/11/2011	5	Summonses Issued as to All Defendants. (Tripp, S.) (Entered: 08/11/2011)
08/11/2011	6	NOTICE by Federal Deposit Insurance Corporation Corrected Civil Cover Sheet. (Allen, Ruth) (Entered: 08/11/2011)
10/07/2011	7	NOTICE of Appearance for non-district by Sharon L. Petty on behalf of All Plaintiffs (Petty, Sharon) (Entered: 10/07/2011)
10/07/2011	8	NOTICE of Appearance for non-district by Mary L. Wolff on behalf of All Plaintiffs (Wolff, Mary) (Entered: 10/07/2011)
10/10/2011	9	WAIVER OF SERVICE Returned Executed by Federal Deposit Insurance Corporation. Dickson B. Bridger waiver sent on 9/9/2011, answer due 11/8/2011. (Wolff, Mary) (Entered: 10/10/2011)

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10/10/2011	10	WAIVER OF SERVICE Returned Executed by Federal Deposit Insurance Corporation. Otto C. Buddy Burrell, Jr. waiver sent on 9/9/2011, answer due 11/8/2011. (Wolff, Mary) (Entered: 10/10/2011)
10/10/2011	11	WAIVER OF SERVICE Returned Executed by Federal Deposit Insurance Corporation. Paul G. Burton waiver sent on 9/9/2011, answer due 11/8/2011. (Wolff, Mary) (Entered: 10/10/2011)
10/10/2011	12	WAIVER OF SERVICE Returned Executed by Federal Deposit Insurance Corporation. Frances Peter Fensel, Jr waiver sent on 9/9/2011, answer due 11/8/2011. (Wolff, Mary) (Entered: 10/10/2011)
10/10/2011	13	WAIVER OF SERVICE Returned Executed by Federal Deposit Insurance Corporation. James D. Hundley waiver sent on 9/9/2011, answer due 11/8/2011. (Wolff, Mary) (Entered: 10/10/2011)
10/10/2011	14	WAIVER OF SERVICE Returned Executed by Federal Deposit Insurance Corporation. Horace Thompson King, III waiver sent on 9/9/2011, answer due 11/8/2011. (Wolff, Mary) (Entered: 10/10/2011)
10/10/2011	15	WAIVER OF SERVICE Returned Executed by Federal Deposit Insurance Corporation. Richard Allen Rippy waiver sent on 9/9/2011, answer due 11/8/2011. (Wolff, Mary) (Entered: 10/10/2011)
10/10/2011	16	WAIVER OF SERVICE Returned Executed by Federal Deposit Insurance Corporation. Fredrick Willetts, III waiver sent on 9/9/2011, answer due 11/8/2011. (Wolff, Mary) (Entered: 10/10/2011)
10/10/2011	17	WAIVER OF SERVICE Returned Executed by Federal Deposit Insurance Corporation. Ottis Richard Wright, Jr waiver sent on 9/9/2011, answer due 11/8/2011. (Wolff, Mary) (Entered: 10/10/2011)
10/17/2011		NOTICE TO COUNSEL: Pursuant to Local Civil Rule 83.1(d): at least one member of the bar of this court shall sign all documents filed in this court. In the future, out-of-state counsel is reminded to include the appropriate signature block information and electronic signature (/s/Judith Attorney) for local counsel on all filings. No need to re-file at this time. (Jenkins, C.) (Entered: 10/17/2011)
10/18/2011	18	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Webb, Camden) (Entered: 10/18/2011)
10/18/2011	19	Memorandum in Support re 18 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Attachments: # 1 Appendix Unpublished Cases, # 2 Appendix Unpublished Cases) (Webb, Camden) (Entered: 10/18/2011)
10/18/2011	20	NOTICE of Appearance by Camden R. Webb on behalf of All Defendants (Webb, Camden) (Entered: 10/18/2011)

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10/18/2011	21	FINANCIAL DISCLOSURE STATEMENT by Dickson B. Bridger. (Webb, Camden) (Entered: 10/18/2011)
10/18/2011	22	FINANCIAL DISCLOSURE STATEMENT by Frances Peter Fensel, Jr. (Webb, Camden) (Entered: 10/18/2011)
10/18/2011	23	FINANCIAL DISCLOSURE STATEMENT by Fredrick Willetts, III. (Webb, Camden) (Entered: 10/18/2011)
10/18/2011	24	FINANCIAL DISCLOSURE STATEMENT by Horace Thompson King, III. (Webb, Camden) (Entered: 10/18/2011)
10/18/2011	25	FINANCIAL DISCLOSURE STATEMENT by James D. Hundley. (Webb, Camden) (Entered: 10/18/2011)
10/18/2011	26	FINANCIAL DISCLOSURE STATEMENT by James D. Hundley. (Webb, Camden) (Entered: 10/18/2011)
10/18/2011	27	FINANCIAL DISCLOSURE STATEMENT by Ottis Richard Wright, Jr. (Webb, Camden) (Entered: 10/18/2011)
10/18/2011	28	FINANCIAL DISCLOSURE STATEMENT by Otto C. Buddy Burrell, Jr. (Webb, Camden) (Entered: 10/18/2011)
10/18/2011	29	FINANCIAL DISCLOSURE STATEMENT by Paul G. Burton. (Webb, Camden) (Entered: 10/18/2011)
10/18/2011	30	FINANCIAL DISCLOSURE STATEMENT by Richard Allen Rippy. (Webb, Camden) (Entered: 10/18/2011)
10/19/2011		REMINDER TO COUNSEL - Pursuant to Judge Boyle's Practice and Procedures located on the court's website, http://www.nced.uscourts.gov/html/chambersTWB.htm, counsel shall provide a courtesy copy of all documents over 20 pages, by mailing or delivering to the clerk's office in Raleigh. If your recently filed document is less than 20 pages or if you have already mailed the courtesy copy, disregard this notice. (Talbert, S.) (Entered: 10/19/2011)
11/08/2011	31	NOTICE of Appearance by David W. Goewey on behalf of All Defendants (Goewey, David) (Entered: 11/08/2011)
11/14/2011	32	RESPONSE in Opposition re 18 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Federal Deposit Insurance Corporation. (Attachments: # 1 Appendix Part I - Unpublished Cases, # 2 Appendix Part II - Unpublished Cases) (Wolff, Mary) (Entered: 11/14/2011)
11/15/2011		REMINDER TO COUNSEL - Pursuant to Judge Boyle's Practice and Procedures located on the court's website, http://www.nced.uscourts.gov/html/chambersTWB.htm, counsel shall provide a courtesy copy of all documents over 20 pages, by mailing or delivering to the clerk's office in Raleigh. If your recently filed document is less than 20 pages or if you have already mailed the courtesy copy, disregard this notice. (Talbert, S.) (Entered: 11/15/2011)
12/01/2011	33	NOTICE of Appearance by Meredith L. Boylan on behalf of All Defendants (Boylan, Meredith) (Entered: 12/01/2011)

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12/01/2011	34	REPLY to Response to Motion re 18 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Attachments: # 1 Appendix Unpublished Cases) (Webb, Camden) (Entered: 12/01/2011)
12/15/2011	35	NOTICE of Appearance by Ronald R. Glancz on behalf of All Defendants (Glancz, Ronald) (Entered: 12/15/2011)
02/01/2012		Motion Submitted to U.S. District Judge Terrence W. Boyle: 18 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM. (Talbert, S.) (Entered: 02/01/2012)
02/27/2012	36	NOTICE of Hearing on 18 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM: Motion Hearing set for 3/15/2012 at 02:00 PM in Raleigh - 5th Floor Courtroom before U.S. District Judge Terrence W. Boyle. (Talbert, S.) (Entered: 02/27/2012)
03/13/2012		Reset Hearing as to 18 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM: Motion Hearing set for 3/15/2012 at 02:00 PM in Raleigh - 7th Floor - Courtroom 2 - before U.S. District Judge Terrence W. Boyle. (Talbert, S.) (Entered: 03/13/2012)
03/15/2012	37	Minute Entry for proceedings held before U.S. District Judge Terrence W. Boyle in Raleigh: Motion Hearing held on 3/15/2012 regarding 18 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Dickson B. Bridger, Horace Thompson King, III, Paul G. Burton, Fredrick Willetts, III, James D. Hundley, Richard Allen Rippy, Otto C. Buddy Burrell, Jr., Ottis Richard Wright, Jr., Frances Peter Fensel, Jr. Parties present and ready to proceed. Court will enter a written order. (Court Reporter Diane Pressley) (Talbert, S.) (Entered: 03/16/2012)
04/16/2012	38	ORDER denying 18 Motion to Dismiss for Failure to State a Claim. Signed by U.S. District Judge Terrence W. Boyle on 4/13/12. (Talbert, S.) (Entered: 04/16/2012)
04/16/2012	39	ORDER FOR DISCOVERY PLAN sent to all parties. Signed by Julie A. Richards, Clerk of Court on 4/16/12. (Talbert, S.) (Entered: 04/16/2012)
04/26/2012	40	Consent MOTION for Extension of Time to File Answer regarding 1 Complaint by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Attachments: # 1 Text of Proposed Order) (Webb, Camden) (Entered: 04/26/2012)
04/27/2012		MOTION REFERRED to Julie A. Richards, Clerk of Court: 40 Consent MOTION for Extension of Time to File Answer re 1 Complaint. (Talbert, S.) (Entered: 04/27/2012)
04/27/2012		TEXT ORDER granting 40 Motion for Extension of Time. Defendants shall answer or respond to plaintiff's complaint on or before May 14, 2012. Signed by Jolie Skinner for Julie A. Richards, Clerk of Court on 04/27/2012. (Skinner, J.) (Entered: 04/27/2012)
04/30/2012	41	MOTION for Reconsideration regarding 38 Order on Motion to Dismiss for Failure to State a Claim by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard

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		Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Webb, Camden) (Entered: 04/30/2012)
04/30/2012	42	Memorandum in Support regarding 41 MOTION for Reconsideration re 38 Order on Motion to Dismiss for Failure to State a Claim filed by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Attachments: # 1 Appendix Unpublished Cases) (Webb, Camden) (Entered: 04/30/2012)
05/01/2012		REMINDER TO COUNSEL - Pursuant to Judge Boyle's Practice and Procedures located on the court's website, http://www.nced.uscourts.gov/html/chambersTWB.htm, counsel shall provide a courtesy copy of all documents over 20 pages, by mailing or delivering to the clerk's office in Raleigh. If your recently filed document(s) is less than 20 pages or if you have already mailed the courtesy copy(ies), disregard this notice. (Talbert, S.) (Entered: 05/01/2012)
05/14/2012	43	ANSWER to 1 Complaint with Jury Demand by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Webb, Camden) (Entered: 05/14/2012)
05/22/2012	44	Consent MOTION for Extension of Time to File Response/Reply as to 41 MOTION for Reconsideration re 38 Order on Motion to Dismiss for Failure to State a Claim by Federal Deposit Insurance Corporation. (Attachments: # 1 Text of Proposed Order) (Wolff, Mary) (Entered: 05/22/2012)
05/23/2012		MOTION REFERRED to Julie A. Richards, Clerk of Court: 44 Consent MOTION for Extension of Time to File Response/Reply as to 41 MOTION for Reconsideration regarding 38 Order on Motion to Dismiss for Failure to State a Claim. (Talbert, S.) (Entered: 05/23/2012)
05/29/2012	45	Joint MOTION for Extension of Time to File Joint Proposed Discovery Plan by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Attachments: # 1 Text of Proposed Order) (Webb, Camden) (Entered: 05/29/2012)
05/30/2012		MOTION REFERRED to U.S. Magistrate Judge James E. Gates: 45 Joint MOTION for Extension of Time to File Joint Proposed Discovery Plan. (Talbert, S.) (Entered: 05/30/2012)
06/04/2012	46	RESPONSE to Motion regarding 41 MOTION for Reconsideration as to 38 Order on Motion to Dismiss for Failure to State a Claim filed by Federal Deposit Insurance Corporation. (Attachments: # 1 Exhibit A-McGhee v United States of America (unpublished), # 2 Exhibit B-Federal Deposit Insurance Corporation v Greenwood-Memorandum in Support of Motion to Dismiss, # 3 Exhibit C-Federal Deposit Insurance Corporation v Greenwood-Text Order Denying Motion to Dismiss) (Petty, Sharon) (Entered: 06/04/2012)
06/04/2012		TEXT ORDER granting 44 Plaintiff's Motion for Extension of Time. Plaintiff's time to respond to 41 Defendants' Motion for Reconsideration or, in the alternative, to Certify

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		Order is extended to June 4, 2012. Signed by Julie A. Richards, Clerk of Court, on 6/4/2012. (Richards, J.) (Entered: 06/04/2012)
06/04/2012		TEXT ORDER granting 45 Joint Motion for Extension of Time. Plaintiff's and Defendants' Joint Proposed Discovery Plan is due June 12, 2012. Signed by Julie A. Richards, Clerk of Court, on 6/4/2012. (Richards, J.) (Entered: 06/04/2012)
06/05/2012		REMINDER TO COUNSEL - Pursuant to Judge Boyle's Practice and Procedures located on the court's website, http://www.nced.uscourts.gov/html/chambersTWB.htm, counsel shall provide a courtesy copy of all documents over 20 pages, by mailing or delivering to the clerk's office in Raleigh. If your recently filed document(s) is less than 20 pages or if you have already mailed the courtesy copy(ies), disregard this notice. (Talbert, S.) (Entered: 06/05/2012)
06/07/2012	47	MOTION to Strike Defendants' Fifth Affirmative Defense by Federal Deposit Insurance Corporation. (Petty, Sharon) (Entered: 06/07/2012)
06/07/2012	48	Memorandum in Support of Motion to Strike Defendants' Fifth Affirmative Defense by Federal Deposit Insurance Corporation. (Attachments: # 1 Appendix Unpublished Cases) (Petty, Sharon) Modified on 6/8/2012 to correctly reflect that this document is the Memorandum in Support and not a Motion. (Talbert, S.) (Entered: 06/07/2012)
06/08/2012		REMINDER TO COUNSEL - Pursuant to Judge Boyle's Practice and Procedures located on the court's website, http://www.nced.uscourts.gov/html/chambersTWB.htm, counsel shall provide a courtesy copy of all documents over 20 pages, by mailing or delivering to the clerk's office in Raleigh. If your recently filed document(s) is less than 20 pages or if you have already mailed the courtesy copy(ies), disregard this notice. (Talbert, S.) (Entered: 06/08/2012)
06/08/2012		NOTICE OF DEFICIENCY re: 48 Motion to Strike - Counsel used the wrong event to file the Memorandum in Support of the Motion to Strike. In the future, Counsel should use the correct event of Memorandum in Support and not file the Memorandum as a Motion. No need to re-file at this time as the Clerk's Office will make the necessary changes. (Talbert, S.) (Entered: 06/08/2012)
06/12/2012	49	REPORT of Rule 26(f) Planning Meeting by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Webb, Camden) (Entered: 06/12/2012)
06/13/2012		Remark - Parties' Joint Rule 26(f) Report referred to U.S. Magistrate Judge William A. Webb. (Talbert, S.) (Entered: 06/13/2012)
06/14/2012	50	SCHEDULING ORDER: Discovery due by 6/28/2013. Motions due by 7/29/2013.Counsel should review the Order in its entirety for critical deadlines and information. Signed by U.S. Magistrate Judge William A. Webb on 6/14/12. (Talbert, S.) (Entered: 06/14/2012)
06/15/2012	51	REPLY to Response to Motion regarding 41 MOTION for Reconsideration as to 38 Order on Motion to Dismiss for Failure to State a Claim filed by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Webb, Camden) (Entered: 06/15/2012)

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07/02/2012	52	Memorandum in Opposition regarding 47 MOTION to Strike Defendants' Fifth Affirmative Defense filed by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Attachments: # 1 Appendix Unpublished Cases) (Webb, Camden) (Entered: 07/02/2012)
07/03/2012	53	REPORT of Rule 26(f) Planning Meeting by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Webb, Camden) (Entered: 07/03/2012)
07/05/2012		REMARK: 53 Rule 26(f) Report was referred to US Magistrate Judge William A. Webb for issuance of a scheduling Order. (Sawyer, D.) (Entered: 07/05/2012)
07/10/2012		REMINDER TO COUNSEL - Pursuant to Judge Boyle's Practice and Procedures located on the court's website, http://www.nced.uscourts.gov/html/chambersTWB.htm, counsel shall provide a courtesy copy of all documents over 20 pages, by mailing or delivering to the clerk's office in Raleigh. If your recently filed document(s) is less than 20 pages or if you have already mailed the courtesy copy(ies), disregard this notice. (Talbert, S.) (Entered: 07/10/2012)
07/25/2012		Motion Submitted to US District Judge Terrence W. Boyle: 41 MOTION for Reconsideration regarding 38 Order on Motion to Dismiss for Failure to State a Claim. (Talbert, S.) (Entered: 07/25/2012)
07/25/2012		Motion Submitted to US District Judge Terrence W. Boyle: 47 MOTION to Strike Defendants' Fifth Affirmative Defense. (Talbert, S.) (Entered: 07/25/2012)
08/15/2012	54	NOTICE by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr of Supplemental Authority in Support of Defendants' Motion for Reconsideration and Opposition to FDIC's Motion to Strike Defendants' 5th Affirmative Defense (Boylan, Meredith) (Entered: 08/15/2012)
08/29/2012	55	Joint MOTION for Protective Order and Non-Waiver Agreement by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Attachments: # 1 Text of Proposed Order) (Webb, Camden) (Entered: 08/29/2012)
09/04/2012		Motion Submitted to US District Judge Terrence W. Boyle: 55 Joint MOTION for Protective Order and Non-Waiver Agreement. (Talbert, S.) (Entered: 09/04/2012)
09/06/2012	56	Stipulated Protective Order and Non-Waiver Agreement. Signed by US District Judge Terrence W. Boyle on 9/5/12. (Talbert, S.) (Entered: 09/06/2012)
10/03/2012	57	ORDER denying 41 Defendant's Motion for Reconsideration or in the alternative to certify interlocutory appeal and denying 47 Plaintiff's Motion to Strike. Signed by US District Judge Terrence W. Boyle on 10/2/12. (Talbert, S.) (Entered: 10/03/2012)
10/05/2012	58	AMENDED ORDER denying 41 Defendant's Motion for Reconsideration or in the alternative to certify interlocutory appeal and denying 47 Plaintiff's Motion to Strike. Signed by US District Judge Terrence W. Boyle on 10/4/12. (Talbert, S.) (Entered:

		10/05/2012)
10/11/2012	59	NOTICE of Appearance by Kacy Lynn Hunt on behalf of All Defendants (Hunt, Kacy) (Entered: 10/11/2012)
03/18/2013	60	MOTION to Amend 50 Scheduling Order by Dickson B. Bridger. (Attachments: # 1 Exhibit A - Letter Dated 2/21/2013 to Sharon Petty, # 2 Text of Proposed Order) (Webb, Camden) (Entered: 03/18/2013)
03/18/2013	61	MOTION to Compel Production of Documents and Complete Discovery Responses by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Attachments: # 1 Exhibit A - Declaration of Meredith Boylan, # 2 Text of Proposed Order) (Webb, Camden) (Entered: 03/18/2013)
03/18/2013	62	Memorandum in Support regarding 61 MOTION to Compel Production of Documents and Complete Discovery Responses filed by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr., James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Attachments: # 1 Exhibit A - Memorandum and Order Entered by Magistrate Judge Sebelius) (Webb, Camden) (Entered: 03/18/2013)
03/18/2013		NOTICE OF DEFICIENCY regarding: 61 Motion to Compel, 60 Motion to Amend and 62 Memorandum in Support. Counsel failed to properly identify each exhibit. Pursuant to Section L(2)(b) of the Courts' Electronic Policy and Procedure Manual, all exhibits must be identified with a clear and complete description of the document. Clerk's Office corrected the exhibits in entries 60 , 61 and 62 , but reminds counsel for future reference. (Heath, D.) (Entered: 03/18/2013)
04/04/2013	63	MOTION for Extension of Time to File Response as to 61 MOTION to Compel Production of Documents and Complete Discovery Responses, 62 Memorandum in Support, by Federal Deposit Insurance Corporation. (Attachments: # 1 Text of Proposed Order Proposed Order Granting Extension of Time to Respond to Defendants' Motion to Compel) (Petty, Sharon) (Entered: 04/04/2013)
04/04/2013	64	RESPONSE to Motion regarding 60 MOTION to Amend 50 Scheduling Order Notice of Consent to Motion filed by Federal Deposit Insurance Corporation. (Petty, Sharon) (Entered: 04/04/2013)
04/05/2013		MOTIONS REFERRED to US Magistrate Judge William A. Webb: 63 MOTION for Extension of Time to File Response/Reply as to 61 MOTION to Compel Production of Documents and Complete Discovery Responses, 62 Memorandum in Support, 60 MOTION to Amend/Correct 50 Scheduling Order. (Edwards, S.) (Entered: 04/05/2013)
04/05/2013	65	ORDER granting 60 Motion to Amend; granting 63 Motion for Extension of Time to File Response regarding 61 MOTION to Compel Production of Documents and Complete Discovery Responses. Response due by 4/10/2013. The deadline for discovery is hereby extended 120 days, up to and including October 28, 2013. The deadline for filing dispositive motions is likewise extended 120 days, up to and including November 26, 2013. Signed by US Magistrate Judge William A. Webb on 4/5/2013.

