THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Shannon M. Phillips, Master-in-Equity

Appellate Case No. 2022-000393

U.S. Bank Trust, N.A. as Trustee for LSF10 Master Participation Trust,……...…….Respondent,

v.

Austin A. Lowery a/k/a Austin Lowery a/k/a Austin Allen Lowery a/k/a Allen Lowery, individually, and as Heir or Devisee of the Estate of Lisa D. Lowery a/k/a Lisa Marie Davis Lowery, Deceased; South Carolina Department of Revenue; The United States of America acting by and through its agency, Department of the Treasury - Internal Revenue Service; and Elizabeth A. Lowery,.……Defendants,

Of whom Austin A. Lowery a/k/a Austin Lowery a/k/a Austin Allen Lowery a/k/a Allen Lowery, individually, and as Heir or Devisee of the Estate of Lisa D. Lowery a/k/a Lisa Marie Davis Lowery, Deceased, is the…….....Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal of the grant of partial summary judgment, including summary judgment on liability, to the Respondent, U.S. Bank Trust, N.A. as Trustee for LSF10 Master Participation Trust (hereinafter "U.S. Bank").

U.S. Bank sued the Appellant, Austin A. Lowery a/k/a Austin Lowery a/k/a Austin Allen Lowery a/k/a Allen Lowery, individually and as heir or devisee of the Estate of Lisa D. Lowery (hereinafter "Lowery"), in 2019, seeking foreclosure of a mortgage on 53.73 acres of land and a judgment that a mobile home was part of the mortgaged property. (R. pp. 35-46.) The complaint alleged debt under the mortgage pursuant to a note dated September 24, 2002, alleged that the note was in default since May of 2004, and alleged that a release of the mortgage had been "inadvertently recorded" in January of 2019. (R. pp. 37-45.) The complaint alleged the note and mortgage were given to Household Finance Corporation II (hereinafter "Household") and later assigned to U.S. Bank. (R. pp. 37-38.)

U.S. Bank then amended its complaint as of right, to reflect that Lisa Lowery, whom it had originally named as a defendant, had died in 2017. (R. pp. 55-65.) The other allegations of the complaint remained virtually identical, with U.S. Bank still seeking foreclosure of a mortgage on 53.73 acres of land and a judgment that a mobile home was part of the mortgaged property and still alleging debt under the mortgage pursuant to a note dated September 24, 2002, that the note was in default since May of 2004, and that a release of the mortgage had been "inadvertently recorded.". (R. pp. 55-65.)

Lowery answered the amended complaint and counterclaimed. (R. pp. 74-81.) Lowery noted that the property description added to the mortgage document was not in the document he signed and was added to the document later, as he had contemplated, with Household's

knowledge, mortgaging five acres. (R. pp. 75, 79-80.) Lowery answered that the recording of the mortgage release was not an error and that U.S. Bank had released the mortgage. (R. pp. 75, 78.) He pled a number of affirmative defenses and a defense and counterclaim for violation of S.C. Code Ann. § 37-10-102, commonly known as the attorney preference statute, in connection with the closing of the mortgage loan involved in this case, along with inducement of the mortgage loan by unconscionable conduct. (R. pp. 78-80.) Lowery noted that no attorney had supervised the closing. (R. pp. 80.)

By consent, U.S. Bank amended its complaint again, this time seeking foreclosure of the mortgage as to only five acres, relying on a different mortgage document executed six days after the one described in the fist two complaints. (R. pp. 82-92.) The second amended complaint's allegations about debt and default dates remained the same as in the first two amended complaints. (R. pp. 82-92.)

Lowery again answered and counterclaimed. (R. pp. 93-100.) In response to U.S. Bank's allegations of a mortgage, Lowery answered that he "admits he signed something styled as a mortgage document; however, to the extent this document ever constituted a valid mortgage, it has been released. This is the same mortgage as that released mortgage described in [U.S. Bank]'s Amended Complaint in this case, just with a corrected property description. The recording of the release was not an error." (R. p. 94 ¶ 7.) Lowery pled affirmative defenses of release, unclean hands, the statute of limitations, res judicata, and laches. (R. pp. 96-98 ¶¶ 26-44.) He again also pled a defense and counterclaim for violation of the attorney preference statute, with the mortgage loan having been induced by unconscionable conduct. (R. pp. 98-99 ¶¶ 45-51.)

U.S. Bank moved to dismiss Lowery's counterclaim. (R. pp. 105-10.) The court heard and denied that motion. (R. pp. 18-20.) After the motion to dismiss was heard, Lowery swore and filed an affidavit that reads as follows:

> 2. I have read my answer and counterclaim filed on November 1, 2019, in this case, and I hereby verify that the factual statements in it are true.
>
> 3. My late wife, Lisa D. Lowery, and I got the mortgage that is involved in this case because we needed to refinance a construction loan. Time was a major factor, as our construction loan was about to mature.
>
> 4. The mortgage loan involved in this case was made by Household Finance Corporation II. (I will call them "Household" in this affidavit for ease of reference.) Household promised us a lower interest rate than we got. As we approached the closing date for the loan, Household told us that they could only make the loan at the high interest rate that is in the note, but they also said that they would refinance or modify the loan at a five percent fixed rate if we made our payments on time for one year.
>
> 5. Relying on this statement to be true, we went through with getting the loan.
>
> 6. We were never given any opportunity to choose a lawyer to represent us in closing the loan. No one asked us, in writing or otherwise, for our preference as to an attorney to represent us in connection with closing the loan. Household told us we did not need a lawyer and that they would close the loan themselves. They told us they closed loans without a lawyer all the time.
>
> 7. That is what they did. On September 24, 2002, we went to Household's office and were presented with the closing papers for the loan. We were not given advice or explanations of the documents. Instead, the Household employee who was with us just said things like "Sign here." We signed where the employee told us to sign. No lawyer was present at the closing.

