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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi F. Curtis, Circuit Court Judge

Case No. 2019-CP-10-4503
Appellate Case No. 2023-001844

Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit
Loans Inc., Pass-Through Certificates 2007 QH2.....Respondent,

v.

Ashley Johnson Beshara as Trustee of the Revocable Trust Agreement for 2235
Shoreline Drive originally dated the 3rd day of March 2010; Shoreline Farms
Community Association, Inc.; Wells Fargo Bank, N.A.; Cadle Rock Joint Venture,
L. P. an Ohio Limited Partnership, Curtis Rogers and Julie Rogers, Defendants,

Of whom Curtis Rogers, Julie Rogers and Ashley Johnson Beshara as Trustee of the
Revocable Trust Agreement for 2235 Shoreline Drive originally dated 34d day of
March 2010 are the Appellants,

AND

Ashley Johnson Beshara as Trustee of the Revocable Trust Agreement for 2235
Shoreline Drive originally dated the 3rd day of March 2010, Third-Party Plaintiff,

v.

Nationstar Mortgage, LLC,.....Respondent.

RECORD ON APPEAL

Volume II

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Americas, as Trustee &
Nationstar Mortgage, LLC

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

}

COURT OF COMMON PLEAS
CASE No. 2019 CP 10 4503

**DEUTSCHE BANK TRUST COMPANY
AMERICA, AS TRUSTEE FOR
RESIDENTIAL ACCREDIT LOANS, INC.,
PASS-THROUGH CERTIFICATES 2007-
QH2,**

PLAINTIFF,

V.

**ASHLEY JOHNSON BESHARA AS
TRUSTEE OF THE REVOCABLE TRUST
AGREEMENT FOR 2235 SHORELINE
DRIVE ORIGINALLY DATED 3RD DAY OF
MARCH 2010; SHORELINE FARMS
COMMUNITY ASSOCIATION, INC.,;
WELLS FARGO BANK N.A.; CADLE
ROCK VENTURE, L.P. AND OHIO
LIMITED PARTNERSHIP, CURTIS
ROGERS AND JULIE ROGERS,**

DEFENDANTS,

**ASHLEY JOHNSON BESHARA AS
TRUSTEE OF THE REVOCABLE TRUST
AGREEMENT FOR 2235 SHORELINE
DRIVE ORIGINALLY DATED 3RD DAY OF
MARCH 2010,**

THIRD-PARTY PLAINTIFF,

V.

NATIONSTAR MORTGAGE LLC,

THIRD-PARTY DEFENDANT

**DEFENDANTS CURTIS AND JULIE
ROGERS'
MOTION FOR SUMMARY
JUDGMENT AS TO PLAINTIFF**

TO ATTORNEY FOR PLAINTIFF:

PLEASE TAKE NOTICE that the Defendants, Curtis Rogers and Julie J. Rogers (hereinafter “Defendants”), by and through their undersigned attorney will move before the presiding Judge, at chambers, Charleston County Courthouse, Charleston, South Carolina, at such place and time as the court may appoint, more than ten (10) days from the date hereof, for an Order granting summary judgment against Plaintiff and for Defendants on the grounds that the pleadings and admissions by Plaintiff submitted herewith show that there is no genuine issue as to any material fact and that Defendants are entitled to judgment as a matter of law pursuant to Rules 41 and 56, SCRPC.

Defendants submit the following in support of the motion:

1. Responses to Request to Admit dated February 28, 2014, and attached hereto as Exhibit A; and
2. Responses to Requests to Admit dated June 21, 2022, and attached hereto as Exhibit B.

In addition to the above, this motion will be supported by the pleadings, public records and any other exhibits or memorandum which Defendants may submit to this Court at the time of hearing in this matter.

RESPECTFULLY SUBMITTED,

MARY LEIGH ARNOLD, PA

s/Mary Leigh Arnold (#419)
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	Case No.: 2011-CP-10-1805
	)	
Nationstar Mortgage, LLC	)	PLAINTIFF'S RESPONSE TO
	)	DEFENDANT CURTIS ROGERS'
Plaintiff,	)	REQUESTS FOR ADMISSION
	)	
v.	)	
	)	
Curtis Rogers a/k/a Curtis L. Rogers III,	)	
Julie J. Rogers, National City Bank,	)	
Shoreline Farms Community Assoc., Inc.,	)	
and Harbor National Bank.	)	
	)	
Defendants.	)	

TO: MARY LEIGH ARNOLD, ATTORNEY FOR DEFENDANT

In accordance with Rule 36 of the South Carolina Rules of Civil Procedure, Plaintiff Nationstar Mortgage, LLC ("Nationstar") responds to Defendant Curtis Rogers' Requests for Admission as follows:

REQUESTS FOR ADMISSION

1. Admit that Aurora Loan Services, LLC did not originate the subject note and mortgage in this action.

Response: Admit.

2. Admit that from September 15, 2009 through June 30, 2012 Aurora Loan Services, LLC was not the owner of the subject Note.

Response: To the extent Defendant means by use of the term "owner" to refer to the owner of the beneficial interest in the indebtedness evidenced by the promissory note and mortgage of the Defendant, Plaintiff admits.

3. Admit that the copy of Note attached hereto as Exhibit "A" does not bear an endorsement to Residential Funding Company, LLC.

Response: Objection. This request is premised upon a written instrument or document which speaks for itself. Subject to and without waiving said objection, Plaintiff admits.

4. Admit that the copy of Note attached hereto as Exhibit "A" bears and [sic] endorsement in blank executed by Bakhtlar S. Akhunji, Assistant Secretary, Homecomings Financial, LLC, A Delaware Corporation.

Response: Objection. This request is premised upon a written instrument or document which speaks for itself. Subject to and without waiving said objection, Plaintiff admits.

5. Admit that the copy of Note attached hereto as Exhibit "B" bears an endorsement to Residential Funding Company, LLC, executed by Bakhtlar S. Akhunji, Assistant Secretary, Homecomings Financial, LLC, A Delaware Corporation.

Response: Objection. This request is premised upon a written instrument or document which speaks for itself. Subject to and without waiving said objection, Plaintiff admits.

6. Admit that the copy of the Note attached hereto as Exhibit "B" bears an endorsement to Deutsche Bank Trust Company Americas as Trustee executed by Judy Faber, Vice President, Residential Funding Company, LLC.

Response: Objection. This request is premised upon a written instrument or document which speaks for itself. Subject to and without waiving said objection, Plaintiff admits.

7. Admit that the copy of the Note attached hereto as Exhibit "B" does not specifically bear an endorsement to Deutsche Bank Trust Company Americas as Trustee for RALI Series 2007-QH2 Trust.

Response: Objection. This request is premised upon a written instrument or document which speaks for itself. Subject to and without waiving said objection, Plaintiff admits.

8. Admit the copies of the Notes attached hereto as Exhibit "A" & "B" do not bear an endorsement to Aurora Loan Services, LLC.

Response: Objection. This request is premised upon a written instrument or document which speaks for itself. Subject to and without waiving said objection, Plaintiff admits.

9. Admit the copies of the Notes attached hereto as Exhibit "A" & "B" do not bear an endorsement to Nationstar Mortgage, LLC.

Response: Objection. This request is premised upon a written instrument or document which speaks for itself. Subject to and without waiving said objection, Plaintiff admits.

10. Admit that Plaintiff did not produce a copy of the Note attached hereto as Exhibit "C" as part of Plaintiff's responses to requests for production dated July 10, 2013.

Response: Objection. Plaintiff cannot confirm with certainty any or all documents that may or may not have been previously produced by its attorneys, and thus can neither admit nor deny this request as presented. However, subject to and without waiving said objection, Plaintiff admits a copy of the Note bearing an endorsement in blank from Deutsche Bank Trust Company Americas, as Trustee, may not have been part of Plaintiff's

original production, as the original fully-endorsed Note is maintained by a document custodian for safekeeping and is not typically in possession of the loan servicer unless or until such time as the original collateral file may be needed for trial.

11. Admit that as of the date of service of these Requests for Admissions the only assignment of the subject Mortgage recorded in the Charleston County, SC, RMC Office is an assignment which states that it assigns the subject Mortgage to Aurora Loan Services, LLC executed by Mortgage Electronic Registration Systems, Inc., as nominee for Homecomings Financial, LLC F/K/A Homecomings Financial Network, Inc., on September 8, 2009 and recorded on September 15, 2009 at Book 0081, Page 58.

Response: Admit.

12. Admit that as of the date of service of these Requests for Admissions the only assignment of the subject Mortgage Produced by Plaintiff to Defendant in this action is an assignment which states that it assigns the subject Mortgage to Aurora Loan Services, LLC executed by Mortgage Electronic Registration Systems, Inc., as nominee for Homecomings Financial, LLC F/K/A Homecomings Financial Network, Inc., on September 8, 2009 and recorded on September 15, 2009 at Book 0081, Page 58.

Response: Objection. Plaintiff cannot confirm with certainty any or all documents that may or may not have been previously produced by its attorneys, and thus can neither admit nor deny this request as presented. Subject to and without waiving the foregoing objection, Plaintiff admits that an assignment to Nationstar has not, to date, been recorded.

13. Admit that as of the date of service of these Requests for Admission there is not an assignment of the subject Mortgage recorded in the Charleston County, SC, RMC Office assigning the subject mortgage to 1) Residential Funding, LLC; 2) Deutsche Bank Trust Company Americas; 3) Deutsche Bank Trust Company Americas as Trustee for RALI Series 2007-QH2 Trust; or 4) Nationstar Mortgage, LLC.

Response: Objection. Plaintiff objects to the compound nature of this request, which impedes the Plaintiff's ability to provide a full and meaningful response. However, subject to and without waiving the foregoing objection, Plaintiff admits that there is not an assignment of the subject Rogers mortgage from Mortgage Electronic Registration Systems, Inc. to Residential Funding, LLC, Deutsche Bank Trust Company Americas, or Deutsche Bank Trust Company Americas as Trustec for RALI Series 2007-QH2 Trust. Plaintiff denies the remainder of this request.

14. Admit that as of the date of service of these Requests for Admissions Plaintiff has not produced to Defendant in this action is an assignment of the subject Mortgage assigning the subject Mortgage to 1) Residential Funding, LLC; 2) Deutsche Bank Trust Company Americas; 3) Deutsche Bank Trust Company Americas as Trustee for RALI Series 2007-QH2 Trust; or 4) Nationstar Mortgage, LLC.

Response: Objection. Plaintiff objects to the compound nature of this request, which impedes the Plaintiff's ability to provide a full and meaningful response. However, subject to and without waiving the foregoing objection, Plaintiff admits that there is not an assignment of the subject Rogers mortgage from Mortgage Electronic Registration

Systems, Inc. to Residential Funding, LLC, Deutsche Bank Trust Company Americas, or Deutsche Bank Trust Company Americas as Trustee for RALI Series 2007-QH2 Trust, and thus one was not produced to Defendant. Plaintiff denies the remainder of this request.

15. Admit that the document attached hereto as Exhibit "D" is a correspondence from Aurora Bank, FSB, dated September 8, 2011 and addressed to the Defendant Curt Rogers, which states: "Aurora Bank provides the servicing for the owner of your loan. Contact information for the owner is as follows: Deutsche Bank National Trust Company Americas, as Trustee for the Mortgage Asset-Backed Pass-Through Certificates, Series 2007-QH2[.]"

Response: Objection. This request is premised upon a written instrument or document which speaks for itself. Subject to and without waiving said objection, Plaintiff admits the document states as represented, followed by an address for the owner of the loan.

16. Admit that the document attached hereto as Exhibit "E" is a correspondence from Nationstar Mortgage, LLC, dated July 15, 2012 and addressed to the Defendant Curt Rogers, which states: "Welcome to Nationstar Mortgage! We look forward to servicing you loan on behalf of Deutsche Bank, Trustee, RALI SERIES 2007-QH2."

Response: Objection. This request is premised upon a written instrument or document which speaks for itself. Subject to and without waiving said objection, Plaintiff admits the document states as represented.

Dated this the 28th day of February 2014.

**ATTORNEYS FOR PLAINTIFF
NATIONSTAR MORTGAGE, LLC**



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Exhibit B

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

COURT OF COMMON PLEAS

CASE NO. 2019 CP 10 4503

DEUTSCHE BANK TRUST COMPANY
AMERICA, AS TRUSTEE FOR
RESIDENTIAL ACCREDIT LOANS, INC.,
PASS-THROUGH CERTIFICATES 2007-QH2,

PLAINTIFF,

v.

ASHLEY JOHNSON BESHARA AS
TRUSTEE OF THE REVOCABLE TRUST
AGREEMENT FOR 2235 SHORELINE DRIVE
ORIGINALLY DATED 3RD DAY OF
MARCH 2010; SHORELINE FARMS
COMMUNITY ASSOCIATION, INC.; WELLS
FARGO BANK N.A.; CADLE ROCK
VENTURE, L.P. AND OHIO LIMITED
PARTNERSHIP, CURTIS ROGERS AND
JULIE ROGERS,

DEFENDANTS,

ASHLEY JOHNSON BESHARA AS
TRUSTEE OF THE REVOCABLE TRUST
AGREEMENT FOR 2235 SHORELINE DRIVE
ORIGINALLY DATED 3RD DAY OF
MARCH 2010,

THIRD-PARTY PLAINTIFF,

v.

NATIONSTAR MORTGAGE LLC,

THIRD-PARTY DEFENDANT.

**PLAINTIFF DEUTSCHE BANK
TRUST COMPANY AMERICA'S
RESPONSE TO DEFENDANTS'
REQUESTS TO ADMIT**

TO: DEFENDANTS CURTIS AND JULIE ROGERS AND THEIR ATTORNEY:

COMES NOW Plaintiff Deutsche Bank Trust Company Americas, As Trustee For Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2 ("DBTCA"), by and through its attorneys of record, and hereby responds to Defendants Curtis and Julie Rogers' Requests to Admit as follows:

GENERAL OBJECTIONS AND DEFINITIONS

1. These general objections are incorporated into each of the specific responses that follow. Notwithstanding those responses, DBTCA does not waive any of these general objections.

2. With respect to each response set forth herein, DBTCA's investigation continues, and DBTCA reserves the right to supplement or amend any responses as necessary and as additional information is obtained through discovery or otherwise.

3. To the extent that Defendant's requests, definitions, or instructions purport to require DBTCA to provide information or documents known only to, or possessed only by, third parties, DBTCA objects to each such interrogatory, request, definition, or instruction.

4. DBTCA objects to Defendant's requests to the extent they seek information protected from discovery by the attorney-client privilege, work product immunity, or any other privilege or immunity. DBTCA will provide only information and documents not subject to any applicable privilege or immunity.

5. DBTCA objects to Defendant's requests to the extent they seek documents or information which is privileged, confidential, proprietary, protected as trade secrets regarding its business practices, or are otherwise non-discoverable.

6. DBTCA objects to Defendant's requests to the extent they seek documents or information which are privileged or made confidential or otherwise non-discoverable by applicable law, including without limitation any laws requiring the confidential treatment of non-public personal or financial information regarding consumers.

7. DBTCA objects to Defendant's requests to the extent they use terms without definition and capable of numerous interpretations and to the extent Defendant's interrogatories and requests require DBTCA to speculate at its peril regarding the definition of such terms.

8. These responses are based upon such information as is reasonably available to DBTCA and susceptible to retrieval through reasonable efforts.

9. DBTCA objects to the requests and definitions to the extent they are overly broad or unduly burdensome, to the extent they seek information not reasonably calculated to lead to the discovery of admissible evidence, and to the extent they seek information beyond the scope of the litigation.

10. Unless otherwise noted, DBTCA will provide information only for the time period relevant to the allegations in the litigation.

11. To the extent DBTCA's requests, definitions, or instructions purport to impose any obligation on DBTCA greater than or different from those under the South Carolina Rules of Civil Procedure or beyond any discovery limitations imposed at law or by the Court, DBTCA objects to each such request, definition, or instruction.

12. DBTCA expressly reserves any and all objections concerning relevance, authenticity, and admissibility of any documents that it may produce in response to Defendant's requests.

13. These responses and objections have been prepared in accordance with South Carolina law pursuant to a reasonable and diligent investigation and search, and they represent a good faith effort to ascertain responsive information to the extent such information is available at this stage of discovery. To the extent that these requests purport to require more, DBTCA objects on the grounds that the requests exceed the scope of reasonable permissible discovery

contemplated by South Carolina law and would impose an undue burden and expense upon DBTCA.

14. For each answer and specific objection provided in response to any request, DBTCA reserves the right to supplement its objections and answers in the event that non-privileged, discoverable information or other grounds for objection are identified before the end of the discovery period for this action.

Subject to the foregoing objections, DBTCA responds to Defendant's requests as follows:

RESPONSES TO REQUEST FOR ADMISSIONS

1. Admit, that the copy of Adjustable Rate Note dated January 12, 2007 and made payable to Homecomings Financial LLC in the principal amount of \$1,500,000.00 attached hereto as Exhibit A, is the same promissory note referenced by Plaintiff in paragraph 6 of the Complaint filed in the within matter on August 27, 2019.

RESPONSE: It is admitted that Exhibit A is a copy of the Adjustable Rate Note referenced in Paragraph 6 of Case No. 2019CP104503. Except as herein admitted, denied.

2. Admit, that the Mortgage dated January 12, 2007 and executed and delivered to Mortgage Electronic Registration Systems, Inc., as nominee for Homecomings Financial, LLC and recorded in the Office of Register of Deeds for Charleston County at Book B613 at page 844 attached hereto as Exhibit B, is the same Mortgage referenced by Plaintiff in paragraphs 7 and 8 of the Complaint filed in the within matter on August 27, 2019.

RESPONSE: It is admitted that Exhibit B is a copy of the Mortgage referenced in Paragraph 7 of Case No. 2019CP104503. Except as herein admitted, denied.

3. Admit, that the Note attached hereto as Exhibit A is the same promissory note referenced in paragraph 4 of the Complaint filed in Civil Action Number 2009-CP-10-5840.

RESPONSE: It is admitted that Exhibit A is a copy of the Adjustable Rate Note referenced in Paragraph 4 of Case No. 2009CP105840. Except as herein admitted, denied.

4. Admit, that the Note attached hereto as Exhibit A is the same promissory note referenced in paragraph 4 of the Complaint filed in Civil Action Number 2011-CP-10-1805.

RESPONSE: It is admitted that Exhibit A is a copy of the Adjustable Rate Note referenced in Paragraph 4 of Case No. 2011-CP-10-1805. Except as herein admitted, denied.

5. Admit, that the Note attached hereto as Exhibit A is the same promissory note referenced in paragraph 4 of the Complaint filed in Civil Action Number 2015-CP-10-1971.

RESPONSE: It is admitted that Exhibit A is a copy of the Adjustable Rate Note referenced in Paragraph 4 of Case No. 2015-CP-10-1971. Except as herein admitted, denied.

6. Admit, that the Mortgage attached hereto as Exhibit B is the same Mortgage referenced in paragraphs 5 and 6 of the Complaint filed in Civil Action Number 2009-CP-10-5840.

RESPONSE: It is admitted that Exhibit B is a copy of the Mortgage referenced in Paragraph 5 and 6 of Case No. 2009-CP-10-5840. Except as herein admitted, denied.

7. Admit, that the Mortgage attached hereto as Exhibit B is the same Mortgage referenced in paragraphs 5 and 6 of the Complaint filed in Civil Action Number 2011-CP-10-1805.

RESPONSE: It is admitted that Exhibit B is a copy of the Mortgage referenced in Paragraph 5 and 6 of Case No. 2011-CP-10-1805. Except as herein admitted, denied.

8. Admit, that the Mortgage attached hereto as Exhibit B is the same Mortgage referenced in paragraphs 5 and 6 of the Complaint filed in Civil Action Number 2015-CP-10-1971.

RESPONSE: It is admitted that Exhibit B is a copy of the Mortgage referenced in Paragraph 5 and 6 of Case No. 2015-CP-10-1971. Except as herein admitted, denied.

9. Admit, that the Adjustable Rate Rider attached hereto as Exhibit C hereto was produced by Plaintiff and Nationstar on April 18, 2022.

RESPONSE: It is admitted that electronic imaging of Plaintiff's loan records included the image attached to these Requests as Exhibit C. Except as herein admitted, denied.

10. Admit, that Exhibit C is an altered document since between pages "5 of 6" and "6 of 6" the signature page from another document has been inserted that does not belong.

RESPONSE: It is admitted that Exhibit C to these Requests are electronic images of Plaintiff's loan records which inadvertently included a signature page from the associated note, between

pages 5 and 6 of the Adjustable Rate Rider to the Mortgage which does not pertain to the Adjustable Rate Rider. Except as herein admitted, denied.

Dated: June 21, 2022

Respectfully submitted,

McGUIREWOODS LLP

/s/ T. Richmond McPherson
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*Attorney for Third-Party Defendant Nationstar
Mortgage LLC and Plaintiff Deutsche Bank Trust
Company Americas, As Trustee For Residential
Accredit Loans, Inc., Pass-Through Certificates
2007-QH2*

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

Deutsche Bank Trust Company) Civil Action No. 2019-CP-10-04503
Americas, as Trustee for Residential)
Accredit Loans, Inc., Pass-Through)
Certificates 2007-QH2,)

Plaintiff,)

v.)

Ashley Johnson Beshera as Trustee of the)
Revocable Trust Agreement for 2235)
Shoreline Drive originally dated 3rd day)
of March 2010; Shoreline Farms)
Community Association, Inc.; Wells)
Fargo Bank, N.A.; Cadle Rock Venture,)
L.P. and Ohio Limited Partnership, Curtis)
Rogers and Julie Rogers)

Defendants,)

Ashley Johnson Beshera as Trustee of the)
Revocable Trust Agreement for 2235)
Shoreline Drive originally dated 3rd day)
of March 2010,)

Third-Party Plaintiff,)

v.)

Nationstar Mortgage LLC,)

Third-Party Defendant.)

**PLAINTIFF AND THIRD-PARTY DEFENDANT'S BRIEF IN OPPOSITION TO
ROGERS' MOTION TO COMPEL AND FOR SANCTIONS**

Plaintiff Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit
Loans, Inc., Pass-Through Certificates 2007-QH2 ("Deutsche Bank" or "DBNTC") and Third-
Party Defendant Nationstar Mortgage LLC ("Nationstar") by counsel, respectfully submit this

brief in opposition to Rogers' Motion to Compel and for Sanctions filed by Curt and Julie Rogers ("Rogers).

INTRODUCTION

On May 12, 2022, DBNTC and Nationstar timely responded to Intervening Defendants Curt and Julie Rogers' Interrogatories, Requests for Production and Requests for Admissions. The Rogers have now filed the instant motion to complain about DBNTC's responses. However, noticeably absent from the Rogers' motion is any argument or identification of relevant discoverable information withheld from them. Moreover, the Rogers may not request "sanctions" at this time under Rule 37 of the S.C.R.C.P.

ARGUMENT

As the Rogers note, in responding to discovery requests, the responding party has the Right to object to the request. "Each discovery response, whether to an interrogatory or discovery request, whether to an interrogatory or discovery production is to be answered or objected to separately. Each interrogatory "shall be answered separately and fully in writing..." SCRCP, Rule 33(a). If there are objections to interrogatories or requests for interrogatories or requests for production, "the reasons for objection shall be stated..." SCRCP, Rules 33(a) and 34(b).

Under Rule 37, a litigant may move to compel further responses. "The discovering party may also make such a motion if it believes, in good faith, the answers it has received are incomplete or the objections improper. Rule 37(a)(3), SCRCP. The Court may then issue an order compelling discovery; if the order is not obeyed, the court may take appropriate action, including imposing sanctions pursuant to Rule 37(a) and (b), SCRCP." *Richardson on Behalf of 15th Cir. Drug Enft Unit v. Twenty-One Thousand & no/100 Dollars (\$21,000.00) U.S. Currency & Various Jewelry*, 430 S.C. 594, 598–99, 846 S.E.2d 14, 16 (Ct. App. 2020).

Here, the Rogers have moved to compel further discovery without any basis and have moved for sanctions despite the absence of any order compelling discovery or any violation of said order. Neither request is proper.

First, as their motion demonstrates, DBNTC and Nationstar did answer each Interrogatory and request separately and did state the basis for the Rogers complain that DBNTC has not provided the “names of their witnesses.” However, in response to the Rogers’ First Interrogatory, DBNTC identified witness to the matter without objection as follows:

1. Give the names and addresses of persons known to the party or counsel to be witnesses concerning the facts of the case and indicate whether written or recorded statements have been taken from the witnesses and indicate who has possession of any such statements.

ANSWER:

1. A representative of Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2, who can be reached through the undersigned counsel.

2. A representative of Nationstar Mortgage LLC, who can be reached through the undersigned counsel.

3. Curt and Julie Rogers.

4. Ashley Johnson Beshera

It is true that DBNTC could not identify the precise representatives who will appear at any trial of this action in May 2022 and cannot identify same until an actual trial date is established. However, the Rogers have always known the “witnesses” DBNTC is aware of concerning this matter.

In a second example, the Rogers complain that DBNTC dared to object to an Interrogatory requesting as follows:

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party or counsel that relate to any claim or the defense of the case.

This Interrogatory seeks to have DBNTC list every document relating to any allegation or defense in the case. A discovery request simply cannot be more broad and unwieldy. In addition

to objecting to this interrogatory, DBNTC responded noting that documents related to the subject loan would support its claim for foreclosure. With respect to the remaining claims or defenses, DBNTC identified any documents produced in this proceeding or filed in prior proceedings. The Rogers make no attempt to show that this does not adequately answer their Interrogatory.

Finally, the Rogers object to what they refer to as “boilerplate” objections to Requests for Production. Merely referring to objections as “boilerplate,” however, does not carry any aspect of the Rogers’ burden with respect to their motion to compel. Rather, the Rogers are obligated to demonstrate why the information is discoverable on a request-by-request basis. The Rogers have, in fact, requested copious amounts of information with no apparent need and in an attempt to inflate costs and harass their adversaries. The Rogers request all servicing agreements, all loan servicing manuals, all records of MIN transfer audits, all loss mitigation procedures, all communications between any loan servicer and any lender, all training materials – and the list goes on and on. On the other hand, some of the Rogers’ Requests are impossible to comprehend. For instance, they request all documents related to any “claim” concerning the subject loan; a Request that has no obvious meaning.

In fact, the issue is not boilerplate objections to discovery but discovery requests that greatly exceed the actual scope and nature of the instant case. DBNTC has filed a request for foreclosure against Defendant Beshara, with no deficiency sought. The Rogers have countersued based on issues arising in a prior attempt to foreclose and, apparently, their belief the loan is unconscionable and various vague torts purportedly committed 10 years ago. The vast discovery sought by the Rogers greatly exceeds any potential issue presented. The Rogers’ motion fails to include a single argument for why any of the information to which DBNTC and Nationstar objected is necessary for the litigation of this action. Consequently, the motion to compel must be

denied. Further, as noted, neither Nationstar nor DBNTC have violated an order compelling them to produce further discovery and, therefore, are not subject to any sanctions.

CONCLUSION

For all of these reasons, Nationstar and DBNTC respectfully requests that the Court deny Rogers' Motion to Compel and For Sanctions.

This the 1st day of February 2023.

Respectfully submitted,

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*Attorney for Plaintiff Deutsche Bank Trust Company
Americas, as Trustee for Residential Accredited Loans,
Inc., Pass-Through Certificates 2007-QH2 and
Third-Party Defendant Nationstar Mortgage LLC*

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

Deutsche Bank Trust Company) Civil Action No. 2019-CP-10-04503
Americas, as Trustee for Residential)
Accredit Loans, Inc., Pass-Through)
Certificates 2007-QH2,)

Plaintiff,)

v.)

Ashley Johnson Beshera as Trustee of the)
Revocable Trust Agreement for 2235)
Shoreline Drive originally dated 3rd day)
of March 2010; Shoreline Farms)
Community Association, Inc.; Wells)
Fargo Bank, N.A.; Cadle Rock Venture,)
L.P. and Ohio Limited Partnership, Curtis)
Rogers and Julie Rogers)

Defendants,)

Ashley Johnson Beshera as Trustee of the)
Revocable Trust Agreement for 2235)
Shoreline Drive originally dated 3rd day)
of March 2010,)

Third-Party Plaintiff,)

v.)

Nationstar Mortgage LLC,)

Third-Party Defendant.)

PLAINTIFF AND THIRD-PARTY DEFENDANT'S
MOTION FOR PARTIAL SUMMARY JUDGMENT AND INCORPORATED
MEMORANDUM IN SUPPORT

Plaintiff Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit
Loans, Inc., Pass-Through Certificates 2007-QH2 (“Deutsche Bank”) and Third-Party Defendant
Nationstar Mortgage LLC (“Nationstar”) by counsel, state as follows in support of their Motion

for Partial Summary Judgment. Specifically, Plaintiff and Third-Party Defendant move for summary judgment on the Counterclaims and Third-Party Complaint filed by Defendant Ashley Johnson Beshera as Trustee (“Beshera”) alleging the following claims against Deutsche Bank and Nationstar: (1) Demand for Accounting; (2) Negligent Misrepresentation; (3) Abuse of Process; (4) Malicious Prosecution; (5) Violation of the South Carolina Unfair Trade Practices Act (“SCUTPA”); and (6) Declaratory Judgment and the Counterclaims and Cross-Claims of Curt and Julie Rogers (“Intervenors”) for: 1) Declaratory Judgment, 2) Negligent Misrepresentation, 3) Abuse of Process, 4) Malicious Prosecution and 5) Violation of the South Carolina Unfair and Deceptive Trade Practices Act.