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		(Edwards, S.) (Entered: 04/05/2013)
04/10/2013	66	Second MOTION for Extension of Time to File Response/Reply as to 61 MOTION to Compel Production of Documents and Complete Discovery Responses by Federal Deposit Insurance Corporation. (Attachments: # 1 Text of Proposed Order Proposed Order) (Petty, Sharon) (Entered: 04/10/2013)
04/10/2013		MOTION REFERRED to Julie A. Richards, Clerk of Court: 66 Second MOTION for Extension of Time to File Response/Reply as to 61 MOTION to Compel Production of Documents and Complete Discovery Responses. (Edwards, S.) (Entered: 04/10/2013)
04/11/2013		TEXT ORDER granting plaintiff's 66 motion for extension of time. Plaintiff FDIC has through and including April 12, 2013 to respond to defendants' 61 motion to compel. Signed by Jolie Skinner for Julie A. Richards, Clerk of Court on 4/11/2013. (Skinner, J.) (Entered: 04/11/2013)
04/12/2013	67	RESPONSE in Opposition regarding 61 MOTION to Compel Production of Documents and Complete Discovery Responses filed by Federal Deposit Insurance Corporation. (Attachments: # 1 Exhibit Subpoena to FDIC-C, # 2 Exhibit Boylan letter to Culton, # 3 Exhibit Culton letter to Boylan) (Petty, Sharon) (Entered: 04/12/2013)
04/15/2013		MOTION REFERRED to US Magistrate Judge William A. Webb: 61 MOTION to Compel Production of Documents and Complete Discovery Responses. (Edwards, S.) (Entered: 04/15/2013)
04/19/2013	68	NOTICE by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr regarding 61 MOTION to Compel Production of Documents and Complete Discovery Responses Request for a Hearing (Webb, Camden) (Entered: 04/19/2013)
04/23/2013		Referred the Notice/Request for a Hearing at 68 to US Magistrate Judge William A. Webb for his review and consideration. (Edwards, S.) (Entered: 04/23/2013)
05/09/2013	69	Joint MOTION to Amend/Correct Protective Order and Non-Waiver Agreement by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Attachments: # 1 Text of Proposed Order Amended Protective Order and Non-Waiver Agreement) (Webb, Camden) (Entered: 05/09/2013)
05/09/2013		Motion Submitted to Judge Terrence W. Boyle: 69 Joint MOTION to Amend/Correct Protective Order and Non-Waiver Agreement. (Edwards, S.) (Entered: 05/09/2013)
05/09/2013	70	ORDER GRANTING 61 Motion to Compel and Defendant's request for a hearing at 68 is DENIED. Signed by US Magistrate Judge William A. Webb on 5/9/2013. (Edwards, S.) (Entered: 05/09/2013)
05/21/2013	71	ORDER granting 69 Motion to Amend Protective Order and Non-Waiver Agreement. Signed by US District Judge Terrence W. Boyle on 5/20/2013. (Edwards, S.) (Entered: 05/21/2013)

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05/22/2013	72	MOTION to Withdraw as Attorney For Plaintiff by Federal Deposit Insurance Corporation. (Attachments: # 1 Text of Proposed Order Proposed Order Granting Motion to Withdraw) (Petty, Sharon) (Entered: 05/22/2013)
05/23/2013		Motion Submitted to Judge Terrence W. Boyle: 72 MOTION to Withdraw as Attorney For Plaintiff. (Edwards, S.) (Entered: 05/23/2013)
05/29/2013	73	ORDER granting 72 Motion to Withdraw as Attorney. Attorney Sharon L. Petty terminated. Signed by District Judge Terrence W. Boyle on 5/29/2013. (Rudd, D.) (Entered: 05/29/2013)
06/13/2013	74	NOTICE by Federal Deposit Insurance Corporation of Compliance with May 9, 2013 Order (Attachments: # 1 Exhibit A -- Sheehan Affidavit, # 2 Exhibit B -- Rodriguez Affidavit) (Wolff, Mary) (Entered: 06/13/2013)
06/17/2013	75	Referred Plaintiff's 74 Notice of Compliance to US Magistrate Judge William A. Webb for his review. (Fisher, M.) (Entered: 06/17/2013)
07/11/2013	76	Joint MOTION to Amend/Correct 50 Scheduling Order by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Webb, Camden) (Entered: 07/11/2013)
07/12/2013		MOTION REFERRED to US Magistrate Judge William A. Webb: 76 Joint Motion to Amend Scheduling Order. (Fisher, M.) (Entered: 07/12/2013)
07/15/2013	77	ORDER granting 76 Joint Motion to Extend the Discovery Deadline. Signed by US Magistrate Judge William A. Webb on 7/15/2013. (Fisher, M.) (Entered: 07/15/2013)
11/15/2013	78	MOTION to Compel Production of Responsive Documents and Testimony From Non-Party North Carolina Office of the Commissioner of Banks by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Attachments: # 1 Exhibit A - Declaration of Kacy L. Hunt, # 2 Exhibit 1 to Hunt Declaration - 2012 Subpoena, # 3 Exhibit 2 to Hunt Declaration - October 18, 2012 M. Chestnut email, # 4 Exhibit 3 to Hunt Declaration - November 2012 Letter, # 5 Exhibit 4 to Hunt Declaration - March 2013 Letter, # 6 Exhibit 5 to Hunt Declaration - 2013 Subpoena, # 7 Exhibit B - Declaration of Thomas E. Gilbertsen, # 8 Text of Proposed Order) (Webb, Camden) (Entered: 11/15/2013)
11/15/2013	79	Memorandum in Support regarding 78 MOTION to Compel Production of Responsive Documents and Testimony From Non-Party North Carolina Office of the Commissioner of Banks filed by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Attachments: # 1 Appendix Case Authority) (Webb, Camden) (Entered: 11/15/2013)
11/22/2013	80	MOTION for Extension of Time to File Response/Reply as to 78 MOTION to Compel Production of Responsive Documents and Testimony From Non-Party North Carolina Office of the Commissioner of Banks by North Carolina Office of the Commissioner of Banks. (Attachments: # 1 Text of Proposed Order) (Chestnut, Leonidas) (Entered: 11/22/2013)

11/22/2013		MOTION REFERRED to US Magistrate Judge William A. Webb: 80 Motion for Extension of Time to File Response as to 78 Motion to Compel Production of Responsive Documents and Testimony From Non-Party North Carolina Office of the Commissioner of Banks. (Fisher, M.) (Entered: 11/22/2013)
11/22/2013	81	NOTICE of Appearance for non-district by Mary L. Wolff on behalf of Federal Deposit Insurance Corporation (Wolff, Mary) (Entered: 11/22/2013)
11/25/2013	82	ORDER GRANTING 80 Motion for Extension of Time to File Response regarding 78 Motion to Compel Production of Responsive Documents and Testimony From Non-Party North Carolina Office of the Commissioner of Banks. Response due by 12/13/2013. Signed by US Magistrate Judge William A. Webb on 11/22/2013. (Fisher, M.) (Entered: 11/25/2013)
12/11/2013	83	Memorandum in Opposition regarding 78 MOTION to Compel Production of Responsive Documents and Testimony From Non-Party North Carolina Office of the Commissioner of Banks filed by North Carolina Office of the Commissioner of Banks. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Text of Proposed Order) (Chestnut, Leonidas) (Entered: 12/11/2013)
12/12/2013	84	NOTICE of Appearance for non-district by Douglas A. Black on behalf of All Plaintiffs (Black, Douglas) (Entered: 12/12/2013)
12/13/2013		MOTION REFERRED to US Magistrate Judge William A. Webb : 78 Defendant's Motion to Compel Production of Responsive Documents and Testimony From Non-Party North Carolina Office of the Commissioner of Banks. (Fisher, M.) (Entered: 12/13/2013)
12/13/2013		MOTION NO LONGER REFERRED to US Magistrate Judge Wiliam A. Webb: 78 Motion to Compel Production of Responsive Documents and Testimony From Non-Party North Carolina Office of the Commissioner of Banks. (Fisher, M.) (Entered: 12/13/2013)
12/13/2013	85	ORDER REASSIGNING MAGISTRATE JUDGE: This case has now been reassigned to US Magistrate Judge Robert B. Jones, Jr. Signed by Julie A. Richards, Clerk of Court, on 12/13/2013. (Fisher, M.) (Entered: 12/13/2013)
12/13/2013		MOTION REFERRED to US Magistrate Judge Robert B. Jones, Jr: 78 Defendant's Motion to Compel Production of Responsive Documents and Testimony From Non-Party North Carolina Office of the Commissioner of Banks. (Fisher, M.) (Entered: 12/13/2013)
12/18/2013	86	ORDER REASSIGNING MAGISTRATE JUDGE: At the direction of the court and for the continued administration of justice, the magistrate judge assignment in this case is hereby assigned to US Magistrate Judge Kimberly A. Swank. Signed by Julie A. Richards, Clerk of Court, on 12/18/2013. (Fisher, M.) (Entered: 12/18/2013)
12/18/2013		MOTION REFERRED to US Magistrate Judge Kimberly A. Swank: 78 Motion to Compel Production of Responsive Documents and Testimony From Non-Party North Carolina Office of the Commissioner of Banks. (Fisher, M.) (Entered: 12/18/2013)
01/10/2014	87	Joint MOTION to Amend/Correct 50 Scheduling Order by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley,

		Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Attachments: # 1 Text of Proposed Order) (Webb, Camden) (Entered: 01/10/2014)
01/10/2014		MOTION REFERRED to US Magistrate Judge Kimberly A. Swank: 87 Joint Motion to Amend 50 Scheduling Order. (Fisher, M.) (Entered: 01/10/2014)
01/13/2014	88	ORDER GRANTING 87 Joint Motion to Amend the Scheduling Order. Discovery shall be concluded by 2/28/2014. Motions shall be filed by 3/28/2014. Signed by US Magistrate Judge Kimberly A. Swank on 1/13/2014. Counsel is directed to read Order in its entirety for critical information and deadlines. (Fisher, M.) (Entered: 01/13/2014)
02/18/2014	89	NOTICE by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr regarding 78 MOTION to Compel Production of Responsive Documents and Testimony From Non-Party North Carolina Office of the Commissioner of Banks NOTICE OF WITHDRAWAL (Webb, Camden) (Entered: 02/18/2014)
02/28/2014	90	Joint MOTION to Amend/Correct 88 Order on Motion to Amend/Correct, THE SCHEDULING ORDER by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Webb, Camden) (Entered: 02/28/2014)
03/05/2014	91	NOTICE by North Carolina Office of the Commissioner of Banks of Withdrawal from Case and Request to Stop Electronic Notice (Chestnut, Leonidas) (Entered: 03/05/2014)
03/07/2014		MOTION REFERRED to US Magistrate Judge Kimberly A. Swank: 90 Joint Motion to Amend Scheduling Order. (Fisher, M.) (Entered: 03/07/2014)
03/21/2014	92	ORDER GRANTING 90 Motion to Amend Scheduling Order. Discovery shall be commenced by 3/31/2014. Potentially dispositive motions deadline is 5/2/2014. Signed by US Magistrate Judge Kimberly A. Swank on 3/20/2014. (Fisher, M.) (Entered: 03/21/2014)
04/30/2014	93	Joint MOTION to Amend/Correct 92 Order on Motion to Amend/Correct the Scheduling Order by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Attachments: # 1 Text of Proposed Order) (Webb, Camden) (Entered: 04/30/2014)
05/01/2014		MOTION SUBMITTED to US District Judge Terrence W. Boyle: 93 Joint Motion to Amend Scheduling Order. (Fisher, M.) (Entered: 05/01/2014)
05/02/2014	94	ORDER granting 93 Motion to Amend scheduling order. Signed by District Judge Terrence W. Boyle on 5/2/2014. The parties are reminded to read the order in its entirety. (Downing, L.) (Entered: 05/02/2014)
05/12/2014	95	MOTION in Limine to Exclude Opinions of Harry Potter by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard

		Wright, Jr. (Webb, Camden) (Entered: 05/12/2014)
05/12/2014	96	Memorandum in Support regarding 95 MOTION in Limine to Exclude Opinions of Harry Potter filed by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Attachments: # 1 Exhibit H. Potter Rebuttal Report, # 2 Exhibit H. Potter Deposition Excerpts) (Webb, Camden) (Entered: 05/12/2014)
06/02/2014	101	MOTION for Summary Judgment by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Webb, Camden) (Entered: 06/02/2014)
06/02/2014	104	MOTION to Seal 103 PROPOSED SEALED Exhibit,,,,,,,,, by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Webb, Camden) (Entered: 06/02/2014)
06/02/2014	105	MOTION to Seal Document 97 PROPOSED SEALED MOTION (Selected Participants Only)by Federal Deposit Insurance Corporation (available to: Defendants Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson, 98 PROPOSED SEALED Memorandum in Support,,,,, 100 PROPOSED SEALED Exhibit,,, 99 PROPOSED SEALED Exhibit,,,,,, by Federal Deposit Insurance Corporation. (Black, Douglas) (Entered: 06/02/2014)
06/03/2014	106	NOTICE by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr regarding 104 MOTION to Seal 103 PROPOSED SEALED Exhibit,,,,,,,,, PROPOSED ORDER (Webb, Camden) (Entered: 06/03/2014)
06/03/2014	107	NOTICE by Federal Deposit Insurance Corporation regarding 105 MOTION to Seal Document 97 PROPOSED SEALED MOTION (Selected Participants Only)by Federal Deposit Insurance Corporation (available to: Defendants Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, J, 98 PROPOSED SEALED Memorandum in Support,,,,, 100 PROPOSED SEALED Exhibit,,, 99 PROPOSED SEALED Exhibit,,,,,, PROPOSED ORDER GRANTING PLAINTIFF'S MOTION TO FILE DOCUMENTS UNDER SEAL (Wolff, Mary) (Entered: 06/03/2014)
06/05/2014	108	RESPONSE to Motion regarding 95 MOTION in Limine to Exclude Opinions of Harry Potter filed by Federal Deposit Insurance Corporation. (Wolff, Mary) (Entered: 06/05/2014)
06/05/2014	109	AFFIDAVIT regarding 108 Response to Motion, 95 MOTION in Limine to Exclude Opinions of Harry Potter AFFIDAVIT OF HARRY POTTER by Federal Deposit Insurance Corporation filed by Federal Deposit Insurance Corporation. (Attachments: # 1 Exhibit A - POTTER REBUTTAL REPORT) (Wolff, Mary) (Entered: 06/05/2014)

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06/23/2014	110	REPLY to Response to Motion regarding 95 MOTION in Limine to Exclude Opinions of Harry Potter filed by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Attachments: # 1 Exhibit A - Deposition excerpts) (Webb, Camden) (Entered: 06/23/2014)
06/26/2014	113	MOTION to Seal 112 PROPOSED SEALED Exhibit,,,,,,,,,,,,,,,,,,,, by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Attachments: # 1 Text of Proposed Order) (Webb, Camden) (Entered: 06/26/2014)
06/26/2014	115	MOTION to Seal Document 114 PROPOSED SEALED Response,,,,, In Opposition to Defendants' Motion for Summary Judgment by Federal Deposit Insurance Corporation. (Attachments: # 1 Text of Proposed Order) (Wolff, Mary) (Entered: 06/26/2014)
07/14/2014	116	REPLY to Response to Motion regarding 101 MOTION for Summary Judgment filed by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Webb, Camden) (Entered: 07/14/2014)
07/14/2014	118	MEMORANDUM IN SUPPORT regarding 17 Motion to Strike Affidavit of Robert Gammill, by Federal Deposit Insurance Corporation. (Wolff, Mary) Modified on 7/31/2014 to accurately identify attached document. (Fisher, M.) (Entered: 07/14/2014)
07/14/2014	119	REPLY to Response to Motion regarding 97 PROPOSED SEALED MOTION (Selected Participants Only)by Federal Deposit Insurance Corporation (available to: Defendants Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson filed by Federal Deposit Insurance Corporation. (Attachments: # 1 Exhibit A - FDIC Speaches and Testimony) (Wolff, Mary) (Entered: 07/14/2014)
07/14/2014	120	MOTION TO FILE 117 UNDER SEAL, filed by Federal Deposit Insurance Corporation. (Attachments: # 1 Text of Proposed Order) (Wolff, Mary) Modified on 7/31/2014 to correctly identify the filed document. (Fisher, M.) (Entered: 07/14/2014)
07/31/2014		MOTIONS SUBMITTED to US District Judge Terrence W. Boyle: 97 Plaintiff's Motion for Partial Summary Judgment, and 101 Defendant's Motion for Summary Judgment. (Fisher, M.) (Entered: 08/21/2014)
08/04/2014	121	RESPONSE in Opposition regarding 117 PROPOSED SEALED MOTION (Selected Participants Only)by FDIC, as Receiver for Cooperative Bank (available to: Defendants Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson Plaintiff's Motion to Strike filed by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Webb, Camden) (Entered: 08/04/2014)
08/20/2014		MOTIONS SUBMITTED to US District Judge Terrence W. Boyle: 95 Motion in Limine to Exclude Harry Potter, 104 Motion to Seal, 105 Motion to Seal, 113 Motion

		to Seal, 115 Motion to Seal, and 120 Motion to Seal. (Fisher, M.) (Entered: 08/20/2014)
08/21/2014	122	REPLY to Response to Motion regarding 117 PROPOSED SEALED MOTION (Selected Participants Only)by FDIC, as Receiver for Cooperative Bank (available to: Defendants Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson, 118 MOTION Strike the Declaration of Robert T. Gammill and to Exclude the Opinions Set Forth Therein regarding 111 Memorandum in Opposition,,, Plaintiff's Memorandum Supporting Motion filed by Federal Deposit Insurance Corporation. (Wolff, Mary) (Entered: 08/21/2014)
08/22/2014		MOTION SUBMITTED to US District Judge Terrence W. Boyle: 117 PROPOSED SEALED MOTION (Selected Participants Only)by FDIC, as Receiver for Cooperative Bank (available to: Defendants Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson. (Fisher, M.) (Entered: 08/22/2014)
09/04/2014	123	NOTICE of Appearance by Thomas E. Gilbertsen on behalf of All Defendants (Gilbertsen, Thomas) (Entered: 09/04/2014)
09/11/2014	124	ORDER GRANTING 95 Defendants' Motion in Limine to Exclude Opinions of Harry Potter, DENYING AS MOOT 97 Plaintiff's Motion for Partial Summary Judgment, GRANTING 101 Defendants' Motion for Summary Judgment, GRANTING 104 Motion to Seal, GRANTING 105 Motion to Seal Document, GRANTING 113 Motion to Seal, GRANTING 115 Motion to Seal Document, DENYING AS MOOT 117 Plaintiff's Motion to Strike, and GRANTING 120 Motion to Seal. Signed by US District Judge Terrence W. Boyle on 9/10/2014. (Fisher, M.) (Entered: 09/11/2014)
09/23/2014	126	JUDGMENT: IT IS ORDERED, ADJUDGED, and DECREED that the defendants' Motion for Summary Judgment [DE 101] is GRANTED, the plaintiff's Motion for Partial Summary Judgment [DE 97] is DENIED AS MOOT, the various motions to seal [DE 104, 105, 113, 115, 120] are GRANTED, the defendant's Motion to Exclude the Opinion of Expert Harry Potter [DE 95] is GRANTED, and the plaintiff's Motion to Strike [DE 117] is DENIED AS MOOT. This matter is now closed. Signed by Macy B. Fisher, for Julie A. Richards, Clerk of Court, on 9/23/2014. (Fisher, M.) (Entered: 09/23/2014)
10/02/2014	127	NOTICE OF APPEAL as to 126 Judgment,, 124 Order on Motion in Limine, Order on PROPOSED SEALED Motion, Order on Motion for Summary Judgment, Order on Motion to Seal, Order on Motion to Seal Document,,,, Order on Motion for Miscellaneous Relief,,,,,,,,,,,,,,,, by Federal Deposit Insurance Corporation. (Wolff, Mary) (Entered: 10/02/2014)
10/03/2014	128	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals regarding 127 Notice of Appeal. (Tripp, S.) (Entered: 10/03/2014)
10/07/2014	129	MOTION for Bill of Costs by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Attachments: # 1 Affidavit of Meredith L. Boylan in Support of Defendants' Bill of costs) (Webb, Camden) (Entered: 10/07/2014)

10/09/2014	130	US Court of Appeals Case Number 14-2078, Ashley Webb, Case Manager for 127 Notice of Appeal, filed by Federal Deposit Insurance Corporation. (Fogle, L.) (Entered: 10/09/2014)
10/21/2014	131	MOTION Disallowance of and Objection to Defendants' Bill of Costs regarding 129 MOTION for Bill of Costs by Federal Deposit Insurance Corporation. (Attachments: # 1 Supplement Memorandum) (Wolff, Mary) (Entered: 10/21/2014)
10/30/2014	132	RESPONSE in Opposition regarding 131 MOTION Disallowance of and Objection to Defendants' Bill of Costs regarding 129 MOTION for Bill of Costs filed by Dickson B. Bridger, Otto C. Buddy Burrell, Jr., Paul G. Burton, Frances Peter Fensel, Jr, James D. Hundley, Horace Thompson King, III, Richard Allen Rippy, Fredrick Willetts, III, Ottis Richard Wright, Jr. (Attachments: # 1 Exhibit 1 - Boylan Supplemental Declaration) (Webb, Camden) (Entered: 10/30/2014)
11/10/2014	133	REPLY to Response to Motion regarding 131 MOTION Disallowance of and Objection to Defendants' Bill of Costs regarding 129 MOTION for Bill of Costs , 129 MOTION for Bill of Costs (PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR DISALLOWANCE OF AND OBJECTION TO DEFENDANTS' BILL OF COSTS) filed by Federal Deposit Insurance Corporation. (Wolff, Mary) (Entered: 11/10/2014)

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Description:	Docket Report	**Search Criteria:**	7:11-cv-00165-BO
Billable Pages:	20	**Cost:**	2.00

DCD-XXIII

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, SOUTHERN DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for COOPERATIVE BANK,

Plaintiff,

vs. **Civil Action No.: _______________**

FREDRICK WILLETTS, III, PAUL G. BURTON, JAMES D. HUNDLEY, HORACE THOMPSON KING, III, OTTIS RICHARD WRIGHT, JR., RICHARD ALLEN RIPPY, FRANCIS PETER FENSEL, JR., DICKSON B. BRIDGER and OTTO C. "BUDDY" BURRELL, JR.,

Defendants.