> 8. Among the documents we signed at the closing on September 24, 2002, was the document that is Exhibit A to this affidavit.
>
> 9. What we intended to mortgage for this loan was five acres that is part of a 53-acre tract of land. We told that to the Household people, and they represented to us that the five-acre parcel was what was being mortgaged.
>
> 10. If any of the papers we signed at the closing had a property description of the 53-acre tract in them, that was not shown to us.
>
> 11. A few days after the closing, someone from Household called us and said that they had made an error in the mortgage and that we needed to come in and re-sign the same mortgage. We did that on September 30, 2002. No lawyer was present for that re-signing, either.
>
> 12. We made our payments on time for a year like Household said to do. I then contacted Household about getting the lower interest rate they had promised us. The Household people said we would have to apply for a refinance to do that. We applied, and Household turned us down.
>
> 13. Because of the two mortgage documents on record, one of which described the whole 53-acre tract, I was unable to get refinancing to get out of this mortgage with Household.

(R. pp. 310-12.) Exhibit A to Lowery's affidavit is a document styled as an attorney preference selection form that states "None" for preference as to attorney and which is dated September 24, 2002, the date of the mortgage loan closing. (R. p. 313.)

U.S. Bank moved for summary judgment on Lowery's counterclaim. (R. pp. 107-08.) Lowery moved for summary judgment on U.S. Bank's claims and for liability in his favor on his counterclaim. (R. pp. 110-17.)

The lower court denied Lowery's motions. (R. pp. 24-27.) The lower court granted U.S. Bank's motion for summary judgment but kept Lowery's attorney preference violation defense alive, ruling that "Lowery's counterclaim against U.S. Bank is dismissed WITH

PREJUDICE to the extent such counterclaim is asserted to secure an award of monetary damages and attorney's fees from U.S. Bank[,]" while also ruling that "[t]his order is without prejudice to Lowery's right to raise his counterclaim as an equitable and statutory defense for the purpose of setoff or recoupment, or both, and introduce evidence in support thereof, to U.S. Bank's request for foreclosure of the mortgage." (R. pp. 28-34.)

Some months passed, and U.S. Bank moved for summary judgment as to the entire case. (R. pp. 118-25.) In support of this motion, U.S. Bank filed a number of documents, including the HUD-1 settlement statement for this loan, which gives a closing date of September 24, 2002, lists Household as the settlement agent, and contains no charges for attorneys' fees. (R. pp. 143-45, 346-48.)

Among the materials that Lowery filed in opposition to this motion were an amended complaint from a 2008 action Household had brought to foreclose the mortgage, alleging the same default date as that alleged in the instant case, and the last order from that 2008 action, a Form 4 order filed July 26, 2013, that stated "IT IS ORDERED that this case is hereby stricken from the active roster for failure to prosecute, pursuant to Rule 40(j), and may be restored to the active docket without a filing fee once the parties are ready to proceed." (R. pp. 278-87.) That order contains no indication that any party consented to what the court ordered in it. (R. pp. 286-87.)

On February 23, 2022, the lower court issued an order stating that "[t]he only issues remaining after this order are the amount of the debt and the amount of [Lowery]'s set off/recoupment." (R. p. 1.) The lower court decided that "Lowery has failed to come forward with sufficient facts which would create a genuine issues [sic] of material fact to lead this court to conclude that the agreement or transaction to have been unconscionable at the time it was

made, or to have been induced by unconscionable conduct. Therefore, U.S. Bank is entitled to summary judgment as a matter of law." (R. p. 10.) The order ruled as follows:

> Plaintiff is granted summary judgment as to Defendant's affirmative defenses of res judicata, release and unconscionability.
>
> Plaintiff is granted summary judgment as to Defendant's liability for foreclosure subject to submitting by affidavit appropriate documentation supporting the amount of the debt at least three days prior to a final hearing.
>
> Defendant is granted judgment by way of offset only for an attorney preference violation subject to submitting the amount claimed for the offset by way of affidavit at least three days prior to a final hearing.

(R. p. 11.)

Lowery moved for reconsideration or at least clarification of this order, pointing out, among other things, that the court had not addressed his laches defense and that the order's affidavit procedure to be used for the trial of the case infringed upon his right to cross-examine U.S. Bank's witness or witnesses. (R. pp. 171-75.) The court denied this motion. (R. pp. 14-17.)

This appeal followed.

STATEMENT OF FACTS

U.S. Bank's predecessor, Household, put Lowery and his wife (to whose interest he has succeeded) in a very bad spot, depriving them of the benefit of an attorney to represent them in the closing and taking advantage of the disadvantage at which Household put them, inducing them to enter into this loan with false promises. (R. pp. 310-12.) Household's refusal to use a lawyer in closing the mortgage loan – despite South Carolina law requiring attorney supervision of mortgage closings from 1987 forward – resulted in Household recording a

document in the land records stating that it held a mortgage on 53.73 acres of Lowery's land, not just five. (R. pp. 311-12, 331-35.) Household employees slipped the 53.73 acre description in without Lowery ever having an opportunity to see it and stop them, since they added it after he signed the mortgage document. (R. pp. 311, 331-35.) This document remained in the land records for over 16 years, along with the one that Household did in an attempt to correct its mistake, effectively preventing Lowery from ever refinancing the mortgage and getting free of the mortgage relationship Household created. (R. pp. 116-17, 312, 331-35.)

Once U.S. Bank got the mortgage, it released it. (R. pp. 116-17.)

Household, in whose shoes U.S. Bank now stands, sat idly by and did nothing to challenge or attempt to change the order that improperly ended its foreclosure case under Rule 40(j), SCRCP. (R. pp. 286-87.) It let this matter sit, doing nothing to attempt to collect any debt from Lowery.