For the following reasons, the Counterclaims and Third-Party Complaint alleged should be dismissed with prejudice for failure to state a claim:

INTRODUCTION

Defendant Beshera and the Intervenors filed these claims in an effort to prevent foreclosure of the property after there was a default on the mortgage. The undisputed evidence in this case shows, however, that the Counterclaims, Crossclaims and Third-Party Complaint lacks merit. Indeed, all of Defendants’ counterclaims lack the factual and legal support necessary to proceed past summary judgment. Accordingly, this Court should grant Plaintiff’s and Third-Party Defendant’s Motion for Partial Summary Judgment as to all claims.

STATEMENT OF UNDISPUTED FACTS

Loan Origination

This case represents a second attempt to foreclose a first-priority mortgage encumbering real property at 2235 Shoreline Drive, Johns Island, South Carolina 29455 (“Property”). The first-priority mortgage being foreclosed in this current action was originated by the Borrower-

Defendants when Borrower Curt Rogers executed and delivered a promissory note (“Note”) in the amount of \$1,500,000.00 in favor of Homecomings Financial, LLC—f/k/a Homecomings Financial Network, Inc.—(“Lender”) on January 12, 2007. (Compl. ¶ 6.) To secure payment on the note, the Borrower-Defendants signed a mortgage (“Mortgage” and together with the Note, the “Mortgage Loan”) that encumbers the Property. (*Id.* ¶ 7.) The Mortgage was recorded with the Charleston County Register of Deeds Office (“ROD Office”) in Book B613 at Page 844 on January 24, 2007. (*Id.* ¶ 8.)

Borrower-Defendants’ Default and Transfer of the Mortgage Loan and Property

During the repayment term for the Mortgage Loan, the Borrower-Defendants defaulted on their repayment obligations under the Mortgage Loan by failing to remit timely payments coming due on May 1, 2009 and thereafter. (Blunt Aff., ¶ 10.)

Procedural History for the Prior Foreclosure Action

On September 8, 2009, Mortgage Electronic Registration Systems, Inc. as nominee for Lender assigned the Mortgage to Aurora Loan Servicing LLC (“Aurora”) pursuant to an assignment of mortgage that was recorded with the ROD Office in Book 0081 at Page 058 on September 15, 2009. (Blunt Aff., ¶ 8.)

To collect amounts due under the Mortgage Loan, Aurora filed a foreclosure action (“Foreclosure Action”) against the Borrower-Defendants with the Court of Common Pleas for Charleston, South Carolina under civil action no. 2009-CP-10-05840 on September 15, 2009 (“Action 1”). The Borrower-Defendants served an answer without counterclaims in response to Aurora’s complaint on October 21, 2009. Ultimately, the foreclosure action was removed from the court’s active trial roster for loss mitigation with leave for Aurora or Intervenor to restore pursuant to Rule 40(j) Order entered on March 9, 2010. (Exhibit D, Order March 9, 2010.)

The Foreclosure Action was reinstated to the court's active trial roster under case no. 2011-CP-10-01805 pursuant to an order entered on March 10, 2011 ("Action 2"). (Exhibit E, Order March 10, 2011).

After a series of conveyances of the Property and pursuant to a deed recorded with the ROD Office on August 9, 2010, in Book 0137 at Page 344, the Property was conveyed to Beshera.

During this portion of the Foreclosure Action, the Intervenor secured a court order to amend their answer. On February 2, 2012, they served their amended answer and counterclaims to allege counterclaims against Aurora for the following:

- breach of contract and good faith and fair dealing for an alleged breach of a purported work-out agreement,
- declaratory judgment to address alleged unconscionable loan terms,
- unjust enrichment,
- negligent misrepresentation regarding loss mitigation negotiations and purported workout agreements,
- demand for accounting,
- promissory estoppel,
- violations of the South Carolina Unfair Trade Practices Act, and
- violation of the Truth in Lending Act.

(Exhibit F, Amended Answer). Aurora served a timely reply to the counterclaims, and the court entered an order substituting Nationstar for Aurora as the plaintiff in the Foreclosure Action on June 14, 2013. (Exhibit G, Order June 14, 2013.) For a second time, the action was removed from the court's active trial roster pursuant to a consent Rule 40(j) order entered by the court on June 24, 2014. (Exhibit H, Order June 24, 2014.)

Pursuant to a reinstatement order entered on April 7, 2015, the court returned the Foreclosure Action to active trial roster under case no. 2015-CP-10-01971 ("Action 3"). By consent of the Intervenor and Nationstar, the Foreclosure Action was stricken from the docket pursuant to a Rule 40(j) order entered on May 16, 2016. (Exhibit I, Order May 16, 2016.)

Deutsche Bank's Foreclosure

Neither the Intervenor nor Nationstar reinstated the Foreclosure Action to the court's active trial roster. Thus, because the Mortgage Loan was transferred to Deutsche Bank and Deutsche Bank has become the holder of the Mortgage Loan, Deutsche Bank filed this current foreclosure action. (Compl. *passim*.) In its foreclosure complaint, Deutsche Bank pled that it "does not demand a deficiency judgment in the event the sale of the real estate herein does not yield a sum sufficient to satisfy all indebtedness due unto" Deutsche Bank, "including costs and Attorney's fees." (Compl. ¶ 16.)

In response to the Deutsche Bank's foreclosure complaint, Defendant Beshera filed a motion to dismiss to argue that the prior entry of three 40(j) Orders in the Foreclosure Action precluded Deutsche Bank's current action under Rule 41, S.C.R.C.P., and the doctrine of collateral estoppel. (Def. Beshera's Mot. to Dismiss. & Beshera's Reply to Pl. Resp. to Def. Beshera's Mot. To Dismiss.) Beshera further argued that Deutsche Bank's action should also be dismissed because the Borrower-Defendants were not joined as necessary parties to the action in Deutsche Bank's foreclosure complaint. (*Id.*) The court considered these arguments and denied Beshera's motion to dismiss by a Form 4 Order entered on June 23, 2020.

Counterclaims, Cross-Claims, and Third-Party Complaint

In response to Deutsche Bank's foreclosure complaint, Beshera and the Intervenor filed and served answers that included counterclaims against Deutsche Bank and cross-claims and third-party claims against Nationstar. (Beshera's Ans. *passim* & Borrower-Defendants' Ans. *passim*.) Through their counterclaims, cross-claims, and third-party complaint, Beshera and the Borrower-Defendants allege the following six claims against Deutsche Bank and Nationstar:

- Demand for Accounting;
- Negligent Misrepresentation;
- Abuse of Process;
- Malicious Prosecution;

- Violation of the South Carolina Unfair Trade Practices Act (“SCUTPA”); and
- Declaratory Judgment.

The demand for accounting claim, SCUTPA claim, negligent misrepresentation claim, and declaratory judgment claim alleged in this action mirror the counterclaims that the Borrower-Defendants raised in the amended answer that they served in Action 2 on February 2, 2012.¹

STANDARD OF REVIEW

A motion for summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” SCRPC, Rule 56. In considering a summary judgment motion, the Court must view the facts in the light most favorable to the non-moving party. *Koester v. Carolina Rental Ctr. Inc.* 313 S.C. 490, 493, 443 S.E.2d 392, 294 (1994); *Baughman v. Carolina Rental Ctr. Inc.* 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001). The party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545. Once the moving party meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the non-moving party must come forward with specific facts showing there is a genuine issue for trial. *SSI Med. Servs., Inc. v. Cox* 301 S.C. 493, 392 S.E.2d 789 (1990).

“[S]tatutes of limitation were developed to prevent injustices, not to further them.” *Moriarty v. Garden Sanctuary Church of God*, 334 S.C. 150, 163, 511 S.E.2d 699 (Ct. App. 1999),

¹ Exhibit 1, Borrower-Defs Ans. & Countercl. filed in Foreclosure Action (2011-CP-10-01805) on February 2, 2012.

aff'd, 341 S.C. 320, 534 S.E.2d 672, 706 (2000). “Statutes of limitation evolved over time with definite purposes in mind. They protect people from being forced to defend themselves against stale claims.” *Id.* ““One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a [claimant] has slept on his rights.”” *Logan*, 389 S.C. at 618, 698 S.E.2d at 883 (quoting *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996)). ““Another purpose of the statute of limitations is to protect potential defendants from protracted fear of litigation.”” *Id.*

ARGUMENT

1. Beshera’s and Intervenor’s Claims are time-barred.

The claims alleged in the Beshera’s Amended Answer, Counterclaims and Third-Party Complaint are time barred pursuant to applicable statute of limitations. *See* S.C. Code Ann. §§ 15-3-530(1), (5) & (7) (setting three-year statute of limitation for actions concerning “injury to the person or rights of another not arising in contract and not enumerated by law” and “relief on ground of fraud”); S.C. Code Ann. § 15-3-535; S.C. Code Ann. § 39-5-150 (“No action may be brought under this article more than three years after discovery of the unlawful conduct which is the subject of the suit.”).

Beshera’s and Intervenor’s claims arise largely from events that transpired in the litigation of this matter between 2009 and 2016. The last action in the prior litigation occurred on May 16, 2016, when the case no. 2015-CP-10-01971 was stricken from the docket pursuant to a Rule 40(j) order entered on May 16, 2016. Beshera filed her Answer and Counterclaim on July 8, 2020 and her Amended Answer, Counterclaim and Third Party Complaint and Summons on July 15, 2020. Intervenor’s filed their Answer, Counterclaim and Crossclaim on August 13, 2020. Therefore, these claims accrued more than four years before the instant claims were filed and are time barred.

These claims also appear to arise from either origination of the mortgage loan in 2007 or , loss mitigation events occurring between 2010 and 2012. (Exhibit B, C. Rogers Depo., p 47, lns 16-17.) Indeed, these claims were previously alleged by Intervenor in 2012.

Therefore, Beshera's and Intervenor's claims for declaratory judgment, negligent misrepresentation, abuse of process, malicious prosecution, and violation of the SCUPTA, which concern origination of the mortgage loan being foreclosed, loss mitigation events, litigation of previously filed foreclosure actions, and standing to foreclose are all based on facts and circumstances that arose more than three years before they filed their claims. Accordingly, all Claims alleged by Beshera and the Intervenor are time barred.

2. Beshera lacks standing to challenge the terms of the mortgage loan and lacks standing to challenge any endorsements on the note or transfer of the mortgage loan being foreclosed.

Beshera lacks standing to challenge the terms of the mortgage loan and cannot assert any claims based on any endorsements on the note or transfers or assignments of the mortgage being foreclosed. Beshera is not a party to the mortgage loan or intended beneficiary of any assignments or agreements to transfer the note and mortgage that the Intervenor signed. *See Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 445, 494 S.E. 2d 827, 833 (Ct. App. 1997) ("Generally, a third person not in privity of contract with the contracting parties has no right to enforce a contract. However, when the contract is made for the benefit of the third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person"); *see, e.g., Doherty v. PNC Mortg., C/A* No. 0:14-cv-4013-TLW-SVH, 2015 WL 5012781, at *3 (D.S.C. July 16, 2015) *adopted in-part* by 2015 WL 5012823, at *1 (D.S.C. August 21, 2015) (holding that devisee of real property lacked standing to challenge assignment of note and mortgage because she was not party to the agreement

transferring the note and mortgage or a party to either the note or mortgage); *Reese v. U.S. Bank Ass'n*, C/A No. 3:11-cv-2990-CMC-SVH, 2012 WL 1952819, at *3 (D.S.C. Apr. 30, 2012) (“Plaintiff lacks standing to contest the Assignment of Mortgage. Plaintiff is only a party to the Mortgage and, because the Assignment is a separate contract to which Plaintiff is not a party, she cannot question its validity.”).

3. In addition to being time barred, Beshera’s and Intervenor’s negligent misrepresentation claim fails to show any element of cause of action under South Carolina law.

(“[T]he plaintiff must allege and prove the following essential elements to establish liability for negligent misrepresentation: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation.” *Wells Fargo Bank, N.A. v. Pappas*, No. 2016-UP-263, 2016 WL 3200188, at *1 (S.C. Ct. App. June 8, 2016).

Neither Beshera nor Intervenor have ever identified an actual false representation. As a preliminary matter, Beshera alleged that “Plaintiff, Nationstar, and/or its alleged predecessors in interest made false and misleading statements to Defendant[] Curt and Julie Rogers and/or the Court.” Beshera Answer ¶ 79. Naturally, the first element of misrepresentation is a representation “to the Plaintiff” and Beshera cannot base her claim on representations made to Intervenor or the Court.

Further, neither Ms. Beshera nor Mrs. Rogers had any direct communication with Plaintiff, Nationstar or their alleged predecessors. (Exhibit A, J. Rogers Depo., p 13, lns 3-22; Exhibit C,

Beshera Depo., p 14, ln 20 – p 15, ln 4.) Mr. Rogers acknowledged he has had no interaction with Plaintiff. (Exhibit B, C. Rogers Depo., p 25, lns. 17-24.) He testified, however, that he considered the loan terms themselves to be a misrepresentation. *Id.* p 23 ln 14 – p 24 ln 5. Finally, all claimants also identified what appear to be Nationstar’s allegations made during the course of litigation that it was authorized to foreclose. (Exhibit B, C. Rogers Depo., p 25, lns. 2-14.)

Loan terms are not “representations,” and are neither true nor false. *Beneficial Fin. I, Inc. v. Windham*, 431 S.C. 256, 271, 847 S.E.2d 793, 802 (Ct. App. 2020) (“[T]o be actionable, a statement must relate to a present or preexisting fact...”). And, neither Plaintiff, Nationstar nor any other loan servicer, is responsible for Mr. Rogers’ understanding of the loan terms in the first place. Rather, South Carolina has long recognized the “basic premise that it is a duty owed by every contracting party to the other party and to the public to learn and know the contents of a written contract before he signs and delivers it.” *J.B. Colt Co. v. Britt*, 129 S.C. 226, 123 S.E. 845, 847 (1924). Moreover, no one owed a duty to explain the loan to the Intervenor. *See Regions Bank v. Schmauch*, 354 S.C. at 670, 582 S.E.2d at 444 (recognizing that bank owed no duty in tort to notify obligor of obligations or loan renewals related to guaranty agreement).

While Nationstar’s claim of authority to foreclose was true, *see* Affidavit of Alan Blunt, the proposition that allegations, pleadings or even testimony can be asserted as a basis for misrepresentation is absurd. Litigation is an adversarial process. Litigants are compelled to engage in the process and to admit or deny allegations, as Beshera and Intervenor have done. Courts have long recognized there is no civil remedy for litigation-related misconduct because “perjurious testimony constitutes a fraud or deceit on the finders of fact and on the judicial system as a whole, and not on an individual litigant.” *See Patel v. OMH Med. Ctr., Inc.*, 1999 OK 33, ¶ 44, 987 P.2d 1185, 1202. To be sure, in limited situations, judgments obtained based on the basis of fraud can

be set aside under Rule 60(b), but there is no cognizable basis for one litigant to sue another under a theory of misrepresentation.

Next, the Beshera and Intervenor cannot demonstrate any reliance on any purported representations. Beshera and Intervenor affirmatively deny all allegations related to either Nationstar or Deutsche Bank's standing to secure a foreclosure remedy in this action. (Beshraa Countercl. & Third-Party Compl. at ¶¶ 3 & 16, Intervenor Countercl., Crosscl. and Third-Party Compl. at ¶¶ ____.) They simply do not claim to have been deceived or to have changed their position as a result of any representation.²

4. In addition to being time barred in-part, Beshera and Intervenor cannot show a genuine issue of material fact concerning any element of abuse of process.

The essential elements of abuse of process are: (1) an ulterior purpose; and (2) a wilful act in the use of the process not proper in the regular conduct of the proceeding.” *Johnson v. Painter*, 279 S.C. 390, 391, 307 S.E.2d 860, 860 (1983). Significantly, “the tort of abuse of process, as distinguished from that of malicious prosecution, involves the malicious misuse or perversion of the process, *after its issuance*, for an end not lawfully warranted by it. *Id.* (emphasis added)

Generally, Beshera and the Intervenor complain that Plaintiff and Nationstar “improperly used the process of the legal system to attempt to foreclose on the Mortgage by filing Action 1, Action 2, Action 3, and Action 4 when Plaintiff and Nationstar, and/or their alleged predecessors” filed those actions without authority to foreclose. (*See* Intervenor's Countercl. ¶ 90.) They further raise a raft of purported examples of abusive process through failing to be ready for trial, dismissing actions, failing to name Intervenor in Action 4 and failing to obtain an order allowing

² When asked about reliance, Mr. Rogers made no mention of the purported contentions concerning authority to foreclose. Exhibit B, C. Rogers Depo., p 27 ln 24 – p 29 ln 7. Rather, he testified to not receiving a “clear representation as to where we stood at any point.” That is not reliance. He also mentioned making a payment of \$5,900 in connection with a workout agreement that is apparently unrelated to any representation or any allegation in the pleadings. *Id.*

foreclosure, all in “aimed at the illegitimate collateral objective of obtaining an order of foreclosure of the Mortgage...”

These allegations fundamentally misapprehend the tort of abuse of process. The improper filing of actions may constitute malicious prosecution but it can never constitute abuse of process, which requires “malicious misuse or perversion of the process, *after its issuance*, for an end not lawfully warranted by it.” What is more, litigation of an action after it is commenced, including seeking continuances, seeking relief from the Court or otherwise availing oneself of the procedures available to a litigant cannot be logically characterized as “a wilful act in the use of the process not proper in the regular conduct of the proceeding.” In any case, use of the “the process of the legal system to attempt to foreclose” is unquestionably an “end” permitted by a *lawsuit to foreclose*. Beshera’s and Intervenor’s attempt to define the stated objective of the lawsuit as “collateral” to the lawsuit is truly baffling. Beshera’s and Intervenor’s claims for malicious prosecution are manifestly not allowed under South Carolina law.

Unsurprisingly, in their depositions, Beshera and Intervenor’s conceded they have no evidence of an “ulterior purpose.” Mr. Rogers was asked:

- 1 Are you aware of any evidence that plaintiff,
- 2 Nationstar, or its predecessor was attempting to
- 3 accomplish anything other than foreclosure of the
- 4 property through the prior litigation?
- 5 MS. ARNOLD: Objection as to form.
- 6 THE WITNESS: I'm not sure what you're
- 7 talking about. But I guess no.

Exhibit B, C. Rogers Depo., p 30, lns 1-8. In response to the same question, Mrs. Rogers stated “Nothing specific.” Exhibit A, J. Rogers Depo., p 17, ln 3. Ms. Beshera testified “I don’t know.” Exhibit C, Beshera Depo., p 25, ln 26. This testimony does not create a genuine issue of fact

concerning an ulterior purpose. *See, e.g., Food Lion, Inc. v. United Food Commercial Works Intern. Union*, 351 S.C. 65, 567 S.E.2d 251 (Ct. App. 2002) (affirming dismissal of abuse of process claim where plaintiff failed to allege how use of court process was designed to achieve improper collateral purposes that legal process was not designed to achieve).

Additionally, although completely unnecessary for disposition of this claim, Beshera was not a party to Actions 1, 2 and 3, and, therefore, could not possibly show process was used against her in those actions. Conversely, Intervenor was not named in the instant action (Action 4). Thus, even if a claim for abuse of process could lie for the commencement of these actions, no such action would lie against anyone by Beshera for the prior litigation or by Intervenor for the instant case.

Finally, as discussed below, and to the extent necessary, contrary to Beshera's and Intervenor's contentions, multiple entries of Rule 40(j) Orders in the prior foreclosure actions concerning the mortgage loan identified in Deutsche Bank's complaint do not preclude this current action. *See* S.C. R. Civ. P. 40(j) & 41(a)(1).

5. Beshera's and Intervenor's malicious prosecution claims must be summarily dismissed under South Carolina law.

"[T]o maintain an action for malicious prosecution, a plaintiff must establish: (1) the institution or continuation of original judicial proceedings;⁴ (2) by or at the instance of the defendant; (3) termination of such proceedings in [the] plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006) (first alteration in original) (citations omitted). "An action for malicious prosecution fails if the plaintiff cannot prove each of the

required elements by a preponderance of the evidence, including malice and lack of probable cause.” *Id.*

As the court of appeals recently noted, “the element of favorable termination of proceedings to mean a termination reflective of the merits. *Gecy v. Somerset Point at Lady's Island Homeowners Ass'n, Inc.*, 426 S.C. 540, 553, 828 S.E.2d 73, 80 (Ct. App. 2019). This “means a termination consistent with a finding for the defendant on substantive grounds and not based solely on technical or procedural considerations.” *Id.* “For example, a case's dismissal based on the statute of limitations would not be a favorable termination because a decision on the statute of limitations does not reflect the merits of the action.” *Id.*

“Malice is defined as ‘the deliberate[,] intentional doing of an act without just cause or excuse.’ ” *Id.* at 437, 629 S.E.2d at 649 (quoting *Eaves v. Broad River Elec. Coop., Inc.*, 277 S.C. 475, 479, 289 S.E.2d 414, 416 (1982)). “Malice does not necessarily mean a defendant acted out of spite, revenge, or with a malignant disposition, although such an attitude certainly may indicate malice.” *Id.* Where a plaintiff bases the claim on an opponent's institution of civil causes of action, probable cause exists if the facts and circumstances would lead a person of ordinary intelligence to believe that the plaintiff committed one or more of the acts alleged in the opponent's complaint. *Broyhill v. Resolution Mgmt. Consultants, Inc.*, 401 S.C. 466, 475, 736 S.E.2d 867, 871–72 (Ct.App.2012). The issue is not what the actual facts were, but what the prosecuting party honestly believed them to be. *Eaves*, 277 S.C. at 478, 289 S.E.2d at 416 (citation omitted).

The malicious prosecution claim is subject to dismissal with prejudice because Beshera and the Intervenor’s cannot demonstrate termination of any prior litigation in their favor, lack of probable cause for instituting any alleged prior foreclosure action, malice, or any purported damages resulting therefrom. *See, e.g., Law v. South Carolina Dept. of Corrections*, 368 S.C. 424,

436-37, 629 S.E. 2d 642, 649 (Sup. Ct. 2006) (affirming trial court's award of summary judgment to defendant where plaintiff failed to prove termination of prior litigation in plaintiff's favor, lack of probable cause for defendants' legal proceeding, and malice).

Beshera's and Intervenor's claims for malicious prosecution are predicated on the contention that, because Actions 1 and 2 were dismissed pursuant to Rule 40(j), Nationstar lacked probable cause for instituting Action 3 and Plaintiff lacked probable cause for instituting Action 4. These arguments are specious.

As a natural starting point, it must be noted that Beshera was not a party to any of the prior foreclosure actions identified in her Counterclaims and Third-Party Complaint. Thus, there have been no prior prosecutions for this Court to consider malicious. Further, the instant action was not commenced against Intervenor and has not been terminated, let alone terminated in favor of Beshera and the Intervenor. Therefore, the commencement of Action 4 will never provide Intervenor with a basis for a claim and cannot provide Beshera with any claim unless it is terminated.

Intervenor is simply wrong with respect to the Rule 40(j) dismissal of Action 2 triggering the two-dismissal rule under Rule 41, S.C.R.C.P. or any liability for any abuse of process or malicious prosecution claims. Rule 41 does not mention Rule 40(j) or purport to control outcomes under Rule 40(j). and anywhere, unlike Rule 40(j) and because notices of dismissal under Rule 41 can only be unilaterally filed by a plaintiff before the appearance of any defendant. The language of Rule 41(a)(1) does not address multiple dismissals of a prior action with leave to reinstate under Rule 40(j):

Subject to the provisions of Rule 23(c), of Rule 66(a), and of any statute, an action may be dismissed by the plaintiff without order of court (A) by filing and serving a notice of dismissal at any time before service by the adverse party of an

answer or motion for summary judgment, whichever first occurs, or (B) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

S.C. R. Civ. P. 41(a)(1).

Next, because Rule 41(a)(1) only permits the dismissal of an action by filing and serving a *notice* of dismissal before the appearance of a defendant in an action by service of an answer or motion for summary judgment, striking the Foreclosure Action under Rule 40(j) can not trigger the adjudication provisions of Rule 41(a)(1). *See id.* at 41(a)(1)(A). Unlike Rule 41(a)(1), which only permits the filing and service of a notice of dismissal *before* a defendant appears in an action, Rule 40(j) requires a defendant's consent for entry of a Rule 40(j) order. *See* S.C. R. Civ. P. 40(j).

There is no controlling case law authority issued by either the South Carolina Supreme Court or South Carolina Court of Appeals establishing that entry of multiple 40(j) orders in an action trigger the adjudication on the merits provisions of Rule 41(a)(1), S.C.R.C.P. However, numerous cases interpreting Rule 41 of the Federal Rules of Civil Procedure and similar state court iterations of Rule 41, S.C.R.C.P. have recognized that subsequent dismissal of a previously dismissed action by anything other than a *notice* of dismissal does not constitute a merits determination. *Manning v. S.C. Dept. of Highway and Public Transp.*, 914 F.2d 44, 47 n.3 (4th Cir. 1990) (recognizing that two dismissals of an action involving the same claims stated in a previously dismissed action on happens when the second dismissal is by notice, but not when the defendant is dismissed by motion or by stipulation); 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2368, (4th Ed. Oct. 2020 Update) ("By its own clear terms, the 'two dismissal' rule applies only when the second dismissal is by notice under Rule 41(a)(1)(A)(i). It does not apply to a dismissal by stipulation, nor to an involuntary dismissal, nor

to a dismissal by a court order under Rule 41(a)(2). The rule does not apply if the second dismissal is in some way irregular.”); *see also Estate of Livesay ex rel, Morley v. Livesay*, 723 S.E.2d 772, 776-77 (N.C. App. 2012) (holding that two dismissal rule did not apply because the two prior dismissals of action were involuntary and by our order); *Crawford v. Kingston*, 728 S.E.2d 904, 906 (Ga. Ct. App. 2012 (recognizing that under Georgia law, only voluntary dismissals filed by a plaintiff are to be counted for purposes of Georgia’s version of Rule 41)).

Finally, even if Intervenor’s argument were correct, and it is not, their malicious prosecution claim would still lack a genuine issue of fact concerning the favorable termination and probable cause elements of malicious prosecution. As discussed, a favorable termination requires a termination that reflects a substantive, not a technical or procedural, termination. *Gecy v. Somerset Point at Lady’s Island Homeowners Ass’n, Inc.*, 426 S.C. 540, 553, 828 S.E.2d 73, 80 (Ct. App. 2019). While the two-dismissal rule operates as a decision on the merits as a matter of *procedure* under Rule 41, the 40(j) order does not reflect anything related to substance or the merits. Further, because no court, including this Court, has ever adopted Intervenor’s reading of Rule 40(j), it cannot be credibly suggested that Plaintiff or Nationstar lacked probable cause in continuing with their foreclosure. Indeed, this Court has already denied Beshera’s request to dismiss this case for these very reasons.

6. In addition to being time-barred, Beshera’s and Intervenor’s SCUTPA claim fails to create a genuine issue of fact as to any element.

The SCUTPA prohibits “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” S.C.Code Ann. § 39–5–20(a). In order to succeed on a SCUTPA claim, a plaintiff must show

(1) that the defendant engaged in an unlawful trade practice, (2) that the plaintiff suffered actual, ascertainable damages as a result of the defendant’s use

of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest.

Beshera and the Intervenor attempt to bring a “kitchen sink” claim under SCUPTA alleging Plaintiff and Nationstar ran afoul of the statute by

by engaging in unfair and deceptive acts and practices including but not limited to: claiming as owed unconscionable interest amounts pursuant to unconscionable terms of the Note; seeking to enforce security for a note which contains unconscionable terms; making false and misleading representations to Defendant, Curt and Julie Rogers, and the court regarding the actual terms of the loan and Plaintiff, Nationstar and/or their predecessors in interest’s right to enforce the note and mortgage, who the holder of the note and mortgage was at various time between now and 2009, assignments of the mortgage, endorsements of the note, that Plaintiff Nationstar, and/or its predecessor’s interest were real parties in interest, and Plaintiff’s general standing to bring this action, Action 1, Action 2, and Action 3 against Curt and Julie Rogers and Defendant; causing alleged endorsements of the note to be improperly executed and/or altered after execution; causing alleged assignments of the Mortgage to be improperly executed and/or filed without authority; initiating and maintaining Actions 3 and 4 when they were barred by Rule 41, res judicata and/or collateral estoppel; by continuing for 11 years to seek to prosecute the foreclosure of the Mortgage when Plaintiff Nationstar, and/or its alleged predecessors already failed to prosecute the foreclosure of the Mortgage in a timely and judicious manner for more than a decade; by misrepresenting that Plaintiff, Nationstar and/or their alleged predecessors in interest had the authority to agree to a short sale the Subject property and would do if Curt and Julie Rogers brought them a reasonable sale contract; by mispresenting that Plaintiff, Nationstar and/or their alleged predecessors in interest had the authority to agree to enter into a Workout and/or forbearance agreement with Curt and Julie Rogers and if the Rogers complied with the terms of the Agreement then Plaintiff, Nationstar and/or their alleged predecessors in interest had the authority to agree and would agree to a modification of the Note.