COMPLAINT

The Plaintiff, the Federal Deposit Insurance Corporation, as Receiver for Cooperative Bank, Wilmington, North Carolina ("FDIC"), files its complaint against Fredrick Willetts, III, Paul G. Burton, James D. Hundley, Horace Thompson King, III, Ottis Richard Wright, Jr., Richard Allen Rippy, Francis Peter Fensel, Jr., Dickson B. Bridger and Otto C. "Buddy" Burrell, Jr., and states:

I. PARTIES

1. The FDIC is a corporation organized and existing under the laws of the United States of America. 12 U.S.C. §1811, *et. seq*. The FDIC is an instrumentality of the United States of America and is charged with, among other duties, the orderly liquidation of failed banks. 12. U.S.C. §1821(d). Cooperative Bank ("Cooperative" or "the Bank") was a state-chartered, non-

member bank under the laws of the State of North Carolina, and its deposits were insured by the FDIC. On or about June 19, 2009, the North Carolina Office of Commissioner of Banks ("NCCB") closed Cooperative and the FDIC was named Receiver. Pursuant to 12 U.S.C. §1821(d)(2)(A)(I), the FDIC as Receiver succeeded to all rights, titles, powers, and privileges of Cooperative and Cooperative's shareholders with respect to Cooperative, including, but not limited to, Cooperative's claims against Cooperative's former directors and officers for negligence, gross negligence and breaches of fiduciary duty or other legal duties.

2. Fredrick Willetts, III ("Willetts") joined Cooperative in 1972. He succeeded his father, Fredrick Willetts, Jr., as President and CEO in 1991, and as Chairman of the Board in May, 1998. He resigned as President and CEO on February 3, 2009, and as Chairman of the Board of Directors of Cooperative ("Board") on June 9, 2009. Willetts resides in Wilmington, North Carolina.

3. Paul G. Burton ("Burton") was a member of Cooperative's Board from 1992 through his retirement on April 25, 2008. Burton resides in Wilmington, North Carolina.

4. James D. Hundley ("Hundley") joined Cooperative's Board in 1990 and served on the Board until Cooperative failed. Hundley resides in Wilmington, North Carolina.

5. Horace Thompson King, III ("King") served on Cooperative's Board from 1990 until Cooperative failed. King resides in Wilmington, North Carolina.

6. Ottis Richard Wright, Jr. ("Wright") served on Cooperative's Board from 1992 until Cooperative failed. Wright resides in Tabor City, North Carolina.

7. Richard Allen Rippy ("Rippy") served on Cooperative's Board from 1997 until Cooperative failed. Rippy resides in Wilmington, North Carolina.

8. Francis Peter Fensel, Jr. ("Fensel") served on Cooperative's Board from 1990 until Cooperative failed. Fensel resides in Wilmington, North Carolina.

9. Dickson B. Bridger ("Bridger") joined Cooperative in 1984 as a loan officer and mortgage loan originator. By the time Cooperative failed, he was Executive Vice-President of Mortgage Lending. Although he was not a member of the Board, Bridger regularly attended Board meetings, missing only five from January 2006, until Cooperative failed. Bridger resides in Wilmington, North Carolina.

10. Otto C. "Buddy" Burrell, Jr. ("Burrell") began his career in banking in 1970 before joining Cooperative in 1993 as Senior Vice-President, Retail Banking. When Cooperative closed, Burrell was Senior Executive Vice-President and Chief Operating Officer. Burrell also regularly attended Cooperative's Board meetings, missing only four from January 2006, until Cooperative failed. Burrell resides in Wilmington, North Carolina.

II. JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction over this matter, as actions in which the FDIC is a party are deemed to arise under federal law pursuant to 12 U.S.C. §1811, *et. seq*.; 12 U.S.C. §1819(b)(1) and (2), and 28 U.S.C. §§1331 and 1345. The FDIC has the power to sue and complain in any court of law. 12 U.S.C. §1819.

12. The Court has personal jurisdiction over all of the Defendants who at all relevant times were residents of, and conducted the business of Cooperative in, the State of North Carolina.

13. Venue is proper in this District under 28 U.S.C. §1319(b), as all or substantially all of the events and/or omissions giving rise to the claims asserted herein occurred in this

District.

III. FACTUAL BACKGROUND

14. Cooperative was founded in 1898 in Wilmington, North Carolina. Beginning in 1933, three generations of the Willetts family managed Cooperative until Cooperative failed in 2009. In November 2001, the Board and senior management together agreed on a new strategic goal for Cooperative to grow from $443 million to $1 billion in assets by the end of 2005. Cooperative did not meet this goal by the end of 2005, but at that time Willetts and the Board reaffirmed the goal to become a $1 billion bank and pursued an aggressive asset growth plan in furtherance of that goal. Willetts, Burton, Hundley, King, Wright, Rippy and Fensel (collectively "the Director Defendants") were all members of the Board when the aggressive growth strategy was adopted and later reaffirmed.

15. As implemented, the aggressive growth campaign traded the conservative and safe manner in which Cooperative had operated for 100 years for a strategy that concentrated Cooperative's lending in higher risk acquisition, development and construction ("ADC") loans. As a result of Cooperative's aggressive growth strategy, Cooperative's ADC loan concentration grew from 326% of total capital in December 2005 to 469% of total capital in December 2007. In its peer group, ADC loans comprised 104% of total capital in December 2005 and 124% of total capital in December 2007.

16. The Defendants failed to manage the inherent risks associated with their aggressive growth strategy. Rather than employing methods to properly monitor and mitigate the risks associated with the highly speculative lending in which Cooperative was engaging, the Director Defendants permitted a lax loan approval process which did not include a formal loan

committee to meet, review and analyze the loans being made by Cooperative. Instead, the Bank's Credit Manual ("Loan Policy") set forth 9 levels of loan approval authority within the Bank. Five of those levels of authority are relevant to the damages claimed herein: Authority Level 3 - $100,000: Bridger; Level 7- $1.5 million: Willetts or Burrell; Level 8-25% of the Bank's legal lending limit: any three officers with Level 5, 6 or 7 authority, one of which had to be Willetts, Burrell or the Senior Credit Risk Manager; Level 9 - 50% of the Bank's legal lending limit: Willetts and two directors; above 9 – up to the Bank's legal lending limit: full Board approval.

17. State and federal regulators repeatedly warned Cooperative's management and Board about the risks associated with its high concentration in speculative loans and weaknesses in its lending function. Beginning with the NCCB June 20, 2005 Report of Examination ("RoE"), examiners questioned the Bank's goal of reaching $1 billion in assets and raised concerns about the Bank's liquidity and loan concentrations in real estate construction, development loans and beach resort properties.

18. In the FDIC July 24, 2006, RoE examiners noted deficiencies in Cooperative's underwriting and credit administration and advised the Board that the loan portfolio was subject to undue risks with respect to credit administration, underwriting, and monitoring practices. The RoE identified specific underwriting weaknesses - loans were made with little or no hard borrower equity required; analysis of the borrower's or guarantor's contingent liabilities was not performed; and stale financials and credit memoranda were relied upon to approve loans. The examiners admonished the Defendants that previously identified underwriting and administration weaknesses were not being resolved. The FDIC examiners also warned that oversight and

organizational weakness in the lending area were contributing to credit administration and underwriting deficiencies. The Director Defendants took no action in response to these warnings to improve Bank operations.

19. In the September 10, 2007, NCCB RoE examiners' criticisms continued, and the Board was specifically told that deficiencies identified in previous examinations had not been adequately corrected, and that weaknesses in credit administration continued. These warnings were not heeded either. The Defendants persisted in their aggressive growth strategy without implementing sufficient policy or operation changes to improve either underwriting or credit administration.

20. From 2005 to 2008, regulators consistently warned the Board about Cooperative's commercial real estate concentrations. In February 2008, two state banking examiners advised the Board that Cooperative's commercial real estate concentration was the highest percentage in North Carolina - nevertheless, in clear conflict with the best interest of the Bank, the Board permitted and approved Cooperative's continued focus on commercial real estate lending, even though the Board had known since at least early 2007 that the real estate market was slowing.

21. Cooperative received a composite CAMELS 5 rating in the November 10, 2008, Joint FDIC and NCCB RoE. The examiners observed that recommendations for enhancing credit administration and underwriting practices had previously been made, but that these recommendations were not implemented or were ignored. The examiners identified significant weaknesses, including liberal renewal and extension practices; inadequate analysis of the borrower's repayment capacity; inadequate borrower equity in real estate projects; over-reliance on collateral as the primary source of repayment; renewing credits without sufficient current

financial information; inadequate real estate appraisals and the residential lot loan program.

22. The Defendants recklessly failed to ensure that Cooperative identified, measured, monitored and controlled the risk associated with its rapid growth. The Bank's growth was fueled by its risky and uncontrolled increase in residential development and commercial real estate ("CRE") loans, many of which were poorly underwritten and made in violation of laws, regulations and the Loan Policy. The negligence, gross negligence and reckless conduct of the Defendants, as officers and directors of the Bank, ultimately led to the Bank's failure. The failure was caused, in part, by losses on loans for which the FDIC now seeks recovery (the "Loss Loans"), as set forth below.

IV. LOSS LOANS

A. Lot Loans

23. In October 2006, Willetts and Bridger proposed a Lot Loan Program to the Bank's Asset Liability Committee ("ALCO"), a committee of officers whose purpose was to advise the Board on risks and suitability of new loan and other financial products. The Lot Loan Program provided credit to borrowers to buy vacant lots for the purported purpose of eventually building vacation homes in developments along the North Carolina coast. Willetts and Bridger acknowledged that the Lot Loans would not be moneymakers, but they contended that the program would lead to new customers who were more likely to obtain their construction loans from Cooperative when they started to build. The ALCO, which included as members the CFO and Vice-President of Internal Audit, responded that FDIC examiners were concerned about the large number of interest only and no-equity loans in the Bank's portfolio. Willetts and Bridger represented to the ALCO that the Lot Loans would be limited to a 90% loan-to-value ("LTV")

ratio and payments would not be interest only. A 90% LTV for the Lot Loans would violate the Bank's Loan Policy, which allowed only a 65% LTV limit for raw land and a 75% LTV limit for land development.

24. Cooperative made Lot Loans in 12 different developments beginning in late 2006. By September 30, 2008, Lot Loans comprised 52% of Cooperative's Tier One Capital and 45% of its Total Risk Based Capital. Moreover, the Lot Loans were not made as Willetts and Bridger represented to the ALCO. Instead, the loans were exactly what the ALCO and FDIC examiners were concerned about. The loans were no-equity loans with interest only payments. While there were some differences in how the Lot Loan Program worked in the various subdivisions, typically the Program operated so that a third-party, such as Total Realty Management, LLC ("TRM"), would present seminars to individuals from other states, suggesting that these individuals could buy these water-view lots, hold them for a few years, then obtain a significant return on their investment selling their lots. TRM would gather buyers, and then would buy the lots from the developer and turn around and sell them to the buyer on the same day or week often for twice as much as TRM paid for the lots. Appraisers (selected by the mortgage broker to which TRM referred prospective buyers) would appraise the lots based on similar transactions, thus resulting in grossly inflated appraisals. TRM would take a note and second mortgage for 20% of the purchase price in lieu of a "downpayment," pay all the closing costs, and advance the interest payments for up to 24 months. Thus, Cooperative granted many loans secured by vacant lots in which the borrower paid nothing as a downpayment, paid no closing costs, and paid no interest – all based on lots that had been flipped to raise the prices.

25. In addition, contrary to the representations by Willetts and Bridger, a majority of

the loans were stated income loans, and were "no document loans," meaning that the Bank did not require the borrower to provide financial statements or tax returns. This was a violation of the Loan Policy, which required that borrowers submit 2 years of complete tax returns and recent financial statements for all loans over $100,000. The primary purchasers of the lots through the Lot Loan Program were people who lived outside of North Carolina. Of the 78 Lot Loans upon which this claim is based, 76 of the borrowers were from out-of-state.

26. One of the subdivisions where Cooperative made Lot Loans was the Summerhouse subdivision. In Summerhouse, 26 lots were sold to TRM in a one-month period. One lot, #244, was sold to TRM on June 20, 2007, for $226,000. The next day, TRM sold it to Mr. T.T. of Virginia Beach, Virginia, for $425,000. The appraisal of $425,000 relied upon other recently TRM-flipped properties. The Bank's loan to Mr. T.T. was an interest-only $340,000 loan (which showed an 80% LTV ratio). Mr. T.T. did not make the $85,000 down payment, TRM did by "only" taking $114,000 out of the $199,000 equity gain at closing, leaving "paper equity" of $85,000 in the property which it "loaned" to Mr. T.T. The loan to Mr. T.T. was a stated-income, no-document loan in violation of the Loan Policy.

27. Bridger approved all of the Lot Loans upon which this claim is based, even though his approval authority of $100,000 was insufficient. Bridger was grossly negligent in approving the Lot Loans in violation of the Loan Policy, in part because he knew that the majority of the loans were stated-income, no-document loans; the borrowers had no equity in the property; the borrowers paid no closing costs or interest; and the borrowers typically had insufficient cash flow to service the loans and were depending on speculative increases in lot values to repay them. Willetts was grossly negligent in supervising the Lot Loan Program

because Willetts was likewise aware of the violations of the Loan Policy presented by that program as well as the highly speculative nature of the program. Indeed, by June 2007, both Willetts and Bridger knew that some loan officers and even an appraiser had questioned the values of the lots upon which Cooperative was making loans. On July 5, 2007, Bridger informed the ALCO, including Willetts, that he had a second appraisal performed on one of the lots that Cooperative financed, and the second appraisal was for nearly $100,000 less than the appraisal used to support the loan. However, Bridger and Willetts were undeterred by the mounting evidence that the Bank was financing lots at grossly inflated values.

28. The Director Defendants learned about the high-risk Lot Loan Program no later than the July 17, 2007, Board Meeting when Bridger informed them that the Lot Loans did not comply with the Loan Policy. The Director Defendants also knew that Bridger's loan approval authority was only $100,000, because during the 12-month period before the July 17, 2007, meeting, the Board approved the lending authority matrix seven times, and each time Bridger had a maximum lending authority of $100,000. All 78 of the Lot Loans within this claim were for more than $100,000.

29. Even following the July 17, 2007, meeting, the Board took no corrective action with respect to the Lot Loan Program, which was clearly in conflict with the best interests of the Bank. Despite repeated regulatory warnings and Bridger's report to the Board of systematic Loan Policy violations, in a complete abdication of its responsibilities, the Board continually failed to supervise the Bank's Lot Loan lending function. An additional $4.4 million in losses was incurred on Lot Loans approved after the July 17, 2007, Board meeting, as a result of the Director Defendants' gross negligence in failing to monitor, direct and supervise the Lot Loan

program.

30. The following table lists the Lot Loans upon which the FDIC seeks recovery from the various Defendants. The FDIC seeks a judgment against Willetts and Bridger for all of the losses resulting from Lot Loans, and from the Director Defendants for all of the losses relating to Lot Loans approved after July 17, 2007.

LOT LOANS MADE BEFORE JULY 17, 2007, BOARD MEETING

Borrower	Loan #	Date of Origination	Original Loan Amount	Loss to FDIC
RWH[1]	190001300	1/5/2007	999,000.00	328,117.60
KW	190001308	4/26/2007	341,991.00	232,424.59
LKM	190001311	5/3/2007	296,991.00	190,114.07
FMH	1690000195	5/18/2007	279,200.00	208,531.44
SM	1690000196	5/18/2007	295,200.00	221,607.61
SP	1690000197	5/18/2007	221,600.00	161,457.25
MDF	1690000198	5/18/2007	303,200.00	233,185.62
SOW	1690000199	5/18/2007	311,200.00	234,683.77
KMT	1690000200	5/18/2007	295,200.00	221,607.61
KMT	1690000201	5/18/2007	295,200.00	242,445.79
MAR	1690000205	5/18/2007	345,600.00	228,237.48
LD	190001314	5/22/2007	349,191.00	241,998.44
TAE	1690000204	5/24/2007	355,200.00	247,567.67
ABS	190001316	5/30/2007	309,992.00	202,617.35
JKB	1690000207	6/1/2007	295,200.00	225,207.68
TM	1690000210	6/1/2007	287,200.00	215,069.52
BJV	2090000079	6/5/2007	319,200.00	203,561.94
PPB	1690000208	6/8/2007	287,200.00	211,469.46
JKD	1690000214	6/8/2007	303,200.00	224,545.62
BBG	1690000215	6/8/2007	263,000.00	202,491.97
GMG	1690000216	6/8/2007	340,000.00	258,220.86
JB	1690000217	6/8/2007	303,200.00	228,145.69
SF	1690000220	6/8/2007	303,200.00	217,346.27
SDE	1690000221	6/8/2007	303,200.00	228,145.69
AKR	1690000222	6/8/2007	287,200.00	211,469.46

[1] All of the individual borrowers referenced herein are identified by initials to protect the confidential financial information of the borrowers. The loan files for all borrowers referenced herein have previously been provided to the Defendants; thus the Defendants are aware of the full identity of the borrowers on the loans in question.

Borrower	Loan #	Date of Origination	Original Loan Amount	Loss to FDIC
HR	190001321	6/13/2007	271,192.00	174,833.48
KK	1690000224	6/13/2007	303,200.00	224,545.62
BCC	1690000225	6/13/2007	303,200.00	230,207.29
MS	1690000226	6/13/2007	303,200.00	228,145.69
BH	2090000078	6/13/2007	283,200.00	174,100.57
JS	2090000080	6/15/2007	327,200.00	273,069.56
MJS	2090000082	6/15/2007	319,200.00	205,130.52
JLH	1690000229	6/20/2007	324,000.00	245,144.70
WC	1690000231	6/20/2007	303,200.00	231,496.00
DEJ	1690000233	6/20/2007	355,200.00	249,043.59
TAT	1690000234	6/25/2007	340,000.00	243,821.38
RDC	1690000235	6/25/2007	324,000.00	245,168.00
KGF	2090000084	6/25/2007	319,200.00	203,502.40
BHS	190001322	7/2/2007	353,691.00	243,807.18
JAB	2090000081	7/2/2007	355,200.00	229,344.04
RB	190001324	7/5/2007	350,991.00	246,303.60
CD	1690000242	7/11/2007	328,000.00	263,732.82
LC	1690000243	7/11/2007	308,000.00	228,468.46
DAK	2090000091	7/11/2007	319,200.00	207,162.01
			SUBTOTAL	9,967,297.36

LOT LOANS MADE AFTER JULY 17, 2007, BOARD MEETING

Borrower	Loan #	Date of Origination	Original Loan Amount	Loss to FDIC
LAC	190001329	7/25/2007	307,700.00	184,114.52
DB	1690000247	7/26/2007	311,200.00	230,003.43
ML	1690000248	7/26/2007	287,200.00	211,469.46
MVR	1690000254	8/2/2007	287,200.00	208,778.40
ALK	1490000107	8/3/2007	143,910.00	102,411.20
JP	1690000251	8/3/2007	324,000.00	244,080.00
JSP	1690000252	8/3/2007	340,000.00	249,859.90
RJB	1690000253	8/3/2007	340,000.00	270,488.72
CAL	190001330	8/22/2007	287,991.00	6,087.94
JLC	190001331	8/23/2007	311,992.00	213,162.40
CAP	1490000105	8/24/2007	143,910.00	92,954.40
AM	1490000106	8/24/2007	314,910.00	199,487.20
AM	1490000109	8/30/2007	114,210.00	74,533.95
SMR	1490000110	9/4/2007	114,210.00	66,287.55

Borrower	Loan #	Date of Origination	Original Loan Amount	Loss to FDIC
AAN	1490000114	9/5/2007	119,610.00	72,444.52
DKR	2090000090	9/7/2007	319,200.00	205,051.20
JAM	1490000112	9/14/2007	116,910.00	68,227.84
JC	2090000092	9/14/2007	319,200.00	203,660.00
NJW	1490000120	9/18/2007	154,710.00	55,020.00
VJV	1490000123	9/21/2007	154,710.00	51,403.20
TWT	190001338	10/11/2007	280,491.00	186,138.66
MFB	190001340	10/22/2007	289,800.00	129,363.06
SJS	1490000132	10/25/2007	144,810.00	47,135.20
CWL	190001341	11/9/2007	328,140.00	170,294.08
VJV	1490000140	11/14/2007	109,710.00	78,495.20
BMD	1490000139	11/15/2007	119,610.00	86,392.00
JMT	1490000143	11/20/2007	106,110.00	68,178.40
PRB	1490000144	11/26/2007	122,310.00	88,578.40
CL	1490000145	12/4/2007	125,910.00	86,504.00
MAM	1490000158	1/22/2008	125,910.00	83,264.00
SJZ	1490000160	1/22/2008	126,810.00	91,646.40
LR	190001350	2/27/2008	325,800.00	144,303.77
CHF	190001353	3/25/2008	324,360.00	150,412.80
XRR	1490000170	4/10/2008	101,900.00	62,361.18
			SUBTOTAL	4,482,592.98

TOTAL LOSSES ON LOT LOANS $14,449,890.34

B. <u>Commercial Real Estate Loans</u>

31. In addition to the losses incurred on the Lot Loans, the FDIC has also been damaged by losses incurred on CRE loans which contain serious flaws from the deficient underwriting and imprudent credit administration about which the regulators had repeatedly cautioned the Director Defendants.