On a summary judgment motion, when the record was required to be viewed in the light most favorable to Lowery, the lower court ruled that there was not even a genuine issue about whether any of that mattered and, to boot, stripped Lowery of his ability even to cross-examine U.S. Bank's witnesses at trial. (R. pp. 1-13.) The lower court did not just stop at flipping the standard and viewing the record in the light most favorable to the party that had *moved* for summary judgment – it also waved off the requirements of the Due Process Clause. (R. pp. 1-13.)

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). That standard is that

> summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law.

Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986) (citing Spencer v. Miller, 259 S.C. 453, 192 S.E.2d 863 (1972)).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004) (citing Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001); Hall v. Fedor, 349 S.C. 169, 173-74, 561 S.E.2d 654, 656 (Ct. App. 2002)) (internal citations omitted). If "the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]" Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 29 (2008) (citing Wilson v. Style Crest Products, Inc., 367 S.C. 653, 656, 627 S.E.2d 733, 735 (2006)).

> When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues.

Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008) (citing David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006); Rule 56(c), SCRCP) (internal citations omitted).

In 2009, the South Carolina Supreme Court clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. See Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802-03 (2009). In Hancock, the Court held that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Id. at 330, 673 S.E.2d at 803. More than a scintilla is required only in cases requiring heightened burdens of proof or applying federal law. Id. at 330-31, 673 S.E.2d at 803.

ARGUMENT

I. The record contains evidence supporting several affirmative defenses, and that evidence properly precluded summary judgment on liability.

Lowery pled several affirmative defenses to U.S. Bank's claim. (R. pp. 96-98.) The record contained evidence supporting all of those defenses. (R. pp. 116-17, 145, 278-87, 310-13, 346.) Because evidence with a tendency to prove Lowery's affirmative defenses was in the record, the lower court erred reversibly in granting U.S. Bank summary judgment on liability against Lowery. (R. pp. 1-13.)

a. The record contained evidence that the loan was induced by unconscionable conduct.

By providing an attorney preference form to Lowery and his wife at the time of closing, by failing to ascertain their preference as to a lawyer to represent them, and by deceiving them into believing a lawyer was not needed to close the mortgage loan, Household violated the attorney preference statute – as the lower court agreed. (R. pp. 10-11.)

In pertinent part, the attorney preference statute provides:

> Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose -
>
> (a) The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction and except in the case of a loan on property that is subject to the South Carolina Horizontal Property Act (Section 27-31-10 et seq.) the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage and comply with such preference.
>
> The creditor may comply with this section by:
>
> (1) including the preference information on or with the credit application so that this information shall be provided on a form substantially similar to a form distributed by the administrator; or
>
> (2) providing written notice to the borrower of the preference information with the notice being delivered or mailed no later than three business days after the application is received or prepared. If a creditor uses a preference notice form substantially similar to a form distributed by the administrator, the form is in compliance with this section.

S.C. Code Ann. § 37-10-102.

A lender violates S.C. Code Ann. § 37-10-102 when it fails to "ascertain *prior to closing* the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction" and by failing to "comply with such preference." S.C. Code Ann. § 37-10-102(a) (emphasis added). Our Supreme Court has noted that "the suggestion that the attorney preference statute disclosure may be made at closing borders on frivolity." King v. Am. Gen. Finance, Inc., 386 S.C. 82, 91, 687 S.E.2d 321, 326 (2009).

The attorney preference statute is in Chapter 10 of the South Carolina Consumer Protection Code, which is codified in Title 37 of the South Carolina Code of Laws. A statute

in the same chapter, S.C. Code Ann. § 37-10-105, provides the remedies for a violation of § 37-10-102, stating:

> A) If a creditor violates a provision of this chapter, the debtor has a cause of action, other than in a class action, to recover actual damages and also a right in an action, other than in a class action, to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars. No debtor may bring a class action for a violation of this chapter. No debtor may bring an action for a violation of this chapter more than three years after the violation occurred, except as set forth in subsection (C). The three-year statute of limitations applies to actions commenced after May 2, 1997. No inference should be drawn as to the applicable statute of limitations for any pending actions. ***This subsection does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action.***
>
> (B) No creditor may be held liable in an action brought under this section for a violation of this chapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.
>
> (C) ***If the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct***, the court may, in an action other than a class action:
>
> > (1) refuse to enforce the agreement, or a term, or part of the agreement or transaction that the court determines to have been unconscionable at the time it was made;
> >
> > (2) enforce the remainder of the agreement without the unconscionable term or part, or limit the application of the unconscionable term or part to avoid an unconscionable result;

> (3) rewrite or modify the agreement to eliminate an unconscionable term, part, or result and enforce the new agreement; or
>
> (4) award:
>
> > (a) not more than the total amount of the loan finance charge and allow repayment of the unpaid balance of the loan without any finance charge;
> >
> > (b) not more than double the amount of the excess loan finance charge or other charges or fees actually received by the creditor or paid by the debtor to a third party; and
> >
> > (c) attorney's fees and costs.
>
> An action pursuant to this subsection may not be brought after the original scheduled maturity date of the debt.
>
> (D) In an action in which it is found that a creditor has violated this chapter, the court shall award to the debtor the costs of the action and to his attorneys their reasonable fees. In determining attorneys' fees, the amount of the recovery on behalf of the debtor is not controlling.

S.C. Code Ann. § 37-10-105 (emphasis added).

At issue here is whether, for this violation of the attorney preference statute, under these circumstances, Lowery is limited to the relief available under S.C. Code Ann. § 37-10-105(A), "actual damages . . . and a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars[,]" or whether there is a genuine issue of fact about whether the stronger remedies under S.C. Code Ann. § 37-10-105(C) may be available to Lowery in the ultimate analysis. These include remedies that could make the debt upon which U.S. Bank sues wholly or partially unenforceable. Id.