(Beshera Countercl., ¶ 112 & Intervenor’s Countercl. ¶ 116.)

First, Beshera cannot prosecute a SCUPTA claim. She is attempting to raise allegations of conduct directed at the Intervenor, not herself. Moreover, an unfair trade practices claim may not be brought in a representative capacity such as a trustee or representative of an estate. S.C.Code Ann. § 39–5–140(a); *Wogan v. Kunze*, 366 S.C. 583, 609, 623 S.E.2d 107, 121 (Ct. App. 2005), *aff’d as modified*, 379 S.C. 581, 666 S.E.2d 901 (2008). Finally, because Beshera lacks standing

to challenge any endorsements or assignments or transfers of the mortgage loan being foreclosed, she cannot maintain her SCUPTA claim based on any challenge to the transfers of the Intervenor's mortgage since the mortgage loan was originated.

Additionally, the Intervenor's SCUTPA claim cannot be based on the terms of the mortgage loan that Intervenor signed because neither Deutsche Bank nor Nationstar originated the loan. As mere assignees of the mortgage loan, Deutsche Bank and Nationstar are subject to any claims arising from origination of the loan. *See Rosemond v. Campbell*, 288 S.C. 516, 523, 343 S.E.2d 641, 645 (Ct. App. 1986) ("[A]bsent agreement to the contrary, the common law assignee takes only the benefits, not the burdens of the assigned obligation.").

Additionally, Intervenor was unable to substantiate any allegations concerning unfair and deceptive acts regarding any attempt to reach mutual assent concerning a loan modification. At his deposition, Mr. Rogers could say only the following:

20 ... are you aware of anything that the plaintiff
21 did that was unfair or deceptive? And that would be a
22 big, long name. Let's see. Deutsche Bank Trust
23 Company Americas as trustee for residential Accredited Loans

...

A I mean, it states simply there what my
0040

1 feeling is about it. I mean, the terms of the note. I
2 was given options that were just so far out. I believe
3 at one point I was given a loan modification offer that
4 if I could pay \$16,000 a month, that, you know, they
5 would do a workout with me. I mean, I don't think any
6 of us in here are going to be paying \$16,000 a month
7 for a mortgage.

8 Q And were you dealing with the plaintiff with
9 respect to that?

10 MS. ARNOLD: Objection as to the form.

11 THE WITNESS: I believe that was with
12 Nationstar.

13 BY MR. TAYLOR:

14 Q Okay. And is it your position that a loan
15 servicer like Nationstar engages in an unfair and

16 deceptive trade practice if they don't offer you a loan
17 modification that sort of is tailored to your needs?
18 MS. ARNOLD: Objection as to form.
19 THE WITNESS: I don't know how to answer that
20 question. You know, there should be a certain
21 understanding by Nationstar and any mortgage company
22 that, you know, when someone's seeking relief to try
23 and work something out, that they ought to give, you
24 know, some attainable ways to get that done and we have
25 never been offered that.

(Exhibit B, C. Rogers Depo., p 39 ln 19 – p 40 ln 25).

Further, the SCUTPA claim cannot be based on the procedural history of the prior foreclosure action. As a practical matter, they dismissed and the reinstated with the Intervenor's consent and as permitted by the South Carolina Rules of Civil Procedure. More fundamentally, however, litigation over the Intervenor's debt is not an act in trade or commerce. "Trade" and "commerce" are defined to "include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate." S.C. Code Ann. § 39-5-10. Filing a lawsuit to enforce a default on a mortgage and litigating that lawsuit is not any of those things.

Additionally, these SCUPTA claims are clearly private, having no effect on the public interest. A Plaintiff bringing a private cause of action under SCUTPA must allege and prove that the defendant's actions adversely affected the public interest. *Noack Enterprises, Inc. v. Country Corner Interiors, Inc.*, 290 S.C. 475, 478-479, 351 S.E.2d 347, 349-350 (Ct. App. 1986) (citing *Zeeman v. Black*, 156 Ga. App. 82, 85, 273 S.E.2d 910, 915 (Ga. Ct. App. 1980)). Conduct that only affects the parties to the transaction provides no basis for a SCUTPA claim. *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 350, 565 S.E.2d 309, 315 (2002) (citing *Jefferies v. Phillips*, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994)).

Intervenors and Beshera do not credibly allege, nor have they established through discovery, that any of the alleged conduct by Nationstar affects the public interest in any way.³ “An impact on the public interest may be shown if the acts or practices have the potential for repetition.” *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004). “The potential for repetition may be shown by proving that the same kind of actions occurred in the past or by showing that the procedures employed by the defendant create a potential for repetition of the deceptive practices.” *Schnellmann v. Roettger*, 368 S.C. 17, 23, 627 S.E.2d 742, 746 (Ct. App. 2006). A claim under SCUTPA is inadequate where it “fails to allege any specific procedures or business practices that create the potential for repetition.” *Ethox Chem., LLC v. Coca-Cola Co.*, 2013 U.S. Dist. LEXIS 870, at *3 (D.S.C. Jan. 3, 2013).

Finally, the Beshera’s and the Intervenor’s SCUTPA claim fails because they have failed to identify any pecuniary loss supporting a SCUTPA claim. (Exhibits A, B, C Beshera and Rogers’ Depos.)

7. Beshera’s demand for account claim is not cognizable cause of action.

An accounting between a debtor and creditor requires the creditor to establish the amount due, and then the debtor bears the burden of proving payments, discounts, and off-sets. *See Devereux v. McCrady*, 53 S.C. 387, 395 (1898). In South Carolina, however, an accounting is an **equitable remedy, rather than an affirmative cause of action**. *See Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 144 (1989) (citing *Cox v. Lunsford*, 272 S.C. 527 (1979)) (emphasis added).

³ Mr. Rogers testified as follows:

14 What similar acts or practices in the past
15 have plaintiff and Nationstar engaged in that are
16 similar?
17 A I don't know exactly. I'd have to go back
18 and look.

(Exhibit B, C. Rogers Depo., p 43 lns 14-28.)

Thus, an accounting may be awarded as an equitable remedy to support a claim such as unjust enrichment that or breach of a fiduciary duty. *Id.* (citing *Smith v. Union Central Life Ins. Co.*, 112 S.C. 356 (1919)). Likewise, an equitable accounting may be awarded in an action with affirmative claims “involving long and complicated accounts where it would not be practicable for a jury to comprehend the issues and correctly make adjustments” *Id.* (citing *Jefferies v. Harvey*, 206 S.C. 245 (1945)).

Here, Beshera cannot assert a claim for accounting and is not entitled to the equitable remedy of accounting under any other claim. Indeed, Beshera has not pled or established a fiduciary duty owed to her by Plaintiff of Third-Party Defendant or made a claim for unjust enrichment. Further, the accounting claim involves an individual, residential promissory note and mortgage. Accordingly, the loan involved is not so complicated that the trier of fact would not be able to comprehend the issues involved, and Beshera does not allege otherwise. Simply put, an accounting is not an affirmative cause of action. As a result, the “accounting counterclaim” fails to state a claim upon which relief can be granted, making dismissal appropriate as a matter of law.

8. In addition to being time barred, Beshera’s and the Intervenor’s declaratory judgment claims fails under South Carolina law.

Beshera’s and the Intervenor’s claim for declaratory judgment fails as a matter of law for the following reasons:

First, their request for a declaration that Plaintiff is “precluded from maintaining this action by Rule 41,” collateral estoppel or any other defense to the action is clearly improper. The Declaratory Judgment Act was created to allow courts to answer actual controversies over “rights or obligations under the law...” *S.C. Lottery Comm’n v. Glassmeyer*, 433 S.C. 244, 250, 857 S.E.2d 889, 892 (2021). Defenses to civil actions are not “rights or obligations” and will already be decided in the Plaintiff’s action. As Rule 12(b) instructs, “every defense...shall be asserted in the

responsive pleading.” Moreover, as already discussed, Beshera’s and the Intervenor’s assertion of the two-dismissal rule is contrary to South Carolina law. *See* S.C. R. Civ. P. 40(j) & 41(a).

Moreover, Beshera cannot challenge the enforceability of the loan and the Intervenor’s cannot show it is unconscionable. Intervenor’s appear to believe the fact that they were offered multiple payment options, including the option make a low minimum payment of less than the full monthly interest due, which Intervenor’s characterize as negative amortization, was unconscionable. (Exhibit B, p 41 lns 9-11.) In reality, a lower payment option is a great luxury to borrowers such as Intervenor’s. Moreover, nothing prevented Intervenor’s from making a fully amortized or even 15-year amortized payment. Indeed, Intervenor’s could repay the entire loan with no penalty. (Blunt Aff., Note, Secs. 4-5.) The fact that Intervenor’s may have opted to make the lowest payment cannot possibly make the loan unconscionable.

Next, under South Carolina law, Deutsche Bank’s constructive possession⁴ of the original note, with all proper endorsements, provide Deutsche Bank with standing to prosecute this current action. *See* S.C. Code Ann. § 36-3-301; *Bank of America, N.A. v. Draper*, 405 S.C. 214, 223-24, 746 S.E.2d 478, 483 (Ct. App. 2013) (recognizing the party in possession of promissory note for mortgage subject to foreclosure was the holder of the note with standing to foreclose); *see also MidFirst Bank, SSB v. C.W. Haynes & Co., Inc.*, 893 F.Supp 1304, 1314 (D.S.C. 1994) (“[T]he possession required by the [Commercial] Code to constitute a person a ‘holder’ may be constructive possession by delivery to one on his behalf. Thus a person is a ‘holder’ of commercial paper when it is in the physical possession of his agent.”). Indeed, even if the note at issue in this foreclosure action was not in Deutsche Bank’s constructive possession or if the note contained any defective endorsements as alleged in the Intervenor’s pleadings, the declaratory judgment claim

⁴ The original note and mortgage are currently in the physical possession of Deutsche Bank’s foreclosure counsel, The Finkel Law Firm.

fails because under South Carolina, “[a] person may be entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.” S.C. Code Ann. § 36-3-301; *see also*, *Koola v. Ditech Financial LLC*, 611 B.R. 251, 258-60 (D.S.C. 2019) (holding that a servicer of mortgage loan could enforce instrument, even though the note was lost and holding that transferee of lost instrument also had standing to enforce mortgage loan).

Finally, the declaratory judgment fails because under South Carolina law, Article 3 of the Commercial Code—not assignments of a mortgage—dictates whether a party is entitled to foreclose a mortgage that secures a note in the possession of the foreclosing plaintiff. *See Bank of America, N.A. v. Draper*, 405 S.C. at 223-24, 746 S.E.2d at 483 (applying provision of S.C. Code Ann. § 36-3-301 to determine rights of servicer to foreclose mortgage loan).

CONCLUSION

For all the reasons stated herein, the Court should grant Deutsche Bank’s and Nationstar’s motion for summary judgment as to Intervenor’s and Beshera’s claims and award such further relief to Deutsche Bank and Nationstar that Court finds just and warranted.

Deutsche Bank and Nationstar reserve the right to supplement this motion with further statutory and common law authorities, arguments, briefing, evidence, and other materials before any merits hearing for this motion.

This the 1st day of February 2023.

Respectfully submitted,

McGUIREWOODS LLP

/s/ T. Richmond McPherson, III

T. Richmond McPherson, III (SC #80432)

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*Attorney for Plaintiff Deutsche Bank Trust Company
Americas, as Trustee for Residential Accredited Loans,
Inc., Pass-Through Certificates 2007-QH2 and
Third-Party Defendant Nationstar Mortgage LLC*

Exhibit A

Julie Rogers 13-20

0001

1 STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
2 COUNTY OF CHARLESTON NINTH JUDICIAL DISTRICT
3)
4)
5 DEUTSCHE BANK TRUST COMPANY)
6 AMERICAS, AS TRUSTEE FOR)
7 RESIDENTIAL ACCREDIT LOANS, INC.,)
8 PASS-THROUGH CERTIFICATES 2007-QH2,) CIVIL ACTION NO.
9) 2019-CP-10-04503
10 PLAINTIFF,)
11)
12 v.)
13)
14 ASHLEY JOHNSON BESHERA AS TRUSTEE)
15 OF THE REVOCABLE TRUST AGREEMENT)
16 FOR 2235 SHORELINE DRIVE ORIGINALLY)
17 DATED 3RD DAY OF MARCH 2010;)
18 ET AL.,)
19)
20 DEFENDANTS,)
21)
22)
23 ASHLEY JOHNSON BESHERA AS TRUSTEE)
24 OF THE REVOCABLE TRUST AGREEMENT)
25 FOR 2235 SHORELINE DRIVE ORIGINALLY)
DATED 3RD DAY OF MARCH 2010,)
THIRD-PARTY PLAINTIFF,)
v.)
NATIONSTAR MORTGAGE LLC,)
THIRD-PARTY DEFENDANT.)

DEPOSITION OF JULIE ROGERS
(TAKEN by THIRD-PARTY DEFENDANT)
ATTENDING VIA ZOOM IN CHARLESTON COUNTY,
SOUTH CAROLINA
APRIL 19, 2022 at 1:12 p.m.

0002

1 ALSO PRESENT: Curt Rogers (Via Zoom)
2 REPORTED BY: Meredith R. Schramek
3 Registered Professional Reporter
4 Notary Public
5 (Via Zoom in Mecklenburg County,
6 North Carolina)

CERTIFICATE OF REPORTER

STATE OF NORTH CAROLINA)
COUNTY OF MECKLENBURG)

I, MEREDITH R. SCHRAMEK, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by Christine Taylor, a notary public authorized by the state of South Carolina; that the testimony of said witness was taken by me to the best of my ability and thereafter reduced to typewriting under my direction; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

This, the 2nd day of May, 2022.

<%21575,Signature%>

MEREDITH R. SCHRAMEK
Notary Public in and for
County of Mecklenburg
State of North Carolina
Notary Number 200814200186

24 A No.

25 Q Paragraph 38 describes some loss mitigation

0012

1 efforts or relates to loss mitigation efforts between,
2 it says, defendants and plaintiff or its predecessors
3 or alleged loan servicers from 2008 through 2011. Were
4 you involved in any of those loss mitigation efforts?

5 A I assisted with paperwork.

6 Q Okay. Can you tell me what you remember
7 doing?

8 A Well, if I'm correct with the time frame in
9 which you're asking, we sought out a loan modification
10 company, and I continually dealt with them for a good
11 length of time. Unfortunately, they ended up being a
12 scam. But in the beginning, I did all of that. Of
13 course when -- go ahead.

14 Q Do you recall who that company was?

15 A Vantage.

16 Q Vantage?

17 A I don't know the full name anymore. But that
18 was the first part of the name.

19 Q And was that some company that you found like
20 on an Internet search or something?

21 A I don't recall how.

22 Q Okay. Did you pay them money?

23 A Yes.

24 Q Do you recall how much?

25 A I do not recall how much.

0013

1 Q Okay. So you worked with them to fill out
2 some kind of application. Is that what you're
3 describing?

4 A It was much more than applications. They
5 were presumably going to assist us with our loan
6 modification and directly conversing with the banks on
7 our behalf and with us obviously to work out a loan
8 modification.

9 Q Okay. And did you have any other involvement
10 in loss mitigation efforts?

11 A Obviously, being the housewife, homeowner,
12 interior designer, keeping extreme maintenance
13 regarding trying to sell the house was my job.

14 Q I guess what I'm interested in is if you had
15 any direct communications with the lender or loan
16 servicer about loss mitigation efforts, a workout, a
17 loan modification, or short sale?

18 A I understand. No.

19 Q This also describes in paragraph 38 a workout
20 agreement entered into with plaintiff. Do you recall
21 if you entered into that agreement, or if that was just
22 Mr. Rogers?

23 A I don't recall.

24 Q And am I understanding you correctly that you
25 did not personally submit any requests for a short sale

0014

1 or loan modification to the lender or loan servicers?

2 A I did not.

3 Q Did you have any telephone calls with the
4 lender or loan servicers about a loan modification or
5 short sale?

6 A I don't recall.

7 Q Paragraph 83 alleges that plaintiff,
8 Nationstar and/or their alleged predecessors in
9 interest made false and misleading representations to
10 defendants.

11 Did plaintiff, Nationstar, or any other loan
12 servicer make any false or misleading representations
13 to you?

14 A I felt misled because of trying to work out
15 the loan modification, then selling the house, putting
16 it on the market, and being told that we could not sell
17 the house under short sale. It seemed like nobody was
18 communicating properly, and we were misled.

19 Q But as far as the mechanics, you didn't
20 communicate with the lender or loan servicers directly;
21 correct?

22 A Correct.

23 Q And were you personally harmed by, let's say,
24 the inability to conduct a short sale on the property?

25 A Yes.

0015

1 Q Can you explain to me how you were harmed?

2 A Thirteen years now down the road, it's quite
3 evident that we're in a situation that's not good for
4 our future. I would have preferred to have gotten out
5 from under this and moved on and have equity in the
6 home.

7 Q I did not understand the last part. What do
8 you mean have equity in the --

9 A If we had gotten out from under this when we
10 tried to do the right thing, we would have then been
11 able to move on.

12 Q So you're contemplating a purchase of another
13 property?

14 A I'm sure we probably would have contemplated
15 that at the time.

16 Q Starting with paragraph 89 in your answer and
17 counterclaim and cross-claim, the pleading asserts a
18 claim for abuse of process. Can you describe for me
19 what your understanding of how the plaintiff or
20 Nationstar abused process?

21 A It would need to go back to the predecessors.

22 Q Can you be more specific about what that
23 means?

24 A From the beginning, not being able to move
25 forward with what we were told we should do and sell

0016

1 the home, that's the beginning. Through no fault of
2 our own, we're in this current scenario.

3 The 40(j)s, plural, shouldn't -- we just feel
4 like we were not treated fairly, and it was improper
5 for us to continually be called ready to go and others
6 weren't prepared when we were.

7 Q And if you had gone, how would it have
8 benefited you to have gone to trial, for instance?

9 A Well, I can't guess what would have happened.
10 So I don't know what the benefits of the trial would
11 be. I just know that answers are needed for our
12 well-being.

13 Q And are you aware of any evidence that
14 plaintiff or Nationstar or Aurora or some other
15 predecessor were attempting to accomplish something
16 other than foreclosure through the commencement of the
17 prior action or actions?

18 MS. ARNOLD: Objection to form.

19 You can answer.

20 THE WITNESS: I can't answer for them.

21 BY MR. TAYLOR:

22 Q Well, I mean, I'm asking if you're aware of
23 any evidence, an e-mail, a recorded conversation,
24 something along those lines that shows that Nationstar
25 or plaintiff were attempting to accomplish anything

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1 other than foreclosure of the property.

2 MS. ARNOLD: Objection as to form.

3 THE WITNESS: Nothing specific.

4 BY MR. TAYLOR:

5 Q Starting with paragraph 98, your counterclaim
6 and cross-claim, alleges a claim for malicious
7 prosecution. And what is -- what is your understanding
8 of malicious prosecution?

9 A Continually trying to go after something that
10 legally wasn't allowed.

11 Q And are you aware? Has a Court or jury ever
12 held that the plaintiff or Nationstar or some
13 predecessor is not allowed to foreclose?

14 MS. ARNOLD: Objection as to form.

15 THE WITNESS: I don't know the answer.

16 BY MR. TAYLOR:

17 Q Are you aware of any evidence that Nationstar
18 or the plaintiff or any predecessor intended to harm
19 you and Mr. Rogers other than by obtaining a
20 foreclosure?

21 MS. ARNOLD: Objection as to form.

22 THE WITNESS: Well, intend to harm is
23 subjective. The harm that has been done is, for me

24 personally, relationship oriented.

25

0018

1 BY MR. TAYLOR:

2 Q Okay. Describe for me the harm that you have
3 suffered.

4 A Overall, that my husband has gone through
5 13 years of stress, and that is a trickle-down in the
6 family, that truly I feel that he didn't -- wasn't able
7 to be his very best regarding business due to the
8 inability to get loans under his own name. The harm is
9 also, of course, the situation that we have been placed
10 in with my sister being pulled into this. And I might
11 have to circle back to your original question.

12 Q I had asked you to describe the harm that you
13 contend you have suffered as a result of the conduct of
14 plaintiff, Nationstar, or some other loan servicer?

15 A Just incredible stress and inability to
16 function in the business world as we would have had we
17 not had all this hanging over us for 13 years.

18 Q Is it your contention that you would have
19 endured less stress if the property had gone to a
20 foreclosure sale, say, 12 years ago?

21 A I could only surmise that we would have been
22 under a lot less stress, yes.

23 Q What makes you say that if you had been
24 dispossessed of the property?

25 A We could have rebuilt our credit, our ability

0019

1 to move forward, and have equity in another house.

2 Q But you have continued to reside in the house
3 for the last 13 years; correct?

4 A Correct.

5 Q Has that been a benefit of having the
6 foreclosure delayed 13 years?

7 A Not sure that benefit outweighs because,
8 through no fault of our own, we're stuck.

9 Q I mean, do you imagine that you could have
10 built more equity in another property than you saved
11 over the last 13 years of living at 2235 Shoreline
12 Drive?

13 A Who knows? I couldn't guess.

14 Q Starting with paragraph -- and I think I'm
15 still sharing -- 113, the counterclaim and cross-claim
16 alleges a claim for unfair and deceptive trade
17 practices. I don't know if you have thought about it
18 in these terms, but do you feel like you have been
19 harmed in any way that is different in this unfair and
20 deceptive trade practices claim than what you have
21 already described?

22 A Can you rephrase that?

23 Q Yes. So as I look at the paragraph 116, it

24 alleges that my clients, plaintiff and Nationstar, and
25 an alleged predecessor engaged in unfair and deceptive

0020

1 acts and practices.

2 What unfair and deceptive trade practices did
3 plaintiff and Nationstar engage in that you're aware
4 of?

5 A I feel that having to continually prepare for
6 coming to court or -- I don't think it was fair to keep
7 leading us toward a goal or a court date. And unfair
8 as well and illegal, I thought, was to continue to pull
9 up the 40(j)s. I feel the deceptive part is -- has
10 been shown today, that my sister, Ashley, had to be a
11 part of this.

12 Q Well, what is deceptive about that?

13 A That it, to me, is an obvious way to, you
14 know, 11th hour try to get to us because of mistakes
15 that have been made.

16 Q So you explained to me what you believe the
17 plaintiff or Nationstar did that was unfair or
18 deceptive. I had previously asked you a few minutes
19 ago about the harm that you had suffered as a result of
20 these parties, and you gave me a description of that.

21 Would you give the same description with
22 respect to things that you consider to be unfair and
23 deceptive?

24 MS. ARNOLD: Objection as to form.

25 THE WITNESS: I feel unfair, deceptive harm

0021

1 all fall under extreme duress and stress in my home.

2 BY MR. TAYLOR:

3 Q And that's the extreme duress and stress
4 you've already discussed with me?

5 A Yes.

6 Q Are you or Mr. Rogers under, you know,
7 treatment for duress or stress?

8 A Not currently, no.

9 Q I mean, has there been any medical treatment
10 related to stress from the litigation?

11 A Yes.

12 Q Okay. What can you -- who was in treatment?

13 A Me.

14 Q And when did that start?

15 A Off and on, for all the years. I don't know
16 a specific start date.

17 Q Okay. And who is the treater, the physician
18 or other professional?

19 A That is also off and on. I don't have their
20 names.

21 Q What kind of treatment have you received?

22 A Therapy at some points. But currently and
23 consistently, antidepressants.

Exhibit B

Curt Rogers 20-48

0001

1 STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
2 COUNTY OF CHARLESTON NINTH JUDICIAL DISTRICT
3
4)
5 DEUTSCHE BANK TRUST COMPANY)
6 AMERICAS, AS TRUSTEE FOR)
7 RESIDENTIAL ACCREDIT LOANS, INC.,)
8 PASS-THROUGH CERTIFICATES 2007-QH2,) CIVIL ACTION NO.
9) 2019-CP-10-04503
10 PLAINTIFF,)
11)
12 v.)
13)
14 ASHLEY JOHNSON BESHERA AS TRUSTEE)
15 OF THE REVOCABLE TRUST AGREEMENT)
16 FOR 2235 SHORELINE DRIVE ORIGINALLY)
17 DATED 3RD DAY OF MARCH 2010;)
18 ET AL.,)
19)
20 DEFENDANTS,)
21)
22)
23 ASHLEY JOHNSON BESHERA AS TRUSTEE)
24 OF THE REVOCABLE TRUST AGREEMENT)
25 FOR 2235 SHORELINE DRIVE ORIGINALLY)
DATED 3RD DAY OF MARCH 2010,)
THIRD-PARTY PLAINTIFF,)
v.)
NATIONSTAR MORTGAGE LLC,)
THIRD-PARTY DEFENDANT.)

DEPOSITION OF CURTIS ROGERS
(TAKEN by THIRD-PARTY DEFENDANT)
ATTENDING VIA ZOOM IN CHARLESTON COUNTY,
SOUTH CAROLINA
APRIL 19, 2022 at 11:26 a.m.

0002

1 ALSO PRESENT: Julie Rogers (Via Zoom)
2 REPORTED BY: Meredith R. Schramek
3 Registered Professional Reporter
4 Notary Public
5 (Via Zoom in Mecklenburg County,
6 North Carolina)

CERTIFICATE OF REPORTER

STATE OF NORTH CAROLINA)
COUNTY OF MECKLENBURG)

I, MEREDITH R. SCHRAMEK, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by Christine Taylor, a notary public authorized by the state of South Carolina; that the testimony of said witness was taken by me to the best of my ability and thereafter reduced to typewriting under my direction; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

This, the 2nd day of May, 2022.

<%21575-Signature%>

MEREDITH R. SCHRAMEK

Notary Public in and for

County of Mecklenburg

State of North Carolina

Notary Number 200814200186

23 good faith, underwent extensive loss mitigation efforts
24 with Plaintiff and/or its alleged predecessors in
25 interest and/or alleged predecessor servicers from 2008

0020

1 through 2011 providing numerous documents on request,
2 requesting loan modifications, and/or short sales
3 making all required payments pursuant to a workout
4 agreement entered into with Plaintiffs and/or its
5 alleged predecessor."

6 So I'm reading this to indicate that you did
7 enter into some kind of workout agreement with the
8 plaintiff or a loan servicer; is that correct?

9 A Yes.

10 Q And what were the basic terms of that?

11 A I can't recall. It was payment towards what
12 I was -- you know, what was late. It was a monthly
13 payment.

14 Q And was that before August 2009?

15 A No.

16 Q It was subsequent to?

17 A Yes.

18 Q And did you complete that workout agreement?

19 A Complete it as in?

20 Q Make all the payments it required?

21 A No.

22 Q Okay. And why were you unable to complete
23 those payments?

24 A I don't recall why. It might have been
25 because we were, you know, offered -- we were trying to

0021

1 short sell the house.

2 Q Okay. Describe for me your attempts to short
3 sell the house.

4 A We had the house on the market for two years.
5 We received two offers that we submitted, neither of
6 which we really ever got an answer on. One stood there
7 for -- I believe it was submitted for about six months.
8 The potential buyer walked away.

9 Q And when did this short sale process start?

10 A I'd have to look at my notes. I don't recall
11 offhand. And I'd have to read this document through.

12 Q You said there were two offers?

13 A Yes.

14 Q Do you remember the amount of either offer?

15 A I believe one was 1.2 million and the other
16 one was 975,000 or nearabouts. Those aren't exact
17 numbers but in the ballpark.

18 Q Paragraph 53 asserts that "Prior to the
19 execution of Assignment 1 on or about July 16, 2009,
20 ALS sent Curt Rogers correspondence with an alleged
21 certified copy of the note and mortgage which are the
22 subject of this action."

23 Do you recall receiving that correspondence?
24 A I do. I don't recall exactly what was
25 documented in that correspondence.