32. Because there was no formal loan committee at Cooperative during the relevant time, approval for CRE Loans was typically obtained by Willetts (or his designee) calling individual directors on the telephone, one at a time until he had enough votes for approval. Prior

to approving loans, the Director Defendants did not meet to discuss the loans and did not have copies of the loan files or any other presentations to evaluate the loans other than what they were told on the telephone. The telephonic discussions of the loans were too brief and cursory to enable the approvers to identify the serious underwriting deficiencies in these CRE Loans. The approvals were "reported" at the next Board meeting. The CRE Loans upon which the FDIC's claim is based are included in the chart below and described in further detail in the paragraphs that follow:

Borrower	Date	Original Amount	Loss to FDIC	Approved By
Bluewater Beach, LLC	06/05/07	$10,605,700	$5,473,021.23	1,2,4,6,7
Palmetto Pointe Building Company, LLC	04/17/07	$5,570,000	$1,378,912.02	1,2,3,5,6
Mill Creek Holdings, LLC	03/06/07	$8,198,000	$2,126,056.01	1,2,3,4,5,7
Mill Creek Holdings, LLC	10/17/07	$1,500,000	$777,149.00	1,7
BBN Mercer, LLC	03/06/07	$6,343,500	$3,025,214.37	1,2,3,4,5,7
BBN Mercer, LLC	10/17/07	$1,500,000	$1,103,977.34	1,7
RWM/PRM	06/08/07	$3,700,000	$1,370,220.28	1,2,3,4
Richmond Hills Residential Partners, LLC	07/30/07	$7,750,000	$3,570,082.06	1,2,4,6,7
Crossover Enterprises, LLC	04/08/08	$2,700,000	$1,196,347.98	7

TOTAL LOSS ON CRE LOANS **$20,020,980.29**

Approvers: 1-Willetts; 2-Fensel; 3-King; 4-Rippy; 5-Wright; 6-Burton; 7-Burrell

Bluewater Beach, LLC

33. On or before June 5, 2007, Willetts, Fensel, Rippy, Burton and Burrell approved a

$10,605,700 loan to Bluewater Beach, LLC ("Bluewater Beach"). The purpose of the loan was to develop 105 acres in a subdivision in Leland, North Carolina. The terms of the loan called for interest only monthly payments, with an 18-month maturity. The loan was secured by roughly 105 acres of the Bluewater Beach Subdivision in Leland. The purpose of the loan was to refinance the acquisition costs of the land, to complete the infrastructure of Phase I (50 residential lots), and land clearing and site preparation for Phases II and III. A glaring problem with the Bluewater Beach loan is that the purchase price for the property was just over $3 million, yet $7,190,516 of the loan was used to payoff a prior loan from SunTrust Bank. There is no explanation in the loan file, and none was provided to the Directors, as to how the other $4,093,516 of the Suntrust loan proceeds had been spent. In June 2007, when Cooperative approved the loan, there were no structures or infrastructure anywhere on the property. Another deficiency in the Bank's underwriting was that the only repayment source noted for the loan was the sale of collateral, a significant deficiency given that neither the newly-formed borrower, Bluewater Beach, nor the guarantors had sufficient cash flow to make monthly interest payments. Moreover, interest costs were not included in the project budget.

34. The Bluewater Beach loan was improperly structured in an effort to avoid legal lending limit violations due to the existing high level of indebtedness to Cooperative already owed by the guarantors on the loan (LB and KP) and their related entities. Even though LB and KP were each 50% owners in Bluewater Beach, the guaranties were structured such that LB was a 55% guarantor and KP was a 45% guarantor. In addition, there was no adequate basis for repayment of the loan. Significantly, KP, one of the guarantors, had a below-average credit score, which was explained away by noting that the low credit score was "mostly due to the high

revolving debt for [KP's construction business]". Further, the guarantors lacked sufficient surplus cash flow to service the debt. In fact, the principals collectively did not have sufficient surplus cash flow to pay the monthly interest charges on the loan. Nevertheless, the loan was approved even though none of the Bank's cash flow analysis included debt service for this loan. Approval of this loan was grossly negligent and clearly in conflict with the best interest of the Bank. To date, the FDIC's loss on the Bluewater Beach loan is $5,473,021.23.

Palmetto Pointe Building Company, LLC

35. On or before April 7, 2007, Willetts, Fensel, King, Wright and Burton approved a $5,570,000 loan to Palmetto Pointe Building Company, LLC ("Palmetto Pointe"). The purpose of the loan was to provide a construction line of credit to acquire 15 residential lots in the Palmetto Pointe Subdivision and build 3 single family spec homes. The loan was an 18-month loan with interest only payments payable monthly with all principal due at maturity. The only repayment source noted for the loan was the sale of homes and lots. However, none of the spec homes were under contract and the 15 lots were undeveloped at the time the loan closed. The financial statements of the guarantors of the loan reflected that the guarantors had limited liquidity to satisfy this loan if the sale of the spec homes and lots did not come to fruition as anticipated. At the time the loan was underwritten, the guarantors had a combined liquidity of only $142,000, and both guarantors' net worth was derived primarily from long-term real estate holdings.

36. The loan to Palmetto Pointe was supported by inadequate or wrongly valued security. The comparable lot sales used in the March 7, 2007 appraisal were sales in 2005 and 2006. Those sales showed that the 2006 sales were 30% lower than the 2005 lot sales, however,

the appraiser applied an average upward time adjustment to each respective lot sale of 6.2%, which was clearly unwarranted given the historical data reflecting declining values for the lots. The foregoing Defendants were grossly negligent in approving this loan which was clearly in conflict with the best interest of the Bank, given the lack of financial strength of the borrower and guarantors as well as the wrongly valued collateral security. The FDIC's loss to date on the Palmetto Pointe loan is $1,378,912.02.

BBN Mercer, LLC/Mill Creek Holdings, LLC

37. On March 6, 2007, Cooperative extended two loans to two special purpose entities, Mill Creek Holdings, LLC ("Mill Creek") and BBN Mercer, LLC ("BBN"). Mill Creek and BBN were owned by the same principals. The loan to Mill Creek was a construction line of credit for $6,343,500, of which $2,427,000 was new money and $3,916,480 was a consolidation of existing debt. The loan to BBN was a construction line of credit for $8,198,000, of which $3,985,000 was new money, and $4,242,379 was a consolidation of existing debt. Mill Creek and BBN were formed in 2005 to acquire 167.77 acres in Boliva, North Carolina and to develop residential lots in the Mill Creek subdivision. BBN and Mill Creek acquired the subject property in two separate purchase transactions in 2005, where each purchased a one-half undivided interest in the property for a total combined purchase price of $5,250,000. The stated purpose of the Mill Creek loan was to complete the infrastructure for 55 remaining residential lots in Phase II, Section 2 and Phase III of Mill Creek Cove subdivision, and the stated purpose of the BBN loan was to complete the infrastructure for the remaining 60 residential lots in Phase I, Section 2, the community clubhouse and pool. Both of these loans were approved by Willetts, Fensel, King, Rippy, Wright and Burrell. These two loans resulted in a total of $14,541,500 in

qualifying commitments to lend to the common enterprise of Mill Creek and BBN, exceeding Cooperative's legal lending limit of $11,940,600 at the time these loans were originated. As such, the Defendants who approved this loan approved it in violation of N.C.G.S.A. §53-48.

38. On October 17, 2007, Cooperative extended two new loans to Mill Creek and BBN, each in the amount of $1.5 million which were purportedly business lines of credit for additional land development expenses. These two loans were approved only by Willetts and Burrell, even though the Loan Policy required the Board's majority approval because the aggregate indebtedness of Mill Creek and BBN exceeded 50% of the Bank's legal lending limit. Moreover, as of October 17, 2007, the Bank had total loans and extensions of credit to the common enterprise of Mill Creek and BBN of $17,541,500, when the Bank's legal lending limit was only $12,610,650. This again was a violation of N.C.G.S.A. §53-48.

39. In September 2008, the Bank renewed the four loans to Mill Creek and BBN with an aggregate balance of $11,036,997, which was 87.9% of the Bank's legal lending limit. The Loan Policy provided that the Bank's president and two directors could approve loans up to 50% of the Bank's legal lending limit, but anything above 50% of the Bank's legal lending limit required the Board's majority approval. All of the September 2008, renewals were approved only by Burrell and Willetts in violation of the Bank's Loan Policy. The renewals also violated the Loan Policy requirement of a new appraisal for any renewal, refinancing or modification of an existing loan when there had been a material change in market condition or when new money was advanced, both of which were present at the time of the renewal. Moreover, with the four renewals, the Bank increased its overall exposure by over $1 million.

40. The FDIC's losses to date on the loans to Mill Creek are $2,126,056 and

$777,149, and the losses on the two loans to BBN are $3,025,214 and $1,103,977. The approval of the original four loans to Mill Creek and BBN was grossly negligent and clearly in conflict with the best interest of the Bank because, among other things, the loans violated the Bank's legal lending limits. The approval of the renewals of the four loans, which included extending additional monies to Mill Creek and BBN, was grossly negligent and clearly in conflict with the best interest of the Bank because, among other things, the loans were approved in violation of the Loan Policy and no explanation was given for the increase in exposure of over $1 million.

RWM/PRM

41. On June 8, 2007, Cooperative made a loan of $3,700,000 to RWM and PRM to provide funds for the purchase of an interest in a land development company which would own and develop a marina in North Carolina. The loan covered 100% of the purchase price for the acquisition of the interest in the company, and also funds for interest carry and project expenses. The loan had a two-year term, which was modified on June 11, 2007, by extending the maturity another year until June 8, 2010, as had been approved at loan origination. The primary repayment source was anticipated to be a land development and construction loan for the marina, however, the take-out loan never occurred. The collateral for the loan was five residential lots owned by the borrowers. This loan was approved by Willetts, Fensel, King, Rippy and Burrell.

42. The RWM/PRM loan, which was an interest-only, fixed rate, 3-year term loan, violated Cooperative's Loan Policy requirement of amortization with regular monthly or quarterly payments for business term loans with an original maturity of more than one year. Cooperative's files do not reflect that any feasibility study for the proposed marina was obtained or considered, nor is there any indication that the purchase agreement for the borrowers'

investment in the land development company was obtained or considered. The appraisal for the five lots that were offered as collateral relied on comparable sales that were over 12 months old, and the appraisal did not include market information to support the values that were suggested. As such, the approval of this loan was grossly negligent and clearly contrary to the best interest of the Bank in allowing the 100% financing of the speculative purchase in the land development company. The FDIC's loss on this loan is $1,370,220.

Richmond Hills Residential Partners, LLC

43. On July 30, 2007, Cooperative extended a $7,750,000 loan to Richmond Hills Residential Partners, LLC ("Richmond Hills"). The purpose of the loan was to payoff existing loans held by SunTrust and Cooperative, to provide funding to pay already incurred development expenses, and to establish an interest reserve to carry the loan for eight months. The loan was for 18 months, with monthly interest-only payments and the principal due at maturity. The primary repayment source was noted to be revenue from lot sales as stated in a purchase contract with St. Lawrence Homes ("SLH"). There was no second or third repayment source noted. At the time of the Cooperative loan, a contract was in place for SLH to purchase all 167 lots of the Richmond Hills Subdivision, only 40 of which were developed and an additional 47 lots were 95% completed. There were no funds in the loan to cover the cost of development of additional lots. Therefore, as the loan was set up, Richmond Hills would only have 72 lots available to sell to SLH, which would not generate sufficient funds to repay Cooperative's loan. As such, this debt could not be retired without the borrower securing additional financing to complete the development of the remainder of the lots.

44. The loan officer overstated the collateral value. He presented the loan using an

appraised value of $105,000 per lot pursuant to an appraisal obtained by SunTrust and recertified to Cooperative prior to the loan closing. However, he should have used the actual contracted for purchase price for the lots which was far less than the per lot value assigned by the appraiser. Instead of the $105,000 per lot the appraiser assigned, the contract prices ranged from $73,000 to $90,000, considerably less than the per lot value in the appraisal. Moreover, neither the borrower nor the guarantors possessed the ability to repay this loan in the event the SLH contract fell through, which indeed happened.

45. The FDIC's loss on the Richmond Hills loan is $3,570,082. Approval of this loan was grossly negligent and clearly in conflict with the best interest of the Bank given the improper valuation of the collateral and the lack of financial support for the loan by the borrower and guarantors.

Crossover Enterprises, LLC

46. On April 9, 2008, the Bank extended a $2,700,000 loan to Crossover Enterprises, LLC ("Crossover"). The purpose of the loan was to refinance three outside construction loans and to provide $700,000 cash-out for investment in another project. The loan was an 18-month, interest only, loan which required a borrower funded interest reserve of $182,250. The collateral for the loan was 28 condominium units located within 4 buildings in Little River, South Carolina (2 one-bedroom units, 11 two-bedroom units and 15 three-bedroom units). This loan was approved by Burrell.

47. Burrell approved this loan notwithstanding the stale financial statement submitted by the borrower and a financial statement by one of the guarantors that did not comply with the Loan Policy; moreover, the debt coverage ratios for both the borrower and the guarantors were

inadequate and in violation of the Loan Policy. Further, the appraisal used to support the loan valued the two-bedroom units at $185,000 and the three-bedroom units at $215,000 which values relied, in part, on sales of condominium units 10 miles from the subject property. The appraisals ignored the actual previous sales of two- and three-bedroom units within the subject buildings, which reflected that two-bedroom units sale prices ranged from $139,900 to $149,900 and three-bedroom units sold for $179,900 to $189,900. The borrower had been unable to sell additional units at that price point, therefore, it was wholly unfeasible that the units were valued at prices higher than the previous sales.

48. The underwriting of this loan was woefully deficit. The borrower had negative book equity and negative cash flow, thus, lacked capacity to service the debt on the loan. The owners of Crossover, who were the guarantors on the loan, were withdrawing more money from the company as dividends and distributions than the company was earning after taxes. Further, in calculating the debt service on the loan, the Bank failed to consider the $15,000 interest payment per month which was due, even though the interest reserve account set up for the loan would only carry the payments for the first 12 months of the 18-month term. The financial analysis showed that neither the borrower nor the guarantors could service the loan without the interest reserve so no consideration was given to how the loan would be paid once the 12-month interest reserve was depleted. In addition, while the loan approval required the borrower to fund the interest reserve, the interest reserve was actually funded from Cooperative's loan proceeds.

49. Burrell approved this loan notwithstanding the financial inability of the borrower and guarantors to service the debt and the wrongly valued collateral offered in support of the loan. Burrell's actions in this regard were negligent and grossly negligent. To date, the FDIC's

loss on the Crossover loan is $1,196,347.

V. CLAIMS FOR RELIEF

COUNT I - NEGLIGENCE AND GROSS NEGLIGENCE

50. The allegations of Paragraphs 1 through 49 of this Complaint are incorporated herein by reference.

51. As directors and officers of Cooperative, the Defendants owed a duty of care to discharge their duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances and in a manner in which they reasonably believed to be in the best interest of Cooperative. This duty of care included, but was not limited to, the following:

(a) To adopt such careful, reasonable and prudent policies and procedures, including those relating to lending and underwriting, as required to insure that the Bank did not engage in unsafe and unsound banking practices, and to insure that the affairs of the Bank were conducted in accordance with these policies and procedures;

(b) To timely acknowledge and adequately respond to changes in economic conditions that create additional risks with respect to certain types of products or transactions;

(c) To review Reports of Examinations and other directives of regulatory agencies, to carry out the instructions and orders contained in those Reports, to investigate and cure problems noted therein, and to prevent any repetition of such problems and deficiencies;

(d) To take such action as necessary to insure that Cooperative's loans were underwritten, approved, disbursed and collected in accordance with the law, regulations, and Loan Policy applicable thereto and in accordance with sound and prudent banking practices;

(e) To exercise reasonable control and supervision over the employees of Cooperative; and

(f) To faithfully and diligently perform their duties as officers and directors of Cooperative.

52. In disregard of their duties to Cooperative, the Defendants failed to exercise that degree of diligence, care, judgment, skill and good faith which an ordinarily prudent person would have exercised under similar circumstances in like positions in managing, conducting, supervising and directing Cooperative's making, supervising and administering of loans. The Defendants' failures to exercise reasonable care, skill, diligence, loyalty and good faith in the discharge of their responsibilities include, but are not limited to:

(a) A complete failure to manage the risks associated with the Bank's aggressive real estate lending, particularly in the area of ADC and CRE loans;

(b) Inadequate analysis of borrower repayment capabilities (eg., a lack of cash flow analysis, inaccurate computations of cash flow and debt service coverage ratios);

(c) Requiring little or no borrower equity in real estate loans and reliance on collateral (such as the sale of real estate) as a primary source of repayment;

(d) Instances in which loans were made for residential lots with little or no documentation or verification of borrower income, employment, or repayment capability;

(e) Liberal loan renewals and extensions, including renewal of interest-only loans;

(f) Failure to establish and enforce appropriate loan repayment programs;

(g) Renewing credits without sufficient or current financial information;

(h) Failing to order and/or analyze real estate appraisals independent from the lending function;

(i) Operating the Bank in a high-risk manner with an excessive risk exposure to the Bank;

(j) Failing to develop or maintain a safe and sound strategy for the operation of the Bank, resulting in excessive credit concentrations in higher risk loans, excessive loan delinquencies, excessive problem assets, violations of law and regulations, resulting in insufficient capital to operate the Bank;

(k) Failing to exercise independent judgment and to act in the best interest of

Cooperative in entering, approving and ratifying loans;

(l) Failing to exercise due diligence and care in the supervision of Cooperative's officers and employees in the discharge of their duties;

(m) Permitting loans to be made on the basis of grossly inadequate or inaccurate information regarding the finances of the borrower, the value of the collateral, and/or the sources of repayment;

(n) Permitting loans to be made on an undersecured basis, contrary to prudent banking practice and in conflict with the best interest of the Bank;

(o) Failing to establish or adhere to policies responsive to the numerous and repeated warnings and criticisms of federal and state banking regulators;

(p) Permitting loans to be made in excess of the legal lending limits established by North Carolina law;

(q) Failing to utilize a formal loan committee to analyze, review, discuss and approve loans; and

(r) Permitting loans in excess of 100% financing for speculative ventures.

53. The acts and omissions of the Defendants are so imprudent, reckless and represent such an extreme deviation from the standard of care so as to amount to not only negligence but also gross negligence on the part of the Defendants.

54. As a direct and proximate result of the foregoing and other breaches, acts and omissions of the Defendants, Cooperative suffered serious financial losses in excess of $33 million on 78 Lot Loans and 9 CRE Loans, referred to herein as the Loss Loans.

55. Pursuant to 12 U.S.C.A. §1821(k), N.C.G.S.A. §55-8-30 and N.C.G.S.A. §55-8-42, the FDIC is entitled to recover from the Defendants all damages sustained as a result of their negligence and gross negligence alleged herein.

COUNT II - BREACH OF FIDUCIARY DUTIES

56. The allegations of Paragraphs 1 through 55 of this Complaint are incorporated herein by reference.

57. Pursuant to applicable federal statutes, regulations and North Carolina law, directors and officers of insured financial institutions, such as Cooperative, stand in a fiduciary relationship to the institutions they serve, and are obligated to discharge the duties of their respective positions in accordance with the standards imposed by those laws.

58. The Defendants owed fiduciary duties, individually and collectively, to exercise the highest degree of loyalty, care, diligence and fair dealing in the management, conduct and direction of the business of Cooperative. The Defendants duties included, but were not limited to, those set forth in Paragraph 51 of this Complaint.