The lower court accepted U.S. Bank's mischaracterization of Lowery's argument about what unconscionable conduct occurred in this case. (R. p. 7.) Lowery has never asserted "that the violation of the attorney preference statute is unconscionable conduct." (R. p. 7.) A contention that the customer is arguing that the mere violation of the attorney preference statute is unconscionable is a position often taken by mortgagees in cases in which they have plainly violated the statute and plainly engaged in unconscionable conduct in the inducement of the mortgage loan, as here. And usually, as here, it is not what the customer is actually saying. It is a species of straw man argument. See State v. Smith, 298 P.3d 1138 (Kan. App. 2013) ("straw man argument is where the arguer wishes to respond to an argument of his or her choosing and not one that is actually presented").

Lowery's affidavit lays out the facts concerning the circumstances of the attorney preference violation and the effect it had on Lowery. (R. pp. 310-13.) The original creditor, Household, of which U.S. Bank claims to be an assignee, lied to Lowery, making him a false promise that it would modify or refinance this loan at a lower interest rate. (R. pp. 310-12.) As Lowery's construction loan was about to mature, he had little choice but to refinance with someone, and Household knew it. (R. pp. 310-11.)

Having coerced and deceived Lowery into getting the loan, Household had Lowery sign two mortgage documents and recorded them both. (R. pp. 310-12, 331-40.) Lowery intended to mortgage five acres to Household, but Household first had him sign a mortgage document on which it placed, without his knowledge, a description of the mortgaged property as being Lowery's entire 53.73 acres, which included the five acres and all Lowery's surrounding property, too. (R. pp. 311-12, 331-35.) Household apparently realized that this was not what was supposed to be mortgaged and had Lowery come back to execute another

mortgage document in which it did describe five acres as mortgaged. (R. pp. 312, 336-40.) Household did not couch this as a new mortgage; rather, it called in Lowery and his now-deceased wife to re-sign the *same* mortgage. (R. pp. 145, 312, 331-46.)

Almost seventeen years later, in 2019, a release document was recorded that referenced the book and page number of the first recorded mortgage document. (R. pp. 116-17.) In the meantime, "[b]ecause of the two mortgage documents on record, one of which described the whole 53-acre tract, [Lowery] was unable to get refinancing to get out of this mortgage with Household." (R. p. 312.)

U.S Bank may contend that the *terms* of the transaction, in the abstract, were not unconscionable, but there is at the very least a genuine issue of fact about whether the *conduct* that induced the transaction was. The beefed-up remedies of S.C. Code Ann. § 37-10-105(C) apply where there has been a violation of the attorney preference statute and the consumer transaction "was induced by unconscionable conduct." Id. The lower court seemed not to understand what inducement by unconscionable conduct means. (R. pp. 7-10.)

The General Assembly has provided that the Consumer Protection Code "shall be liberally construed and applied to promote its underlying purposes and policies." S.C. Code Ann. § 37-1-102(1); accord King, 386 S.C. at 89, 90; Davis v. Nationscredit Fin. Services Corp., 326 S.C. 83, 484 S.E.2d 471 (1997); Camp v. Springs Mtg. Corp., 310 S.C. 514, 426 S.E.2d 304 (1992). Among the specifically enumerated purposes of the Consumer Protection Code are "to further consumer understanding of the terms of credit transactions" and "to protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit, having due regard for the interests of legitimate and scrupulous creditors." S.C. Code Ann. § 37-1-102(2)(c)&(d).

The court must, accordingly, interpret S.C. Code Ann. § 37-10-105, including the statute's use of the word "unconscionable," consistently with the purposes of the Consumer Protection Code, i.e., liberally in favor of the furtherance of consumer understanding of the terms of credit transactions and liberally in favor the protection of consumers against unfair practices by suppliers of consumer credit. S.C. Code Ann. § 37-1-102(1)&(2)(c)&(d).

At issue in this case is a South Carolina mortgage loan. Under South Carolina law, a person has the right to be represented by an attorney of his own choice, without conflicts of interest, in a mortgage closing. See Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773, 777-78 (2003); State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987). A South Carolina mortgage loan closing, including a refinance, must be supervised by an attorney licensed to practice law in South Carolina. Id.

In Wachovia Bank, N.A. v. Coffey, the Court of Appeals observed that "[t]he unauthorized practice of law is *inherently prejudicial* to not only the parties involved in the instant transaction but also the public at large[.]" 389 S.C. 68, 698 S.E.2d 244, 248 (Ct. App. 2010) (emphasis added), *aff'd as modified* 404 S.C. 421, 746 S.E.2d 35, 76 (2013). The Court of Appeals noted that the purpose served by our Supreme Court requiring lawyers to supervise mortgage loan closings is "the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law." Id. (quoting Buyers Service, 292 S.C. at 431). The Supreme Court favorably cited Coffey's "inherently prejudicial" description in Matrix Financial Services Corp. v. Frazer, which reaffirmed that "closing a loan without the supervision of an attorney constitutes the unauthorized practice of law." 394 S.C. 134, 714 S.E.2d 532, 534 (2011). Prejudice inheres in the unauthorized practice of law.