0022

1 Q And is -- ALS, do you recall who that -- what
2 that stands for or who that represents, that acronym?
3 A I believe that was Aurora Loan Services who
4 took over the loan after Homecoming Financial went out
5 of business.
6 Q And had you requested an alleged certified
7 copy of the note and mortgage?
8 A I believe I did.
9 Q And what was your purpose in requesting it?
10 A I don't recall.
11 Q Paragraph 74 states that "Action 3 was called
12 for trial on or about May 12, 2016. And on May 12,
13 2016, Nationstar, as alleged plaintiff, moved to have
14 action three dismissed pursuant to Rule 40(j)."
15 Do you know if you consented to that request?
16 A I believe Sammie can answer that question.
17 Q I'm sorry. I'm just curious if you are
18 aware.
19 A Yes.
20 Q Yes, you're aware?
21 A Yes, I am aware.
22 Q You're aware that you consented?
23 A I don't know what the other options would
24 have been.
25 Q In paragraph 80A, one of the forms of relief

0023

1 you're requesting is something called a declaration.
2 And it says that "The note is unenforceable due to its
3 unconscionable terms specifically including but not
4 limited to negative amortization."
5 Is it your request that you be relieved of
6 any obligation to repay the note?
7 A I believe that no money is due on the note,
8 that it is unenforceable.
9 Q And that would mean that the lender would not
10 be repaid and the current owner of the property would
11 take it?
12 A I believe there are issues with the note and
13 the mortgage.
14 Q Paragraph 83 alleges that "Plaintiff and
15 Nationstar and/or their alleged predecessors in
16 interest made false and misleading representations to
17 Defendants."
18 What false and misleading representations did
19 plaintiff, Nationstar, and/or their alleged
20 predecessors make to you?
21 A I believe it was the chain of title of the
22 note as well as, you know, the pick-and-pay loan.

23 Q Well, could you be more specific? What do
24 you mean the pick-and-pay loan was misrepresented or
25 false?

0024

1 A I believe it would mislead myself to think
2 that I made the interest-only payment that I would be
3 able to continue to stay in the house and would have,
4 you know, additional principal paid toward that
5 removed.

6 Q Well, I mean, if you had made interest-only
7 payment, you would have been able to stay in the house;
8 correct? I mean, let me strike that.

9 You're still in the house; correct?

10 A Yes.

11 Q If you had made the interest-only payment,
12 you would have avoided default; correct?

13 MS. ARNOLD: Object as to form.

14 THE WITNESS: I'm not sure I understand how
15 to answer that. But yes, we were removed from the --
16 this. I guess, with this document, we were removed
17 because we were trying to sell the house. And I was
18 told that we could not be in, you know, a modification
19 situation and also submit a short sale.

20 BY MR. TAYLOR:

21 Q Okay. It sounds like we've moved on from the
22 terms of the loan. So I wish I'd written it down. I
23 think you first mentioned when I asked you what false
24 or misleading misrepresentations plaintiff, Nationstar,
25 or their predecessors had made to you, you said

0025

1 something about the chain of title.

2 And can you describe for me in detail any
3 misrepresentation that was made to you about the chain
4 of title?

5 A The questions were whether or not Nationstar
6 had the right to make the claims they're making given
7 the documents that I reviewed.

8 Q Okay. Can you think of anything specifically
9 that Nationstar represented to you that was false or
10 misleading?

11 A I think at the time that they were
12 representing that they now owned the loan. They
13 didn't -- in fact, with the mortgage and the note, it
14 did not appear that they did own the loan.

15 Q Do you believe someone else owns the loan?

16 A I don't know.

17 Q Have you had any interactions with the
18 plaintiff, which is Deutsche Bank Trust Company of
19 Americas, as trustee for residential Accredited Loans,
20 Inc., pass-through certificates 2007-QH2?

21 A Have I had any correspondence? Is that what
22 you asked?

23 Q Any interaction, verbal, written.
24 A I don't recall that I have, no.
25 Q I don't know what paragraph I was on.

0026

1 MS. ARNOLD: I think you left off at 83 I
2 think is what it was -- the last one I wrote it down,
3 Nathan. Yeah. 83 was the last one I wrote down.
4 BY MR. TAYLOR:
5 Q I think you also mentioned something about
6 maybe not being able to secure a modification if you
7 were attempting to short sell? Are you asserting that
8 anything was misrepresented to you concerning a short
9 sale or a loan modification or any loss mitigation?
10 A Not from your client.
11 Q Okay. And does that mean -- I represent the
12 plaintiff and Nationstar. So I have two clients. Do
13 you believe either the plaintiff or Nationstar
14 misrepresented anything to you concerning loss
15 mitigation, a loan modification, or a short sale?
16 A I believe their predecessors do.
17 Q And who is that?
18 A That would be Aurora Loan Services and
19 Homecomings Financial.
20 Q And Homecomings Financial was the original
21 lender?
22 A That is correct.
23 Q Okay. What did Homecomings Financial
24 misrepresent to you?
25 A I don't recall. I would have to go back and

0027

1 look at my documents.
2 Q What did Aurora Loan Services misrepresent to
3 you?
4 A I was given numerous contacts to call. I
5 would receive a phone call from one person one day and
6 then another person the next day asking the same
7 questions at times. At other times, they would call
8 and ask me completely different questions. One person
9 would say that I could not submit a short sale at the
10 same time of being in a loan modification. And then
11 two days later, I'd get a call saying that, you know,
12 my loan modification had been turned down because I had
13 submitted a short sale. So it was back and forth and
14 completely bungled by Aurora Loan Services.
15 Q And when did this take place?
16 A On or about 2010 -- between 2010 and 2012 I
17 believe. I don't have it in front of me.
18 Q Paragraph 84 says that "Plaintiff,
19 Nationstar, and their alleged predecessors in interest
20 had a pecuniary interest in making the statements."
21 What pecuniary interest does this allege?
22 A I don't recall what statements that is even

23 noting.

24 Q Paragraph 87 alleges that "Defendants
25 justifiably relied on the representations of the

0028

1 Plaintiff and Nationstar and/or their predecessors in
2 interest."

3 Can you explain to me how defendants
4 justifiably relied on representations of plaintiffs and
5 Nationstar and/or their predecessors?

6 A Well, again, like I said in my earlier
7 comment, we were given direction on the phone to do one
8 thing and then two days later given, you know,
9 direction by someone else within that same organization
10 that was saying something different. We would receive
11 knocks on the door from people soliciting on the part
12 of Aurora Loan Services with obviously no interaction
13 and communication with the person who we had just hung
14 up with on the phone. So we did not get a clear
15 representation from anyone as to where we stood at any
16 point.

17 Q But you did not expend or lose any money as a
18 result of your reliance on these representations;
19 correct?

20 MS. ARNOLD: Objection as to form.

21 THE WITNESS: I don't recall.

22 BY MR. TAYLOR:

23 Q Well, I mean, you would recall, wouldn't you
24 not?

25 A I know the checks were written. I don't

0029

1 recall at what point they were cashed, at what point
2 that, you know, we decided that we were getting nowhere
3 in dealing with Aurora Loan Services.

4 Q What checks are you referring to?

5 A There was a check written for one of the
6 workouts for \$5,900 if I remember correctly.

7 Q And that would be a workout agreement that
8 you agreed to?

9 A Yes.

10 Q Starting on paragraph 89 of your counterclaim
11 and cross-claim, you allege a claim for abuse of
12 process. What is your understanding of what abuse of
13 process is?

14 A I believe it was the three actions that were
15 taken against us with regards to the foreclosure. We
16 were ready to go to the foreclosure on each occasion.
17 And at the last -- probably within the last three or
18 four days prior to the hearing, Aurora Loan Services or
19 Nationstar, whoever it was, each independent action
20 stopped and halted the foreclosure action. We were
21 ready to go through with it.

22 Q Did you express that to the Court, that you

23 were ready to go through with it and opposed any
24 further dismissals?

25 A You'll have to ask Sammie that.

0030

1 Q Are you aware of any evidence that plaintiff,
2 Nationstar, or its predecessor was attempting to
3 accomplish anything other than foreclosure of the
4 property through the prior litigation?

5 MS. ARNOLD: Objection as to form.

6 THE WITNESS: I'm not sure what you're
7 talking about. But I guess no.

8 BY MR. TAYLOR:

9 Q Did plaintiff, Nationstar, or any predecessor
10 ever ask you for anything other than money for
11 repayment of the loan?

12 MS. ARNOLD: Objection as to form.

13 THE WITNESS: No.

14 BY MR. TAYLOR:

15 Q Plaintiff, Nationstar, its predecessors never
16 asked you to sell your business to them or engage in
17 some other transaction, that, if you failed to do that,
18 they would sue you for foreclosure; is that correct?

19 MS. ARNOLD: Objection as to form.

20 THE WITNESS: Yes.

21 BY MR. TAYLOR:

22 Q And do you believe that you were harmed by
23 what is alleged here in paragraphs 90 and 91, which I
24 think describes conduct from the prior litigation,
25 Actions 1, 2, and 3? Do you believe you were harmed by

0031

1 those actions?

2 A Undoubtedly.

3 Q And can you describe for me the harm that you
4 suffered?

5 A As I think you've seen, we tried everything
6 possible to give this house back to Aurora Loan
7 Services. We tried to sell it. We tried to do a deed
8 in lieu. We tried the forbearance. We did not fight
9 the foreclosure actions at the time when they first
10 initiated them. We were ready to go. And they
11 continued to bring us up and then dropping us.

12 So yes, my family was harmed with the
13 pressure of dealing with this. I had never been late
14 on anything I'd ever -- any bill or anything. I did
15 not enjoy being where I was in that position, nor did
16 my family.

17 Q I guess I see the filing of a foreclosure
18 action against you as the lender saying, you know, we
19 believe there's a loan. We believe there's a default.
20 There's the power to foreclose in the mortgage. And we
21 want the Court to adjudicate that.

22 And my question is do you contend that you

RECORD0301

23 were harmed by either Aurora or Nationstar or the
24 plaintiff making that assertion in a complaint against
25 you?

0032

1 MS. ARNOLD: Objection as to form.

2 THE WITNESS: With which action?

3 BY MR. TAYLOR:

4 Q Action 1.

5 A No. But the fact that Action 1, you know,
6 was dismissed and then continued Action 2 and Action 3,
7 you know, the yo-yo just continued with any lack of
8 consideration for what it put me as a defendant
9 through.

10 Q Paragraph 93, you allege that "Plaintiff
11 and/or Nationstar improperly used the process of the
12 legal system to attempt to foreclose on the mortgage by
13 failing to name defendants as defendants in Action 4
14 when they were identified in the body of the
15 complaint."

16 Do you believe you were harmed by not being
17 named as a defendant?

18 MS. ARNOLD: Objection as to form.

19 THE WITNESS: I believe the fact that you
20 went after the trustee who was my sister-in-law to get
21 to me was unfair and lacked integrity.

22 BY MR. TAYLOR:

23 Q But you don't own the property; correct?

24 MS. ARNOLD: Objection as to form.

25 THE WITNESS: The property is owned by the

0033

1 trust.

2 BY MR. TAYLOR:

3 Q And I think my question was do you contend
4 that you were harmed by not being named as a defendant?

5 MS. ARNOLD: Objection as to form.

6 THE WITNESS: I do, yes.

7 BY MR. TAYLOR:

8 Q Can you describe for me the harm that you
9 suffered by being omitted from the lawsuit?

10 A Because the lawsuit named me.

11 Q I don't think we're communicating. I take
12 paragraph 93 to allege that you were not named as a
13 defendant.

14 A In that action, correct. But after the three
15 prior actions where I was named, it is obvious that the
16 action was to get to me.

17 Q But because you were not named in Action 4,
18 you did not have to, for instance, hire an attorney to
19 defend Action 4; correct?

20 MS. ARNOLD: Object as to form.

21 THE WITNESS: I don't agree with that.

22 BY MR. TAYLOR:

23 Q Paragraph 96 asserts that "Defendants have
24 sustained actual, statutory, consequential, incidental,
25 compensatory, and special damages.

0034

1 Can you describe for me any actual,
2 consequential, incidental or compensatory or special
3 monetary damages that you have suffered as a result of
4 the conduct that is alleged in paragraphs 90 through 96
5 I think.

6 A Can you ask me that again?

7 Q Sure. Can you describe for me any monetary
8 or financial damages that you have suffered as a result
9 of what you have alleged in this abuse of process
10 claim?

11 A Well, yes. It's hurt my credit. The fact
12 that actions were brought and dropped, you know,
13 damaged myself and my family. It damaged my ability to
14 do what I do, and that is to go out and raise money
15 to -- for projects. It kept me from being in a
16 situation where I could provide for my family. It put
17 my life on hold.

18 Q Have you hired an expert or anything to, you
19 know, try to quantify the damage that you're
20 describing?

21 A Not yet.

22 Q What evidence do you have that the actions
23 described in your abuse of process claim have damaged
24 your credit?

25 A Well, there was a foreclosure pending against

0035

1 me since 2009. So for, you know, the last 13 years,
2 any search of my name in the Charleston County records
3 would show that I'm under foreclosure.

4 Q Okay. But I mean, are you familiar with how
5 credit reporting agencies operate and what effect that
6 had on your credit score?

7 MS. ARNOLD: Objection as to form.

8 THE WITNESS: I'm not necessarily talking
9 about my credit score.

10 BY MR. TAYLOR:

11 Q Okay. Well, what did you mean when you said
12 it affects your credit?

13 A It affects my ability to go out and raise
14 money. And my credit worthiness is in question because
15 this has been ongoing since 2009.

16 Q What do you mean when you say it "affects
17 your ability to raise money"?

18 A Any type of lender would go and look into my
19 name, into who I am. And prior to this, I had no
20 issues. And I was very creditworthy. However, after
21 this foreclosure in 2009, I have been unable to go out
22 and raise money to do projects as I was doing prior to

RECORD0303

23 the foreclosure.

24 Q Has any lender told you that -- have you been
25 declined by any lender for an application for credit?

0036

1 A Yes.

2 Q And when was that?

3 A I believe it was around 2017.

4 Q Okay. And who was the lender?

5 A You know, I was trying to get a loan. I
6 believe it was through Loan Depot. And what occurred
7 was they pulled up our home and saw that it was under
8 foreclosure.

9 Q Was a foreclosure pending in 2017?

10 A It was on our record. It was on our record,
11 yes.

12 Q And has any lender ever told you that it --
13 that they were declining you for credit because of a
14 foreclosure action rather than nonpayment of the debt?

15 MS. ARNOLD: Objection as to form.

16 THE WITNESS: I don't understand the
17 difference.

18 BY MR. TAYLOR:

19 Q Okay. Well, you -- we've looked at the note
20 earlier in your deposition; right?

21 A Right.

22 Q And that was where you promised to repay the
23 loan to the lender; correct?

24 A Correct.

25 Q And you stopped making those payments by

0037

1 August 2009; correct?

2 A Correct.

3 Q And when you stopped making payments on a
4 loan, that affects your credit score; correct?

5 A Yes.

6 MS. ARNOLD: Objection as to form.

7 BY MR. TAYLOR:

8 Q So I think you have been telling me that you
9 suffered damages as a result of credit because the
10 foreclosure was filed. And I'm asking you if anyone
11 has specifically told you that it's because of the
12 foreclosure action rather than the fact that you were
13 not repaying the debt?

14 MS. ARNOLD: Objection as to form.

15 THE WITNESS: Not in so many words. But it's
16 obvious that the two are the same when it comes to
17 someone deciding whether you're creditworthy or not.

18 BY MR. TAYLOR:

19 Q If we scroll down, starting on paragraph 98,
20 you have alleged a claim for malicious prosecution.
21 What's your understanding of what malicious prosecution
22 is?

23 A My understanding is the fact that these
24 actions were brought three times with no ability to
25 complete them, leaving it in turmoil, and, again,

0038

1 leaving us in turmoil.

2 Q Paragraph 107 alleges that "Plaintiff and/or
3 Nationstar lacked probable cause to institute Action
4 Number 3 and further acted with malice in instituting
5 Action Number 3." Do you see that?

6 A Yes.

7 Q Can you tell me why you believe plaintiff or
8 Nationstar lacked probable cause in instituting Action
9 Number 3?

10 A I don't recall the lacking of probable cause.
11 I'm sure there's a reason for it. However, the malice
12 in instituting it and the inability to complete it and
13 prosecute it was evident.

14 Q And can you tell me why you believe that
15 plaintiff and/or Nationstar was acting maliciously?

16 A It appeared they didn't have the ability to
17 fully prosecute by not completing it.

18 Q Well, I mean, if that's true, I guess it
19 could be an honest mistake, or it could be that they
20 were sort of out to get you and Mrs. Rogers.

21 And my question is are you aware of any
22 reason to believe that it was not an honest mistake,
23 whatever we're talking about, and that they were intent
24 on harming you and Mrs. Rogers?

25 MS. ARNOLD: Objection as to form.

0039

1 THE WITNESS: I don't know their intent
2 necessarily, but I do know they did harm us.

3 BY MR. TAYLOR:

4 Q I mean, are you aware of anyone at plaintiff
5 or Nationstar who has a vendetta against you
6 personally?

7 A I think that's irrelevant. I'm not claiming
8 that.

9 Q There's a similar paragraph here in
10 paragraph 111 and 112 to the paragraphs we looked at
11 for abuse of process. Do you have any additional
12 monetary damages from this claim of malicious
13 prosecution that we didn't already discuss with respect
14 to your claim for abuse of process?

15 A No.

16 Q Okay. Starting on paragraph 113, there's a
17 claim for unfair trade practices. Do you see that?

18 A Yes.

19 Q And can you tell me what you -- well, first
20 of all, are you aware of anything that the plaintiff
21 did that was unfair or deceptive? And that would be a
22 big, long name. Let's see. Deutsche Bank Trust

23 Company Americas as trustee for residential Accredited
24 Loans, Inc., pass-through certificates 2007-QH2.
25 A I mean, it states simply there what my

0040

1 feeling is about it. I mean, the terms of the note. I
2 was given options that were just so far out. I believe
3 at one point I was given a loan modification offer that
4 if I could pay \$16,000 a month, that, you know, they
5 would do a workout with me. I mean, I don't think any
6 of us in here are going to be paying \$16,000 a month
7 for a mortgage.

8 Q And were you dealing with the plaintiff with
9 respect to that?

10 MS. ARNOLD: Objection as to the form.

11 THE WITNESS: I believe that was with
12 Nationstar.

13 BY MR. TAYLOR:

14 Q Okay. And is it your position that a loan
15 servicer like Nationstar engages in an unfair and
16 deceptive trade practice if they don't offer you a loan
17 modification that sort of is tailored to your needs?

18 MS. ARNOLD: Objection as to form.

19 THE WITNESS: I don't know how to answer that
20 question. You know, there should be a certain
21 understanding by Nationstar and any mortgage company
22 that, you know, when someone's seeking relief to try
23 and work something out, that they ought to give, you
24 know, some attainable ways to get that done and we have
25 never been offered that.

0041

1 BY MR. TAYLOR:

2 Q And paragraph 117 alleges that "Plaintiff
3 and/or Nationstar's unfair and deceptive acts or
4 practices have an impact on the public interest of
5 consumers in this state."

6 Can you describe for me what impact
7 Nationstar's unfair and deceptive acts or practices
8 have had on the public interest?

9 A I would say the pick-and-pay loan is probably
10 the most obvious situation that people have fallen prey
11 to.

12 Q But that was a loan you entered into with
13 Homecomings Financial; correct?

14 MS. ARNOLD: Objection as to form.

15 THE WITNESS: I was entered into that with
16 Aurora Loan Services, who was the predecessor of
17 Nationstar.

18 BY MR. TAYLOR:

19 Q But plaintiff and Nationstar were not present
20 for your loan closing, did not process your loan
21 application, or anything like that; correct?

22 A I believe Aurora Loan Services was

23 representing the plaintiff.

24 Q When was this?

25 A When the pick-and-pay was offered. I'd have

0042

1 to look at the document. I don't have it in front of
2 me.

3 Q 2007?

4 A No. It would have been after that. 2009.

5 Q January 12, 2007, I think is what -- is the
6 date that we have on this note.

7 A Okay.

8 Q Does that sound correct?

9 A Yes.

10 Q And the lender is the -- if you look at
11 paragraph 1, the lender is Homecomings Financial, LLC,
12 f/k/a Homecomings Financial Network, Inc.?

13 A Okay.

14 Q And you've mentioned Aurora a couple of
15 times. I mean, how did you obtain this loan? Did you
16 go to a broker?

17 A Yes, I believe so.

18 Q And was Aurora Loan Services that broker?

19 A No.

20 Q So Aurora did not get involved until after
21 the loan was made; is that correct?

22 MS. ARNOLD: Objection as to form.

23 THE WITNESS: I don't -- I guess, yes. It
24 mean, it appears so.

25

0043

1 BY MR. TAYLOR:

2 Q And was this -- this was not a purchase loan?
3 You already owned this property?

4 A Correct.

5 Q So you refinanced a prior loan with this
6 loan?

7 A Yes.

8 Q And was there any cash-out?

9 A No. You know, I don't recall.

10 Q Fair enough. Paragraph 118 asserts that
11 "Upon information and belief, Plaintiff and Nationstar
12 have engaged in similar acts and practices in the
13 past."

14 What similar acts or practices in the past
15 have plaintiff and Nationstar engaged in that are
16 similar?

17 A I don't know exactly. I'd have to go back
18 and look.

19 Q And paragraph 121, again, alleges damages.
20 Are the damages from the alleged unfair and deceptive
21 acts any different than the damages we discussed in
22 connection with the abuse of process and the malicious

23 prosecution?
24 MS. ARNOLD: Objection as to form.
25 THE WITNESS: I don't know how to answer that

0044

1 question. I would need to look deeper into this.
2 Truthfully it's been a while since I looked at this
3 document.
4 BY MR. TAYLOR:
5 Q Understood. I guess I'm just trying to
6 capture all the monetary damages that you think would
7 be owed to you if you prevailed in this action. And
8 you told me about your credit and that you believe that
9 made it more difficult for you to obtain credit.
10 Any other monetary or financial loss that you
11 have suffered as a result of any of the conduct alleged
12 in your complaint?
13 A There's been quite a bit of duress caused by
14 this on my family as you can imagine. Over 13 years
15 having to deal, you know, with getting to go to a
16 foreclosure three times and then having the rug pulled
17 out from under you before the foreclosure took place.
18 Just the inability of, you know, the plaintiff and
19 Nationstar and the predecessors, the way that they
20 botched up this foreclosure is -- I wouldn't wish it on
21 anybody.
22 Q And just so I understand, you're describing
23 the duress of being in a foreclosure action, the
24 litigation of it?
25 A For 13 years, yes.

0045

1 Q I mean, would it have been less stressful if
2 the foreclosure had been granted and the property had
3 been sold?
4 A With the first action, yes.
5 Q You would have preferred to have had the
6 property foreclosed and you would have been
7 dispossessed of it?
8 MS. ARNOLD: Objection as to form.
9 THE WITNESS: I've done everything I could to
10 do the right thing and to give this property back in
11 2009 and moving forward. But what has occurred with
12 the last two actions and then the fourth action going
13 after my sister-in-law, going around me to go to my
14 sister-in-law, yeah. It's completely unfair.
15 Completely wrong on a lot of levels. Financial as
16 well.
17 BY MR. TAYLOR:
18 Q Did plaintiff or Nationstar or Aurora ever
19 agree to a short sale?
20 A No.
21 Q So there's no written agreement between you
22 and a buyer and the parties on the lender side short

23 sell the property?
24 A There was written agreement with me and the
25 buyer and an offer on the property that I submitted to

0046

1 Aurora.
2 Q Okay. But that was not approved?
3 A We never received an answer.
4 Q Who submitted the -- who submitted the offer?
5 A I did.
6 Q And how did you do that?
7 A Via fax per Aurora's request.
8 (Exhibit 5 Marked for Identification.)
9 BY MR. TAYLOR:
10 Q And I will show you what I will mark as
11 Exhibit 5. And I'm showing you a fax cover sheet that
12 says from Curt Rogers to loss mitigation group, Aurora
13 Loan Services. And it appears to have been sent on
14 June 22, 2010. Is that the -- is this the short sale
15 offer that you are -- you have been referring to?
16 A That's one of them.
17 Q What's that?
18 A That is one of them.
19 Q Okay. And tell me what you -- let's see.
20 That looks like that's Aurora's requirements. And so
21 now I'm looking at a Freddie Mac form. Did you fill
22 this out?
23 A Yes. It looks like it.
24 Q Okay. And so it looks like there's according
25 to this, there were two other lienholders, Harbor

0047

1 National and National City.
2 A Yes.
3 Q Did either of those entities agree to a short
4 sale?
5 A They weren't in a position to agree to a
6 short sale.
7 Q What do you mean by that?
8 A They were in the second -- the second and
9 third position.
10 Q Okay. I'm just asking did you ever make a
11 request to them to also accept a short sale that they
12 responded to?
13 A Well, being a short sale, there was not
14 enough in the sale of the property for anything to
15 remain for them to agree to or not agree to. They were
16 too far down the list.
17 Q Right. But you would want them to release
18 their interest to the new buyer; right?
19 A We never got that far.
20 Q Okay. And this was for -- the purchase price
21 was 1,200,000?
22 A Correct. That's what it says.

RECORD0309

23 Q And who is the -- who is the buyer for this?
24 A I believe this was Utsey.
25 Q Utsey. Okay. And you faxed this -- what did

0048

1 we say? -- June 2010? Did you not have a broker, an
2 agent?

3 A I did.

4 Q Okay. Who was that?

5 A It was -- my mind just went bank. Lisa
6 Newton.

7 Q And I guess why wasn't she handling the
8 request for the short sale?

9 A I don't know.

10 Q Okay. So what happened after you faxed this
11 in June of 2010?

12 A I don't believe we heard back.

13 Q Okay. And was this the -- I think you
14 mentioned that there were two -- another one in the
15 \$975,000 range?

16 A Right.

17 Q Did this one come first, or did the other one
18 come first?

19 A I don't recall. For some reason, I feel like
20 this one came first.

21 Q And when did you say -- I guess, Mr. Utsey
22 decided to walk away at some point; is that correct?

23 A Yes.

24 Q And was that also in 2010?

25 A I want to -- I believe it was actually 2011.

0049

1 I believe Mr. Utsey stayed around for a while.

2 Q And did you have any telephone conversations
3 with anyone about this offer?

4 A At Aurora, yes.

5 Q Okay. And what -- tell me about those.

6 A It's hard for me to recall, because, again,
7 they were conversations. But as I said earlier, I was
8 given a point of contact and spoke with that person for
9 about a week in hopes of getting this approved. Then I
10 got a call the next week from someone else who had no
11 knowledge that I even submitted this.

12 I called my contact, and they said, "Yes.
13 We've submitted it." And then I wasn't able to get in
14 touch with my contact.

15 So it just kind of bounced around. And I do
16 believe, now that you mention it, that my agent did try
17 and make phone calls to see where we stood with it as
18 well. And she was unable to get anything from them.
19 Again, I mean, it was just -- we were doing everything
20 we could to sell the property. Had it listed for two
21 years. I think our asking price was \$2 million at one
22 point when we first started. And you got to remember,

RECORD0310

Exhibit C

Ashley Beshara
11-31

0001

1 STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
2 COUNTY OF CHARLESTON NINTH JUDICIAL DISTRICT
3)
4 DEUTSCHE BANK TRUST COMPANY)
AMERICAS, AS TRUSTEE FOR)
5 RESIDENTIAL ACCREDIT LOANS, INC.,)
PASS-THROUGH CERTIFICATES 2007-QH2,) CIVIL ACTION NO.
6) 2019-CP-10-04503
PLAINTIFF,)
7)
v.)
8)
ASHLEY JOHNSON BESHERA AS TRUSTEE)
9 OF THE REVOCABLE TRUST AGREEMENT)
FOR 2235 SHORELINE DRIVE ORIGINALLY)
10 DATED 3RD DAY OF MARCH 2010;)
ET AL.,)
11)
DEFENDANTS,)
12)
))
13 ASHLEY JOHNSON BESHERA AS TRUSTEE)
OF THE REVOCABLE TRUST AGREEMENT)
14 FOR 2235 SHORELINE DRIVE ORIGINALLY)
DATED 3RD DAY OF MARCH 2010,)
15)
THIRD-PARTY PLAINTIFF,)
16)
v.)
17)
NATIONSTAR MORTGAGE LLC,)
18)
THIRD-PARTY DEFENDANT.)
19)
))
20 -----
21 DEPOSITION OF ASHLEY WILLIAMS
22 (TAKEN by THIRD-PARTY DEFENDANT)
23 ATTENDING VIA ZOOM IN COBB COUNTY, GEORGIA
24 APRIL 19, 2022 at 10:13 a.m.
25

0002

1 ALSO PRESENT: Curt Rogers (Via Zoom)
Julie Rogers (Via Zoom)
2
REPORTED BY: Meredith R. Schramek
3 Registered Professional Reporter
Notary Public
4 (Via Zoom in Mecklenburg County,
North Carolina)

RECORD0312

CERTIFICATE OF REPORTER

STATE OF NORTH CAROLINA)

COUNTY OF MECKLENBURG)

I, MEREDITH R. SCHRAMEK, hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me to the best of my ability and thereafter reduced to typewriting under my direction; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

I further certify that I have no direct contract with any party in this action, and my compensation is based solely on the terms of my subcontractor agreement.

Nothing in the arrangements made for this proceeding impacts my absolute commitment to serve all parties as an impartial officer of the court.