59. The Defendants, individually and collectively, breached their fiduciary duties to Cooperative, its depositors and shareholders, by not discharging their duties in good faith, and by failing to exercise that degree of diligence, care, loyalty, judgment and skill required of them in the conduct, direction, supervision and control of Cooperative's business and affairs.

60. The Defendants committed or permitted acts and omissions which resulted in great damage to Cooperative, including, but not limited to, those act and omissions listed in Paragraph 52 of this Complaint.

61. As a direct and proximate result of the breaches of fiduciary duty by the Defendants, Cooperative sustained losses in excess of $33 million.

62. Pursuant to provisions of applicable law, the FDIC is entitled to recover from the

Defendants all damages sustained as a result of the breaches of fiduciary duty alleged herein.

WHEREFORE, THE FDIC PRAYS for judgments against the Defendants as follows:

1. Against Willetts for:

$14,449,890	on losses from loss Lot Loans
$5,473,021	on the Bluewater Beach loan
$1,378,912	on the Palmetto Pointe loan
$2,903,205	on the Mill Creek loans
$4,129,191	on the BBN loans
$1,370,220	on the RWM/PRM loan
$3,570,082	on the Richmond Hills loan

For a total of $33,274,520

2. Against Burton for:

$4,482,593	on loss Lot Loans made after July 17, 2007
$1,378,912	on the Palmetto Pointe loan
$3,570,082	on the Richmond Hills loan

For a total of $9,431,587

3. Against Hundley for:

$4,482,593	on loss Lot Loans made after July 17, 2007

For a total of $4,482.593

4. Against King for:

$4,482,593	on loss Lot Loans made after July 17, 2007
$1,378,912	on the Palmetto Pointe loan
$2,126,056	on the Mill Creek loans
$3,025,214	on the BBN loan
$1,370,220	on the RWM/PRM loan

For a total of $12,382,995

5. Again Wright for:

$4,482,593	on loss Lot Loans made after July 17, 2007
$1,378,912	on the Palmetto Pointe loan

$2,126,056 on the Mill Creek loans
$3,025,214 on the BBN loan

For a total of $11,012,775

6. Against Rippy for:
$4,482,593 on loss Lot Loans made after July 17, 2007
$5,473,021 on the Bluewater Beach loan
$2,126,056 on the Mill Creek loans
$3,025,214 on the BBN loan
$1,370,220 on the RWM/PRM loan
$3,570,082 on the Richmond Hills loan

For a total of $20,047,186

7. Against Fensel for:

$4,482,593 on loss Lot Loans made after July 17, 2007
$5,473,021 on the Bluewater Beach loan
$1,378,912 on the Palmetto Pointe loan
$2,126,056 on the Mill Creek loans
$3,025,214 on the BBN loan
$1,370,220 on the RWM/PRM loan
$3,570,082 on the Richmond Hills loan

For a total of $21,426,098

8. Against Bridger for:

$14,449,890 on losses from loss Lot Loans

For a total of $14,449,890

9. Against Burrell for:

$5,473,021 on the Bluewater Beach loan
$2,903,205 on the Mill Creek loans
$4,129,191 on the BBN loans
$1,370,220 on the RWM/PRM loan
$3,570,082 on the Richmond Hills loan
$1,196,348 on the Crossover loan

For a total of $18,642,067

10. For prejudgment interest against all Defendants on amounts for which they are liable.

11. For the FDIC's recoverable costs and expenses incurred in connection with this matter.

12. For a trial by jury and for any other relief as the Court may deem just, equitable or proper.

Respectfully submitted,

/s/ Ruth Allen

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
CIVIL ACTION NO. 7:11 CV 00165-BO

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for COOPERATIVE BANK,	)	
Plaintiff,	)	**ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANTS**
v.	)	
FREDERICK WILLETTS III, PAUL G. BURTON, JAMES D. HUNDLEY, HORACE THOMPSON KING, III, OTTIS RICHARD WRIGHT, JR., RICHARD ALLEN RIPPY, FRANCIS PETER FENSEL, JR., DICKSON B. BRIDGER, and OTTO C. "BUDDY" BURRELL, JR.	)	
Defendants.	)	

Defendants – Frederick Willetts, III, Paul G. Burton, James D. Hundley, Horace Thompson King, III, Ottis Richard Wright, Jr., Richard Allen Rippy, Francis Peter Fensel, Jr., Dickson B. Bridger, and Otto C. "Buddy" Burrell, Jr. ("the Defendants") – by and through their undersigned counsel, hereby respond to the individually numbered allegations of the Complaint filed by the Federal Deposit Insurance Corp., as Receiver for Cooperative Bank ("FDIC"). To this point, Defendants' investigation of the allegations set forth in the Complaint has been informed by only a limited production of documents, and with no deposition testimony or other formal discovery. Accordingly, Defendants' responses are limited to information and knowledge presently within their custody and control and Defendants reserve the right to amend this Answer and Affirmative Defenses. Defendants deny all factual allegations not expressly admitted herein.

ANSWER

1. Paragraph 1 states legal conclusions to which no response is required. To the extent a response is required, Defendants admit that Cooperative was a state-chartered, non-member bank under the laws of the State of North Carolina, that its deposits were insured by the FDIC, and that on or about June 19, 2009, the North Carolina Office of Commissioner of Banks, in cooperation with the FDIC, closed Cooperative and the FDIC was named Receiver.

2. Mr. Willetts admits the allegations in Paragraph 2.

3. Mr. Burton admits the allegations in Paragraph 3.

4. Dr. Hundley admits that he served on Cooperative's Board from 1990 until regulators seized the bank on June 19, 2009 and that he resides in Wilmington, N.C.

5. Mr. King admits that he served on Cooperative's Board from 1990 until regulators seized the bank on June 19, 2009 and that he resides in Wilmington, North Carolina.

6. Mr. Wright admits that he served on Cooperative's Board from 1992 until regulators seized the bank on June 19, 2009 and that he resides in Tabor City, North Carolina.

7. Mr. Rippy admits that he served on Cooperative's Board from 1997 until regulators seized the bank on June 19, 2009 and that he resides in Wilmington, North Carolina.

8. Mr. Fensel admits that he served on Cooperative's Board from 1990 until regulators seized the bank on June 19, 2009 and that he resides in Wilmington, North Carolina.

9. Mr. Bridger admits that he joined Cooperative in 1984 as a loan officer and mortgage loan originator. He admits that he was Executive Vice-President of Mortgage Lending when regulators seized the bank on June 19, 2009. Mr. Bridger admits that he regularly attended parts of Cooperative Board meetings. He denies that he was present for the entirety of the Board meetings he attended. He admits that he resides in Wilmington, North Carolina.

10. Mr. Burrell admits that he has been a banker since 1970, that he joined Cooperative in 1993 as Senior Vice President, Retail Banking, and that he was Senior Executive Vice President and Chief Operating Officer when regulators seized the Bank on June 19, 2009. Mr. Burrell admits that he regularly attended parts of Cooperative Board meetings. He denies that he was present for the entirety of the Board meetings he attended. He admits that he resides in Wilmington, North Carolina.

11. Paragraph 11 does not set forth allegations to which a response is required.

12. Paragraph 12 does not set forth allegations to which a response is required.

13. Paragraph 13 does not set forth allegations to which a response is required.

14. Defendants admit that Cooperative was founded in 1898 in Wilmington, North Carolina and that members of the Willetts family were involved in management of the bank from 1933 until it was seized by regulators in June 2009. Defendants admit that one of Cooperative's strategic goals was to grow the Bank's assets to $1 billion, but they deny that the bank "pursued an aggressive asset growth plan" in 2001 or in 2005. Defendants admit that directors Willetts, Burton, Hundley, King, Wright, Rippy, and Fensel were members of the Board in 2001 and 2005.

15. Denied.

16. Denied.

17. The Reports of Examination are documents that can be fairly read only in their entirety. To the extent the FDIC refers to or quotes from the Reports of Examination, the Defendants refer the Court to such documents for the specific language therein. The Defendants deny any factual allegations in Paragraph 17 that are inconsistent with the Reports of Examination.

18. The Reports of Examination are documents that can be fairly read only in their entirety. To the extent the FDIC refers to or quotes from the Reports of Examination, the Defendants refer the Court to such documents for the specific language therein. The Defendants deny any factual allegations in Paragraph 18 that are inconsistent with the Reports of Examination. The Defendants deny that "[t]he Director Defendants took no action in response to . . . warnings to improve Bank operations."

19. The Reports of Examination are documents that can be fairly read only in their entirety. To the extent the FDIC refers to or quotes from the Reports of Examination, the Defendants refer the Court to such documents for the specific language therein. The Defendants deny any factual allegations in Paragraph 19 that are inconsistent with the Reports of Examination. The Defendants deny that they did not "heed" regulator warnings and that they pursued an "aggressive growth strategy without implementing sufficient policy or operation changes to improve either underwriting or credit administration."

20. Whether the Defendants acted "in clear conflict with the best interest of the Bank" is (or purports to be some kind of) a legal conclusion to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 20. Further, the Reports of Examination are documents that can be fairly read only in their entirety. To the extent the FDIC refers to or quotes from the Reports of Examination, the Defendants refer the Court to such documents for the specific language therein. The Defendants deny any factual allegations that are inconsistent with the Reports of Examination.

21. The Reports of Examination are documents that can be fairly read only in their entirety. To the extent the FDIC refers to or quotes from the Reports of Examination, the Defendants refer the Court to such documents for the specific language therein. The Defendants

deny any factual allegations that are inconsistent with the Reports of Examination. Defendants admit that Cooperative received a composite CAMELS 5 rating in the November 10, 2008 Report of Examination, after having received composite CAMELS 2 ratings for the five prior years.

22. Denied.

23. Defendants admit that the Lot Loan Program was discussed at an October 26, 2006 ALCO meeting. The written meeting minutes that were prepared and any applicable loan policy speak for themselves. Defendants deny the remainder of the allegations in Paragraph 23.

24. Defendants admit that Cooperative made lot loans in 2006. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations regarding TRM. Defendants deny the remainder of the allegations in Paragraph 24.

25. Defendants admit that Cooperative made lot loans to out-of-state borrowers. The written loan files speak for themselves and, to the extent the factual allegations in Paragraph 25 are inconsistent with the loan files, Defendants deny those allegations. Defendants deny the remainder of the allegations in Paragraph 25.

26. Defendants admit that Cooperative made lot loans in the Summerhouse subdivision. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations regarding TRM. Defendants admit that Cooperative made a loan to T.T. The written loan file for T.T.'s loan and any applicable loan policy speak for themselves and, to the extent the factual allegations in Paragraph 26 are inconsistent with those documents, Defendants deny those allegations.

27. Denied.

28. Defendants admit that Board meeting minutes indicate lot loan program was

discussed during a July 17, 2007 Board Meeting. Board meeting minutes can be fairly read only in their entirety. To the extent the FDIC refers to or quotes from such meeting minutes, or additional meeting minutes, the Defendants refer the Court to the documents for the specific language therein. The Defendants deny any factual allegations in Paragraph 28 that are inconsistent with the meeting minutes. Further, the written loan files speak for themselves and, to the extent the factual allegations in Paragraph 28 are inconsistent with the loan files, Defendants deny those allegations. Defendants deny that Mr. Bridger's lending authority was limited to $100,000.

29. Denied.

30. The written loan files relating to these individual loans speak for themselves and, to the extent the factual allegations in Paragraph 30 are inconsistent with the loan files, Defendants deny those allegations. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the amount of the FDIC's claimed losses.

31. Denied.

32. Defendants admit that Cooperative made the loans identified in Paragraph 32. Defendants admit that loans often were initially approved by telephone after consultation with Mr. Willetts or a loan officer. Defendants deny that "[t]he telephonic discussions of the loans were too brief and cursory." With respect to the individual loans identified in Paragraph 32, the written loan files speak for themselves and, to the extent the factual allegations in Paragraph 32 are inconsistent with the loan files, Defendants deny those allegations. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the amount of the FDIC's claimed losses. Defendants deny the remainder of the allegations in

Paragraph 32.

33. Denied. The written loan file speaks for itself, and, to the extent the factual allegations in Paragraph 33 are inconsistent with the loan file, Defendants deny those allegations.

34. Denied. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the amount of the FDIC's claimed losses.

35. Denied. The written loan file speaks for itself and, to the extent the factual allegations in Paragraph 35 are inconsistent with the loan file, Defendants deny those allegations.

36. Denied. The written loan file speaks for itself and, to the extent the factual allegations in Paragraph 36 are inconsistent with the loan file, Defendants deny those allegations. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the amount of the FDIC's claimed losses.

37. Denied. The written loan file speaks for itself and, to the extent the factual allegations in Paragraph 37 are inconsistent with the loan file, Defendants deny those allegations.

38. Denied. The written loan file and any applicable loan policy speak for themselves and, to the extent the factual allegations in Paragraph 38 are inconsistent with those documents, Defendants deny those allegations.

39. Denied. The written loan file and any applicable loan policy speak for themselves and, to the extent the factual allegations in Paragraph 39 are inconsistent with those documents, Defendants deny those allegations.

40. Denied. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the amount of the FDIC's claimed losses.

41. With respect to the loan identified in Paragraph 41, the written loan file speaks for itself and, to the extent the factual allegations in Paragraph 41 are inconsistent with the loan file,

Defendants deny those allegations.

42. Denied. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the amount of the FDIC's claimed losses.

43. With respect to the loan identified in Paragraph 43, the written loan file speaks for itself and, to the extent the factual allegations in Paragraph 43, are inconsistent with the loan file, Defendants deny those allegations.

44. With respect to the loan identified in Paragraph 44, the written loan file speaks for itself and, to the extent the factual allegations in Paragraph 44, are inconsistent with the loan file, Defendants deny those allegations. Defendants deny the remainder of the allegations in Paragraph 44.

45. Denied. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the amount of the FDIC's claimed losses.

46. With respect to the loan identified in Paragraph 46, the written loan file speaks for itself and, to the extent the factual allegations in Paragraph 46 are inconsistent with the loan file, Defendants deny those allegations.

47. Denied. The written loan file and any applicable loan policy speak for themselves and, to the extent the factual allegations in Paragraph 47 are inconsistent with those documents, Defendants deny those allegations.

48. Denied.

49. Denied. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the amount of the FDIC's claimed losses.

COUNT I - NEGLIGENCE AND GROSS NEGLIGENCE

50. Defendants incorporate by reference all of their responses contained in Paragraphs 1 through 49.

51. This paragraph and its subparts state legal conclusions to which no response is required.

52. Denied.

53. Denied.

54. Denied. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the amount of the FDIC's claimed losses.

55. Denied.

COUNT II - BREACH OF FIDUCIARY DUTIES

56. Defendants incorporate by reference all of their responses contained in Paragraphs 1 through 55 as if fully set forth herein.

57. This paragraph states legal conclusions to which no response is required.

58. This paragraph states legal conclusions to which no response is required.

59. Denied.

60. Denied.

61. Denied.

62. Denied.

PRAYER FOR RELIEF

Defendants join in the FDIC's request for a jury trial. Defendants deny that the FDIC is entitled to the relief sought.

AFFIRMATIVE DEFENSES

Defendants assert the following affirmative defenses, which do not admit any of the Plaintiff's allegations, or waive or limit any defenses raised by the Defendants in their Motion to Dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6).

First Affirmative Defense
Business Judgment Rule
(All Defendants)

1. The FDIC's claims are barred in whole or in part by the Business Judgment Rule because they are based on business decisions the Defendants made as officers or directors of the Bank.

2. The Business Judgment Rule establishes a presumption that corporate officers and directors made decisions with due care and in good faith, and in the honest belief that their actions were in the best interest of the corporation. A corporate decision made with due care and in good faith will not be second-guessed unless it cannot be attributed to any rational business purpose.

3. In making policy and loan decisions, the Defendants acted in good faith, with due care, and in the honest belief that their actions were in the best interest of Cooperative.

4. Under the Business Judgment Rule, the FDIC is barred from attacking the Defendants' business decisions unless the Defendants acted with gross negligence.

5. Thus, the FDIC's ordinary negligence claims fail as a matter of law.

Second Affirmative Defense
Limitation of Liability Pursuant to N.C.G.S. 55-2-02(b)(3)
(Burton, Fensel, Hundley, King, Rippy, Willetts, Wright)

6. The FDIC's claims against directors Burton, Fensel, Hundley, King, Rippy, Wright, and Willetts (in his capacity as a director) are barred in whole or in part by N.C.G.S. Section 55-2-02(b)(3), which states that a corporation's articles of incorporation may include a

provision:

> limiting or eliminating the personal liability of any director arising out of an action whether by or in the right of the corporation or otherwise for monetary damages for breach of any duty as a director. No such provision shall be effective with respect to (i) acts or omissions that the director at the time of such breach knew or believed were clearly in conflict with the best interests of the corporation, (ii) any liability under G.S. 55-8-33, (iii) any transaction from which the director derived an improper personal benefit, or (iv) acts or omissions occurring prior to the date the provisions became effective.

7. In accordance with N.C.G.S. Section 55-2-02(b)(3), Cooperative's Articles of Incorporation include a provision stating that a director of the Bank shall not be personally liable to the Bank or its shareholders for monetary damages for breach of any fiduciary duty as a director.

8. This provision applies to all director conduct other than:

> (i) acts or omissions that the director at the time of such breach knew or believed were clearly in conflict with the best interests of the Bank, (ii) any liability under Section 55-8-33 of the North Carolina Business Corporation Act or any successor to such Section, (iii) any transaction from which the director derived an improper personal benefit, (iv) such acts or omissions under which the elimination of personal liability of directors for monetary damages would be in violation of the provisions of Chapter 53 of the General Statutes of North Carolina (or any amendment thereto); (v) acts or omissions occurring prior to the date this provision becomes effective, or (vi) to the extent otherwise required by North Carolina law.

9. The FDIC is bound by this provision and is barred from bringing negligence or breach of fiduciary duty claims against the directors to the extent those claims are premised on ordinary negligence and do not fall within one of the exceptions enumerated in the Statute and/or the Articles of Incorporation.

10. Thus, the FDIC's ordinary negligence claims against the directors fail as a matter of law.

<u>Third Affirmative Defense</u>
Reliance Pursuant to N.C.G.S. 55-8-30(b)
(Burton, Fensel, Hundley, King, Rippy, Willetts, and Wright)

11. The FDIC's claims against directors Burton, Fensel, Hundley, King, Rippy, Wright, and Willetts (in his capacity as a director) are barred in whole or in part by N.C.G.S. § 55-8-30(b), which states:

> In discharging his duties a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by: (1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented; (2) Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within their professional or expert competence.

12. Under this statutory provision, a director who reasonably relies upon officers, employees, or consultants is immune to claims of ordinary negligence.

13. In making policy and loan decisions, Cooperative's directors reasonably relied on information provided to them by Cooperative's officers, other employees, bank examiners, appraisers, accountants, outside auditors, and other consultants.

14. Thus, the FDIC's ordinary negligence claims against the directors fail as a matter of law.

<u>Fourth Affirmative Defense</u>
Reliance Pursuant to N.C.G.S. 55-8-42
(Bridger, Burrell, Willetts)

15. The FDIC's claims against officers Bridger, Burrell, and Willetts (in his capacity as an officer) are barred in whole or in part by N.C.G.S. 55-8-42(b), which states:

> In discharging his duties an officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by: (1) One or more officers or employees of the corporation whom the officer reasonably believes to be reliable and competent in the matters presented; or (2) Legal counsel, public accountants, or other persons as to matters the officer reasonably believes are within their professional or expert competence.

16. Under this statutory provision, an officer who reasonably relies upon other officers, employees, or consultants is immune to claims of ordinary negligence.

17. In making policy and loan decisions, Cooperative's officers reasonably relied on information provided to them by Cooperative's officers, other employees, bank examiners, appraisers, accountants, outside auditors, and other consultants.

18. Thus, the FDIC's ordinary negligence claims against the officers fail as a matter of law.

Fifth Affirmative Defense
Avoidable Consequences/Failure to Mitigate Damages
(All Defendants)

19. The FDIC's claims are barred in whole or in part by its failure to mitigate damages.

20. An injured plaintiff must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong. A plaintiff that fails to do so cannot recover for any part of the loss that could have been avoided.

21. As the receiver of Cooperative, the FDIC failed to take reasonable steps to reduce the losses attributable to the loans identified in the Complaint.

22. As the receiver of Cooperative, on or about June 19, 2009, the FDIC entered into a loss-share agreement with the bank that acquired Cooperative.

23. Under the terms of the loss-share agreement, the FDIC assumed 80% or, in some cases, 95% of loan losses incurred by the acquiring bank.

24. The terms of the loss-share agreement did not provide the acquiring bank with the incentive to take reasonable steps to lessen any alleged losses and/or maximize the value of collateral by, for example agreeing to loan modifications or workouts, or by making reasonable

collection efforts.

25. The FDIC is therefore barred from recovering any damages that might have been reasonably avoided.

Sixth Affirmative Defense
Superseding or Intervening Causes
(All Defendants)

26. The FDIC's claims against the Defendants are barred in whole or in part by the doctrine of superseding or intervening cause.