Among the chief reasons our Supreme Court requires an attorney licensed to practice law in this state to supervise a mortgage loan closing is so that the mortgage loan customer is in a position to receive accurate information from the lawyer, who represents the customer, about the terms of credit transactions, and so that the lawyer may protect the customer from unfair practices by suppliers of mortgage credit. Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434. The closing lawyer represents the mortgage loan customer[1], Doe, 355 S.C. at 315, and must supervise the closing because, among other things, "attorneys . . . have the ability to furnish their clients legal advice should the need arise and fall under the regulatory rules of" the Supreme Court. Buyers Service, 292 S.C. at 434. Per our Supreme Court, underpinning the attorney supervision requirement is the principle that "protection of the public is of paramount concern." Id. Chiefly, what the Court has sought to protect the public from are the negative consequences engendered by people entering into mortgage loan transactions without the opportunity to make a meaningful, informed choice about whether to sign on to the terms of those transactions. Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434. The closing attorney is there to ensure the choice to enter into the mortgage loan is meaningful and the bargaining process is fundamentally fair. Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434.

The right to be represented by an attorney of one's own choice is a substantial right. Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005). This is no less so in the context of an out-of-court transaction like a mortgage loan closing. See Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434. The right of a mortgage loan customer to be represented in a mortgage loan closing by a loyal, unconflicted attorney of his own choice, there to ensure the

[1] Under certain circumstances, the closing attorney may also represent the lender. Doe, 355 S.C. at 315.

customer has a meaningful choice about whether to enter into the transaction and that the process is fair, is indeed substantial. Hagood, 362 S.C. 191; Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434.

Unconscionability simply means "[e]xtreme unfairness." Black's Law Dictionary 1663 (9th ed. 2009). In discussing unconscionability, our Supreme Court has said that "[a]bsence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 669 (2007). Unconscionability is not and should not be a one-size-fits-all inquiry; rather, "unconscionability claims are context-specific[.]" McFarland v. Wells Fargo Bank, N.A., 810 F.3d 273, 283 (4th Cir. 2016) (analyzing West Virginia unconscionability law).

"A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." Decker, 322 S.C. at 219. "Our courts are constrained to avoid a statutory construction that would have the effect of reading a provision out of a statute." Protection & Advocacy for People with Disabilities, 417 S.C. at 274. The South Carolina General Assembly has provided that S.C. Code Ann. § 37-10-105(C) applies where the court finds that an "agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct[.]" S.C. Code Ann. § 37-10-105(C) (emphasis added). This is similar to what the Fourth Circuit concluded that the West Virginia legislature had done with similar statutory language, "diverging from [the] traditional understanding [of substantive unconscionability] and authorizing a claim for unconscionable inducement that does not require a showing of substantive unconscionability." McFarland, 810 F.3d at 284. Inducement by unconscionable conduct focuses on process rather

than substantive transaction terms. S.C. Code Ann. § 37-10-105(C); cf. McFarland, 810 F.3d at 284. In a situation of inducement by unconscionable conduct, the underlying loan terms do not have to be unconscionable; rather, the court looks to the surrounding conduct and assesses that conduct for extreme unfairness. See McFarland, 810 F.3d at 284; S.C. Code Ann. § 37-10-105(C).

The General Assembly has required that analysis of unconscionability or inducement by unconscionable conduct under the Consumer Protection Code not be limited to a pre-written checklist of elements or even factors. S.C. Code Ann. § 37-5-108(4)(a) ("consideration must be given to applicable factors," listing some factors but noting that list is "without limitation"). An absence of meaningful choice and a lack of fundamental fairness, though, are among the hallmarks of unconscionability. See Simpson, 644 S.E.2d at 669. That is consistent with the legislative mandate concerning interpretation of the Consumer Protection Code. S.C. Code Ann. § 37-1-102(1)&(2)(c)&(d). The essence of unconscionability is fundamental unfairness, and there are as many forms in which that may manifest itself as there are opportunities for it to do so. See McFarland, 810 F.3d at 283; S.C. Code Ann. § 37-5-108(4)(a).

"[T]he fact that the seller, lessor, or lender knowingly has taken advantage of the inability of the consumer or debtor reasonably to protect his interests" is specifically listed by our legislature as a factor to be used in analyzing whether a transaction was induced by unconscionable conduct. S.C. Code Ann. § 37-5-108(4)(a)(iv). If the lending institution making a mortgage loan deprives its customer of the opportunity to have an attorney represent him in the closing, it has deprived him of a substantial right that exists to make sure he has a meaningful choice and that the process is a fair one. See Hagood, 362 S.C. 191; Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434. Depriving him of that right is extremely unfair.

The closing of a South Carolina mortgage loan without its supervision by a licensed South Carolina attorney, particularly where the customer is not given any opportunity to select an attorney to represent him, can be understood to be inducement of the loan by unconscionable conduct. Viewing the record in the light most favorable to Lowery and drawing all reasonable inferences in his favor, the unauthorized practice of law noted in his affidavit is unconscionable conduct (particularly so when coupled with the 53-acre vs. five-acre property description discrepancy *and* a false promise to refinance or modify the loan), and, reckoning by that same standard, closing a mortgage loan without the required attorney supervision, a requirement that exists to ensure fundamental fairness and borrower understanding of the terms of the transaction, is inducement of the loan by unconscionable conduct. (R. pp. 310-12.) That is a reading of Simpson, Hagood, Coffey, Matrix, Doe, Buyers Service, §§ 37-1-102, 37-10-102, and 37-10-105 that is logically consistent and is in accord with the public policy of this state.

The lowered court reasoned that closing this mortgage loan without an attorney could not have been unconscionable conduct because, at the time this mortgage loan was closed, "closings did occur without the presence of counsel." (R. p. 8.) Mortgage loan closings in South Carolina have been required since 1987 to be supervised by an attorney licensed to practice law in this state. State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987). That was well before the mortgage closing at issue in this case. If the law expressly set forth in Buyers Service was violated a lot around that time, that does not provide a mortgagee with an excuse or defense.

There is at least a genuine issue of material fact about whether the mortgage loan here, for which there was an undisputed violation of the attorney preference statute, was induced by

unconscionable conduct. Applying the correct standard, that issue of fact precluded summary judgment here, and the lower court committed reversible error.

b. There is evidence that the mortgage subject of this case has been released.