This, the 2nd day of May, 2022.

<%21575, Signature%>

MEREDITH R. SCHRAMEK, RPR, CCR 3040

20 any requires such management in investment and shall
21 collect the income if any therefrom and shall dispose
22 of the net income and principal as follows."
23 Other than holding the property as the
24 trustee, have you done any management, investment,
25 reinvestment, collection of income with respect to this

0010

1 property?
2 A No.
3 Q Have you done anything other than serve as
4 the title holder?
5 A No.
6 Q Do you have any records or bookkeeping or
7 anything related to the affairs of the property?
8 A No. They have been going to my attorney.
9 Q What has been going to your attorney?
10 A Any documents that I might have received.
11 Q Okay. Do you pay taxes for the property?
12 A No.
13 Q Maintain insurance for the property?
14 A No.
15 Q And who requested that you serve in this
16 capacity?
17 A Curt Rogers.
18 Q What is your relationship with him?
19 A He is my brother-in-law.
20 Q Okay. So is Mrs. Rogers your sister?
21 A Yes.
22 Q And are the Rogers incompetent in any way,
23 unable to manage their own affairs?
24 MR. KEYS: Object to the form.
25

0011

1 BY MR. TAYLOR:
2 Q You can answer.
3 A I mean, I'm not a psychiatrist to know
4 whether someone's competent or not. I would say that
5 they are wholly able to manage themselves based on my
6 knowledge.
7 Q There's also some language about the
8 potential for you being removed as the trustee. At any
9 point were you removed, or did you step down as trustee
10 under this agreement?
11 A Yes.
12 Q Okay. Can you describe that for me?
13 A Once I was served with documents about the
14 lawsuit, I became aware of what had been transpiring
15 and asked that I be removed.
16 Q And was that done?
17 A Yes.
18 Q So you are no longer the trustee?
19 A No.

RECORD0314

20 Q When approximately did that happen?
21 A Within the last couple of years. There
22 should be a document somewhere with the legalities.
23 Q Okay. And was a new trustee appointed?
24 A Yes.
25 Q Who is the new trustee?

0012

1 A Lee Beford. Is that his -- Lee Beford.
2 Q Do you know Mr. Beford's address?
3 A No, I do not.
4 Q Do you know if he has any relationship to the
5 Rogers?
6 A He does not to my understanding.
7 Q And is it your understanding that he's
8 serving as trustee under the same instrument that you
9 were?
10 A Yes.
11 MR. KEYS: Object to the form.
12 (Exhibit 2 Marked for Identification.)
13 BY MR. TAYLOR:
14 Q Let's see if I can -- do you see a different
15 document on your screen now?
16 A I believe so.
17 Q Okay. Let's scroll up here. And this is
18 Defendant Ashley Johnson Beshara as trustee of the
19 revocable trust agreement for the property. And this
20 is your amended answer, counterclaim, and third-party
21 complaint.
22 A Okay.
23 Q Do you recognize this?
24 A Yes.
25 Q And I will represent to you -- do you see

0013

1 paragraph 7 there?
2 A Yes.
3 Q And that responds to paragraphs 6 and 7 of
4 the complaint in this action which sets forth the
5 plaintiffs', you know, basis and request for
6 foreclosure. And paragraph 6 and 7 relate to the
7 Rogers taking out the loan, executing a note and
8 mortgage to borrow, I think, \$1,500,000. And your
9 response says that you lack sufficient information to
10 form an opinion and belief.
11 Are you aware of any evidence indicating that
12 the Rogers did not take out a loan and sign a note and
13 mortgage?
14 A I'm not party to the mortgage. I don't have
15 any information.
16 Q Do you see paragraph 24?
17 A Yes.
18 Q And it states that "For a further defense,
19 Defendant alleges that Plaintiff has acted

20 unconscionably and, therefore, precluded from
21 maintaining this action."
22 Can you explain to me what the plaintiff has
23 done that is unconscionable?
24 A They have not shown good faith. They have
25 not agreed to mitigation efforts and not agreed to a

0014

1 short sale, which in my mind, should have happened.

2 Q And you said they have not acted in good
3 faith. Is there any other specific information related
4 to that that you can provide in response?

5 A Not specifically other than what I've read in
6 these documents.

7 Q And you referenced, I think, a short sale and
8 loss mitigation effort. Were you involved in those
9 efforts?

10 A No.

11 Q So would it be fair to say that you have
12 received information from the Rogers about what
13 happened, but you did not witness it?

14 MR. KEYS: Object to form.

15 THE WITNESS: I have learned about this but
16 not necessarily through the Rogers.

17 BY MR. TAYLOR:

18 Q Okay. And how did you learn of it?

19 A Mostly through these documents.

20 Q Okay. Back to my question. You were not
21 present for and did not witness these events related to
22 the short sale or loss mitigation efforts or anything
23 related to the Rogers' loan; is that correct?

24 MR. KEYS: Object to the form.

25 THE WITNESS: The only direct communication I

0015

1 had about these -- the subject matter that you're
2 asking is that I got a phone call a time or two where
3 someone was interested in purchasing the property, and
4 I was told that they were not in a position to sell.

5 BY MR. TAYLOR:

6 Q Who was the caller on the phone?

7 A Someone in real estate.

8 Q And I think you said that you were told they
9 were not in a position to sell?

10 A Correct.

11 Q Who told you? And who is "they"?

12 A Curt told me that they were not in a position
13 to sell.

14 Q That the Rogers were not in the position to
15 sell?

16 A Based on the fact that they had offered to
17 try to sell before and the bank denied them.

18 Q So a person you don't know called you and
19 said, "Is there any potential for selling this

20 property"?
21 A Correct.
22 Q And you relayed that to Mr. Rogers?
23 A Correct.
24 Q And his response was that it could not happen
25 because the lender had previously refused a request for

0016

1 that type of sale?
2 A Correct.
3 Q Paragraph 25 alleges that "Plaintiff has
4 failed to comply with the South Carolina Consumer
5 Protection Code and is precluded from maintaining this
6 action."
7 Are you aware of any way in which the
8 plaintiff failed to comply with the South Carolina
9 Consumer Protection Code?
10 A I don't really know anything about that.
11 Q And are you aware that included in your
12 response is something called a counterclaim and
13 third-party claim?
14 A Yes. I've read that.
15 Q Paragraph 33 states that the note contains
16 unconscionable negative amortization terms. Can you
17 explain what you mean by that?
18 A I think it's self-explanatory. I have
19 nothing further to add.
20 Q Have you ever read the note?
21 A No.
22 Q Paragraph 34 somewhat describes the Rogers'
23 loss mitigation efforts. And just to clarify, other
24 than what you already testified to, receiving a
25 telephone call about the sale, you have no personal

0017

1 knowledge of those efforts; is that correct?
2 MR. KEYS: Object to the form.
3 THE WITNESS: "Of those efforts" meaning the
4 wording in this particular --
5 BY MR. TAYLOR:
6 Q Paragraph? Yes.
7 A Paragraph. Sorry. No. I know nothing else.
8 Q One of the things that is alleged in the
9 complaint is that the Rogers defaulted on the repayment
10 obligations. Do you have any evidence that that's not
11 accurate?
12 MR. KEYS: Object to the form.
13 THE WITNESS: All the mortgage statements
14 have been sent to my attorney.
15 BY MR. TAYLOR:
16 Q Were you personally involved in making
17 payments on the loan?
18 A No.
19 Q So you don't have any firsthand knowledge of

RECORD0317

20 what payments were made and what payments weren't; is
21 that correct?

22 A I do not.

23 MR. KEYS: Object to the form.

24 BY MR. TAYLOR:

25 Q Do you see paragraph 76 and 77?

0018

1 A Yes.

2 Q And it says "For and as a 13th defense and by
3 way of a counterclaim against Plaintiff and as a
4 third-party claim against Nationstar, Defendant is
5 entitled to an accounting from Plaintiff and
6 Nationstar."

7 That's in paragraph 77. Do you know what an
8 accounting is?

9 A Maybe not in legal terms. But I would assume
10 that it was transactions.

11 Q You would assume what was transactions?

12 A Financial transactions is what I would assume
13 "accounting" means.

14 Q Okay.

15 A In this sentence though --

16 Q Go ahead.

17 A I was going to say in this sentence it may
18 not mean financial. An accounting.

19 Q Can you say how an accounting would assist
20 you in this matter?

21 A I think it would show proof of what's due --
22 allegedly due.

23 Q Just so I understand, you don't have any
24 records of the payments that have been made that you
25 could compare that accounting to; is that correct?

0019

1 MR. KEYS: Object to the form.

2 THE WITNESS: No. My attorney has them.

3 BY MR. TAYLOR:

4 Q Did they come from you, or did they come from
5 someone else?

6 A Someone else.

7 Q Did they come from the Rogers?

8 A I do not know.

9 Q If you look at paragraph -- starting with
10 paragraph 78, this is a claim for negligent
11 misrepresentations in your amended answer.

12 Do you see that?

13 A Yes.

14 Q And paragraph 79 states that "Plaintiff,
15 Nationstar, and/or its alleged predecessors in interest
16 made false and misleading statements to Defendants" --
17 I'll add the "S" there -- "Curt and Julie Rogers and/or
18 the Court."

19 Do you see that?

20 A Yes.
21 Q Am I correct that you do not contend that
22 plaintiff, Nationstar, and/or its alleged predecessors
23 made false or misleading misrepresentations to you?
24 MR. KEYS: Object to the form.
25 THE WITNESS: They may have through papers

0020

1 that were sent to my attorney but not to me personally.
2 BY MR. TAYLOR:
3 Q Okay. Well, I guess that's --
4 A Although my attorney represents me.
5 Q Are you aware of any false representation
6 being made directly to you by plaintiff, Nationstar, or
7 its predecessors?
8 A I would have to direct you to my attorney. I
9 don't know how to answer that.
10 Q Well, as you sit here today, you're not able
11 to identify any false representation made directly to
12 you by --
13 MR. KEYS: Object to the form.
14 BY MR. TAYLOR:
15 Q -- plaintiff, Nationstar, or its
16 predecessors?
17 A Directly to me through my attorney.
18 Q What was represented directly to you through
19 your attorney that was false?
20 A The paperwork trail that my attorney received
21 shows false chain of title and note and so forth. So
22 it's misleading.
23 Q And are you referring to things that occurred
24 when the foreclosure was previously litigated against
25 the Rogers?

0021

1 MS. ARNOLD: Objection as to form.
2 THE WITNESS: I don't understand your
3 question.
4 BY MR. TAYLOR:
5 Q Were you involved in any previous lawsuits
6 concerning this property?
7 A No.
8 Q And do you believe that the Rogers were
9 involved in previous lawsuits involving foreclosure of
10 this property?
11 A Yes. Three times.
12 Q And you were not involved in those three
13 previous cases?
14 A No.
15 Q And any representations made in those cases
16 were not made directly to you; correct?
17 MR. KEYS: Object to the form.
18 THE WITNESS: Correct.
19 BY MR. TAYLOR:

20 Q Are you aware of any false or misleading
21 representations made to the Court?
22 MR. KEYS: Object to the form.
23 THE WITNESS: I'm aware through the paperwork
24 that has been presented.
25

0022

1 BY MR. TAYLOR:
2 Q You're aware of what?
3 A False and misleading representations in
4 previous trials? Is that what you're asking?
5 Q Yes. I'm asking if you're aware of
6 plaintiff, Nationstar, or its predecessors making false
7 or misleading representations to the Court. And if so,
8 what representations were made?
9 A I'm aware through the documents that have
10 been uploaded from the previous cases and the
11 attorneys' comments showing things that were done
12 incorrectly that were false and/or misleading regarding
13 the note and the mortgage.
14 Q Were you harmed by any of those false
15 representation?
16 MR. KEYS: Object to the form.
17 THE WITNESS: I feel like the undue stress of
18 all of these proceedings have negatively affected
19 everyone involved. And yes --
20 BY MR. TAYLOR:
21 Q But you weren't involved in the first three
22 proceedings; correct?
23 A Correct.
24 Q You've only been involved in this proceeding?
25 A Correct.

0023

1 Q Paragraph 80 states that "Plaintiff,
2 Nationstar, and/or its alleged predecessors in interest
3 had a pecuniary interest in making the statements."
4 Do you know what pecuniary interest they held
5 in making those statements?
6 A No.
7 Q Paragraph 83 alleges that "Defendant Curt and
8 Julie Rogers justifiably relied upon the
9 representations of the plaintiff and/or its alleged
10 predecessors in interest."
11 Can you explain to me how they relied upon
12 the representations of plaintiff and/or its alleged
13 predecessors in interest?
14 A No.
15 Q Starting with paragraph 85, you have alleged
16 a claim for abuse of process. Do you see that?
17 A Yes.
18 Q Do you know what that means?
19 A Yes.

20 Q What is your understanding of that?
21 A Using the legal system in a way to -- that
22 negatively affects the property at Shoreline Drive.
23 Q So paragraph 86 alleges that "Plaintiff and
24 Nationstar improperly used the process of the legal
25 system to attempt to foreclose on the mortgage by

0024

1 filing suits in Action 1, 2, 3, and 4."
2 And we established, I think, that you were
3 not involved in Action 1, 2, or 3; correct?
4 A Correct.
5 Q Would it be fair to say that plaintiff and
6 Nationstar did not improperly use the process of the
7 legal system against you in Action 1, 2, 3?
8 MR. KEYS: Object to the form.
9 THE WITNESS: Not against me. But it was
10 about the house that is in the trust that I'm involved
11 with.
12 BY MR. TAYLOR:
13 Q Do you believe that plaintiff or Nationstar's
14 use of the legal system in Actions 1, 2, or 3 harmed
15 the property?
16 MR. KEYS: Object to the form.
17 THE WITNESS: So you're asking me if the
18 legal actions harmed the property?
19 BY MR. TAYLOR:
20 Q Correct.
21 A I think that getting clear title down the
22 road could be a problem because of Actions 1, 2, and 3.
23 Q Can you explain that to me?
24 A I don't know. I don't have enough
25 information to explain it in probably a correct way.

0025

1 But having legal action against a property generally
2 causes the title down the road to be blurred in my
3 understanding.
4 Q Are you aware of any evidence that plaintiff
5 or Nationstar was or is attempting to accomplish
6 anything other than foreclosure of the property through
7 the prior litigation or through this action?
8 A It was under my understanding that they also
9 wanted compensation. Hold on. I'm looking. Relief
10 and damages. They wanted property --
11 Q Okay.
12 A -- and damages.
13 Q So other than -- are you referring to relief
14 that is requested in the complaint itself?
15 A I don't know where I got that.
16 Q Okay.
17 A That's -- my impression is that they want the
18 property and relief and damages.
19 Q Are you aware of Nationstar or the plaintiff

20 attempting to accomplish some goal other than
21 foreclosure of the property, repayment of their
22 obligation through the sale of the property in
23 foreclosure?

24 A I don't know.

25 MR. KEYS: Object to the form.

0026

1 BY MR. TAYLOR:

2 Q Paragraph 92 states that "As a result of
3 plaintiff and Nationstar's improper actions as
4 specified herein, Defendant" -- that's you --
5 "individually and/or as fiduciary to Curt and Julie
6 Rogers has sustained actual, statutory, consequential,
7 incidental, compensatory, and special damages in an
8 amount to be determined by the trier of fact at a trial
9 of this case."

10 Can you explain to me any damages that you
11 suffered as a result of Actions 1, 2, or 3?

12 A No.

13 Q Starting with paragraph 94, the answer
14 asserts a third-party claim and counterclaim for
15 something called malicious prosecution.

16 Do you know what malicious prosecution is?

17 A Possibly.

18 Q Okay. What's your understanding?

19 A Malicious is evil. And prosecution means
20 obviously to prosecute someone.

21 Q Okay. And similar to your claim for abuse of
22 process, it would be accurate to say that plaintiff,
23 Nationstar, or its predecessors did not prosecute
24 Actions 1, 2, or 3 against you; correct?

25 MR. KEYS: Object to the form.

0027

1 THE WITNESS: It was against the house trust
2 which I am a party to.

3 BY MR. TAYLOR:

4 Q But you were not a party to those cases;
5 correct?

6 A Correct.

7 Q You were not named in the litigation as a
8 defendant; correct?

9 A Correct.

10 Q And you did not suffer any harm from those
11 prior cases; correct?

12 MR. KEYS: Object to the form.

13 THE WITNESS: I personally did not.

14 BY MR. TAYLOR:

15 Q And do you have any reason to believe that
16 plaintiff in this case or Nationstar or any of the
17 other loan servicers who may have been involved had any
18 evil intent as you said?

19 MR. KEYS: Object to the form.

20 THE WITNESS: I think by continuing to bring
21 suit over and over, there's ill intent.
22 BY MR. TAYLOR:
23 Q I think you said earlier that you don't have
24 any information about whether or not all the payments
25 were made on the loan; is that correct?

0028

1 A I do not.
2 Q And you don't dispute that the Rogers took
3 out a loan of \$1,500,000; is that correct?
4 MR. KEYS: Object to the form.
5 THE WITNESS: I see that in documents. The
6 loan was taken out before the trust was created.
7 BY MR. TAYLOR:
8 Q Correct. And is it your position that, if
9 the Rogers did not repay the loan, that there's no one
10 who should be able to foreclose and sell the property?
11 MR. KEYS: Object to the form.
12 THE WITNESS: Can you reword that, please?
13 BY MR. TAYLOR:
14 Q Sure. If we assume that payments were not
15 made, do you have any reason to believe that some
16 lender is not -- that there is no lender who's entitled
17 to foreclose on this property?
18 MR. KEYS: Object to the form.
19 THE WITNESS: I can't -- I can't answer that.
20 I'm not party to the mortgage. And how I feel one way
21 or another about a bank lending and/or collecting isn't
22 relative I don't think.
23 BY MR. TAYLOR:
24 Q I mean, that may be true. I'm just trying to
25 understand if it's your position in this litigation

0029

1 that the Rogers should get to own the house in
2 perpetuity without making any additional payment?
3 MR. KEYS: Object to the form.
4 THE WITNESS: All right. So reword it again,
5 please.
6 BY MR. TAYLOR:
7 Q Is it your position in this litigation that
8 the loan is unenforceable and that the Rogers should
9 own the house without ever making additional payments?
10 MR. KEYS: Object to the form.
11 THE WITNESS: That's two different questions.
12 The chain of title and the chain of note diverged at
13 some point. So there were errors. And I don't think
14 that they should never have to pay going forward.
15 BY MR. TAYLOR:
16 Q Starting at paragraph 109, you have alleged a
17 claim for unfair trade practices. Do you see that on
18 your screen?
19 A Yes, yes.

20 Q And as I understand it, this claim is also
21 based on the Rogers' interactions with plaintiff or
22 Nationstar or predecessors in interest, not your
23 interaction with plaintiff, Nationstar, or predecessors
24 in interest; is that correct?
25 MR. KEYS: Object to the form.

0030

1 THE WITNESS: Yes.
2 BY MR. TAYLOR:
3 Q So you may believe that those parties engaged
4 in unfair or deceptive practices in the conduct of
5 commerce related to the Rogers but not related to you;
6 is that correct?
7 MR. KEYS: Object to the form.
8 THE WITNESS: Well, it has ultimately come
9 directly to me because here we are.
10 BY MR. TAYLOR:
11 Q In paragraph 113, the amended answer alleges
12 that "Plaintiff and/or Nationstar's unfair and
13 deceptive acts or practices have an impact on the
14 public interest of consumers of this state."
15 Can you explain to me what plaintiff or
16 Nationstar's unfair and deceptive acts have had an
17 impact on the public interest of the consumers of this
18 state?
19 A It shows a willingness to be deceptive in
20 getting what they would like through documents that
21 were improperly administered. And in the interest of
22 public of any consumer who gets loans from a bank, I
23 think that it's unfair and could easily be repeated if
24 not stopped.
25 Q Are you aware of plaintiff's, Nationstar's,

0031

1 or any predecessor's interest having any impact on
2 anyone other than the Rogers?
3 A I do not.
4 Q Paragraph 114 it alleges "Upon information
5 and belief, Plaintiff and Nationstar have engaged in
6 similar acts and practices in the past, including but
7 not limited to" -- well, let me start over.
8 Paragraph 114 alleges that "Plaintiff and
9 Nationstar have engaged in similar acts and practices
10 in the past."
11 Are you aware of any similar acts and
12 practices plaintiff and Nationstar have engaged in in
13 the past?
14 A I'm aware of this civil action case that's
15 noted here, but I do not know details.
16 Q So you're not able to tell me anything about
17 this civil action, 2012-CP-15-00166?
18 A Correct.
19 Q Give me just a minute. I may be done.

20 Just a couple more. You provided some
21 documents in response to a document request from the
22 plaintiff in this matter. Are you aware of that?
23 A Yes.
24 Q And were those documents that you had in your
25 possession, or did they come from some other source?

0032

1 A Some other source.
2 Q And who was that?
3 A The attorney as far as I can tell based on
4 what you may be asking for.
5 Q So you didn't give the documents to your
6 attorney? He already had them?
7 A Correct.
8 MR. KEYS: Object to the form.
9 MR. TAYLOR: Thank you, ma'am. I don't have
10 any other questions for you. Your attorneys are free
11 to ask you questions if they'd like.
12 MR. KEYS: No questions from me.
13 MS. ARNOLD: I have none.
14 (Signature reserved.)
15 (Deposition concluded 11:01 a.m.)
16
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25

0033

1 CERTIFICATE OF REPORTER
2 STATE OF NORTH CAROLINA)
3 COUNTY OF MECKLENBURG)
4 I, MEREDITH R. SCHRAMEK, hereby certify that the
5 witness whose testimony appears in the foregoing deposition
6 was duly sworn by me; that the testimony of said witness
7 was taken by me to the best of my ability and thereafter
8 reduced to typewriting under my direction; that I am
9 neither counsel for, related to, nor employed by any of the
10 parties to the action in which this deposition was taken;
11 and, further, that I am not a relative or employee of any
12 attorney or counsel employed by the parties thereto, nor
13 financially or otherwise interested in the outcome of the
14 action.
15 I further certify that I have no direct contract with
16 any party in this action, and my compensation is based
17 solely on the terms of my subcontractor agreement.
18 Nothing in the arrangements made for this proceeding
19 impacts my absolute commitment to serve all parties as an

RECORD0325

Exhibit D

STATE OF SOUTH CAROLINA

COUNTY OF CharlestonAurora Loan Services, LLC☒ PlaintiffCurtis Rogers, et al v.☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2009-CP-10-5840MOTION AND ORDER INFORMATION
FORM AND COVER SHEET**Plaintiff's Attorney:**John S. Kay #7914; Alan M. Stewart #15576;
John B. Kelchner #13589; H. Guyton Murrell #64134;
Suzannah Hayes #66404; Meredith S. Lee #72593

Address:

Korn Law Firm, PA
PO Box 12369, Columbia, SC 29211-2369
Phone: 803.252.5817 x2052 Fax: 803.231.2105
e-mail: KShirer@kornlawfirm.com

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- ☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing InformationNature of Motion: Order Removing Case from Active DocketEstimated Time Needed: Court Reporter Needed: ☐ YES / ☒ NO**SECTION II: Motion/Order Type**

- ☐ Written motion attached
- ☒ Form Motion/Order

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

Alan M. Stewart
Signature of Attorney for ☒ PlaintiffFebruary 17, 2010
Date submitted**SECTION III: Motion Fee**

- ☒ PAID - AMOUNT: \$ 25.00
- ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy ☐ Motion for Execution (Rule 69, SCRPC)
- ☐ Motion for Publication

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

Name of Court Reporter:

☐ Other:**JUDGE'S SECTION**

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

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by: Date Filed:

☐ MOTION FEE COLLECTED:☐ CONTESTED - AMOUNT DUE:

RECORD0327

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Aurora Loan Services, LLC,

PLAINTIFF,

vs.

Curtis Rogers a/k/a Curits L. Rogers, III, Julie J. Rogers,
National City Bank, Shoreline Farms Community
Association, Inc., and Harbor National Bank,

DEFENDANTS.

F29-04814

IN THE COURT OF COMMON PLEAS

ORDER REMOVING CASE FROM
ACTIVE DOCKET

(NON-JURY MORTGAGE
FORECLOSURE)

C/A NO:2009-CP-103840

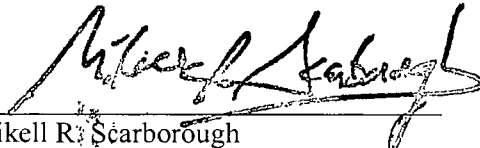
DEFICIENCY WAIVED

FILED
2009 MAR -9 PM 12:54
CLERK OF COURT
JULIE A. STRONG

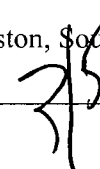
It appearing that the within case was one of foreclosure of a mortgage, and that the parties have agreed to enter into a loss mitigation agreement in an attempt to cure the Defendant(s) arrearage now, upon motion of the Korn Law Firm, P.A., Attorneys for Plaintiff,

IT IS HEREBY ORDERED that this case be struck from the roster of active cases with leave to restore.

AND IT IS SO ORDERED.

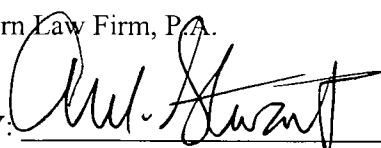

Mikell R. Scarborough
Master in Equity

Charleston, South Carolina

, 2010

I SO MOVE:

Korn Law Firm, P.A.

BY: 

PETER D. KORN / JOHN S. KAY

ALAN M. STEWART / JOHN B. KELCHNER

H. GUYTON MURRELL / SUZANNAH HAYES

MEREDITH S. LEE

Attorneys for the Plaintiff

P. O. Box 11264

1300 Pickens Street

Columbia, SC 29201

(803) 252-5817

RECORD0328

5104-01

**KORN LAW FIRM, P. A.
POST OFFICE BOX 11264
1300 PICKENS STREET
COLUMBIA, SOUTH CAROLINA 29211
(803) 252-5817**

February 24, 2010

The Honorable Mikell R. Scarborough
Master in Equity
100 Broad Street, Suite 266
Charleston, SC 29401

Re: United Companies Lending Corporation vs Curtis Rogers a/k/a Curits L. Rogers, III,
Julie J. Rogers, National City Bank, Shoreline Farms Community Association, Inc., and Harbor
National Bank
Docket No. 2009-CP-10-5840
Our File No. F29-04814

Dear Judge Scarborough:

Enclosed please find the original and two copies of the Order Striking Case from Active Roster with
Leave to Restore on the above referenced case. Please file for record, returning the clocked copy in the
envelope provided within. Please find a check in the amount of \$25.00 for motion fee.

Thank you in advance for your cooperation in this matter.

Very truly yours,



Kayla Shirer
Legal Assistant

/kjs
Enc.

cc:

Alice F. Paylor, Esquire
Attorney for Harbor National Bank
PO Box 893
Charleston, SC 29402

Mary Leigh Arnold, Esquire
Attorney for Curtis and Julie Rogers
749 Johnnie Dodds Blvd., Suite B
Mt. Pleasant, SC 29464

RECORD0329

Aurora Loan

versus

Rogers

Plaintiff

Defendant

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and the verdict has been rendered.
- ☐ **DECISION BY COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other - _____
- ☒ **ACTION STRICKEN (CHECK REASON):** ☒ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding Arbitration, Subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by Court

Dated at Charleston, South Carolina,

2/24/2010

Date

Judge

This judgment was entered on the _____ Day of _____, 20____, and a copy mailed first class to _____ of _____, 20____, to attorneys of record or to parties (when appearing pro-se) as follows:

Attorney(s) for Plaintiff(s)

Attorney(s) for Defendant(s)

Clerk of Court

ELECTRONICALLY FILED - 2023 FEB 01 3:50 PM - CHARLESTON - COMMON PLEAS - CASE#2019CP0004503

FILED

2010 MAR -9 PM 12:52

JULIE J. ARMSTRONG
CLERK OF COURT

BY

Exhibit E

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Aurora Loan Services, LLC,
[X] Plaintiff,
vs.

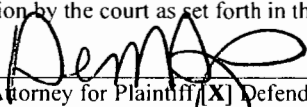
CASE NO. 2009-CP-10-5840

11-CP-10-1005

**MOTION AND ORDER INFORMATION
FORM AND COVER SHEET**

Curtis Rogers, et al.
[] Defendant

check box above indicating submitting party

Name, SC Bar no. and address of Plaintiff's attorney Dean A. Hayes—66066 Korn Law Firm, P.A. 1300 Pickens Street Columbia, SC 29201 Telephone: 803-252-5817 Fax: 803-252-9501 E-mail: collect@kornlawfirm.com Other:		Name, SC Bar no. and address of Defendant's attorney Mary Leigh Arnold— Alice F. Paylor— 749 Johnnie Dodds Blvd., Ste. B 134 Meeting St., Suite 200 Mt. Pleasant, SC 29464 Charleston, SC 29401 Fax: 843-971-6055 Fax: 843-724-8036 Telephone: 843-971-6053 Telephone: 843-266-8105 E-mail: E-mail:	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion:		Court Reporter Needed: YES ☐ NO ☐	
Estimated Time Needed:			
SECTION II: Motion/Order Type			
☐ Written motion attached ☒ Form Motion/Order: Order Restoring Case to the Active Roster I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for Plaintiff ☒ Defendant ☐		2/14/11 Date Submitted	
SECTION III: Motion Fee			
☐ PAID – AMOUNT: ☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect (check reason) ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☒ Other: \$150.00 restore fee			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE CODE: _____ Date:	
CLERK'S VERIFICATION			
Collected by: _____ (print name)		Date File:	
☐ MOTION FEE COLLECTED: ☐ CONTESTED – AMOUNT DUE:			

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Aurora Loan Services, LLC,

PLAINTIFF,

vs.