27. Financial industry analysts and commentators, FDIC senior officials, and other federal financial regulators have acknowledged that the "Great Recession" and its dramatic effects on the housing market could not reasonably have been anticipated. Thus, the Defendants could not reasonably have anticipated the unprecedented failure of the United States housing market and the global recession and its impact on the Coastal Carolina real estate industry.

28. The sequence of events that occurred in the wake of the global recession and led to the collapse of the Greater Wilmington, North Carolina real estate market is solely responsible for the FDIC's alleged loan losses.

29. Accordingly, the Defendants are not liable for any alleged losses.

Seventh Affirmative Defense
Offset
(All Defendants)

30. Any award for damages allegedly caused by the Defendants' actions should be reduced by any refund, payment, or other compensation that would have been owed to Cooperative Bank or Cooperative Bankshares, and which the FDIC has obtained as the Bank's Receiver.

Respectfully submitted,

WILLIAMS MULLEN

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May 14, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this the 14th day of May, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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This the 14th of May 2012.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
CIVIL ACTION NO. 7:11 CV 00165-BO

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for COOPERATIVE BANK,

Plaintiff,

v.

FREDERICK WILLETTS, III, PAUL G. BURTON, JAMES D. HUNDLEY, HORACE THOMPSON KING, OTTIS RICHARD WRIGHT, JR., RICHARD ALLEN RIPPY, FRANCIS PETER FENSEL, JR., DICKSON B. BRIDGER, and OTTO C. "BUDDY" BURRELL, JR.

Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, defendants Frederick Willetts, III, Paul G. Burton, James D. Hundley, Horace Thompson King, Ottis Richard Wright, Jr., Richard Allen Rippy, Francis Peter Fensel, Jr., Dickson B. Bridger, and Otto C. "Buddy" Burrell, Jr., (the "Defendants") respectfully move for summary judgment as to the claims contained in the complaint filed by plaintiff Federal Deposit Insurance Corporation, as Receiver for Cooperative Bank ("FDIC"). In support of this Motion, Defendants respectfully refer the Court to the Memorandum of Points and Authorities filed contemporaneously herewith. Additionally, Defendants respectfully request an oral hearing on this Motion, in accordance with Local Civil Rule 7.1(i).

Respectfully submitted this the 2nd day of June, 2014.

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I hereby certify that on June 2, 2014, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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This the 2nd day of June, 2014.

WILLIAMS MULLEN

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STATEMENT OF

THE FEDERAL DEPOSIT INSURANCE CORPORATION
by

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DIRECTOR
DIVISION OF RISK MANAGEMENT SUPERVISION

BRET D. EDWARDS
DIRECTOR
DIVISION OF RESOLUTIONS AND RECEIVERSHIPS

RICHARD A. BROWN
CHIEF ECONOMIST

on

STATE OF COMMUNITY BANKING: IS THE CURRENT REGULATORY ENVIRONMENT ADVERSELY AFFECTING COMMUNITY FINANCIAL INSTITUTIONS?

before the

SUBCOMMITTEE ON FINANCIAL INSTITUTIONS
AND CONSUMER CREDIT
COMMITTEE ON FINANCIAL SERVICES

U.S. House of Representatives

March 20, 2013
2128 Rayburn House Office Building

EXHIBIT A

Chairwoman Capito, Ranking Member Meeks, and members of the Subcommittee, we appreciate the opportunity to testify on behalf of the Federal Deposit Insurance Corporation (FDIC) regarding the state of community banking and to describe the findings of the *FDIC Community Banking Study*, a comprehensive review based on 27 years of data on community banks.[1] We also welcome the opportunity to discuss the reviews by the Government Accountability Office (GAO) and the FDIC Office of Inspector General (OIG) of the causes of the recent financial crisis and the FDIC's supervision and resolution-related responses.

As the Subcommittee is well aware, the recent financial crisis has proved challenging for all financial institutions. The FDIC's problem bank list peaked at 888 institutions in 2011. Since January 2008, 469 insured depository institutions have failed, with banks under $1 billion making up 407 of those failures. Fortunately, the pace of failures has declined significantly since 2010, a trend we expect to continue.

The failure of a bank has the potential to be a highly disruptive event. While the FDIC protects insured depositors and resolves each institution in the least costly and least disruptive manner possible, the customers of a failed bank may still face the need to establish a new banking relationship that meets their financial needs. A bank failure also may be disruptive to a local community if the failure results in an adverse impact on the availability of credit or if distress sales of the failed bank's assets adversely affect local real estate prices.

[1] *FDIC Community Banking Study*, December 2012, http://www.fdic.gov/regulations/resources/cbi/study.html

Given the challenges that community banks, in particular, have faced in recent years, the FDIC last year launched a "Community Banking Initiative" to refocus our efforts to communicate with community banks and to better understand their concerns. The knowledge gathered through this Initiative will help to ensure that our supervisory actions are grounded in the recognition of the important role that community banks play in our economy. A key product of the Initiative was the recently published *FDIC Community Banking Study*, which is discussed in more detail below.

Congress also enacted P.L. 112-88, which mandates comprehensive reviews by the GAO and by the FDIC OIG of the causes of the recent crisis, the supervisory response, and the resolution of failed institutions. Consistent with the *FDIC Community Banking Study*, the GAO and OIG reviews identify three primary factors that contributed to bank failures in the recent crisis, namely: 1) rapid growth; 2) excessive concentrations in commercial real estate lending (especially acquisition and development lending); and 3) funding through highly volatile deposits. By contrast, community banks that followed a traditional business plan of prudent growth, careful underwriting and stable deposit funding were much more likely to survive the recent crisis.

Our testimony discusses the findings of the *FDIC Community Banking Study*, as well as our assessment and response to the reviews by the FDIC OIG and the GAO.

FDIC Community Banking Study

In December 2012, the FDIC released the *FDIC Community Banking Study*, our comprehensive review of the U.S. community banking sector covering 27 years of data. The Study set out to explore some of the important trends that have shaped the operating environment for community banks over this period, including: long-term industry consolidation; the geographic footprint of community banks; their comparative financial performance overall and by lending specialty group; efficiency and economies of scale; and access to capital. This research was based on a new definition of community bank that goes beyond size to also account for the types of lending and deposit gathering activities and limited geographic scope that are characteristic of community banks.

Specifically, where most previous studies have defined community banks strictly in terms of asset size (typically including banks with assets less than $1 billion), our study introduced a definition that takes into account a focus on lending, reliance on core deposit funding, and a limited geographic scope of operations. Applying these criteria for the baseline year of 2010 has the effect of excluding 92 banking organizations with assets less than $1 billion while including 330 banking organizations with assets greater than $1 billion. Importantly, the 330 community banks over $1 billion in size held $623 billion in total assets – approximately one-third of the community bank total. While these institutions would have been excluded under many size-based definitions, we found that they operated in a similar fashion to smaller community banks. It is important to note that the purpose of this definition is research and analysis; it is not intended to substitute for size-based thresholds that are currently embedded in statute, regulation, and supervisory practice.

Our research confirms the crucial role that community banks play in the American financial system. As defined by the Study, community banks represented 95 percent of all U.S. banking organizations in 2011. These institutions accounted for just 14 percent of the U.S. banking assets in our nation, but held 46 percent of all the small loans to businesses and farms made by FDIC-insured institutions. While their share of total deposits has declined over time, community banks still hold the majority of bank deposits in rural and micropolitan counties.[2] The Study showed that in 629 U.S. counties (or almost one-fifth of all U.S. counties), the only banking offices operated by FDIC-insured institutions at year-end 2011 were those operated by community banks. Without community banks, many rural areas, small towns and urban neighborhoods would have little or no physical access to mainstream banking services.

Our Study took an in-depth look at the long-term trend of banking industry consolidation that has reduced the number of federally insured banks and thrifts from 17,901 in 1984 to 7,357 in 2011. All of this net consolidation can be accounted for by an even larger decline in the number of institutions with assets less than $100 million. But a closer look casts significant doubt on the notion that future consolidation will continue at this same pace, or that the community banking model is in any way obsolete.

More than 2,500 institutions have failed since 1984, with the vast majority failing in the crisis periods of the 1980s, early 1990s, and the period since 2007. To the extent that future crises can be avoided or mitigated, bank failures should contribute much less to future

[2] The 3,238 U.S. counties in 2010 included 694 micropolitan counties centered on an urban core with population between 10,000 and 50,000 people, and 1,376 rural counties with populations less than 10,000 people.

consolidation. In addition, about one third of the consolidation that has taken place since 1984 is the result of charter consolidation within bank holding companies, while just under half is the result of voluntary mergers. But both of these trends were greatly facilitated by the gradual relaxation of restrictions on intrastate branching at the state level in the 1980s and early 1990s, as well as the rising trend of interstate branching that followed enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. The pace of voluntary consolidation has indeed slowed over the past 15 years as the effects of these one-time changes were realized. Finally, the Study questions whether the rapid pre-crisis growth of some of the nation's largest banks, which occurred largely as a result of mergers and acquisitions and growth in retail lending, can continue at the same pace going forward. Some of the pre-crisis cost savings realized by large banks have proven to be unsustainable in the post-crisis period, and a return to pre-crisis rates of growth in consumer and mortgage lending appears, for now anyway, to be a questionable assumption.

The Study finds that community banks that grew prudently and that maintained diversified portfolios or otherwise stuck to their core lending competencies during the study period exhibited relatively strong and stable performance over time. Other institutions that pursued higher-growth strategies – frequently through commercial real estate or construction and development lending – encountered severe problems during real estate downturns and generally underperformed over the long run. Moreover, the Study finds that economies of scale play a limited role in the viability of community banks. While average costs are found to be higher for very small community banks, most economies of scale are largely realized by the time an institution reaches $100 million to $300 million in size, depending on the lending specialty.

These results comport well with the experience of banking industry consolidation since 1984, in which the number of bank and thrift charters with assets less than $25 million has declined by 96 percent, while the number of charters with assets between $100 million and $1 billion has grown by 19 percent.

With regard to measuring the costs associated with regulatory compliance, the Study noted that the financial data collected by regulators does not identify regulatory costs as a distinct category of noninterest expenses. In light of the limitations of the data and the importance of this topic in our discussions with community bankers, the FDIC conducted interviews with a group of community banks as part of our Study to try to learn more about regulatory costs. As described in Appendix B of the Study, most interview participants stated that no single regulation or practice had a significant effect on their institution. Instead, most stated that the strain on their organization came from the cumulative effects of all the regulatory requirements that have built up over time. Many of the interview participants indicated that they have increased staff over the past ten years to support the enhanced responsibility associated with regulatory compliance. Still, none of the interview participants indicated that they actively track the various costs associated with regulatory compliance, because it is too time-consuming, too costly, and so interwoven into their operations that it would be difficult to break out these specific costs. These responses point to the challenges of achieving a greater degree of quantification in studying this important topic.

In summary, the Study finds that, despite the challenges of the current operating environment, the community banking sector remains a viable and vital component of the overall

U.S. financial system. It identifies a number of issues for future research, including the role of commercial real estate lending at community banks, their use of new technologies, and how additional information might be obtained on regulatory compliance costs.

Examination and Rulemaking Review

In addition to the comprehensive study on community banks, the FDIC also reviewed its examination, rulemaking, and guidance processes during 2012 with a goal of identifying ways to make the supervisory process more efficient, consistent, and transparent – while maintaining safe and sound banking practices. This review was informed by a February 2012 FDIC conference on the challenges and opportunities facing community banks, a series of six roundtable discussions with community bankers around the nation, and ongoing discussions with the FDIC's Advisory Committee on Community Banking.

Based on concerns raised in these discussions, the FDIC has implemented a number of enhancements to our supervisory and rulemaking processes. First, the FDIC has restructured the pre-exam process to better scope examinations, define expectations and improve efficiency. Second, the FDIC is taking steps to improve communication with banks under our supervision by using web-based tools to provide critical information about changes in regulations, including deadlines for submitting comments on proposed new rules. Finally, the FDIC has instituted a number of outreach and technical assistance efforts, including increased direct communication between examinations, increased opportunities to attend training workshops and symposiums, and conference calls and training videos on complex topics of interest to community bankers.

The FDIC plans to continue its review of examination and rulemaking processes, and is developing new initiatives to provide technical assistance to community banks, which we expect to introduce later this year.

Reviews Required by P.L. 112-88

Under P.L. 112-88, the GAO was tasked with analyzing the causes and impact of a number of elements of the crisis, including: 1) the causes of high levels of bank failures in states with 10 or more failures since 2008; 2) the procyclical impact of fair value accounting standards; 3) the causes and potential solutions for the "vicious cycle" of loan write downs, raising capital, and failures; 4) an analysis of the community impact of bank failures; and 5) the feasibility and overall impact of loss share agreements.

P.L. 112-88 also tasked the FDIC's OIG with reviewing eight specific issue areas: 1) loss share agreements, otherwise known as shared-loss agreements (SLAs); 2) losses at failed banks; 3) examiner implementation of appraisal guidelines; 4) examiner assessment of capital adequacy and private capital investment in failing institutions; 5) examiner implementation of loan workout guidance; 6) the application and impact of formal enforcement orders; 7) the impact of FDIC policies on investments in institutions; and 8) the FDIC's handling of private equity company investments in institutions. The OIG subsequently reviewed and described FDIC compliance with applicable regulatory and supervisory standards in each of the eight areas.

The resulting GAO and OIG reviews were detailed and comprehensive, providing a wealth of information and data regarding the causes of the recent crisis and the FDIC's response. Although the GAO review did not include any recommendations, the OIG made several useful recommendations that are highly relevant to the FDIC's efforts to address the many issues arising from the crisis. The FDIC concurs with all of the OIG's recommendations and is now in the process of implementing them. Detailed descriptions of the FDIC's assessment of the issues identified by P.L. 112-88, the OIG's recommendations and the FDIC's implementation efforts are provided as an Appendix to this testimony.

Conclusion

The recent financial crisis has proved challenging for financial institutions in general and for community banks in particular. Analyses of bank failures during the crisis by the FDIC, its OIG and the GAO point to some common risk factors, including rapid growth, concentrations in high-risk loans, and funding through volatile deposits. In contrast, community banks that followed more conservative business models were much more likely to survive the crisis. The FDIC's extensive study of community banking over a 27-year period shows that while these institutions face a number of challenges, they will remain a viable and vital component of the overall U.S. financial system in the years ahead.

As mandated by statute, the GAO and the FDIC OIG conducted reviews that provided valuable information regarding the causes of the recent crisis and the FDIC's response. The FDIC welcomes the insights provided by the GAO and the OIG regarding the causes of the

recent crisis. As described in the Appendix to this testimony, the review by the FDIC OIG also made a number of useful recommendations that the FDIC is now in the process of implementing. We believe that this type of analysis and policy review is an important element of our long-term efforts to maintain a safe and sound financial system and to effectively and appropriately respond when FDIC-insured institutions encounter financial distress.

Appendix

The discussions below correspond to the eight issue areas identified in P.L. 112-88 for review by the FDIC's Office of Inspector General (OIG). Each section includes a discussion of the key policy issues, any recommendations by the OIG and actions being undertaken by the FDIC to implement the recommendations.

Issue 1 -- Shared-Loss Agreements

When the Office of the Comptroller of the Currency (OCC) or a state banking regulator closes an FDIC-insured institution, federal law requires the FDIC to use the least costly method to resolve the failing institution. During the savings and loan and banking crisis of the late 1980s and early 1990s, the FDIC in most cases took control of the troubled assets of failed banks and managed them for eventual liquidation. Although the management of troubled assets in receivership met our statutory responsibilities in resolving failed banks, this strategy was found to have some serious shortcomings. Liquidating assets in receivership can result in significant disruptions for borrowers and surrounding communities, a diminution in the value of assets held under government control, and high losses to the insurance fund. In addition, the FDIC and the Resolution Trust Corporation had to employ over 20,000 people to manage and sell the assets from those bank failures.

An innovation introduced in the early 1990s was the shared loss agreement (SLA), in which the acquiring institution would assume all of the assets of the failed bank in exchange for a partial indemnification against future losses on troubled assets. Under a typical SLA structure, the FDIC would assume 80 percent of future losses on troubled assets, with the acquiring institution assuming the remaining 20 percent. While this partial indemnification against loss would induce risk averse acquirers to take on these troubled assets under private management, and thus keep them out of a government-controlled receivership, it also provided an incentive for the acquirer to maximize net recoveries on those assets – consistent with the fiduciary responsibility of the FDIC.

In the recent financial crisis, the FDIC has made much more extensive use of SLAs to facilitate the prompt transfer of failed bank assets to private management. SLAs were an essential tool to overcome the extreme uncertainty and risk aversion with regard to future loan performance and collateral values, especially early in the crisis. Almost 65 percent of the bank failures since the beginning of 2008 through 2012 were resolved through whole-bank purchase and assumption transactions with SLAs. As of December 31, 2012, the cost savings obtained through using whole-bank purchase and assumption transactions with SLAs, as opposed to more costly resolution alternatives, were projected to be approximately $41.1 billion

The goals of SLAs are to allow as many assets as possible to be kept in the private sector with a lending institution and to have the acquiring institution manage those assets under

incentives that closely align the interests of the bank with the interests of the FDIC. Because an acquiring institution has financial exposure to the losses on assets purchased under this arrangement, it has an incentive to utilize a "least loss" strategy in managing and disposing of these assets.

SLAs also address the effect of bank failures on the local market by keeping more of the failed bank's borrowers in a banking environment. The acquiring institution can more easily work with the borrowers to restructure problem loans or to advance additional funding when prudent, helping to avoid a further decline in collateral values in the failed bank's market. Most importantly for the borrowers, the provisions of the SLAs entered into by the FDIC during this crisis require the acquiring institution to consider modifications for nonperforming loans in order to minimize unnecessary foreclosures.

Prospective bidders for failed institutions have the option to bid with or without an SLA. As expected, the number of failing bank resolution transactions conducted with SLAs has begun to decrease as the economy has recovered and as real estate markets have stabilized. In 2010, 130 of 157 bank failures, or 83 percent, were resolved using SLAs. Since then, both the number and percent of failed bank resolutions involving SLAs has declined steadily. In 2011, 58 out of 92 failed bank resolutions, or 63 percent, involved an SLA, as did 20 of 51 resolutions, or 39 percent, in 2012. None of the four failures so far this year was resolved using an SLA.

Term of shared-loss agreements

There are two primary types of SLAs, those applied to single family mortgage loans and those applied to non-single family loans. Single family SLAs have a term of ten years. Non-single family loan SLAs have a term of eight years, consisting of five years of shared-loss coverage followed by three years to allow for recovery payments to the FDIC on the assets for which a shared-loss claim was paid. The long term nature of the agreements is intended to allow for the acquiring institution to maximize the value of the failed bank's assets. As part of that process, banks work with distressed borrowers, attempting to reach a mutually beneficial resolution. The expiration of these agreements does not change the underlying incentives for the acquiring institution to develop new customer relationships and maximize net recoveries.

Management of acquired assets

The SLA requires the acquiring institution's best efforts to maximize recoveries. In satisfying this requirement, the acquiring institution is expected to consider every resolution alternative, including loan modifications. As such, acquiring institutions must undertake loss mitigation efforts prior to taking any foreclosure action. Additionally, the acquiring institution is required to manage and administer each loan covered under an SLA in accordance with prudent business and banking practices and in accordance with the acquiring institution's written internal credit policies and established practices.

The requirement for acquiring institutions to undertake loan modifications is subject to a financial analysis designed to ensure that qualifying borrowers are approved for modification and that such a strategy will maximize long-term recoveries. Because acquiring institutions

generally share a portion of any losses, they share the FDIC's interest in pursuing modification in cases where it can be shown to maximize recoveries. Loss mitigation alternatives that increase the value of the loans will likely improve the affordability of the loan to the borrower and thereby lower the probability of default. Loan modifications can help borrowers preserve their stake in their homes and businesses. Collectively, these efforts to avoid foreclosures can help to preserve the viability of the community as a whole, which is also clearly in the best interest of an acquiring bank doing business in that community. All of these considerations point to a strong incentive on the part of the acquiring bank to avoid foreclosure or short sale and pursue a loan modification or restructuring whenever that alternative proves feasible.

Commercial real estate loan restructuring requirements

On December 17, 2010, the FDIC issued *Commercial Loss Mitigation Guidance on Commercial Real Estate (CRE) Loans,* requiring acquiring institutions to pursue a disposition strategy other than foreclosure on a covered asset when an alternative strategy is projected to result in the least loss. For commercial loans that are restructured by an acquiring institution, the loss share reimbursement is based on the portion of a restructured loan that is categorized as a loss. Therefore, an acquiring institution may file a shared-loss claim on a commercial loan based on the market value of the underlying collateral without the need to foreclose.

Residential mortgage modification requirements

SLAs also require the acquiring institution to implement a comprehensive loan modification program, such as HAMP or the FDIC Loan Modification Program, for single-family mortgages covered under the agreement. Modifications improve borrower affordability, increase the probability of performance, and allow borrowers to remain in their homes. Prior to any foreclosure action, the acquiring institution is required to perform and document a simple financial analysis to assess the feasibility of modifying a single family mortgage loan. If a qualified borrower accepts the modification offer, the bank can submit a shared-loss claim to the FDIC. One clear advantage for acquiring institutions to pursue modification is the ability to be paid sooner than might be the case in a foreclosure. Not only must the institution exhaust all loss mitigation options before foreclosure can proceed, but foreclosure and the sale of foreclosed property is a process that can take up to two years or more, depending on the state in which the property is located. Hence, the acquiring institution has a strong incentive to consider and engage in single family mortgage loan modifications where viable.