This is a contested mortgage foreclosure case. One of the things that U.S. Bank must prove in order to prevail on its claim is that it has a mortgage. "A mortgage and a note are separate securities for the same debt, and a mortgagee who *has a note and a mortgage* to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action." U.S. Bank Natl. Trust Assn. v. Bell, 385 S.C. 364, 684 S.E.2d 199, 204 (Ct. App. 2009) (emphasis added).

A mortgage is a legal relationship concerning real estate. It is not, and never has been, a piece of paper. "A mortgage is a specific lien" and is "a security interest[.]" Lever v. Lighting Galleries, Inc., 374 S.C. 30, 647 S.E.2d 214, 216, 218 (2007); accord Manning v. Screven, 56 S.C. 78, 34 S.E. 22, 25 (1899) (mortgage is a lien). "In South Carolina, a mortgage is a mere security for a debt." Blackwell v. Blackwell, 289 S.C. 470, 472, 346 S.E.2d 731, 732 (Ct. App. 1986). "A mortgage is a lien on real property." Resolution Trust Corp. v. Eagle Lake and Golf Condominiums, 310 S.C. 473, 476, 427 S.E.2d 646, 648 (1993). The mortgage is the contractual relationship that constitutes a lien on real property. Id.; Wallace v. Craig, 27 S.C. 514, 4 S.E. 74, 80 (1887).

There is no dispute that U.S. Bank executed and recorded a document, already of record in this action, that released a mortgage given by Lowery to Household for the subject debt at the subject time. (R. pp. 116-17.) U.S. Bank's contention, accepted by the lower court, was that the release was for a different mortgage than the one it seeks to foreclose. That contention is belied by the evidence. (R. pp. 145, 312, 331-46.) That evidence is that there has only ever

been one mortgage here – the document for it was just signed twice. (R. pp. 145, 312, 331-46.) The mortgage release released the only mortgage – the only lien relationship – that has ever been in existence between the parties. At the very least, there is a genuine issue of material fact on this point.

Indeed, the HUD-1 settlement statement for this loan (a copy of which U.S. Bank filed) gives September 24, 2002, as the closing date, and no settlement statement has been produced indicating that there was another closing on September 30, 2002. (R. pp. 145, 346.) What happened on September 30, 2002, is just what Lowery's affidavit says happened: at Household's request, Lowery and his now-deceased wife came in and signed the same mortgage a second time. (R. p. 312.) There may have been two pieces of paper, but there has only ever been one mortgage. When U.S. Bank released the mortgage, it released the only mortgage it has ever had on the subject property.

There is at least a genuine issue of material fact about whether the mortgage at issue has been released. Summary judgment for U.S. Bank was not proper.

c. If the mortgage has been released, the statute of limitations bars suit on the note.

If the mortgage has been released – as the evidence indicates it has – Lowery has a good statute of limitations defense on any claim on the note. (R. pp. 116-17.) Under S.C. Code Ann. § 15-3-520(a), there is a 20-year statute of limitations on "an action upon a bond or other contract in writing secured by a mortgage of real property[.]" Id. If a mortgage that once secured contractual debt is released, the debt ceases to be governed by this 20-year statute of limitations. Newell v. Neal, 50 S.C. 68, 27 S.E. 560, 567 (1897), holds that a debt that was once secured by a mortgage is subject to the ordinary unsecured debt statute of limitations once that mortgage ceases to exist. Id. The mortgage here was released. (R. pp. 116-17.) A claim

on the debt at issue is governed by the three-year statute of limitations in S.C. Code Ann. § 15-3-530(1) that applies to most contracts. Since U.S. Bank has been staunch in contending that the breach upon which it sues occurred in May of 2004 (R. pp. 87 ¶ 18) and this suit was not brought until June of 2019, a claim on the note is barred by the statute of limitations. Id.

d. The record supports Lowery's res judicata defense.

In 2008, Household brought a foreclosure action on the basis of the same default as what U.S. Bank alleges here. (R. pp. 282 ¶ 17.) By order filed July 26, 2013, that action ended when it was "stricken from the active roster for failure to prosecute, pursuant to Rule 40(j)[.]" (R. p. 286.) None of the parties to that case consented to the action being stricken from the active docket under Rule 40(j), SCRCP, or otherwise. (R. pp. 286-87, 296, 302.) Such consent is required in order for an action to be stricken with leave to restore. Id.

Unlike what the lower court decided, authorities show that the striking of an action under Rule 40(j), SCRCP, is a dismissal. The notes to Rule 40 read as follows:

> Rule 40(j) is the final section of the rule and substantially revises the procedure for **dismissing** a case previously found in Rule 40(c)(3). Rule 40(j) now requires all adverse parties to consent to the **dismissal** in writing, but, the consent also operates to toll the statute of limitations for one year after the case is stricken from the docket as to each consenting party. Any remaining portion of the statute of limitations begins to run one year after the case was stricken unless the case has previously been restored to the General Docket. A party moving to restore a case must give 10 days notice of the motion, and upon being restored the case is placed on the General Docket where it proceeds as a newly filed action on the General Docket. A case can **also be dismissed** voluntarily under Rule 41(a).

Notes to Rule 40, SCRCP (emphasis added).

Our Supreme Court has quoted from this language from the notes to Rule 40, including the word "dismissal[,]" in Maxwell v. Genez, 356 S.C. 617, 621, 591 S.E.2d 26, 28 (2003).