Curtis Rogers a/k/a Curtis L. Rogers, III, Julie J. Rogers,
National City Bank, Shoreline Farms Community
Association, Inc., and Harbor National Bank,

DEFENDANTS.

F29-04814

IN THE COURT OF COMMON PLEAS

ORDER RESTORING CASE TO
THE ACTIVE ROSTER

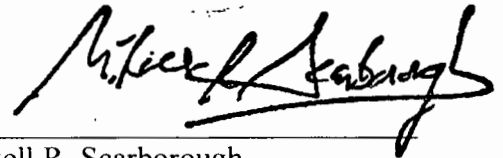
(NON-JURY MORTGAGE
FORECLOSURE)

11-CP-10-1005
C/A NO: 2009-CP-10-5840

DEFICIENCY WAIVED

It appears to the Court that the within case was stricken from active roster pursuant to Rule 40(j) with leave to restore upon filing of the proper motion as required by the Rules of Civil Procedure. The plaintiff filed a Motion to Restore Case to Active Roster on August 26, 2010.

NOW, THEREFORE, IT IS ORDERED THAT THIS case be restored to the active roster and that a hearing be held on the merits, and that final judgment be entered, with appeal to the South Carolina Supreme Court.



Mikell R. Scarborough
Master in Equity

Charleston, South Carolina

2/28, 2011

FILED
2011 MAR 10 AM 9:32
JULIE J. ARMSTRONG
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Aurora Loan Services, LLC,)
Plaintiff,)
vs.)
Curtis Rogers a/k/a Curtis L. Rogers,)
III, Julie J. Rogers, National City)
Bank, Shoreline Farms Community)
Association, Inc., and Harbor)
National Bank)
Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
C/A NO: ~~2009-CP-10-5840~~ **11-CP-10-1805**

CERTIFICATE OF SERVICE

2011 MAR 10 AM 9:32
JULIE J. ARMSTRONG
CLERK OF COURT
BY

I, Elizabeth A. Perkins, an employee of the Korn Law Firm, P.A., attorneys for Plaintiff in the above-captioned action, certify that **PLAINTIFF'S PROPOSED ORDER RESTORING CASE TO ACTIVE ROSTER** was served on counsel for Defendants by causing a copy of the same to be deposited into the United States Mail, addressed as follows:

Alice F. Paylor, Esquire
134 Meeting Street, Suite 200
Charleston, SC 29401
ATTORNEY FOR DEFENDANT
HARBOR NATIONAL BANK

Mary Leigh Arnold, Esquire
749 Johnnie Dodds Blvd., Ste. B
Mt. Pleasant, SC 29464
ATTORNEY FOR DEFENDANTS
CURTIS L. ROGERS, III AND
JULIE J. ROGERS

this 14th day of February, 2011.

KORN LAW FIRM, P.A.


Elizabeth A. Perkins
Paralegal to Dean A. Hayes

Columbia, South Carolina
F29-04814

Exhibit F

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Aurora Loan Services, LLC,)
Plaintiff(s),)

vs.)

Curtis Rogers a/k/a Curtis L. Rogers)
III, Julie J. Rogers, National City)
Bank, Shoreline Farms Community)
Assoc., Inc., and Harbor National)
Bank,)
Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO. ~~2009-CP-10-5840~~
2011-CP-10-1205

**AMENDED ANSWER and COUNTERCLAIM
OF DEFENDANTS**

CURTIS ROGERS and JULIE J. ROGERS

(Jury Trial Demanded)

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2012 FEB 13 PM 3:35

FILED

TO: DEAN HAYES, ATTORNEY FOR PLAINTIFF:

The Defendants Curtis Rogers and Julie J. Rogers (hereinafter referred to as Defendants) answering the Complaint of the Plaintiff herein, and states as follows that:

1. Defendants deny each and every allegation of the Complaint not hereinafter specifically admitted, explained or modified.
2. Defendants lacks knowledge and information sufficient to form and opinion or belief as to the allegations of Paragraph 1, and therefore deny all allegations except that the Defendants Rogers are residents of Charleston County and demands strict proof thereof.
3. The allegations of Paragraph 2 constitute legal conclusions which these Defendants are required neither to admit nor deny.
4. Defendants admit the allegations of Paragraph 3.
5. Answering the allegations of Paragraph 4 and Paragraph 5, Defendants crave reference to the documents identified therein and denies any allegation inconsistent with the

specific terms of said documents.

6. Defendants lacks knowledge and information sufficient to form and opinion or belief as to the allegations of Paragraph 6 and Paragraph 7, and therefore deny the same and demands strict proof thereof.

7. The allegations of Paragraphs 8, 9, 10 and paragraph 11 constitute legal conclusions which these Defendants are required neither to admit nor deny.

8. Answering the allegations of Paragraphs 12, 13, 14 and Paragraph 15, Defendants crave reference to the documents identified therein and denies any allegation inconsistent with the specific terms of said documents.

9. Defendants deny the allegations in Paragraph 16 and demands strict proof thereof.

10. The allegations of Paragraph 17 and Paragraph 18 constitute legal conclusions which these Defendants are required neither to admit nor deny.

11. Defendants deny the allegations in Paragraph 19 and demands strict proof thereof.

12. The allegations of Paragraph 20 constitute legal conclusions which these Defendants are required neither to admit nor deny.

FOR AND AS A FIRST DEFENSE
(Failure to State Claim)

13. Further answering said Complaint and for a further defense thereto Defendants allege that Plaintiff's Complaint fails to set forth a sufficient cause of action.

FOR AND AS A THIRD DEFENSE
(Real Party In Interest and Standing)

14. Further answering said Complaint, and as and for a further defense thereto, Defendants allege that the Complaint fails to name a necessary and real party in

interest and Plaintiff is not the real party or owner of the subject note and mortgage and/or lacks standing and therefore the Complaint should be dismissed.

FOR AND AS A FOURTH DEFENSE
(Work Out Agreement)

15. Further answering said Complaint, and as and for a further defense thereto, Defendants allege that the Plaintiff's cause of actions are barred due to the Workout Agreement reached between the parties.

FOR AND AS A FIFTH DEFENSE
(Novation)

16. Further answering said Complaint, and as and for a further defense thereto, Defendants allege that the Plaintiff's cause of actions are barred under the theory of novation.

FOR AND AS A SIXTH DEFENSE

17. Further answering said Complaint and for a further defense thereto Defendants specifically plead as an affirmative defense to the allegations of the Complaint, accord and satisfaction, comparative negligence, duress, fraud, illegality, laches, estoppel, no contract, statute of limitations, misrepresentation, unclean hands, mistake, payment, release, waiver, lack of consideration, failure to mitigate or any other matter constituting avoidance or affirmative defense which may arise and develop as discovery in this progresses.

FOR AND AS A SEVENTH DEFENSE
(Reservation and Non-Waiver)

18. Defendants reserve and do not waive any additional or further defenses as may be revealed by additional information that may be acquired in discovery

FOR AND AS A EIGHTH DEFENSE AND BY WAY OF COUNTERCLAIM
(Breach of Contract and Good Faith and Fair Dealing)

19. All prior allegations not inconsistent with this cause of action are realleged and incorporated by reference herein.

20. Defendants are residents of the Charleston County State of South Carolina.

21. Plaintiff is an limited liability company organized and existing under the laws of Delaware and doing business in the State of South Carolina.

22. Defendants entered into a note and mortgage with Homecomings Financial as referenced in the subject Complaint.

23. In a letter dated October 27, 2011, Aurora Bank FSB states:

The above referenced loan is a "Payment Option Arm" loan, which allows you to choose among several payment options each month. One of those options is a "minimum payment," which is an amount that is less than the amount needed to pay the interest that has accrued on the loan for the prior month. Because the minium payment does not pay all the interest then due on the loan, the unpaid interest amount accrues and is added to the principal balance of the loan..."

24. At some point and time Plaintiff purportedly acquired at least the servicing rights the note and mortgage. No assignment as been recorded with the Charleston RMC Office transferring the interest created in Homecomings to Plaintiff or any other entity.

25. On or about October 13, 2009 after the commencement of the within action, Plaintiff transmitted to Defendant, Curt Rogers, a proposed workout agreement, a copy of which is attached hereto as Exhibit "A".

26. As requested Defendant Curt Rogers signed the agreement and delivered

simultaneously therewith the required payment.

27. Defendants made the required payments.

28. On or about mid April 2010, Plaintiff telephone Defendants to advise they were being denied a permanent modification.

29. Plaintiff claimed Defendants' were denied a modification because their monthly housing to income ratio is too high. Plaintiff did not provide Defendants with any NPV values or the means by which it determined Defendants housing income ratio is too high.

30. Upon information and belief Plaintiffs further advised Defendants they were denied a modification because they had submitted a short sale proposal to the Plaintiff for consideration.

31. Defendants have suffered emotional distress because of the confusion surrounding Plaintiff's willing to enter into a workout agreement then failing to enter into a permanent modification based on pretextual reasons, failure to enter into a permanent modification, failure to approve a short sale, making inaccurate statements about their account and to improperly reinstate foreclosure proceedings.

32. On or about November 9, 2009 , Defendants by and through their counsel sent to Aurora, a Qualified Written Request (QWR) pursuant to the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. ' 2605(e). The QWR contained Defendant's name and address.

33. Plaintiff entered into the workout agreement referenced above with Defendant, which was supported by valuable consideration and contained sufficiently definite terms to be binding and fully-enforceable agreements. Among the consideration furnished in support of the modifications was Defendant's provision of detailed, additional financial information to Plaintiff and Plaintiff to allow them to assess his eligibility for a loan modification, Defendant's agreement to pay interest on

capitalized amounts (such as arrears, and taxes and insurance and recording fees) that otherwise would not have accrued interest in accordance with the original loan terms, and a restructuring of Defendant's mortgage terms that would enabled him to make timely mortgage payments each month.

34. Every contract has an implied duty of good faith and fair dealing. Plaintiff by failing to properly administer the workout agreement or the Home Modification Program it offers and promotes, disavowing the agreements entered into with Defendant, losing documents submitted by Defendant, failing to timely respond to borrowers requests, filing foreclosure actions against Defendant while Defendants were in an active and ongoing loss mitigation program and negotiations with Plaintiff; and failing to adhere to the terms of the its lost mitigation program and modifications; and failing to offer, or timely offer affordable loss mitigation options to borrowers, for failing to appropriately post payments, rejecting payments, falsely stating past due amounts, reporting to credit agencies default rather than the modified agreements, for failure to give proper credit for payments received and for improper fees charged.

35. Plaintiff breached its agreement and duty of good faith and fair dealing with Defendants by failing to properly administer the Home Modification Program it offers and promotes, losing documents submitted by Defendants, failing to timely respond to borrowers requests, filing foreclosure actions against Defendants while Defendants were in an active and ongoing loss mitigation program and negotiations with Plaintiff; and failing to adhere to the terms of the its lost mitigation program; and failing to offer, or timely offer affordable loss mitigation options to borrowers, for failing to appropriately post payments, for failure to give proper credit for payments received and for improper fees charged

36. As a result of the breach of Plaintiff, Defendants have suffered damages including, but not limited to, lost properties, devaluation and lack of marketability of Defendants'

home, continued accrued interest, damage to credit history, excess charges, improper charges and emotional distress. .

37. Defendants are informed and believe they are entitled to actual, consequential, incidental, expectation, and special damages against Plaintiff in the appropriate amount, costs, and such other and further relief as the court deems just and proper.

FOR AND AS A NINTH DEFENSE AND BY WAY OF COUNTERCLAIM
(Declaratory and Injunctive Relief)

38. Defendants adopt the allegations of paragraphs 1 through 37 and incorporate the same herein by reference as if stated verbatim.

39. Defendants are persons interested under agreements and bring this action pursuant to the Uniform Declaratory Judgments Act, S.C. Code Ann. §§ 15-53-10, et. seq. (Law Co-op. 1976), to determine the validity of and their legal rights and obligations, if any, under the terms of the loan transactions.

40. The Note should be unenforceable due to its unconscionable terms specifically including but not limited to negative amortization. Additionally, and alternatively if the terms of the Note are enforceable and not null and void, then entered the workout agreement between Defendants and Plaintiff should be enforceable. As such, Defendants seek an order declaring the note null, void and unenforceable or in the alternative the terms of the workout agreement enforceable, allowing the Defendants to rescind the loan transactions requiring the return of all payments made to Plaintiff, prohibiting and or enjoining Plaintiffs from declaring the terms of the loan transactions in default, prohibiting and enjoining Plaintiffs from initiating or prosecuting a foreclosure action and/or reforming the loan transactions.

41. Additionally, Defendants seek the disgorgement of Plaintiff's illicit profits, restitution in the amount of excess interest levied by Plaintiff, and modification of the transactions and other relief as set forth in the prayer below.

42. As a result of Plaintiff's unfair improper, and unconscionable lending and servicing practices as described above, Defendants have suffered, and will continue to suffer, severe and irreparable harm and injury.

43. Accordingly, Defendants respectfully ask the Court to enter a preliminary and/ or permanent injunction ordering Plaintiff to cease and desist their unfair and unconscionable lending or servicing practices of attempting to enforce and enforcing loan terms that are unconscionable and / or unreasonable and/or should be modified and subjecting their homes to foreclosure.

FOR AND AS TENTH DEFENSE AND BY WAY OF COUNTERCLAIM
(Unjust Enrichment)

44. Defendants adopt the allegations of paragraphs 1 through 43 and incorporate the same herein by reference as if stated verbatim.

45. Plaintiff has been unjustly enriched at the expense of and to the detriment of Defendants by failing to act in good faith and properly create, implement and administer a modification program.

46. Defendants are informed and believe they are entitled to recover from the Plaintiff all assets and monies improperly withheld and received, any benefits received from the Plaintiff for its breach and inappropriate application of a modification program.

FOR AND AS AN ELEVENTH DEFENSE AND BY WAY OF COUNTERCLAIM
(Negligent Misrepresentation)

47. Defendants adopt the allegations of paragraphs 1 through 46 and incorporate the same herein by reference as if stated verbatim.

48. Plaintiff, as originator and successor and assign or servicer, upon information and belief, made false representations and misleading representations to the Defendants regarding the actual terms of the loan transactions, the application of a modification program, the workout agreement, the short sale program, their compliance with a federally required modification program and internal modification programs, and the availability of a modification.

49. In the course and conduct of offering and servicing the loan, Plaintiff and it is successors misrepresented, expressly or by implication, the terms of the loan (negative amortization) and the availability of a modification and its terms and workout agreement.

50. Plaintiff had a pecuniary interest in making the statements and soliciting the consumers' business by making this agreement.

51. Plaintiff owed a duty of care to see that it communicated truthful information to the consumers.

52. Plaintiff breached that duty by failing to exercise due care.

53. Defendants and all other consumers justifiably relied upon these representations.

54. By virtue of the negligent misrepresentations, the Defendants have been actually damaged and because these representations were willful, intentional, with malice towards the Defendants and with a reckless disregard for the rights of the Defendants, they seek an award of actual and punitive damages in accordance with their prayer for relief.

**FOR AND AS A TWELFTH DEFENSE AND BY WAY OF COUNTERCLAIM
(Accounting)**

55. Defendants adopt the allegations of paragraphs 1 through 54 and incorporate the

same herein by reference as if stated verbatim.

56. Defendants are entitled to an accounting from Plaintiff detailing all payments made, when received, when applied, how applied, interest charged, fees assessed and all other matters relating to the amount claimed owed.

FOR AND AS A THIRTEENTH DEFENSE AND BY WAY OF COUNTERCLAIM
(Promissory Estoppel)

57. Defendants adopt the allegations of paragraphs 1 through 56 and incorporates the same herein by reference as if stated verbatim.

58. Plaintiff made a number of promises to Defendants in connection with its modification of his mortgage and workout agreement.

59. Defendants reasonably relied on Plaintiff's promises by making modified monthly payments on his mortgage.

60. Defendants suffered injury because of his reliance on Plaintiff's promises that their mortgage was modified including, but not limited to, foregoing other loss mitigation options that would have been viable, losing the opportunity to sell his home or file for bankruptcy, and accruing interest on his mortgage. Defendants also suffered injury because Plaintiff improperly reported, upon information and belief, his mortgage account as delinquent to credit reporting agencies, which has damaged his credit rating.

61. As a result of Plaintiff's failure to uphold its promises, Defendants are entitled to
a. actual damages in an amount to be established at trial and costs and disbursements.

FOR AND AS A FOURTEENTH DEFENSE AND BY WAY OF COUNTERCLAIM
(Unfair and Deceptive Trade Practices)

62. Defendant adopts the allegations of paragraphs 1 through 61 and incorporates the same herein by reference as if stated verbatim.

63. Plaintiff through its agents, is engaged in the business of making and servicing mortgage loans in South Carolina for compensation or pecuniary gain.

64. Plaintiff is engaged in commerce as defined in the Unfair Trade Practice Act of South Carolina.

65. Plaintiff engaged in unfair or deceptive acts or practices in the conduct of commerce which is unlawful and in violation of the Unfair Trade Practices Act of South Carolina by, among other things, reneging on a loan modification amounting to a bait and switch and or misleading the consumer to believe they will be able to stay in their home. .

66. Such unfair and deceptive acts or practices proximately cause Defendants actual damages in an amount to be determined by the trier of fact.

67. Plaintiff's unfair and deceptive acts or practices impact on the public interest of consumers in this State and have the potential for repetition.

68. On information and belief, Plaintiff or one or more of Plaintiff's predecessors or agents have engaged in similar acts and practices in the past and are likely to engage in such illegal activities in the future.

69. Defendants believe that they is entitled to have the damages awarded by the trier of fact trebled because of the conduct described herein was willful.

70. Defendants believe that they are entitled to an award of reasonable attorney's fees and expenses of this litigation.

FOR AND AS A FIFTHTEENTH DEFENSE AND BY WAY OF COUNTERCLAIM
(Violation of Truth and Lending)

71. Defendants incorporate all preceding paragraphs as though fully set forth herein.

72. 15 U.S.C.A. § 1601, et seq., is the Federal Truth in Lending Act ("TILA"). The

Federal Reserve Board of Governors implements the Federal Truth in Lending Act through Regulation Z (12 C.F.R. § 226) and its Official Staff Commentary. Compliance by lenders with Regulation Z became mandatory on October 1, 1982. Likewise, Official Staff Commentary issued by the Federal Reserve Board is also binding on all lenders.

73. The purpose of TILA is to protect consumers. This is stated in 12 C.F.R. §226.1, which reads:

§226.17. General disclosure requirements.

(a) Form of Disclosures. (1) The creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, in a form that the consumer may keep. The disclosures shall be grouped together, shall be segregated from everything else, and shall not contain any information not directly related to the disclosure required under §226.18.

74. Plaintiff's Pick a Payment loan violates TILA because Plaintiff or its predecessors failed to comply with the disclosure requirements mandated by Regulation Z and the Official Staff Commentary issued by the Federal Reserve Board. Plaintiff and its predecessor failed in a number of ways to clearly, conspicuously and/or accurately disclose the terms of the Pick a Payment loan to Defendants as Plaintiff was required to do under TILA.

75. As such, Defendants seek redress under the Truth in Lending Act. Defendants are entitled to injunctive relief, redress, restitution, disgorgement, money damages, attorneys' fees, costs and expenses and other equitable relief against Plaintiff for engaging in unfair or deceptive acts or practices and as a result of their violation of TILA.

JURY TRIAL DEMANDED

PRAYER FOR RELIEF

Wherefore, in light of the foregoing, Defendants respectfully request
that this Court:

1. Rescind the underlying mortgage transactions and terminate any security interests created under the transactions;
2. Enjoin the enforcement of the subject note and mortgage;
3. Enjoin the pending foreclosure actions;
4. Award actual, compensatory, punitive and treble damages in an amount to be determined at trial;
5. Award reasonable costs of this action including attorneys' fees;
- and
6. Award all such other and further relief as this Court deems just and proper.

MARY LEIGH ARNOLD, P.A.



Mary Leigh Arnold, Esquire
749 Johnnie Dodds Blvd., Ste. B
Mt. Pleasant, South Carolina 29464
Telephone (843) 971-6053
Fax (843) 971-6055
ATTORNEY FOR DEFENDANTS
CURTIS ROGERS AND JULIE ROGERS

Mt. Pleasant, SC
Dated: February 2, 2012

CERTIFICATE OF SERVICE

I certify that on this 2nd day of February, 2012, a copy of the within Amended Answer and Counterclaim of Defendants Curtis Rogers and Julie Rogers was placed in the United States Mail postage pre-paid, addressed to Plaintiffs counsel as follows:

Dean Hayes, Esquire
Korn Law Firm, P.A
1300 Pickens Street
P. O. Box 11264
Columbia, SC 29211-1264



Mary Leigh Arnold

Exhibit G

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Aurora Loan Services, LLC,)
[X] Plaintiff,)
vs.)

CASE NO. 2011-CP-10-01805

**MOTION AND ORDER INFORMATION
FORM AND COVER SHEET**

Curtis Rogers, et al.)
[] Defendant)
check box above indicating submitting party)

<u>Name, SC Bar no. and address of Plaintiff's attorney</u> Dean A. Hayes—66066 Korn Law Firm, P.A. 1300 Pickens Street Columbia, SC 29201 Telephone: 803-252-5817 Fax: 803-252-9501 E-mail: collect@kornlawfirm.com Other:		<u>Name, SC Bar no. and address of Defendant's attorney</u> Mary Leigh Arnold— Alice F. Paylor— 749 Johnnie Dodds Blvd., Ste. B 134 Meeting St., Suite 200 Mt. Pleasant, SC 29464 Charleston, SC 29401 Fax: 843-971-6055 Fax: 843-724-8036 Telephone: 843-971-6053 Telephone: 843-266-8105 E-mail: E-mail:	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion:		Court Reporter Needed: YES ☐ NO ☐	
Estimated Time Needed:			
SECTION II: Motion/Order Type			
☐ Written motion attached ☒ Form Motion/Order: Order Restoring Case to the Active Roster I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for Plaintiff		 Date Submitted	
SECTION III: Motion Fee			
☒ PAID – AMOUNT: ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect (check reason) ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: \$150.00 restore fee			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE CODE: _____ Date:	
CLERK'S VERIFICATION			
Collected by: _____ (print name)		Date File:	
☐ MOTION FEE COLLECTED: ☐ CONTESTED – AMOUNT DUE:			

RECORD0350

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Aurora Loan Services, LLC,)
Plaintiff,)

C/A NO: 2011-CP-10-01805

vs.)

**ORDER SUBSTITUTING THE
PLAINTIFF AND AMENDING
THE CAPTION**

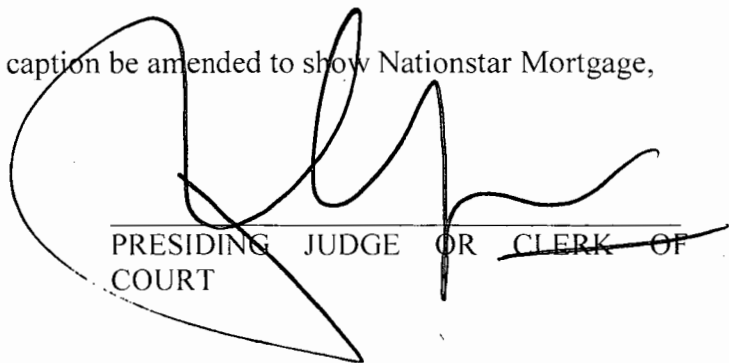
Curtis Rogers a/k/a Curtis L. Rogers,)
III, Julie J. Rogers, National City)
Bank, Shoreline Farms Community)
Association, Inc., and Harbor)
National Bank.)

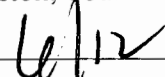
Defendants.)

FILED
2013 JUN 14 AM 9:50
JULIE J. ARMSTRONG
CLERK OF COURT

It appearing to the Court that this action was brought in the name of Aurora Loan Services, LLC, and it appearing that the Note and Mortgage in this case have been assigned to Nationstar Mortgage, LLC, therefore, and on motion of the plaintiff's attorney that Nationstar Mortgage, LLC, should be substituted for Aurora Loan Services, LLC, as the plaintiff, and the caption be amended to show Nationstar Mortgage, LLC, as the proper plaintiff and present lienholder.

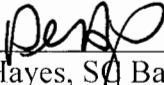
IT IS HEREBY ORDERED that the caption be amended to show Nationstar Mortgage, LLC, as plaintiff.


PRESIDING JUDGE OR CLERK OF
COURT

Charleston, South Carolina
, 2013

[SIGNATURE PAGE TO FOLLOW]

I SO MOVE:



Dean A. Hayes, SC Bar No: 66066
Chris S. Truluck, SC Bar No: 77829
KORN LAW FIRM, P.A.
1300 Pickens Street
Post Office Box 12369
Columbia, SC 29211-2369
Telephone: (803) 231-2022
Facsimile: (803) 231-2060
ATTORNEYS FOR PLAINTIFF

June 7, 2013
Columbia, South Carolina

Exhibit H

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-10-1805

Nationstar Mortgage, LLC

Curtis Rogers, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☒ **ACTION STRICKEN (CHECK REASON):** ☒ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

FILED
2014 JUN 24 AM 9:55
JILLIE J. ARMSTRONG
CLERK OF COURT

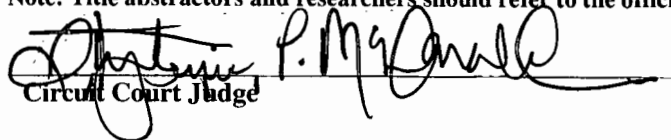
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

2163
Judge Code

6/19/2014
Date

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Nationstar Mortgage, LLC,

Plaintiff,

vs.

Curtis Rogers a/k/a Curtis L. Rogers III, Julie J. Rogers, National City Bank, Shoreline Farms Community Assoc., Inc., and Harbor National Bank,

Defendants.

IN THE COURT OF COMMON PLEAS

**CONSENT ORDER STRIKING CASE
FROM ACTIVE DOCKET PURSUANT
TO RULE 40(j)**(NON-JURY MORTGAGE
FORECLOSURE)

C/A NO: 2011-CP-10-01805

F29-04814

IT APPEARING THAT Plaintiff, Nationstar Mortgage, LLC, with the consent of counsel for Curtis Rogers & Julie J. Rogers request that the above-captioned foreclosure action be stricken from the active roster pursuant to Rule 40(j) with leave to restore.

Pursuant to Rule 40(j), the parties agree that if the case is restored upon motion made upon one year of the date stricken, the statute of limitations shall be tolled during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored.

THEREFORE, IT IS ORDERED that this case be stricken from the active roster with leave to restore.

June 19, 2014
Charleston, SC


PRESIDING JUDGE

2014 JUN 24 AM 9:56
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

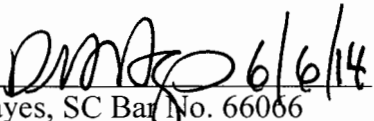
FILED

[CONSENT SIGNATURE PAGE TO FOLLOW]

RECORD0356

WE CONSENT:

KORN LAW FIRM, P.A.



Dean A. Hayes, SC Bar No. 66066
Post Office Box 12369
Columbia, SC 29202
Telephone: (803) 252-5817
ATTORNEY FOR PLAINTIFF

MARY LEIGH ARNOLD, P.A.



Mary Leigh Arnold
749 Johnnie Dodds Boulevard, Suite B
Mount Pleasant, SC 29465
Telephone: (843) 971-6053
ATTORNEY FOR DEFENDANTS ROGERS

A MARY LEIGH ARNOLD P.A.

Attorney and Counselor at Law

June 16, 2014

The Honorable Julie J. Armstrong
Clerk of Court for Charleston County
100 Broad St., Suite 106
Charleston, SC 29401

749 Johnnie Dodds Blvd
Suite B
Mount Pleasant, South Carolina
29464
T 843 971 6053
F 843 971 6055
Sammie@maryarnoldlaw.com

RE.: Nationstar Mortgage, LLC v. Curtis Rogers, et al.
Case No.: 2011-CP-10-1805

Dear Ms. Armstrong:

Please find enclosed, in regard to the above referenced matter, a proposed Consent Order Striking the Case from the Active Docket Pursuant to Rule 40(j), and a corresponding check for said motion. I kindly request that you file the same.