Monitoring of shared-loss agreements

The FDIC monitors compliance with the SLAs through quarterly reporting by the acquiring institution and through periodic reviews of the acquiring institution's adherence to the agreement terms. If the FDIC determines that an acquiring institution has not complied with the terms of the SLA, including the requirement to consider and engage in loan modifications, the FDIC will delay payment of shared-loss claims until compliance problems are corrected. The FDIC can deny payment of a claim altogether or indefinitely suspend payments for as long as the acquiring institution remains out of compliance with the agreement. The periodic reviews of the acquiring institution are completed onsite, and include: verifying the accuracy of shared-loss

claims; ensuring compliance with loss mitigation efforts; testing the acquiring institution's policies and procedures to ensure uniform criteria are being applied to both shared-loss assets and the bank's own legacy assets; reviewing internal audit reports and the external independent public accountant reports to ensure that internal controls are in place; and verifying that adequate accounting, reporting, and recordkeeping systems are in place. Thus far, we have found that the overwhelming majority of acquiring institutions are diligent in their efforts to comply with all the terms of the SLAs.

OIG Recommendation

The OIG recommended that the FDIC develop a strategy for mitigating the impact of impending portfolio sales and SLA terminations on the Deposit Insurance Fund, and that it ensure that procedures, processes, and resources are sufficient to address the volume of terminations and potential requests for asset sales.

The FDIC agrees with this recommendation, and steps are being taken to meet its stated goals. At the same time, we believe that a number of factors, including the provisions of the SLAs themselves, will help to avoid the unnecessary sale of distressed assets and mitigate the market impact once the SLAs are terminated.

For example, the FDIC policy for portfolio note sales provides that: 1) the acquiring institution's right to conduct a portfolio sale is conditional and requires FDIC consent; 2) the evaluation of portfolio sales by the FDIC will include an analysis of alternative collection and modification strategies and a review to determine whether collections would be maximized on an asset-by-asset basis; 3) the FDIC's Loan Sale Advisory Review Committee will review all request for portfolio sales and large individual loan sales to ensure a consistent approach to the approval process; and 4) an acquiring institution is not to rely on portfolio sales as a primary resolution strategy for shared-loss assets.[3]

The FDIC has closely monitored and diligently enforced compliance with the SLAs. We believe that, as a result of our efforts in this regard combined with the aging of the portfolios, a relatively small portion of the original principal balance of non-single family assets covered under SLAs will remain outstanding when the shared-loss coverage periods on those agreements terminate. Since the inception of the program in 2008 through year-end 2012, the total covered principal balance for non-single family assets has already shrunk by over 60 percent, from approximately $139 billion to $54 billion. We project the total covered principal balance to shrink further to approximately $25 billion by the time the shared-loss coverage periods for the remaining non-single family SLAs expire. Furthermore, the majority of the shared-loss coverage periods on the outstanding non-single family SLAs are scheduled to expire over a four-year period (from 2014 to 2017) and over a wide geographic area. To the extent that the balances of covered assets have already declined, and that the expiration of the non-single family SLAs that cover these remaining balances will be spread out over a period of years and across different

[3] The FDIC has repeatedly communicated its expectations regarding the requirements and approval of portfolio note sales to the acquiring institutions in a variety of settings, including the Annual Risk Sharing Conference held in October 2012 and the Georgia Bankers Roundtable Conference held in November 2012. Formal guidance also was issued to all acquiring institutions in a letter dated October 9, 2012.

geographical regions, we do not expect the scheduled expiration of non-single family SLAs to have severe effects on local asset markets.

Some also have expressed the concern that, after the shared-loss coverage periods end, acquiring institutions will sell or otherwise dispose of non-single family assets at distressed prices. However, SLAs do not provide incentives for the acquiring institutions to engage in the "fire sale" of covered assets at the end of the shared-loss coverage period. As these agreements expire, the acquiring institutions will absorb 100 percent of all losses from below market sales or other dispositions, resulting in a hit to capital for these institutions. Further, the FDIC retains rights to recoveries on assets during the recovery period and, as a result, the acquiring institutions remain bound by the requirements of the SLA, including the requirement to maximize recoveries.

The FDIC has committed to conducting a full assessment of the sufficiency of its procedures, processes, and resources for the anticipated volume of portfolio sales and SLA terminations. The FDIC will complete the assessment and deliver its conclusions to the OIG by September 30, 2013.

OIG Recommendation

The second OIG recommendation was that the FDIC research the risks presented by commercial loan extension decisions and determine whether additional controls should be introduced to monitor the efforts of acquiring institutions to extend the terms of commercial loans. We agree with this recommendation.

The FDIC has established an internal national task force that is composed of staff from the Division of Resolutions and Receiverships and the Division of Risk Management Supervision to share information and proactively collaborate on topics such as concerns about shared-loss agreements. In addition, regular collaboration with regulators at the Federal Reserve Board (FRB), the OCC, and the Canadian Office of Superintendent of Financial Institutions has been established to ensure consistency and to facilitate open communication and information sharing throughout the term of the SLAs.

The FDIC is in the process of enhancing its Compliance Review Program to require the evaluation of loan amendments, including maturity date extensions, to ensure that they comply with the SLA provisions governing loan modifications. The goal of this effort is to ensure that any loan modification or refusal to modify a loan is consistent with maximizing recoveries and with the acquiring institution's policies and procedures with regard to legacy loans. Violations of the SLA will not be tolerated. If found, such violations could result in loans being removed from loss sharing and, when appropriate, the clawback of any claims paid by the FDIC. In addition, the Compliance Review Program will target high risk areas, such as sales of real estate owned, where assets could be liquidated in a manner that is inconsistent with prudent management standards and that fails to maximize collections.

The FDIC conducts targeted Loss Mitigation Reviews, which are undertaken in addition to our regularly scheduled compliance monitoring reviews and serve as a mechanism to directly

communicate with acquiring institutions as to the requirements of the program. The acquiring institutions are reminded of the contractual obligations of the agreements and expectations for loan modification efforts, as well as the potential penalties for violations of the terms of the SLA. The reviews include, but are not limited to, inconsistent policies on commercial loan term extensions, violations of management standards and permitted amendment provisions, violations of internal bank policy and procedures, and actions that are inconsistent with maximizing collections.

In response to the OIG report, the FDIC has committed to reinforcing previous communications, requiring FDIC compliance monitoring contractors to review a sample of loan modification decisions for maturing loans, and analyzing the costs and benefits of collecting and monitoring trend information on commercial loan modifications. The FDIC will complete these actions and deliver its conclusions to the OIG by September 30, 2013.

Finally, the FDIC will continue to reach out to banks and other members of the public that may have concerns about the impact of the SLAs and their impending terminations. This type of communication will provide us with additional information on the potential issues that could arise as the shared-loss coverage period on the SLAs terminate, and enhance our ability to address these concerns in a timely fashion.

Issue 2 -- Losses at Institutions

According to Material Loss Reviews conducted by the OIG in the aftermath of bank failures, losses at community banks during the crisis were most often caused by management strategies of aggressive growth and concentrations in commercial real estate (CRE) loans, including notably, concentrations in acquisition, development and construction loans, coupled with inadequate risk management practices in an environment of falling real estate values that led to impairment losses on delinquent and nonperforming loans. Another common characteristic of failed banks was reliance on volatile brokered deposits as a funding source.

We are not aware of, and the OIG did not identify, any instances where a bank failed due to supervisor required write-downs of current loans – so-called "paper losses." When examiners classified loans considered current by bank management, the examiners did so for safety and soundness reasons in accordance with regulatory guidance on classification of loans.

In addition, the application of fair value accounting was not found to have had a significant effect on most community bank failures. Fair value accounting is most often applied to valuations of securities, and since most community banks classify debt securities as available for sale (AFS), the unrealized gains and losses on AFS securities do not impact regulatory capital under current rules.

OIG Recommendation

The OIG study of the losses that led to the failure of community banks during the financial crisis included no recommendations for the FDIC.

Issue 3 -- Appraisals

Interagency supervisory policy establishes that repayment capacity is the primary driver of examination classification decisions.[4] However, as the crisis unfolded, it became clear that the failure to follow prudent underwriting criteria had contributed to the inability of many borrowers to service their loans. For example, many residential borrowers experienced difficulty in making their payments when their monthly loan payment reset to a higher amount, and many commercial borrowers experienced similar financial difficulties due to diminished cash flows from lower sales or reduced operating income. As primary sources of loan repayment declined, lenders were increasingly forced to rely on the value of real estate collateral as a secondary source of repayment. Amid the real estate market distress triggered by the housing bust and resulting financial crisis, rising levels of nonperforming loans and subsequent foreclosures and distressed sales placed additional downward pressure on real estate prices. As the market value of many commercial and residential properties declined to levels below their original estimated value, the proper valuation of real estate collateral became a critical component of evaluating the condition of troubled banks.

Then, as now, the FDIC reviews the appraisal programs of supervised institutions through the analysis of individual appraisals during loan reviews and through the assessment of a bank's appraisal policies and procedures. Examiners use a risk-focused approach tailored to a lender's real estate lending activities and expand the depth of their review when the examination process identifies any areas of concern. The FDIC uses an exception-based process to document noncompliance with appraisal guidance, regulations, and the institutions' valuation program requirements. When no deficiencies are noted relative to the FDIC's appraisal regulations, current guidance requires that a statement to that effect be included in the examination documentation.[5] While the OIG's report found that examiners documented instances of noncompliance consistent with the FDIC's exception-based process, it also noted that examination documentation did not always include the required positive assurance statement.

OIG Recommendation

The OIG report recommended that the FDIC clarify and remind examiners of the supervisory expectations relative to documenting their review of a bank's appraisal program, including the need to include a positive assurance statement when examiners determine that appraisal practices are satisfactory. The FDIC concurs with these recommendations. In response, the FDIC has clarified its examination expectations relative to examiner review of valuations programs, reminded examiners of the requirement to include a positive assurance statement when appropriate, and compliance with this requirement will be monitored within the FDIC's existing internal review control process.

The OIG also recommended to the FDIC, OCC, and FRB that the agencies strengthen requirements for examiner documentation related to the review of appraisal programs. On

[4] See *Interagency Appraisal and Evaluation Guidelines*, December 2, 2010, at http://www.fdic.gov/news/news/financial/2010/fil10082.html

[5] See Part 323 of the FDIC Rules and Regulations at http://www.fdic.gov/regulations/laws/rules/2000-4300.html.

February 19, 2013, the FDIC discussed with the OCC and the FRB its strategy to improve documentation by reminding examiners of existing guidance and to monitor compliance as part of our internal control function. The agencies agreed to continue to evaluate whether additional guidance on appraisal review documentation might be warranted going forward.

Supervisory guidance also requires examiners to assess the appropriateness of an institution's Allowance for Loan and Lease Losses (ALLL) within the framework of U.S. generally accepted accounting principles (GAAP). GAAP requires that the ALLL reflect losses which are "probable and estimable;" therefore, bank management must determine an appropriate ALLL level that is supported by reasonable assumptions and objective data. Furthermore, GAAP requires that all credit losses associated with a loan be deducted from the allowance, and that the loss portion of the loan balance be charged off in the period in which the loan is deemed uncollectible. If the ALLL is found to be insufficient during an FDIC examination, we may recommend that management increase the allowance or improve its ALLL calculation methodology to ensure that financial reporting is accurate under GAAP.

The OIG made no recommendations with respect to how examiners follow examination procedures in evaluating an institution's ALLL.

Issue 4 -- Capital

Examiners assess an institution's capital adequacy by considering a number of factors, including: the institution's financial condition; the nature, trend, and volume of problem assets, the adequacy of ALLL; earnings and dividends; management's access to additional capital; prospects and the plans for growth, and past experience in managing growth; access to capital markets and other sources of capital; balance sheet composition and risks associated with nontraditional activities; and risk exposure associated with off-balance-sheet activities. During the crisis, examiners evaluated capital adequacy in accordance with the criteria outlined in the Uniform Financial Institution Ratings System (UFIRS) and applicable standards under the provisions of Prompt Corrective Action. When an institution was successful in raising external capital, examiners incorporated those capital raises into the analysis of capital adequacy and the overall rating of the institution.

OIG Recommendation

The OIG review made no recommendations with respect to the capital issues identified in the statute.

Issue 5 -- Loan Workouts

During the crisis, diminished cash flows associated with commercial properties contributed to sharp declines in real estate prices and made it difficult for many borrowers to make their payments. In such situations, prudent workout arrangements are often in the best

interest of the financial institution and the borrower. In response, the FDIC, working with the other Federal financial institution regulators, issued guidance encouraging lenders to work with borrowers experiencing financial difficulty repaying their real estate loans.[6] The guidance states that renewed or restructured loans to borrowers who have the ability to repay their debts according to reasonable, modified terms will not be subject to adverse classification solely because the value of the underlying collateral has fallen below the loan balance. Financial institutions that implement prudent commercial real estate loan workout arrangements after performing a comprehensive review of a borrower's financial condition are not subject to criticism for engaging in these efforts even if the restructured loans have weaknesses that result in adverse credit classification.

OIG Recommendation

While the OIG determined that examiners had successfully implemented three of the four elements of the interagency guidance – those related to loan-specific workout arrangements, classification of loans, and regulatory reporting and accounting considerations -- the review did note a lack of documentation that examiners had reviewed the institution's implementation of the risk management requirements in cases where no exceptions were noted. The OIG recommended that the FDIC remind examiners of documentation requirements related to the review of loan workout programs.

The FDIC concurs with the OIG recommendations. On February 27, 2013, the FDIC reminded risk management examiners of its examination expectations relative to their review of the risk management elements of loan workout programs at supervised institutions.

Issue 6 -- Supervisory Orders

To promote uniformity of practice and to ensure that banks most in need of corrective action receive the appropriate supervisory attention, the FDIC has adopted a policy that presumes that banks with composite UFIRs ratings of 3, 4, or 5 will be the subject of either a formal or informal enforcement action unless there are specific circumstances that would excuse the institutions from such an action.[7] By definition, banks with composite ratings of 4 or 5 have significant problems that warrant formal action, and banks rated composite 3 have weaknesses that, if not corrected, could worsen to a more severe situation. Accordingly, FDIC policy indicates that at least an informal action, such as a memorandum of understanding, be taken against composite 3 rated institutions.

OIG Recommendation

The OIG determined that the FDIC, OCC, and FRB are each following their respective agency's policy with respect to issuing enforcement actions, but noted that those policies differ

[6] See *Policy Statement on Prudent Commercial Real Estate Workouts*, October 2009, at http://www.fdic.gov/news/news/financial/2009/fil09061a1.pdf and *Statement on Working with Mortgage Borrowers,* April 2007 at http://www.fdic.gov/news/news/press/2007/pr07032a.html.

[7] See *FDIC Risk Management Manual of Examination* Policies at http://www.fdic.gov/regulations/safety/manual/

somewhat across the agencies. Accordingly, the OIG recommended that the agencies study these differences to determine whether there are certain approaches that have been more successful. The FDIC agrees with this recommendation, and is currently undertaking an internal review of enforcement action trends. We will share the results with the other agencies as part of a joint project to review the effectiveness of enforcement actions the agencies agreed to launch under the Task Force on Supervision, a group of senior supervision officials under the Federal Financial Institutions Examination Council.

The OIG also reviewed whether enforcement actions may have limited credit availability and determined that some enforcement order provisions may have indirectly limited lending. However, the OIG also found that there were important safety and soundness reasons for those provisions and that other factors – such as the weakness in the economy, competition, and a lack of loan demand – impacted lending more. Similarly, the review of whether orders affected the ability to raise capital showed that a bank's ability to raise capital is related more to its condition, earnings, asset quality, and growth prospects than the existence of an enforcement order.

Issue 7 -- Impact of FDIC Policies on Investment

Through various statutes, rules, and policies, and in order to protect the Deposit Insurance Fund, the FDIC is required to consider a number of factors when evaluating applications for entry into banking or expansion of banking activities. The FDIC approved the majority of applications and notices over the review period. In cases where applications were not approved, the FDIC documented its concerns about various aspects of the proposals.

OIG Recommendation

The OIG did not identify instances of the FDIC "steering" potential investors away from failing banks, and made no recommendations for the FDIC with respect to its treatment of potential bank investors.

Issue 8 -- Private Capital Investors

As the financial crisis intensified, the number of problem and failing banks rose rapidly, and these institutions found it increasingly difficult to attract external capital. At the same time, the FDIC found it increasingly difficult to attract bidders to acquire failed institutions. In August 2009, the FDIC Board of Directors adopted the *Final Statement of Policy on Qualifications for Failed Bank Acquisitions,* a policy statement providing guidance to private capital investors wishing to invest in bank holding companies or insured depository institutions formed for the purpose of acquiring failed institutions.[8] Among other things, the policy requires higher levels of capital – namely, a commitment of Tier 1 common equity to total assets of at least 10 percent for a period of 3 years from the time of acquisition of a failed institution – as well as a commitment

[8] *Final Statement of Policy on Qualifications for Failed Bank Acquisitions* http://www.fdic.gov/news/board/Aug26no2.pdf

for cross-support on the part of institutions making multiple acquisitions, limits on affiliate transactions, and prohibitions on complex, functionally opaque ownership structures.

Overall, private capital investors subject to the statement of policy have played a positive, but relatively small, part in the resolution of failed institutions. As of the date of the OIG's review, a total of 13 private capital investor groups had purchased 36 failed institutions. The FDIC's experience thus far indicates that private capital investors have complied with the statement of policy and have not presented significant supervisory issues.

OIG Recommendation

The OIG had no recommendations with respect to the private capital investment policy.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

No. 7:11-CV-165-BO

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for COOPERATIVE BANK, Plaintiff,	)	
v.	)	**ORDER**
FREDERICK WILLETTS, III, et al., Defendants.	)	

This matter is before the Court on plaintiff's motion for partial summary judgment [DE 97], defendants' motion for summary judgment [DE 101], defendants' motion to exclude [DE 95], plaintiff's motion to strike [DE 117], and parties' various motions to seal [DE 104, 105, 113, 115, 120]. For the following reasons, the motions to seal are GRANTED, defendants' motion to exclude is GRANTED, plaintiff's motion to strike is DENIED AS MOOT, defendants' motion for summary judgment is GRANTED and plaintiff's motion for summary judgment is DENIED AS MOOT.

BACKGROUND

Cooperative Bank ("Cooperative") was a commercial banking institution charted under North Carolina law with deposits insured by the Federal Deposit Insurance Corporation ("FDIC"). In June 2009, the North Carolina Commissioner of Banks ("NCCB") declared Cooperative insolvent and named the FDIC as Receiver of the Bank. Pursuant to 12 U.S.C. § 1821(d)(2)(A)(i), the FDIC succeeded to all rights, titles, powers, and privileges of Cooperative

and Cooperative's shareholders with respect to Cooperative, including, but not limited to, Cooperative's claims against Cooperative's former directors and officers for negligence, gross negligence, and breaches of fiduciary duty or other legal duties.

The FDIC filed this suit against former officers and directors of Cooperative for negligence, gross negligence, and breaches of fiduciary duty in connection with their approval of 86 loans made between January 5, 2007 and April 10, 2008 ("Subject Loans"). In approving the Subject Loans, the complaint alleges and the FDIC submits that the proof at trial will show that defendants deviated from prudent lending practices established by Cooperative's loan policy, published regulatory guidelines, and generally established banking practices, such as obtaining and verifying current financial information, adhering to minimum loan-to-value ("LTV") ratios and adhering to maximum debt-to-income ("DTI") ratios. In addition the complaint alleges defendants, in approving the Subject Loans, ignored prior regulatory criticisms and warnings pertaining to imprudent underwriting practices such as the failure to require hard borrower equity, the failure to analyze and consider borrowers' and guarantors' contingent liabilities, the failure to perform a global cash flow analyses of borrowers and guarantors with multiple entity relationships, and the failure to perform proper debt service coverage analyses.

In conjunction with the closure of Cooperative, the FDIC engaged in an established practice of allowing other institutions to bid for the right to assume Cooperative assets and liabilities. The successful bidder, referred to as the Acquiring Institution ("AI"), entered into a Purchase and Assumption Agreement ("P&A") with the FDIC pursuant to which it agreed, among other things, to pursue collection of the Subject Loans in a commercially reasonable manner. The P&A included a shared loss agreement ("SLA") in which, after all collection efforts were exhausted, if the value of the loan assets deteriorated further than the book value at the date

of closing within the five years after close the FDIC would absorb 80% of the loss and the AI would absorb 20% of the loss on the Subject Loans. The FDIC's 80% share of the loss on the Subject Loans is approximately $40 million for which it seeks recovery in this action.