The Court in Maxwell also referred to the order striking the case from the docket pursuant to Rule 40(j) as "the 40(j) dismissal[.]" Id. n. 1. Rule 40(j), SCRCP, makes clear that the striking of a case from the active docket under that rule does *not* function as a dismissal only if and when the conditions of that rule are met. It was certainly a dismissal, as U.S. Bank's behavior illustrates. If U.S. Bank regarded the previous action is still pending, it would have sought (and would have had to seek) restoration of the previous action. See Rules 12(b)(8) and 40(j), SCRCP. Instead, U.S. Bank brought this new action.

When the court in the 2008 foreclosure action ordered that the case was "stricken from the active roster for failure to prosecute, pursuant to Rule 40(j)" (R. p. 286), that order was a dismissal. Notes to Rule 40, SCRCP; Maxwell, 356 S.C. at 621 & n. 1. Most importantly for the purposes of this appeal, it was a dismissal that was not of a sort provided for under the South Carolina Rules of Civil Procedure, including one not provided for in Rule 41, SCRCP.

Accordingly, it was a dismissal with prejudice. Rule 41(b) explicitly provides that a dismissal for failure to prosecute as well as any other "dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for failure to join a party under Rule 19, operates as an adjudication upon the merits." Rule 41(b), SCRCP.

This is the meaning of the plain language of Rule 41(b), SCRCP. "Rules of procedure, like statutes, should be given their plain meaning." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 61, 566 S.E.2d 863 (Ct. App. 2002). "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." In re: Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995). "Our courts are constrained to avoid a statutory construction that would have the effect of reading a provision out of a statute." Protection & Advocacy for People with Disabilities, Inc. v. Buscemi, 417 S.C. 267, 274, 789 S.E.2d 756,

760 (Ct. App. 2016). The lower court's order ignored this plain meaning and read the operative language of Rule 41(b) out of the rule. (R. pp. 3-4.) Our law does not permit this. Protection & Advocacy, 417 S.C. at 274.

The dismissal of Household's claim, which was not one of the dismissals authorized by Rule 41, decided that Household (as mortgagee under the mortgage at issue) was not entitled to anything it sought in its claim. (R. pp. 278-87.) A "dismissal with prejudice indicates an adjudication on the merits and precluded subsequent litigation to the same extent as if the action had been tried to final adjudication. Where an action has been dismissed with prejudice, the judgment operates in subsequent litigation to the same extent as if the action had been tried to a final adjudication." Jones v. City of Folly Beach, 326 S.C. 360, 483 S.E.2d 770, 773 (Ct. App. 1997). The dismissal of the first action, not being a dismissal provided for in Rule 41, SCRCP, adjudicated that action on the merits. Id.; Rule 41(d), SCRCP.

> "[R]es judicata precludes parties from subsequently relitigating issues actually litigated and those that might have been litigated in a prior action." Duckett v. Goforth, 374 S.C. 446, 464, 649 S.E.2d 72, 81 (Ct. App. 2007). "Res judicata is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies." Id. at 464, 649 S.E.2d at 81-82 (quoting Nelson v. QHG of S.C. Inc., 354 S.C. 290, 304, 580 S.E.2d 171, 178 (Ct. App. 2003)). In order for res judicata to apply, the parties—or their privies—and subject matter must be identical, and the prior suit adjudicated the issue. 7 S.C. Jur. Estoppel and Waiver § 27 (1991). "For purpose of res judicata, however, the concept of privity rests not on the relationship between the parties asserting it, but rather on each party's relationship to the subject matter of the litigation." Yelsen Land Co. v. State, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012). "The term 'privy,' when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right." Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994). "One in privity is one whose legal interests were litigated in the former proceeding." Id. "Privies are those who are so connected with the parties in estate, or in blood, or in

> law, as to be identified with them in interest . . . ." Bailey v. U.S. Fid. & Guar. Co., 185 S.C. 169, 193 S.E. 638, 641 (1937).

Equivest Fin., LLC v. Ravenel, 422 S.C. 499, 507, 812 S.E.2d 438, 442 (Ct. App. 2018).

Res judicata bars the parties to the first case – and their privies – "from raising any issues which were adjudicated in the former suit *and any issues which might have been raised in the former suit*." Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (emphasis added). A litigant's claim is barred under res judicata even when he "is 'prepared in the second action (1) [t]o present evidence or *grounds or theories of the case* not presented in the first action or (2) [t]o seek remedies or forms of relief not demanded in the first action.'" S.C. Pub. Interest Foundation v. Greenville County, 401 S.C. 377, 386, 737 S.E.2d 502, 507 (Ct. App. 2013) (emphasis in original, quoting Restatement (Second) of Judgments § 25 (1982 & Supp. 2012)).

Res judicata applies to all rights and remedies "with respect to *all or part of the transaction, or series of connected transactions, out of which the action arose.*" Id. at 388 (emphasis in original; quoting Restatement (Second) of Judgments § 24).

> Failure to assert a compulsory counterclaim precludes a later assertion of that claim in a subsequent or independent action. . . . The Restatement [Second, Judgments § 22(2)(a)] similarly provides that a party may be precluded from subsequently maintaining an action on a counterclaim that was not interposed in a previous suit where the counterclaim must be interposed by a compulsory counterclaim statute or rule of court.

47 Am.Jur.2d Judgments § 504 (2006).

U.S. Bank claims to be an assignee of Household's mortgage subject of this action, which means U.S. Bank is the privy of Household. Yelsen Land, 397 S.C. at 22; Bailey, 193 S.E. at 641; Equivest Fin., 422 S.C. at 507; Roberts, 316 S.C. at 496. By operation of Rule 41(b), SCRCP, a merits adjudication between these parties about this same subject matter –

indeed, suing on the same default of the same note – was already made in the 2008 action Household brought. (R. pp. 278-87.) Res judicata thus bars U.S. Bank's claim here. Lowery recognizes that success on this defense would negate his attorney preference violation defense and the relief that would go along with it, but the law is what it is. Res judicata bars this litigation between these parties about these issues. S.C. Pub. Interest Foundation, 401 S.C. at 386; Plum Creek Dev. Co., 334 S.C. at 34; Equivest Fin., 422 S.C. at 507.