MARY LEIGH ARNOLD, PA


D. Conor Keys

Enclosure:
(as stated)
CC:
Dean Hayes

RECORD0358

ELECTRONICALLY FILED - 2023 Feb 01 3:50 PM - CHARLESTON - COMMON PLEAS - CASE#2019CP1004503

JUN 19 2014
5PM

Exhibit I

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-1971

Aurora Loan Services

Curtis Rogers

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41, SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☒ **ACTION STRICKEN (CHECK REASON):** ☒ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: By consent of the parties, (see attached), this case is Ordered stricken pursuant to Rule 40(j).

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2134
Judge Code

Date

5/13/16

To: Don Michel; 'John B. Kelchner'

Subject: RE: Case 2015CP1001971- Aurora Loan Services Llc VS Curtis Rogers , defendant, et al added to Court Roster for period 2016-05-16 through 2016-05-20.

Thanks Don. Pursuant to my conversation with John I just want a simple Order that says case struck pursuant to Rule 40j. Thanks Sammie

MARY LEIGH ARNOLD, P.A.

749 Johnnie Dodds Blvd, Suite B

Mt. Pleasant, S.C. 29464

(843) 971-6053

email: sammie@maryarnoldlaw.com

CONFIDENTIAL & PRIVILEGED

Unless otherwise indicated or obvious from the nature of the following communication, the information contained herein is attorney-client privileged and confidential information/work product. The communication is intended for the use of the individual or entity named above. If the reader of this transmission is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error or are not sure whether it is privileged, please immediately notify us by return e-mail and destroy any copies, electronic, paper or otherwise, which you may have of this communication.

-----Original Message-----

From: Don Michel [mailto:DMichel@charlestoncounty.org]

Sent: Thursday, May 12, 2016 2:40 PM

To: 'John B. Kelchner'

Cc: 'Sammie Arnold'; 'hayes@hollergarner.com'

Subject: RE: Case 2015CP1001971- Aurora Loan Services Llc VS Curtis Rogers , defendant, et al added to Court Roster for period 2016-05-16 through 2016-05-20.

Thank you very much. We will enter a form order striking the case and attaching these emails to the order. It should be filed at some point next week.

Don

Don Michel

Court Management Supervisor

Charleston County Clerk of Court

Direct: 843-958-5013

<http://clerkofcourt.charlestoncounty.org>

Track your cases at courtplus.org from any internet connected device.

-----Original Message-----

From: John B. Kelchner [mailto:John.Kelchner@hutchenslawfirm.com]

Sent: Thursday, May 12, 2016 2:39 PM

To: Don Michel
Cc: 'Sammie Arnold'; 'hayes@hollergarner.com'
Subject: RE: Case 2015CP1001971- Aurora Loan Services Llc VS Curtis Rogers , defendant, et al added to Court Roster for period 2016-05-16 through 2016-05-20.

Don,

I have been in touch with Nationstar today about this and they are aware of tomorrow's roster meeting and trial roster next week. I do not know if Nationstar will be retaining our services but would request that the case be struck so that Nationstar can retain new counsel.

Thanks, John

Hutchens Law Firm

John B. Kelchner | Associate Attorney

<mailto:John.Kelchner@hutchenslawfirm.com>

240 Stoneridge Drive, Suite 400 | Columbia, SC 29210 P.O. Box 8237 | Columbia, SC 29202
T: 803-726-2700 Ext:2704 | F: 803-726-2832

<http://HutchensLawFirm.com>

-----Original Message-----

From: Don Michel [<mailto:DMichel@charlestoncounty.org>]
Sent: Thursday, May 12, 2016 12:38 PM
To: John B. Kelchner
Cc: 'Sammie Arnold'; 'hayes@hollergarner.com'
Subject: RE: Case 2015CP1001971- Aurora Loan Services Llc VS Curtis Rogers , defendant, et al added to Court Roster for period 2016-05-16 through 2016-05-20.

So I just want to confirm that you have the authority to consent to this 40(j) when you no longer counsel? I will print this email and attach it to the order if so.

Don Michel
Court Management Supervisor
Charleston County Clerk of Court
Direct: 843-958-5013
https://mailgate.hutchenslawfirm.com/enduser/classify_url.html?url=7lnlwZWRWBbaOooyWlwOk46hM1MlkEQVMzgZDRiiubsC/OWZ/rFNWZ6wXDPxNw/2

Track your cases at courtplus.org from any internet connected device.

-----Original Message-----

From: John B. Kelchner [<mailto:John.Kelchner@hutchenslawfirm.com>]
Sent: Thursday, May 12, 2016 12:37 PM

To: Don Michel
Cc: 'Sammie Arnold'; 'hayes@hollergarner.com'
Subject: RE: Case 2015CP1001971- Aurora Loan Services Llc VS Curtis Rogers , defendant, et al added to Court Roster for period 2016-05-16 through 2016-05-20.

Don,

I spoke with Sammie and she consented to the 40(j). Would this email be sufficient to reflect that consent and for the Judge to issue a form 40(j) order?

Thanks, John

Hutchens Law Firm

John B. Kelchner | Associate Attorney

mailto:John.Kelchner@hutchenslawfirm.com

240 Stoneridge Drive, Suite 400 | Columbia, SC 29210 P.O. Box 8237 | Columbia, SC 29202
T: 803-726-2700 Ext:2704 | F: 803-726-2832

<http://HutchensLawFirm.com>

-----Original Message-----

From: Don Michel [mailto:DMichel@charlestoncounty.org]
Sent: Thursday, May 12, 2016 12:34 PM
To: John B. Kelchner
Cc: 'Sammie Arnold'; 'Dean Hayes'
Subject: RE: Case 2015CP1001971- Aurora Loan Services Llc VS Curtis Rogers , defendant, et al added to Court Roster for period 2016-05-16 through 2016-05-20.

John,

Thank you for the update. A 40(j) must be by consent order so we would need that from you and Sammie if you are wishing to proceed that way. Are you able to sign a consent order on their behalf? If not, Judge Young may do an order dismissing it without prejudice. Not sure where this case is on the statute of limitations though so you two talk again and let me know how you would like to proceed?

Don

Don Michel
Court Management Supervisor
Charleston County Clerk of Court
Direct: 843-958-5013
https://mailgate.hutchenslawfirm.com/enduser/classify_url.html?url=7InlwZWRWBbaOooyWlwOk46hM1MlkEQVMzgZDRiiubsC/OWZ/rFNWZ6wXDPxNw/2

Track your cases at courtplus.org from any internet connected device.

-----Original Message-----

From: John B. Kelchner [mailto:John.Kelchner@hutchenslawfirm.com]

Sent: Thursday, May 12, 2016 12:31 PM

To: Don Michel

Cc: 'Sammie Arnold'; 'Dean Hayes'

Subject: RE: Case 2015CP1001971- Aurora Loan Services Llc VS Curtis Rogers , defendant, et al added to Court Roster for period 2016-05-16 through 2016-05-20.

Importance: High

Don,

This is a matter that I handled when I was working at Korn Law Firm. I left Korn in 2014 and the firm retained the file. As you probably know, Korn Law Firm was taken over by Butler & Hosch, which closed last May. Our firm has not been transferred this file. I have reached out to Nationstar to notify them of the meeting tomorrow and roster next week.

Given the unusual circumstances regarding the delay in this case, I would respectfully request that the Court issue an Order Striking the Case from the Active Docket pursuant to Rule 40(j) so that Nationstar can determine how it wishes to proceed. I have spoken with Ms. Arnold who is counsel for the Defendant Curtis Rogers and she has graciously consented to my request to remove the case.

If you have any questions or concerns, please do not hesitate to contact me. I greatly appreciate your consideration in this matter.

John

Hutchens Law Firm

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-----Original Message-----

From: cpas@charlestoncounty.org [mailto:cpas@charlestoncounty.org]

Sent: Thursday, May 12, 2016 8:52 AM

To: John B. Kelchner

Subject: Case 2015CP1001971- Aurora Loan Services Llc VS Curtis Rogers , defendant, et al added to Court Roster for period 2016-05-16 through 2016-05-20.

THE REFERENCED CASE IS ON THE JURY TRIAL ROSTER FOR THE WEEK OF MAY 16, 2016. UNLESS YOU HAVE ALREADY BEEN EXCUSED, ATTENDANCE AT TOMORROW'S ROSTER MEETING IS MANDATORY EITHER ONLINE VIA THE CLERK OF COURT CHAT ROOM OR IN PERSON IN COURTROOM 4B AT 9:30AM. THE COMPLETE LIST OF CASES FOR NEXT WEEK CAN BE FOUND ON THE UPDATE TEXT LINK LOCATED ON THE JURY TRIAL ROSTER ONLINE.

[Insert your disclaimer here]

[Insert your disclaimer here]

[Insert your disclaimer here]

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

}

COURT OF COMMON PLEAS
CASE No. 2019 CP 10 4503

DEUTSCHE BANK TRUST COMPANY
AMERICA, AS TRUSTEE FOR
RESIDENTIAL ACCREDIT LOANS, INC.,
PASS-THROUGH CERTIFICATES 2007-
QH2,

PLAINTIFF,

v.

ASHLEY JOHNSON BESHARA AS
TRUSTEE OF THE REVOCABLE TRUST
AGREEMENT FOR 2235 SHORELINE
DRIVE ORIGINALLY DATED 3RD DAY OF
MARCH 2010; SHORELINE FARMS
COMMUNITY ASSOCIATION, INC.;
WELLS FARGO BANK N.A.; CADLE
ROCK VENTURE, L.P. AND OHIO
LIMITED PARTNERSHIP, CURTIS
ROGERS AND JULIE ROGERS,

DEFENDANTS,

ASHLEY JOHNSON BESHARA AS
TRUSTEE OF THE REVOCABLE TRUST
AGREEMENT FOR 2235 SHORELINE
DRIVE ORIGINALLY DATED 3RD DAY OF
MARCH 2010,

THIRD-PARTY PLAINTIFF,

v.

NATIONSTAR MORTGAGE LLC,

THIRD-PARTY DEFENDANT

DEFENDANTS CURTIS AND
JULIE ROGERS'
MEMORANDUM IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

Defendants, Curtis and Julie Rogers (hereinafter “Defendants” or “Rogers”) submit this memorandum of law in support of their Motion for Summary Judgment filed on September 8, 2022.

INTRODUCTION

Almost fourteen (14) years ago on September 15, 2009 the first of four actions was filed against the Note and Mortgage of the Rogers relating to their primary residence. The same case was repeatedly refiled and dismissed over a period of seven (7) years. In 2011, 2014 and 2016 orders of dismissals were filed. Each time the matter came up for either hearing or trial, the matter was voluntarily dismissed by the plaintiff. There having been three (3) dismissals there is nothing for a Court to do in this repetitive action. The rules of court and procedure, including the two-dismissal rule bar this action which, in fact, is the fourth action brought against the same note and mortgage.

The rules of court and laws are designed so that cases are brought within a certain time period and are ended. They are not designed nor do they allow for the repeated filing of the same matter. The rules of court are simple: you file a suit, you prosecuted it. If you choose not to prosecute your suit you get one opportunity to dismiss. If you refile and choose again not to prosecute your suit and dismiss for a second time, and a third time you administer your own fatal blow. Deutsche’s unwillingness to prosecute the multiple actions previously filed bars this action.

CONCISE STATEMENT OF UNDISPUTED FACTS

Curt Rogers executed a Promissory Note in favor of Homecomings Financial, LLC on January 12, 2007. (hereinafter “CRogers Note) On the same day Curt and Julie Rogers executed a Mortgage in favor of Mortgage Electronic Registration Systems, Inc., as nominee for Homecomings, Financial, LLC. (hereinafter “Rogers Mortgage”). The Rogers’ Mortgage encumbers Curt and Julie Rogers primary residence located at 2235 Shoreline Drive, Johns Island, S.C. 29455. (Blunt Affidavit, ¶ 6, 2019)

On September 15, 2009, a foreclosure action was initiated seeking judicial foreclosure of the CRogers Note and Rogers Mortgage by Aurora Loan Services, LLC claiming to be the present holder of the loan documents. The case was given Civil Action No. 2009-CP-10-5840. (hereinafter “2009 Action”) In paragraph 16 of the Complaint the Plaintiff elected to and did “declare the entire balance of said indebtedness due and payable...” (2009 Complaint, ¶16) On March 9, 2010, the 2009 Action was voluntarily dismissed pursuant to Rule 40(j), SCRCP. (“Dismissal Order 1”)(Ex. A to Rogers Answer)

On March 10, 2011, two years later, the matter was restored at the request of the Plaintiff. Upon restoration a new civil action number was given to the matter: Civil Acton No. 2011-CP-10-1805. (hereinafter “2011 Action”) The identical Complaint used in the 2009 Action was used in the 2011 Action. On June 12, 2013 an Order of Substitution was filed substituting Nationstar Mortgage LLC for Aurora, the new loan servicer or assignee. On March 4, 2014, the Rogers filed a Motion for Summary Judgment. The Rogers motion was noticed by the court for hearing on May 8, 2014 via “Notice of Motions Roster Publication.” (Ex. A, attached hereto, 2011 Action Docket) Shortly thereafter, on June 24, 2014, the case again was dismissed by Order pursuant to Rule 40(j), SCRCP. (“Dismissal Order 2”)(Ex. B to Rogers Answer) Separately, a Form 4 Order was entered. (“Form 4 Order 1”)(Ex B, Rogers Answer) Form 4 Order 1 provides:

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment
by the Court:

ORDER INFORMATION
This order ☒ ends ☐ does not end the case.

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(Ex. B to Rogers Answer)

On April 7, 2015 an Order restoring the 2011 Action was filed. With the restoration and commencement of a third action the case was given the new civil action number: Civil Action No.

2015-CP-10-1971. (hereinafter “2015 Action”). The Complaint in the 2015 Action was identical to the Complaint in the 2009 Action and 2011 Action. Nothing took place in the 2015 Action except for on May 12, 2016 a Notice of Case Roster was sent notifying the parties the case was on the jury roster for the week of May 16, 2016. (Ex. B, attached hereto, 2015 Action Docket). The notice of a potential trial resulted in the third voluntary dismissal of the case. On May 16, 2016, only a Form 4 Order was entered ending the matter. (“Form 4 Order 2”)(Ex. C to Rogers Answer) It provides:

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: **By consent of the parties, (see attached), this case is Ordered stricken pursuant to Rule 40(j).**

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

(Ex C to Rogers Answer)

On August 27, 2019, this action, the fourth action, was filed seeking foreclosure of the CRogers Note and Rogers Mortgage. (hereinafter “2019 Action”) This time the action was commenced by Deutsche Bank and Trusted Company Americas, as Trustee for Residential Accredited Loans, Inc., Pass-Through Certificates 2007-QH2.¹ (hereinafter “Deutsche”) Deutsche in paragraph 2 of its Complaint claims to be “the servicer and/or mortgagee” of the CRogers Note and Rogers Mortgage. Undisputed is the fact that the CRogers Note and Rogers Mortgage that are identified in Paragraphs 7 and 8 of the 2019 Action are the same note and mortgage that were the subject matter of the 2009 Action, 2011 Action and the 2015 Action. (Ex. B., Rogers Mot. Sum. Judg., Deutsche Responses to Admit)

STANDARD OF REVIEW

¹ Deutsche, Aurora and Nationstar are all in privity and basically one in the same. They are all either owners, holders, mortgagees, services or successors in interest to or of the CRogers Note and Rogers Mortgage.

Summary judgment is proper only when it is clear that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). In determining whether any triable issue of fact exists, the evidence and inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *McNair v. Rainsford*, 330 S.C. 332, 341, 499 S.E.2d 488, 493 (Ct.App.1998). In *Baughman v. AT & T*, 306 S.C. 101, 410 S.E.2d 537 (1991), the Supreme Court discussed the moving party's burden to support a summary judgment motion:

Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility "may be discharged by 'showing'— that is, pointing out to the [trial] court—that there is an absence of evidence to support the nonmoving party's case." The moving party need not "support its motion with affidavits or other similar materials *negating* the opponent's claim."

Id. At 115, 410 S.E.2d at 545 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986)). Once a moving party sustains its initial burden, the opposing party cannot rest upon the allegations made in its pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *Midland Mut. Life Ins. Co. v. Harrell*, 331 S.C. 394, 397-98, 503 S.E.2d 189, 190-91 (Ct.App.1998).

LAW AND ARGUMENT

A. **A Rule 40(j) Order is an Order of Dismissal.**

A case that has ended pursuant to Rule 40(j), SCRPC has been dismissed. *Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 630-631, 779 S.E.2d 826 (Ct. App. 2015) ("there is a basis in our law for considering a case stricken pursuant to the rule as the equivalent of dismissed"); and *Pers. Care, Inc. v. Theos*, 825 S.E.2d 281 (Ct. App. 2019)(the procedural posture of the case is

“dismissed” in the context of a Rule 40(j) motion to restore). In *Goodwin*, the Court reasoned when determining whether a Rule 40(j) Order is equivalent to a dismissal, that “the tolling period would not be necessary if striking the case pursuant to Rule 40(j) were not the equivalent of a dismissal.” *Id.* at 831. Indeed, each of the three (3) times a Rule 40(j) Order was filed involving the CRogers Note and Rogers Mortgage, the cases were ended and dismissed.

B. Rule 40(j), SCRCPP Is Not a Tool to Allow for Abusive or Unlimited Dismissals.

By changing the procedure for dismissal of cases when called for trial but not ready under Rule 40(c), SCRCPP, Rule 40(j), SCRCPP did not create an open ended avenue for repeated dismissals. To the contrary.

"If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." *Pers. Care, Inc. v. Theos*, 825 S.E.2d 281 (S.C. App. 2019), *quoting*, *Knotts v. S.C. Dept. of Natural Res.*, 348 S.C. 1, 10, 558 S.E.2d 511, 516 (2002). Rule 40(j), SCRCPP provides:

(j) Case Stricken from Docket by Agreement. A party may strike its complaint, counterclaim, cross-claim or third party claim from any docket **one time** as a matter of right, provided that all parties adverse to that claim, counterclaim, cross-claim or third party claim agree in writing that it may be stricken, and all further agree that if the claim is restored upon motion made within 1 year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored. A party moving to restore a case stricken from the docket shall provide all parties notice of the motion to restore at least 10 days before it is heard. Upon being restored, the case shall be placed on the General Docket and proceed from that date as provided in this rule.

Rule 40(j), SCRCPP replaced Rule 40(3)(c), SCRCPP providing for a new procedure for dismissing and restoring cases. *Graham v. Dorchester County School Dist.*, 339 S.C. 121, 528 S.E.

2d 80 (Ct. App. 2000); and *Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 630, 779 S.E.2d 826, 830 (Ct. App. 2015)("In the notes to the 1994 amendments to the South Carolina Rules of Civil Procedure, Rule 40(j) is described as 'substantially revis[ing] the procedure for dismissing a case previously found in Rule 40(c)(3).'). Rule 40(j), SCRCP revised and restricted the former Rule 40(c)(3), SCRCP, which only struck a case and left it pending before the court. Rule 40(j), SCRCP does not leave a matter pending before the court but rather limits dismissals and, unlike Rule 40(c)(3), provides for the tolling of the statute of limitations for a claim dismissed, if the claim is restored upon motion made within one year of the date of removal. *See, Maxwell v. Genez*, 356 S.C. 617, 621, 591 S.E.2d 26, 28 (2003). "The effect of the [Rule 40(j)] is not to set a new deadline, but to extend the statute of limitations' deadline by applying the rule's tolling provision when the motion to restore is made within a year." *Pers. Care, Inc. v. Theos*, 825, S.E. 2d 281 (Ct. App. 2019), *citing, Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 630, 779 S.E.2d 826, 830 (Ct. App. 2015).

Rule 40(j), SCRCP clearly contemplates a one-time strike. It allows on a singular occasion for the dismissal of a case that protects against a statute of limitations challenge in the future if the Rule is properly followed. *See, Maxwell*, 356, S.C. 617, 622 n. 2, 591 S.E. 2d 26, 28 n. 2 (2003) ("Parties who consent to strike a claim pursuant to Rule 40(j) agree not to challenge the statute of limitations for one year."). Nothing in the Rule suggests it was adopted to allow for anything more than a one-time dismissal. Multiple dismissals are not contemplated or permitted. The Rule is designed to dismiss cases not ready for trial and clear congested dockets under restricted conditions. Nothing in the Rule promotes the idea that a party that refuses to prosecute the action it commenced and bring it to conclusion before the court, can simply repeatedly dismiss and restore as done here. The multiple dismissals ended the matter with finally and precludes the prosecution of a fourth matter.

C. A Party Only Has a Single Opportunity to Voluntarily Dismiss Without Prejudice.

A case dismissed pursuant to Rule 40(j), SCRCP has been compared to a dismissal under Rule 41(a). In the notes to the 1994 Amendments addressing the revisions to 40(j) it is stated: “A case can also be dismissed voluntarily under Rule 41(a).” Rule 40, General Docket, Trial Rosters and Call of Cases for Trial, South Carolina Rules Anno. (SC Bar)(2022 Ed.)).

Rule 41(a), SCRCP houses the long accepted two-dismissal rule. “Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.” Rule 41(a), SCRCP. Rule 41, SCRCP unequivocally states where an action has been previously dismissed the second dismissal operates as an adjudication on the merits.

Both Rules 40(j) and 41(a), SCRCP permit only one voluntary dismissal. “Dismissal, unless otherwise stated, is an adjudication on the merits.” "James F. Flanagan, South Carolina Civil Procedure, 490 (2020 Ed.). The second voluntary dismissal was an adjudication on the merits and therefore with prejudice. Because both the second and third voluntary dismissals functioned as an adjudication on the merits, this forth action by Deutsche is barred. *See, Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986) ("A dismissal 'with prejudice' indicates an adjudication on the merits and, operating as res judicata, precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication."); *Laughon v. O'Braitis*, 360 S.C. 520, 527, 602 S.E.2d 108, 111 (Ct. App. 2004) ("In a subsequent action involving the same subject matter, the dismissal finally settles all matters litigated in the earlier proceedings, and all matters which might have been litigated therein.").

The United States Supreme Court in the case of *Cooter Gell v. Hartmarx Corporation*, 496 U.S. 384, 110 S. Ct. 2447, 10 L. Ed. 2d 359 (1990) was confronted with determining whether a federal court was divested of jurisdiction from determining Rule 11 sanctions for failure to make sufficient pre-filing inquiries to support a complaint, after plaintiff voluntarily dismissed the case pursuant to Rule 41(a)(1), FRCP. Although *Cooter* is not on point, because of certain issues addressed by the Court, it is instructive here.

The Court noted that both Rule 11, FRCP and Rule 41(a)(1), FRCP are aimed at curbing abuses of the judicial system. The Court further noted that:

Rule 41(a)(1) permits a plaintiff to dismiss an action without prejudice only when he files a notice of dismissal before the defendant files an answer or motion for summary judgment and only if the plaintiff has never previously dismissed an action "based on or including the same claim." Once the defendant has filed a summary judgment motion or answer, the plaintiff may dismiss the action only by stipulation, Rule 41(a)(1)(ii), or by order of the court, "upon such terms and conditions as the court deems proper" Rule 41(a)(2). If the plaintiff invokes Rule 41(a)(1) a second time for an "action based on or including the same claim," the action must be dismissed with prejudice.

Id. at 394.

Like the federal rule 41(a)(1), Rules 40(j) and 41(a)(1), SCRCPP, were designed to limit abuses. Rule 40(j), SCRCPP was designed to limit a dismissal to one occasion but only with the consent of all parties. It was designed to afford litigates with limited protection with regard to the statute of limitations once, but only if the proscribed times were followed. Similarly, Rule 41(a) was designed to limit dismissals without prejudice. Thus, like the federal Rule 41(a), Rules 40(j) and 41(a)(1), SCRCPP were aimed at curbing abuse and not allowing successive filings. To permit this fourth action to proceed would be to allow the very abuses Rule 40(j) and 41(a)(1) were designed to preclude.

D. Equity Does Not Reward the Non-Vigilant for their Own Inaction.

“In equity goods guys should win and bad guys should lose.” *SUEM – Spitz’s Ultimate Equitable Maximu: In Equity Good Guys Should Win and Bad Buys Should Loose*, Roger Young and Stephen Spitz, South Carolina Law Review, Vol. 55, Issue 1, Article 7, p. 175 (Fall 2003). Deutsche is responsible for its and its predecessor’s deleterious behavior and the situation it finds itself.

It is now approaching 14 years since the first action on the CRogers Note and Rogers Mortgage was commenced. The matter has been in and out of the court repeatedly with little to no activity on the part of the Deutsche other than allowing time to expire. Deutsche could have avoided the present posture if finds itself in if it had bother to prosecute any of the three prior actions.

Two years lapsed between the filing of 2009 Action and the 2011 Action. Three years after the 2011 Action had commenced with no trial, the Rogers filed a motion for summary judgment. Approximately a month after the Notice of Hearing on the Rogers’ motion had been set the matter was again dismissed. Slightly less than a year later the 2015 Action was filed. No activity took place in the 2015 Action except for the notice of a trial term. Within days of the trial notice the matter was again dismissed. It was another three years thereafter that the 2019 Action was filed. Deutsche did nothing in any of the actions to prosecute the claim. In fact, when the Rogers dispositive motion came up for hearing Deutsche ran and hide. It ran and hide when the matter came up for trial. Deutsche has done nothing but stall and avoid having to prosecute the matter.

In addition to failing to prosecute, Deutsche in the present action has chosen to engage in obstructive discovery behavior. The Rogers propounded upon Deutsche and Nationstar the standard interrogatories provided for in Rule 33(b), SCRCF on April 11, 2022. Rather than provide the names of their corporate witnesses they intend to call to prove their case, they generically responded with “a representative” and no specific name. Pursuant to Rule 11, SCRCF the Rogers wrote to counsel

on May 13, 2022 outlining their deficiencies and recommended reading the Honorable Roger Young's memorandum addressing discovery responses and practices. Receiving no response, on September 7, 2022 the Rogers filed a Motion to Compel which is pending. To date, Deutsche has not identified a witness that will testify on its behalf to prove its case even though the matter has appeared on the jury roster January 9, 2023.²

Contrary to Deutsche and lenders' general belief they are subject to the same rules of law and court as anyone else with no special treatment because they are a financial institution. Nonetheless, Deutsche unlike any other litigate thinks it can dismiss and refile a case as many times as it wishes with impunity. Deutsche thinks it does not have to do the fundamental task of telling the other side the name of the witness it will call at trial to prove its case. Deutsche operates under the misperception the rules of law, procedure and court do not apply to it. Deutsche operates under the misperception it cannot be held accountable for its failures. The bar to Deutsche prosecuting this fourth action is of its own making. The rule of law must be followed and Deutsche should lose because of the choices it has made.

In *Georganne Apparel Inc., v. Todd*, 303 S.C. 87, 399 S. E. 2d 16 (Ct. App. 1990), a trial court's dismissal of an action with prejudice was upheld. The history of *Georganne* is as follows:

- January 1986 initial Complaint was filed;
- September 1986 case struck pursuant to 40(c)(3) at Plaintiff's request;
- September 1987 case restored at Plaintiff's request;
- February 1988 Plaintiff entered consent order limiting claim against Accounts to professional negligence;
- May 1988 Order entered precluding Plaintiff for calling designated expert because of failure to cooperate in setting up expert deposition;
- May 1988 Plaintiff's motion to dismiss pursuant to Rule 41(a)(2) granted without prejudice but with conditions;
- September 1988 Plaintiff filed new complaint adding a party and causes of action;

² When this matter appeared on the January 9, 2023 trial roster Deutsche requested a continuance so all pending motions could be heard.

- November 1988 trial court dismiss case with prejudice finding Plaintiff's addition of parties and causes of action violated the May 1988 Order.

Taking in the totality of circumstances including the violation of the May Order and the fact Plaintiff had been given abundant opportunity to litigate, the Court found no abuse of discretion. "There is a limit beyond which the court should allow a litigate to consume the time of the court and to prolong unnecessarily time, effort and costs to defending parties." *Id.* at 19. As in *Georganna*, taking in the totality of the circumstances specifically including the three (3) dismissals, Deutsche should not be allowed to consume the time of the court a fourth time with an action it chose to voluntarily dismiss three prior times.

CONCLUSION

For the forgoing reasons set forth above, the Rogers have established as a matter of law they are entitled to an order dismissing this action with prejudice based upon the rules of civil procedure, common law and principles of equity.