DISCUSSION

I. MOTIONS TO SEAL.

The parties have filed several unopposed motions to seal pursuant to FED. R. CIV. P. 26(c), Local Rule 79.2 and the May 21, 2013 Amended Stipulated Protective Order and Non-Waiver Agreement [DE 71]. The motions concern several memoranda and exhibits which reflect documents that either plaintiff or defendants have designated as protected under the Protective Order and/or documents that may reveal confidential information. For good cause shown Court GRANTS these motions and the Court orders the sealing of documents and exhibits as follows. Pursuant to motion to seal [DE 104], the Court orders that DE 102 and associated exhibits nos. 9, 11, 15–36, 39–56, 60, and 62 be SEALED. Pursuant to motion to seal [DE 105], the Court orders that the entirety of DE 97, DE 98, DE 99, and DE 100, including all exhibits therein be SEALED. Pursuant to motion to seal [DE 113], the Court orders that DE 111 and associated exhibits B, D, E, G, and H, as well as exhibits 1–55 of exhibit C, be SEALED. Pursuant to motion to seal [DE 115], the Court orders that DE 114 including all exhibits therein be SEALED. Finally, pursuant to motion to seal [DE 120], the Court orders that DE 117 including all exhibits therein be SEALED.

II. DEFENDANTS' MOTION TO EXCLUDE.

Defendants seek to exclude Harry Potter as an expert witness because they allege his opinions on SLA have no basis, are unreliable, and unhelpful, and because his opinion on damages is not rebuttal testimony, but instead an untimely attempt to produce a previously

undisclosed expert on damages issues. Mr. Potter's expert testimony was offered as rebuttal testimony to defendants' expert, Ted Gammill. [DE 96-1].

Expert testimony is only admissible under Rule 702 if it is "relevant" and "rests on a reliable foundation." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 260–61 (4th Cir. 1999). Here it appears that Mr. Potter has only analyzed one SLA in his career before being hired to testify in this case. [DE 96-2 Potter Dep. at 14:16–15:22]. This is not substantive experience with the use of SLA and their impact on losses. Therefore Mr. Potter has no basis for giving an expert opinion to the jury about how the FDIC uses SLA or their impact on the damages in this case. *See United States v. Wilson*, 484 F. 3d 267, 274–76 (4th Cir. 2007) (explaining how an expert basing his testimony on experience must explain how his experience leads him to his conclusions and is a sufficient basis for the opinion). Mr. Potter's report merely relies on information found in OIG and FDIC publications. An expert is not needed to relay this type of information to the jury. There is simply no fit here between Mr. Potter's accounting background and experience and his opinions offered on the use of SLA. Accordingly his opinions on SLA are properly excluded.

Mr. Potter's damages opinions must also be excluded as they are not rebuttal testimony and were submitted after the deadline for designating a damages expert passed. Even Mr. Potter does not consider his damages opinion to be rebuttal. [DE 96-2 Potter Dep. at 9:18–10:3]. The FDIC makes no attempt at excusing its late expert submittal on damages and the opinion must therefore be excluded. Accordingly, the Court excludes Harry Potter as an expert witness and does not consider his opinions in ruling on the motions for summary judgment.

III. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

A motion for summary judgment cannot be granted unless there are no genuine issues of material fact for trial. FED. R. CIV. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

The moving party must demonstrate the lack of a genuine issue of fact for trial and if that burden is met, the party opposing the motion must "go beyond the pleadings" and come forward with evidence of a genuine factual dispute. *Celotex*, 477 U.S. at 324. The Court must view the facts and the inferences drawn from the facts in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986). Conclusory allegations are insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) ("[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.") (emphasis in original). "There must be evidence on which the jury could reasonably find for the plaintiff by a preponderance of the evidence." *Id.* at 252. Therefore the inquiry asks whether reasonable jurors could find for the plaintiff by the preponderance of the evidence. *Id.* Plaintiff must produce "significant probative evidence tending to support the complaint" or provide "specific facts showing there is a genuine issue for trial." *Id.* at 249–50. The Court will not consider "unsupported assertions," or "self-serving opinions without objective corroboration." *Evans v. Techs. Apps. & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996).

Defendants seek summary judgment on all claims against them. The FDIC brings three claims for relief against defendants: 1) negligence; 2) gross negligence; and 3) breach of fiduciary duties.

A. The Business Judgment Rule Defeats Plaintiff's Negligence and Breach of Fiduciary Duties Claims.

As the Court held in ruling on the motion to dismiss in this case:

> The business judgment rule serves to prevent courts from unreasonably reviewing or interfering with decision made by duly elected and authorized representatives of a corporation. *Robinson on North Carolina Corporations*, § 14.06. "Absent proof of bad faith, conflict of interest, or disloyalty, the business decisions of officers and directors will not be second-guessed if they are 'the product of a

> rational process,' and the officers and directors have 'availed themselves of all material and reasonably available information' and honestly believed they were acting in the best interest of the corporation." *State v. Custard*, 2010 N.C.B.C. 6, 2010 WL 1035809 *21 (N.C. Super. March 19, 2010) (quoting *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 124 (D.Ch. 2009)). The business judgment rule is akin to a gross negligence standard. *See First Union Corp. v. SunTrust Banks, Inc.*, 2001 N.C.B.C. 09, 2001 WL 1885686 *10 (N.C. Super. August 10, 2001).

F.D.I.C. v. Willets, 882 F. Supp. 2d 859, 864 (E.D.N.C. 2012). At that stage, the Court could not know whether the business judgment rule shielded defendants' liability absent further factual development and declined to dismiss the case. *Id.* Now, however, the facts have been fully developed and the Court finds that the business judgment rule applies and shields defendants from liability on the ordinary negligence and breach of fiduciary duties claims.

Under the business judgment rule, there can be no liability for officers and directors even when "a judge or jury considering the matter after the fact, believes a decision substantively wrong or degrees of wrong extending though 'stupid,' to 'egregious' or 'irrational,' . . . so long as the court determines that the process employed was either rational or employed in a *good faith* effort to advance the corporate interests." *State v. Custard*, No. 06 CVS 4622, 2010 WL 1035809 *21 (N.C. Super. Mar. 19, 2010) ("*Custard II*") (emphasis in original) (quoting *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967–68 (D. Ch. 1996)).

The business judgment rule involves two presumptions. First, it establishes "'an initial evidentiary presumption that in making a decision the directors [and officers] acted with due care (i.e., on an informed basis) and in good faith in the honest belief that their action was in the best interest of the corporation.'" *Custard II*, 2010 WL at *20–21 (quoting *Robinson on North Carolina Corporations* § 14.6, at 281 (5th ed. 1995)). This is a gross negligence standard. *First Union Corp.* 2001 WL 1885686 *10. Second, the business judgment rule establishes, absent rebuttal of the first presumption, a "powerful substantive presumption that a decision by a loyal

and informed board will not be overturned by a court unless it cannot be attributed to any rational business purpose." *Ehrenhaus v. Baker*, 717 S.E.2d 9, 25 (N.C. App. 2011) (quotation omitted). Here plaintiff cannot rebut either presumption on the evidence before the Court.

The substantial discovery produced in this case, which includes voluminous records, 15 depositions of party, third party, and expert witnesses including Cooperative's regulators at the FDIC, fails to reveal any evidence that suggests any defendant engaged in self-dealing or fraud, or that any defendant was engaged in any other unconscionable conduct that might constitute bad faith. Although the decisions of defendants to engage in various forms of lending and to make the particular loans challenged in the complaint, and the wisdom of such decisions raise interesting discussion points in hindsight, the business judgment rule precludes this Court from delving into whether or not the decisions were "good" and limits the Court's involvement to a determination of whether the decisions were made in "good faith" or were founded on a "rational business purpose." Considering the absence of any indication of bad faith, conflict of interest, or disloyalty, the Court now considers whether defendants employed a rational process in making the challenged loans.

A review of the evidence makes it clear that defendants both employed a rational process and acted with a rational business purpose. The complaint alleges that defendants ignored multiple Reports of Examination ("ROE") issued by the FDIC that warned them about Cooperative's underwriting and credit practices and asking for changes. *See e.g.,* [DE 1 Complaint at ¶¶17–20]. However, the very same ROE that recommended changes also graded defendants' management, asset quality, and sensitivity to risks as "satisfactory" and not requiring "material changes." These "grades" are the CAMELS rating provided to Cooperative. [1]

[1] "CAMELS" is an acronym for six primary areas of bank operations that are evaluated by bank examiners" Capital, Asset Quality, Management, Earnings, Liquidity, and Sensitivity to Market Risk. Ratings are assigned on a scale of

Cooperative received a CAMELS "2" rating, including a "2" rating for management (the defendants) and asset quality (Cooperative's loans) and sensitivity to market risks in 2006. Therefore the facts show that the process that defendants used to make the challenged loans were expressly reviewed, addressed, and graded by FDIC regulators in the 2006 ROE. The regulators assigned defendants a passing grade of "2" in the CAMELS system and to now argue that the process behind the loans is irrational is absurd. Further, each of the loans at issue was subject to substantial due diligence and an approval process that defies a finding of irrationality. The same challenged underwriting and credit administration processes were thoroughly reviewed in 2006, 2007, and 2008 by independent auditors at CRM. CRM independently concluded, in the ordinary course of its review, that "extensive underwriting is performed at loan inception" and that Cooperative's new credit originations were "well documented with credit memoranda that adequately articulated the credit decision processes." [DE 103-9 at 3]. The Court therefore finds, as a matter of law, that defendants' processes and practices for the challenged loans were *rational* and that plaintiff has failed to rebut the first presumption of the business judgment rule.

Therefore the Court moves to considering whether the challenged actions of the defendants can be attributed to a rational business purpose. The Court concludes they can be, as a matter of law. The burden of defeating the business judgment rule when the first presumption survives is extraordinarily high especially in conditions, as here, of a tumultuous market. *Eringhaus*, 717 S.E.2d at 30 ("Given the time demands and tumultuous market conditions, the business judgment rule is likely insurmountable in this case."). Cooperative's pursuit of the challenged loans was in furtherance of Cooperative's goal to grow to a $1 billion institution and stay competitive with other regional and national banks making substantial inroads into its

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1 to 5, with a "1" being the highest score possible. *See generally* 62 Fed. Reg. 752-01, *Uniform Financial Institutions Rating System*. Banks scoring a "1" or "2" CAMELS rating are considered well-managed and presenting no material supervisory concerns. *Id.*

territory. [DE 102-5 Hundley Dec. at ¶6]. The record can simply not support a finding that the defendants' business purpose fell so far beyond lucid behavior that it could not even be considered "rational." Although there were clearly risks involved in Cooperative's approach, the mere existence of risks cannot be said, in hindsight, to constitute irrationality. Further, corporations are expected to take risks and their directors and officers are entitled to protection from the business judgment rule when those risks turn out poorly. Where, as here, defendants do not display a conscious indifference to risks and where there is no evidence to suggest that they did not have an honest belief that their decisions were made in the company's best interests, then the business judgment rule applies even if those judgments ultimately turned out to be poor. *Custard II*, 2010 WL at *22–23.

The Court finds that defendants are entitled to the business judgment rule's protection as a matter of law and indisputable fact. Therefore the Court enters judgment against plaintiff's claims for negligence and breach of fiduciary duty.

B. Defendants Were Not Grossly Negligent.

Section 1821(k) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) provides that the definition of gross negligence should be grounded in state law. "The difference between ordinary negligence and gross negligence is substantial . . . negligence, a failure to use due care, *be it slight or extreme*, connotes inadvertence. Wantonness [gross negligence], on the other hand, connotes *intentional wrongdoing*." *Yancey v. Lea*, 550 S.E.2d 155, 158 (N.C. 2001) (emphasis in original). North Carolina courts have historically used interchangeably the terms "gross negligence" and "willful and wanton conduct." *Id.* at 157. "Under North Carolina law, gross negligence has the same basic elements as negligence, but requires either intentional wrongdoing or deliberate misconduct affecting the safety of others,

such as when the act is done purposely and with knowledge that such act is a breach of duty to others." *Boykin Anchor Co., Inc. v. AT&T Corp.*, 825 F. Supp. 2d 706 (E.D.N.C. 2011).[2]

The FDIC has presented no evidence that any of the defendants approved the challenged loans and made policy decisions knowing that these actions would harm Cooperative and breach their duties to the bank. The FDIC cannot show that any of the defendants engaged in wanton conduct or consciously disregarded Cooperative's well-being. As the FDIC can point to no evidence supporting such a finding, defendants are entitled to summary judgment on the gross negligence claim.

IV. PLAINTIFF'S MOTION TO STRIKE.

Plaintiff seeks to strike the declaration of Robert T. Gammill and attached exhibits [DE 111-2, 111-3, and 111-4] because they allege it contains new expert opinions and previously undisclosed facts and data supporting them and because it was submitted after the expert witness disclosure deadline. However, as the declaration was submitted in support of defendants' memorandum in opposition to plaintiff's motion for partial summary judgment, and this Court has granted summary judgment in full in favor of defendants, the Court need not consider the motion. Accordingly it is denied as moot.

V. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

Plaintiff's motion for partial summary judgment on two of defendants' affirmative defenses is now moot as the Court granted summary judgment for defendants without relying on those particular affirmative defenses. However, the Court will briefly discuss the FDIC's claim

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[2] The court notes that its earlier reliance, in *Willetts*, 882 F. Supp. 2d at 865, on *Jones v. City of Durham*, 622 S.E.2d 596, 597 (2005) *opinion withdrawn and superseded on reh'g*, 622 S.E.2d 202 (2006), was misplaced as the North Carolina Supreme Court withdrew the *Jones* opinion and no North Carolina court has applied the withdrawn reasoning of *Jones* while several have defined gross negligence in its traditional terms. *See e.g., Greene v. City of Greenville*, 736 S.E.2d 833, 835 (N.C. App. 2013) (defining gross negligence as "wanton conduct done with conscious or reckless disregard for the rights and safety of others").

that the "Great Recession" was not only foreseeable, but was actually foreseen by the defendants. [DE 98 at 24]. The Court discusses this claim only due to the absurdity of the FDIC's position.

The FDIC relies on several pieces of evidence to support its claim that defendants foresaw the downturn in the economy as early as October 2006. [DE 98 at 9–10]. However, it ignores the unique historical factors happening at the same time including numerous economists and economic forecasters' prognosis of a strong economy going forward at that time. *See e.g.* Chris Isidore, *Goldman's chief to take on Treasury*, CNN MONEY (May 30, 2006, 1:26 PM), http://money.cnn.com/2006/05/30/news/economy/snow_replacement/index.htm?cnn=yes "While that pace of growth is widely expected to slow, many economists see the economy remaining strong. . . ."). Even as late as April 2007, the United States Treasury Secretary was pushing the idea that the economy was strong and healthy and that the housing market had reached its bottom. Greg Robb, *Paulson says U.S. housing sector 'at or near bottom'*, MARKET WATCH (Apr. 20, 2007, 1:01 PM), http://www.marketwatch.com/story/paulson-says-us-housing-sector-at-or-near-bottom. Further, throughout 2007 and into 2008, North Carolina and national economists continued to publish upbeat economic forecasts. *See* Mark Schreiner, *Experts: N.C. to do well in 2007*, STAR-NEWS (January 3, 2007, 6:15 AM), http://www.starnewsonline.com/article/20070103/NEWS/ 701030430; *Federal Reserve Bank Press Release*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (Aug. 7, 2007), http://www.federalreserve.gov/newsevents/press/monetary/20070807a.htm ("the economy seems likely to continue to expand at a moderate pace over coming quarters"); Harry M. Davis, *We are in a Recession*, NORTH CAROLINA BANKERS ASSOCIATION BUSINESS BAROMETER (April 2008), http://www.ncbankers.org/uploads/File/Bulletin/2008/April/080403Barometer.pdf ("while Florida, California, Ohio, Arizona, Nevada, Michigan are already in a recession, North Carolina is not").

After the fact, Federal Reserve Chairman Ben Bernanke observed that "a 'perfect storm' had occurred that regulators could not have anticipated," and former Chairman Alan Greenspan confessed that "it was beyond the ability of the regulators to ever foresee such a sharp decline." Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*, January 2011 found at http://fcic-static.law.stanford.edu/edn_media/fcic-reports/fcic_final_report_full.pdf at 3. Further the Federal Crisis Inquiry Commission has concluded that "[c]laims that there was a general failure of risk management in financial institutions or excessive leverage or risk-taking are part of what might be called a 'hindsight narrative.'" *Id.* at 446 (concluding this narrative to be false).

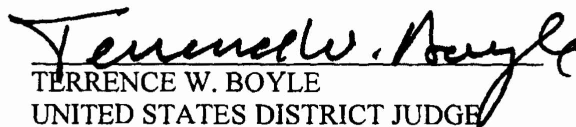
In sum, the FDIC claims that defendants were not only more prescient than the nation's most trusted bank regulators and economists, but that they disregarded their own foresight of the coming crisis in favor of making risky loans. Such an assertion is wholly implausible. The surrounding facts, and public statements of economists and leaders such as Henry Paulson and Ben Bernanke belie FDIC's position here. It appears that the only factor between defendants being sued for millions of dollars and receiving millions of dollars in assistance from the government is that Cooperative was not considered to be "too big to fail." *See* Eric Dash, *If it's Too Big to Fail, Is It Too Big to Exist?* NEW YORK TIMES (June 20, 2009), http://www.nytimes.com/2009/06/21/weekinreview/21dash.html?partner=rss&emc=rss (discussing the "too-big-to-fail doctrine"). Taking the position that a big bank's directors and officers should be forgiven for failure due to its size and an unpredictable economic catastrophe while aggressively pursuing monetary compensation from a small bank's directors and officers is unfortunate if not outright unjust.

CONCLUSION

For the forgoing reasons, defendants' motion for summary judgment is GRANTED, plaintiff's motion for partial summary judgment is DENIED AS MOOT, the various motions to seal are GRANTED, Defendants' motion to exclude is GRANTED, and plaintiff's motion to strike is DENIED AS MOOT. The clerk is directed to enter judgment accordingly and to close the file.

SO ORDERED.

This the 10 day of September, 2014.



TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION, *as received for Cooperative Bank*, Plaintiff,	)	
v.	)	**JUDGMENT** **7:11-CV-165-BO**
RICHARD RIPPY, JAMES HUNDLEY, FRANCES FENSEL, JR., HORACE KING, FREDERICK WILLETTS, III, DICKSON BRIDGER, PAUL BURTON, OTTIS WRIGHT, JR., and OTTO BURRELL, JR., Defendants.	)	

Decision by Court.

IT IS ORDERED, ADJUDGED, and DECREED that the defendants' Motion for Summary Judgment [DE 101] is GRANTED, the plaintiff's Motion for Partial Summary Judgment [DE 97] is DENIED AS MOOT, the various motions to seal [DE 104, 105, 113, 115, 120] are GRANTED, the defendant's Motion to Exclude the Opinion of Expert Harry Potter [DE 95] is GRANTED, and the plaintiff's Motion to Strike [DE 117] is DENIED AS MOOT. This matter is now closed.

This Judgment was filed and entered on September 23, 2014, and copies were delivered to:
Douglas Black (electronically via CM/ECF)
Mary Wolff (electronically via CM/ECF)
Ruth Allen (electronically via CM/ECF)
Camden Webb (electronically via CM/ECF)
David Goewey (electronically via CM/ECF)
Thomas Gilbertsen (electronically via CM/ECF)
Kacy Hunt (electronically via CM/ECF)
Meredith Boylan (eletronically via CM/ECF)
Ronald Glancz (electronically via CM/ECF)

DATE	JULIE A. RICHARDS, CLERK
September 23, 2014	/s/ Macy B. Fisher (By) Macy B. Fisher, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
Case No. 7:11-CV-00165-BO

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for COOPERATIVE BANK, **Plaintiff,** **v.** **FREDERICK WILLETTS, III, PAUL G. BURTON, JAMES D. HUNDLEY, HORACE THOMPSON KING, III, OTTIS RICHARD WRIGHT, JR., RICHARD ALLEN RIPPY, FRANCIS PETER FENSEL, JR., DICKSON B. BRIDGER, and OTTO C. "BUDDY" BURRELL, JR.,** **Defendants.**	)	**PLAINTIFF'S NOTICE OF APPEAL**

NOTICE is hereby given that the Federal Deposit Insurance Corporation, as Receiver for Cooperative Bank ("FDIC-R"), plaintiff in the above-captioned cause, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the final Judgment entered in this cause on September 23, 2014 (D.E. 126), and any other orders, findings, conclusions and holdings relating or contributing to the final judgment including, but not limited to, the Order entered in this cause on September 11, 2014 (D.E. 124), granting Defendants' Motion for Summary Judgment (D.E. 101), denying as moot Plaintiff's Motion for Partial Summary Judgment (D.E. 97), granting Defendants' Motion to Exclude Opinions of Harry Potter (D.E.95), and denying as moot Plaintiff's Sealed Motion to Strike the Declaration of Robert T. Gammill and to Exclude the Opinions Set Forth Therein (D.E. 117).

Title 12 of the United States Code, Section 1819(b)(2)(E)(4), provides that the FDIC-R "shall not be subject to payments of any filing fees in United States district courts or courts of appeals."

This 2nd day of October, 2014.

Respectfully submitted,

/s/ Ruth Allen

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CERTIFICATE OF SERVICE

I hereby certify that on this the 2nd day of October, 2014, I electronically filed the foregoing document under seal with the Clerk of the Court using the CM/ECF system and served the following electronically:

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