If anything, Lowery is entitled to summary judgment on the basis of res judicata. There was certainly evidence in the record to support his res judicata defense, and that precluded the lower court from granting U.S. Bank summary judgment on liability.

e. There is at least a genuine issue of fact about whether laches bars U.S. Bank's claim.

This action was brought almost 15 years after the default on which U.S. Bank sues and almost six years after the court dismissed U.S. Bank's predecessor's identical action for failure to prosecute. (R. pp. 35-46, 278-87.) Even if there had been no other issues, the genuine issue of material fact about laches would have precluded the lower court, had it applied the standard, from granting summary judgment to U.S. Bank. "Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Mid–State Trust, II v. Wright, 323 S.C. 303, 474 S.E.2d 421 (1996). An unreasonable length of time has passed, and U.S. Bank and its predecessor neglected in that time to bring this suit. No explanation has been offered for why suit was not brought earlier. The unreasonable length of this delay prejudices Lowery, as a mountain of interest is claimed to have accrued during these long seasons of delay. (R. p. 166.)

U.S. Bank is Household's privy, as discussed above, and, as its assignee, took this note and mortgage subject to the defenses created by Household's acts and omissions. Under South

Carolina law, an assignee takes a mortgage "subject to all the infirmities in and against his assignor." Patterson v. Rabb, 38 S.C. 138, 17 S.E. 463, 467 (1893); accord Woodrow v. Frederick, 133 S.C. 431, 439, 131 S.E. 598, 601 (1926) (same principle described as "settled by an unbroken series of authorities"). This court summarized the law of assignee liability well in Rosemond v. Campbell, 288 S.C. 516, 343 S.E.2d 641 (Ct. App. 1986), noting in pertinent part as follows:

> At common law, an assignee's rights can be no greater than those of his assignor. Dixie Wood Preserving Co. v. Albert Gersten & Associates, 244 S.C. 57, 135 S.E.2d 368 (1964). Consequently, the assignee of a debt takes the obligation subject to all claims and defenses the obligor may have against the assignor. Id.

288 S.C. at 522-23.

U.S. Bank is stuck with the effect of Household's unreasonably long and prejudicial delay. There was a genuine issue of material fact about laches that made summary judgment improper.

f. The evidence tends to show an unclean hands defense.

Similarly, as Household's privy and assignee, U.S. Bank brings its claim subject to Lowery's unclean hands defense. There was at least a genuine issue of material fact about whether Household's inequitable conduct described in Lowery's affidavit would bar U.S. Bank from success on liability on its equitable foreclosure claim. (R. pp. 310-13.) A court "will refuse to lend its aid to one who has been guilty of inequitable conduct in the subject matter." Masonic Temple, Inc. v. Ebert, 199 S.C. 5, 18 S.E.2d 584, 591 (1942); accord Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E.2d 735, 738 (1943). That issue of material fact made summary judgment improper.

II. The lower court's order robs Lowery of his right to cross-examine witnesses.

By allowing U.S. Bank to try its case on damages by using affidavits to present its case, the lower court has stripped Lowery of his right to cross-examine U.S. Bank's witnesses at trial. (R. p. 11.) This is wrong and is reversible error. Lowery's right to cross-examination is part of the guarantee of due process. E.g., Moore v. Moore, 376 S.C. 467, 472, 657 S.E.2d 743, 746 (2008). The lower court has denied Lowery a right of procedural due process. Even a defendant in default is entitled to cross-examine witnesses at the damages hearing, and Lowery is not in default. Limehouse v. Hulsey, 404 S.C. 93, 114, 116-17, 744 S.E.2d 566, 578, 579 (2013); Howard v. Holiday Inns, Inc., 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978).

Even were this issue to stand alone, reversal would be required on this point.

CONCLUSION

The court should reverse the grant of summary judgment to U.S. Bank, reinstate Lowery's affirmative defenses, including but not limited to those based on inducement of the loan by unconscionable conduct, and remand this case for further proceedings consistent with that reversal.

Respectfully submitted,

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July 2, 2023

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Shannon M. Phillips, Master-in-Equity

Appellate Case No. 2022-000393

U.S. Bank Trust, N.A. as Trustee for LSF10 Master Participation Trust,……...…….Respondent,

v.

Austin A. Lowery a/k/a Austin Lowery a/k/a Austin Allen Lowery a/k/a Allen Lowery, individually, and as Heir or Devisee of the Estate of Lisa D. Lowery a/k/a Lisa Marie Davis Lowery, Deceased; South Carolina Department of Revenue; The United States of America acting by and through its agency, Department of the Treasury - Internal Revenue Service; and Elizabeth A. Lowery,.……Defendants,

Of whom Austin A. Lowery a/k/a Austin Lowery a/k/a Austin Allen Lowery a/k/a Allen Lowery, individually, and as Heir or Devisee of the Estate of Lisa D. Lowery a/k/a Lisa Marie Davis Lowery, Deceased, is the…….....Appellant.

CERTIFICATE OF COUNSEL
REGARDING COMPLIANCE WITH RULE 211(b), SCACR

I certify that the foregoing final brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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Of whom Austin A. Lowery a/k/a Austin Lowery a/k/a Austin Allen Lowery a/k/a Allen Lowery, individually, and as Heir or Devisee of the Estate of Lisa D. Lowery a/k/a Lisa Marie Davis Lowery, Deceased, is the…….....Appellant.

PROOF OF SERVICE

I certify that I have served the foregoing final brief on the date given below by emailing it to counsel for the Respondent at the address(es) noted below.

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July 2, 2023