RESPECTFULLY SUBMITTED,

MARY LEIGH ARNOLD, PA
s/Mary Leigh Arnold (#419)
749 Johnnie Dodds Blvd., Suite B
Mt. Pleasant, SC 29464
Phone: 843-971-6053
sammie@maryarnoldlaw.com



Julie J. Armstrong
Charleston County Clerk of Court

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Aurora Loan Services Llc VS Curtis Rogers , defendant, et al

Case Number:	2015CP1001971	Court Agency:	Common Pleas	Filed Date:	04/07/2015
Case Type:	Common Pleas	Case Sub Type:	Foreclosure 420	File Type:	Jury
Status:	Dismissed	Assigned Judge:	Clerk Of Court C P, G S, And Family Court		
Disposition:	Dismissed per Rule 40J	Disposition Date:	05/16/2016	Disposition Judge:	Young, Roger M. Sr.
Original Source Doc:		Original Case #:		Restore Reason:	Reopen Case for Rule 40J
Judgment Number:		Court Roster:			

Case Parties Find Case Case History Associated Cases Actions Financials						
Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Aurora Loan Services Llc	Order/Dismissal Rule 40J	Order		05/16/2016-09:00		
Kelchner, John Brian	Roster/Notice of Case Roster Publication Sent	Action		05/12/2016-08:51	05/16/2016-08:51	
Arnold, Mary Leigh	Roster/Notice of Case Roster Publication Sent	Action		05/12/2016-08:51	05/16/2016-08:51	
Paylor, Alice F	Roster/Notice of Case Roster Publication Sent	Action		05/12/2016-08:51	05/16/2016-08:51	
Hayes, Dean Anthony	Roster/Notice of Case Roster Publication Sent	Action		05/12/2016-08:51	05/16/2016-08:51	
Brown, Suzanne E.	Roster/Notice of Case Roster Publication Sent	Action		05/12/2016-08:51	05/16/2016-08:51	
Bernstein, Robert Alan	Roster/Notice of Case Roster Publication Sent	Action		05/12/2016-08:51	05/16/2016-08:51	
Robinson, Mindi C.	Roster/Notice of Case Roster Publication Sent	Action		05/12/2016-08:51	05/16/2016-08:51	
Jackman, Robert Powell	Roster/Notice of Case Roster Publication Sent	Action		05/12/2016-08:51	05/16/2016-08:51	
Aurora Loan Services Llc	Order/Restore Case To Active Docket	Order		04/07/2015-09:13	05/16/2016-09:13	

Doc:	Original Case #:	Case:
Judgment Number:	Court Roster:	

Case Parties | Judgments | Tax Map Information | Associated Cases | Actions | Financials

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
	Info: CASE RESTORED. DO NOT FILE ON THIS CASE	Filing		05/05/5555-09:07		
Aurora Loan Services Llc	Order Restoring Case. Filing Fee Paid. See New Case.	Order		04/07/2015-09:06		
Nationstar Mortgage LLC	Notice of Appearance of Atty Hayes & Jackman, crt/mail	Filing		03/13/2015-11:28		
Aurora Loan Services Llc	Certificate/Mortgagor Non-Compliance & crt/srv	Filing		03/13/2015-10:59		
Aurora Loan Services Llc	Order/Dismisal Rule 40J	Order		06/24/2014-11:41		
Aurora Loan Services Llc	Order/Order Filing Fee	Filing		06/18/2014-14:20	06/24/2014-14:20	
Kelchner, John Brian	Roster/Notice of Motions Roster Publication Sent	Action		05/08/2014-11:08	06/24/2014-11:08	
Brown, Suzanne E.	Roster/Notice of Motions Roster Publication Sent	Action		05/08/2014-11:08	06/24/2014-11:08	
Bernstein, Robert Alan	Roster/Notice of Motions Roster Publication Sent	Action		05/08/2014-11:08	06/24/2014-11:08	
Hayes, Dean Anthony	Roster/Notice of Motions Roster Publication Sent	Action		05/08/2014-11:08	06/24/2014-11:08	
Arnold, Mary Leigh	Roster/Notice of Motions Roster Publication Sent	Action		05/08/2014-11:08	06/24/2014-11:08	
Paylor, Alice F	Roster/Notice of Motions Roster Publication Sent	Action		05/08/2014-11:08	06/24/2014-11:08	
Robinson, Mindi C.	Roster/Notice of Motions Roster Publication Sent	Action		05/08/2014-11:08	06/24/2014-11:08	
Arnold, Mary Leigh	Roster/Notice of Motions Roster Publication Sent	Action		05/07/2014-10:12	06/24/2014-10:12	
Paylor, Alice F	Roster/Notice of Motions Roster Publication Sent	Action		05/07/2014-10:12	06/24/2014-10:12	
Hayes, Dean Anthony	Roster/Notice of Motions Roster Publication Sent	Action		05/07/2014-10:12	06/24/2014-10:12	
Brown, Suzanne E.	Roster/Notice of Motions Roster Publication Sent	Action		05/07/2014-10:12	06/24/2014-10:12	
Bernstein, Robert Alan	Roster/Notice of Motions Roster Publication Sent	Action		05/07/2014-10:12	06/24/2014-10:12	
Robinson, Mindi C.	Roster/Notice of Motions Roster Publication Sent	Action		05/07/2014-10:12	06/24/2014-10:12	
Kelchner, John Brian	Roster/Notice of Motions Roster Publication Sent	Action		05/07/2014-10:12	06/24/2014-10:12	
Kelchner, John Brian	Roster/Notice of Motions Roster Publication Sent	Action		04/03/2014-12:06	06/24/2014-12:06	
Robinson, Mindi C.	Roster/Notice of Motions Roster Publication Sent	Action		04/03/2014-12:06	06/24/2014-12:06	
Bernstein, Robert Alan	Roster/Notice of Motions Roster Publication Sent	Action		04/03/2014-12:06	06/24/2014-12:06	
Brown, Suzanne E.	Roster/Notice of Motions Roster Publication Sent	Action		04/03/2014-12:06	06/24/2014-12:06	
Hayes, Dean Anthony	Roster/Notice of Motions Roster Publication Sent	Action		04/03/2014-12:06	06/24/2014-12:06	
Paylor, Alice F	Roster/Notice of Motions Roster Publication Sent	Action		04/03/2014-12:06	06/24/2014-12:06	
Arnold, Mary Leigh	Roster/Notice of Motions Roster Publication Sent	Action		04/03/2014-12:06	06/24/2014-12:06	
Arnold, Mary Leigh	Motion/Summary Judgment by defendant, crt/srv	Motion		03/04/2014-14:10	06/25/2014-14:10	
Rogers, Curtis	Motion/Motion Filing Fee	Filing		03/04/2014-10:38	06/24/2014-10:38	
	Notice of Appearance of Atty Robinson, crt/srv	Filing		03/03/2014-12:59	06/24/2014-12:59	
Aurora Loan Services Llc	Notice/Notice of Hearing & crt/srv	Filing		11/12/2013-09:33	06/24/2014-09:33	
Arnold, Mary Leigh	Roster/Notice of Motions Roster Publication Sent	Action		10/15/2013-15:18	06/24/2014-15:18	
Arnold, Mary Leigh	Roster/Notice of Motions Roster Publication Sent	Action		10/15/2013-15:18	06/24/2014-15:18	
Kelchner, John Brian	Roster/Notice of Motions Roster Publication Sent	Action		10/15/2013-15:18	06/24/2014-15:18	
Kelchner, John Brian	Roster/Notice of Motions Roster Publication Sent	Action		10/15/2013-15:18	06/24/2014-15:18	
Paylor, Alice F	Roster/Notice of Motions Roster Publication Sent	Action		10/15/2013-15:18	06/24/2014-15:18	
Paylor, Alice F	Roster/Notice of Motions Roster Publication Sent	Action		10/15/2013-15:18	06/24/2014-15:18	
Hayes, Dean Anthony	Roster/Notice of Motions Roster Publication Sent	Action		10/15/2013-15:18	06/24/2014-15:18	
Hayes, Dean Anthony	Roster/Notice of Motions Roster Publication Sent	Action		10/15/2013-15:18	06/24/2014-15:18	
Brown, Suzanne E.	Roster/Notice of Motions Roster Publication Sent	Action		10/15/2013-15:18	06/24/2014-15:18	
Brown, Suzanne E.	Roster/Notice of Motions Roster Publication Sent	Action		10/15/2013-15:18	06/24/2014-15:18	
Bernstein, Robert Alan	Roster/Notice of Motions Roster Publication Sent	Action		10/15/2013-15:18	06/24/2014-15:18	
Bernstein, Robert Alan	Roster/Notice of Motions Roster Publication Sent	Action		10/15/2013-15:18	06/24/2014-15:18	
Aurora Loan Services Llc	Motion/Motion Filing Fee	Filing		09/27/2013-16:37	06/24/2014-16:37	
Hayes, Dean Anthony	Motion/Compel by plaintiff, crt/srv	Motion		09/27/2013-14:38	11/15/2013-14:38	
Harbor National Bank Etc	Notice/Appearence of Atty R Bernstein & crt/srv	Filing		07/02/2013-09:29	06/24/2014-09:29	
Rogers, Curtis	Motion/Motion Filing Fee	Filing		07/01/2013-09:36	06/24/2014-09:36	
Arnold, Mary Leigh	Motion/Vacate by defendant, crt/srv	Motion		06/28/2013-11:49	11/15/2013-11:49	
Aurora Loan Services Llc	Order/Substituting the plntff & amending caption	Order		06/14/2013-09:58	06/24/2014-09:58	
Aurora Loan Services Llc	Service/Certificate Of Service	Filing		06/12/2013-09:59	06/24/2014-09:59	
Aurora Loan Services Llc	Order/Order Filing Fee	Filing		06/11/2013-16:30	06/24/2014-16:30	
	Service/Certificate Of Service	Filing		06/06/2013-12:06	06/24/2014-12:06	
Aurora Loan Services Llc	Reply/Reply to defendant Amended Answer & C/claim, crts/srv	Filing		02/29/2012-16:23	06/24/2014-16:23	
	Order/Defnt's mot to amend answer is granted	Order		02/24/2012-08:56	06/24/2014-08:56	
	Amended Answer & Counterclaim of certain dfndnts, JTD & srv	Filing	RECORD0379	02/13/2012-14:53	06/24/2014-14:53	
	Notice/Notice of Hearing & crt/srv	Filing		12/15/2011-14:52	06/24/2014-14:52	
Arnold, Mary Leigh	Roster/Notice of Motions	Action		09/13/2011-10:58	06/24/2014-10:58	

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

}

COURT OF COMMON PLEAS
CASE No. 2019 CP 10 4503

DEUTSCHE BANK TRUST COMPANY
AMERICA, AS TRUSTEE FOR
RESIDENTIAL ACCREDIT LOANS, INC.,
PASS-THROUGH CERTIFICATES 2007-
QH2,

PLAINTIFF,

v.

ASHLEY JOHNSON BESHARA AS
TRUSTEE OF THE REVOCABLE TRUST
AGREEMENT FOR 2235 SHORELINE
DRIVE ORIGINALLY DATED 3RD DAY OF
MARCH 2010; SHORELINE FARMS
COMMUNITY ASSOCIATION, INC.;
WELLS FARGO BANK N.A.; CADLE
ROCK VENTURE, L.P. AND OHIO
LIMITED PARTNERSHIP, CURTIS
ROGERS AND JULIE ROGERS,

DEFENDANTS,

ASHLEY JOHNSON BESHARA AS
TRUSTEE OF THE REVOCABLE TRUST
AGREEMENT FOR 2235 SHORELINE
DRIVE ORIGINALLY DATED 3RD DAY OF
MARCH 2010,

THIRD-PARTY PLAINTIFF,

v.

NATIONSTAR MORTGAGE LLC,

THIRD-PARTY DEFENDANT

**DEFENDANTS'
SUPPLEMENTAL RESPONSE
IN OPPOSITION TO
PLAINTIFF'S AMENDED
MOTION FOR SUMMARY
JUDGMENT**

In supplement to the response submitted jointly by the Defendants, Ashley Beshara, Curtis Rogers and Julie Rogers ("Defendants") in opposition to Plaintiff, Deutsche Bank Trust Company's ("Deutsche") and Third-Party Nationstar Mortgage LLC's ("Nationstar") amended motion for summary judgment, Defendants submit and attach as Exhibit "A" hereto excerpts from the deposition of Defendant Curtis Rogers. (See Exhibit "A" attached hereto)

Respectfully submitted,

s/Mary Leigh Arnold

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1 STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
 2 COUNTY OF CHARLESTON NINTH JUDICIAL DISTRICT
 3

4 DEUTSCHE BANK TRUST COMPANY)
 AMERICAS, AS TRUSTEE FOR)
 5 RESIDENTIAL ACCREDIT LOANS, INC.,)
 PASS-THROUGH CERTIFICATES 2007-QH2,) CIVIL ACTION NO.
 6) 2019-CP-10-04503
 PLAINTIFF,)

7)
 v.)
 8)

9 ASHLEY JOHNSON BESHERA AS TRUSTEE)
 OF THE REVOCABLE TRUST AGREEMENT)
 FOR 2235 SHORELINE DRIVE ORIGINALLY)
 10 DATED 3RD DAY OF MARCH 2010;)
 ET AL.,)

11)
 DEFENDANTS,)
 12)

13 ASHLEY JOHNSON BESHERA AS TRUSTEE)
 OF THE REVOCABLE TRUST AGREEMENT)
 14 FOR 2235 SHORELINE DRIVE ORIGINALLY)
 DATED 3RD DAY OF MARCH 2010,)

15)
 THIRD-PARTY PLAINTIFF,)
 16)

17)
 v.)
 18)

19 NATIONSTAR MORTGAGE LLC,)
)

20 THIRD-PARTY DEFENDANT.)
)

21)
)

22 -----
 23 DEPOSITION OF CURTIS ROGERS
 24 (TAKEN by THIRD-PARTY DEFENDANT)
 25 ATTENDING VIA ZOOM IN CHARLESTON COUNTY,
 SOUTH CAROLINA
 APRIL 19, 2022 at 11:26 a.m.

0016

1 payment, and then there's an option for the fully
2 amortized payment, and then there's an option for the
3 15-year amortized payment?

4 A Yes.

5 Q And so it's my understanding that you can
6 make the interest-only payment, you can make the fully
7 amortized payment, or you could actually make a payment
8 that amortized over 15 years; is that right?

9 MS. ARNOLD: Objection as to form.

10 THE WITNESS: Yes.

11 BY MR. TAYLOR:

12 Q And is it your assertion that, by giving you
13 those three options, that that's unconscionable?

14 A It is.

15 Q Can you explain to me how that is
16 unconscionable?

17 A Payment -- I would not provide any payment
18 towards principal and would be just an ongoing payment.
19 But I believe it said, you know, within 121st payment
20 would be the end of it. And then at that point, the
21 lender would not -- the person paying it would not ever
22 have any equity or principal paid down on the property,
23 which is, in my opinion, unfair.

24 Q Okay. But you were not required to pick
25 Option I; correct?

0017

1 A Given the financial situation I was in, I
2 feel like they fully understood that I would have to
3 select I.

4 Q Well, I mean, under the terms of the note,
5 you were not required to select Option I; is that
6 correct?

7 A It is offered.

8 Q The fully amortized payment was offered;
9 correct?

10 A Yes.

11 Q And you are, I think you said, a graduate of
12 the University of Georgia; correct?

13 A Yes.

14 Q I mean, you obviously can read and understand
15 contracts; correct?

16 MS. ARNOLD: I don't think he heard you.

17 THE WITNESS: I'm sorry. I didn't hear you.

18 BY MR. TAYLOR:

19 Q I'm sorry. You can read and understand
20 contracts?

21 A Yes.

22 Q Do you have on your screen the answer again?

23 A Yes.

24 Q And do you see paragraph 26, "Defendants are
25 beneficiaries of the revocable trust agreement for

0018

1 2235 Shoreline Drive which holds legal title to the
2 property"?
3 A Yes.
4 Q And I guess I wasn't paying attention to this
5 when I started preparing for this, but it seems like
6 the Fiduciary Services, LLC, is the beneficiary of the
7 trust agreement. Do you disagree with that?
8 MS. ARNOLD: Objection as to form.
9 THE WITNESS: It's been quite some time since
10 this was all put together. I don't recall.
11 BY MR. TAYLOR:
12 Q Let's see. Mr. Beford was the
13 representative, the settlor under the trust; correct?
14 A That's what it says.
15 Q Okay. And who is the -- who is the trustee
16 for this revocable trust agreement now?
17 A It is Michael Carmody.
18 Q Who is that?
19 A Michael Carmody.
20 Q Could you spell his last name for me?
21 A C-a-r-m-o-d-y.
22 Q And how long has he been -- when did he
23 become the trustee?
24 A I believe -- I think it says on that
25 document. But I believe it was around 2019, 2020.

0019

1 Q Well, this one has Ashley Johnson Beshara, I
2 think, as the -- as the initial trustee.
3 A Correct.
4 Q And so Ms. Beshara was seceded by
5 Mr. Carmody --
6 A Yes.
7 Q -- as trustee? And has anyone else served as
8 trustee?
9 A No.
10 Q And why did Mr. Carmody become the successor
11 trustee to Ms. Beshara?
12 A Because we asked him to.
13 Q And why did you ask him to do that?
14 A Ashley wanted to be removed.
15 Q And what is -- I'm sorry. Maybe I already
16 asked this. What is your relationship with
17 Mr. Carmody?
18 A He's an acquaintance.
19 Q Is he a business associate?
20 A No.
21 Q In paragraph 38 of the answer and
22 counterclaim and cross-claim, it says "Defendants, in
23 good faith, underwent extensive loss mitigation efforts
24 with Plaintiff and/or its alleged predecessors in
25 interest and/or alleged predecessor servicers from 2008

0020

1 through 2011 providing numerous documents on request,
2 requesting loan modifications, and/or short sales
3 making all required payments pursuant to a workout
4 agreement entered into with Plaintiffs and/or its
5 alleged predecessor."

6 So I'm reading this to indicate that you did
7 enter into some kind of workout agreement with the
8 plaintiff or a loan servicer; is that correct?

9 A Yes.

10 Q And what were the basic terms of that?

11 A I can't recall. It was payment towards what
12 I was -- you know, what was late. It was a monthly
13 payment.

14 Q And was that before August 2009?

15 A No.

16 Q It was subsequent to?

17 A Yes.

18 Q And did you complete that workout agreement?

19 A Complete it as in?

20 Q Make all the payments it required?

21 A No.

22 Q Okay. And why were you unable to complete
23 those payments?

24 A I don't recall why. It might have been
25 because we were, you know, offered -- we were trying to

0021

1 short sell the house.

2 Q Okay. Describe for me your attempts to short
3 sell the house.

4 A We had the house on the market for two years.
5 We received two offers that we submitted, neither of
6 which we really ever got an answer on. One stood there
7 for -- I believe it was submitted for about six months.
8 The potential buyer walked away.

9 Q And when did this short sale process start?

10 A I'd have to look at my notes. I don't recall
11 offhand. And I'd have to read this document through.

12 Q You said there were two offers?

13 A Yes.

14 Q Do you remember the amount of either offer?

15 A I believe one was 1.2 million and the other
16 one was 975,000 or nearabouts. Those aren't exact
17 numbers but in the ballpark.

18 Q Paragraph 53 asserts that "Prior to the
19 execution of Assignment 1 on or about July 16, 2009,
20 ALS sent Curt Rogers correspondence with an alleged
21 certified copy of the note and mortgage which are the
22 subject of this action."

23 Do you recall receiving that correspondence?

24 A I do. I don't recall exactly what was
25 documented in that correspondence.

0022

1 Q And is -- ALS, do you recall who that -- what
2 that stands for or who that represents, that acronym?

3 A I believe that was Aurora Loan Services who
4 took over the loan after Homecoming Financial went out
5 of business.

6 Q And had you requested an alleged certified
7 copy of the note and mortgage?

8 A I believe I did.

9 Q And what was your purpose in requesting it?

10 A I don't recall.

11 Q Paragraph 74 states that "Action 3 was called
12 for trial on or about May 12, 2016. And on May 12,
13 2016, Nationstar, as alleged plaintiff, moved to have
14 action three dismissed pursuant to Rule 40(j)."

15 Do you know if you consented to that request?

16 A I believe Sammie can answer that question.

17 Q I'm sorry. I'm just curious if you are
18 aware.

19 A Yes.

20 Q Yes, you're aware?

21 A Yes, I am aware.

22 Q You're aware that you consented?

23 A I don't know what the other options would
24 have been.

25 Q In paragraph 80A, one of the forms of relief

0023

1 you're requesting is something called a declaration.
2 And it says that "The note is unenforceable due to its
3 unconscionable terms specifically including but not
4 limited to negative amortization."

5 Is it your request that you be relieved of
6 any obligation to repay the note?

7 A I believe that no money is due on the note,
8 that it is unenforceable.

9 Q And that would mean that the lender would not
10 be repaid and the current owner of the property would
11 take it?

12 A I believe there are issues with the note and
13 the mortgage.

14 Q Paragraph 83 alleges that "Plaintiff and
15 Nationstar and/or their alleged predecessors in
16 interest made false and misleading representations to
17 Defendants."

18 What false and misleading representations did
19 plaintiff, Nationstar, and/or their alleged
20 predecessors make to you?

21 A I believe it was the chain of title of the
22 note as well as, you know, the pick-and-pay loan.

23 Q Well, could you be more specific? What do
24 you mean the pick-and-pay loan was misrepresented or
25 false?

0024

1 A I believe it would mislead myself to think
2 that I made the interest-only payment that I would be
3 able to continue to stay in the house and would have,
4 you know, additional principal paid toward that
5 removed.

6 Q Well, I mean, if you had made interest-only
7 payment, you would have been able to stay in the house;
8 correct? I mean, let me strike that.
9 You're still in the house; correct?

10 A Yes.

11 Q If you had made the interest-only payment,
12 you would have avoided default; correct?

13 MS. ARNOLD: Object as to form.

14 THE WITNESS: I'm not sure I understand how
15 to answer that. But yes, we were removed from the --
16 this. I guess, with this document, we were removed
17 because we were trying to sell the house. And I was
18 told that we could not be in, you know, a modification
19 situation and also submit a short sale.

20 BY MR. TAYLOR:

21 Q Okay. It sounds like we've moved on from the
22 terms of the loan. So I wish I'd written it down. I
23 think you first mentioned when I asked you what false
24 or misleading misrepresentations plaintiff, Nationstar,
25 or their predecessors had made to you, you said

0025

1 something about the chain of title.

2 And can you describe for me in detail any
3 misrepresentation that was made to you about the chain
4 of title?

5 A The questions were whether or not Nationstar
6 had the right to make the claims they're making given
7 the documents that I reviewed.

8 Q Okay. Can you think of anything specifically
9 that Nationstar represented to you that was false or
10 misleading?

11 A I think at the time that they were
12 representing that they now owned the loan. They
13 didn't -- in fact, with the mortgage and the note, it
14 did not appear that they did own the loan.

15 Q Do you believe someone else owns the loan?

16 A I don't know.

17 Q Have you had any interactions with the
18 plaintiff, which is Deutsche Bank Trust Company of
19 Americas, as trustee for residential Accredit Loans,
20 Inc., pass-through certificates 2007-QH2?

21 A Have I had any correspondence? Is that what
22 you asked?

23 Q Any interaction, verbal, written.

24 A I don't recall that I have, no.

25 Q I don't know what paragraph I was on.

0026

1 MS. ARNOLD: I think you left off at 83 I
2 think is what it was -- the last one I wrote it down,
3 Nathan. Yeah. 83 was the last one I wrote down.

4 BY MR. TAYLOR:

5 Q I think you also mentioned something about
6 maybe not being able to secure a modification if you
7 were attempting to short sell? Are you asserting that
8 anything was misrepresented to you concerning a short
9 sale or a loan modification or any loss mitigation?

10 A Not from your client.

11 Q Okay. And does that mean -- I represent the
12 plaintiff and Nationstar. So I have two clients. Do
13 you believe either the plaintiff or Nationstar
14 misrepresented anything to you concerning loss
15 mitigation, a loan modification, or a short sale?

16 A I believe their predecessors do.

17 Q And who is that?

18 A That would be Aurora Loan Services and
19 Homecomings Financial.

20 Q And Homecomings Financial was the original
21 lender?

22 A That is correct.

23 Q Okay. What did Homecomings Financial
24 misrepresent to you?

25 A I don't recall. I would have to go back and

0027

1 look at my documents.

2 Q What did Aurora Loan Services misrepresent to
3 you?

4 A I was given numerous contacts to call. I
5 would receive a phone call from one person one day and
6 then another person the next day asking the same
7 questions at times. At other times, they would call
8 and ask me completely different questions. One person
9 would say that I could not submit a short sale at the
10 same time of being in a loan modification. And then
11 two days later, I'd get a call saying that, you know,
12 my loan modification had been turned down because I had
13 submitted a short sale. So it was back and forth and
14 completely bungled by Aurora Loan Services.

15 Q And when did this take place?

16 A On or about 2010 -- between 2010 and 2012 I
17 believe. I don't have it in front of me.

18 Q Paragraph 84 says that "Plaintiff,
19 Nationstar, and their alleged predecessors in interest
20 had a pecuniary interest in making the statements."

21 What pecuniary interest does this allege?

22 A I don't recall what statements that is even
23 noting.

24 Q Paragraph 87 alleges that "Defendants
25 justifiably relied on the representations of the

0028

1 Plaintiff and Nationstar and/or their predecessors in
2 interest."

3 Can you explain to me how defendants
4 justifiably relied on representations of plaintiffs and
5 Nationstar and/or their predecessors?

6 A Well, again, like I said in my earlier
7 comment, we were given direction on the phone to do one
8 thing and then two days later given, you know,
9 direction by someone else within that same organization
10 that was saying something different. We would receive
11 knocks on the door from people soliciting on the part
12 of Aurora Loan Services with obviously no interaction
13 and communication with the person who we had just hung
14 up with on the phone. So we did not get a clear
15 representation from anyone as to where we stood at any
16 point.

17 Q But you did not expend or lose any money as a
18 result of your reliance on these representations;
19 correct?

20 MS. ARNOLD: Objection as to form.

21 THE WITNESS: I don't recall.

22 BY MR. TAYLOR:

23 Q Well, I mean, you would recall, wouldn't you
24 not?

25 A I know the checks were written. I don't

0029

1 recall at what point they were cashed, at what point
2 that, you know, we decided that we were getting nowhere
3 in dealing with Aurora Loan Services.

4 Q What checks are you referring to?

5 A There was a check written for one of the
6 workouts for \$5,900 if I remember correctly.

7 Q And that would be a workout agreement that
8 you agreed to?

9 A Yes.

10 Q Starting on paragraph 89 of your counterclaim
11 and cross-claim, you allege a claim for abuse of
12 process. What is your understanding of what abuse of
13 process is?

14 A I believe it was the three actions that were
15 taken against us with regards to the foreclosure. We
16 were ready to go to the foreclosure on each occasion.
17 And at the last -- probably within the last three or
18 four days prior to the hearing, Aurora Loan Services or
19 Nationstar, whoever it was, each independent action
20 stopped and halted the foreclosure action. We were
21 ready to go through with it.

22 Q Did you express that to the Court, that you
23 were ready to go through with it and opposed any
24 further dismissals?

25 A You'll have to ask Sammie that.

0030

1 Q Are you aware of any evidence that plaintiff,
2 Nationstar, or its predecessor was attempting to
3 accomplish anything other than foreclosure of the
4 property through the prior litigation?

5 MS. ARNOLD: Objection as to form.

6 THE WITNESS: I'm not sure what you're
7 talking about. But I guess no.

8 BY MR. TAYLOR:

9 Q Did plaintiff, Nationstar, or any predecessor
10 ever ask you for anything other than money for
11 repayment of the loan?

12 MS. ARNOLD: Objection as to form.

13 THE WITNESS: No.

14 BY MR. TAYLOR:

15 Q Plaintiff, Nationstar, its predecessors never
16 asked you to sell your business to them or engage in
17 some other transaction, that, if you failed to do that,
18 they would sue you for foreclosure; is that correct?

19 MS. ARNOLD: Objection as to form.

20 THE WITNESS: Yes.

21 BY MR. TAYLOR:

22 Q And do you believe that you were harmed by
23 what is alleged here in paragraphs 90 and 91, which I
24 think describes conduct from the prior litigation,
25 Actions 1, 2, and 3? Do you believe you were harmed by

0031

1 those actions?

2 A Undoubtedly.

3 Q And can you describe for me the harm that you
4 suffered?

5 A As I think you've seen, we tried everything
6 possible to give this house back to Aurora Loan
7 Services. We tried to sell it. We tried to do a deed
8 in lieu. We tried the forbearance. We did not fight
9 the foreclosure actions at the time when they first
10 initiated them. We were ready to go. And they
11 continued to bring us up and then dropping us.

12 So yes, my family was harmed with the
13 pressure of dealing with this. I had never been late
14 on anything I'd ever -- any bill or anything. I did
15 not enjoy being where I was in that position, nor did
16 my family.

17 Q I guess I see the filing of a foreclosure
18 action against you as the lender saying, you know, we
19 believe there's a loan. We believe there's a default.
20 There's the power to foreclose in the mortgage. And we
21 want the Court to adjudicate that.

22 And my question is do you contend that you
23 were harmed by either Aurora or Nationstar or the
24 plaintiff making that assertion in a complaint against
25 you?

0032

1 MS. ARNOLD: Objection as to form.

2 THE WITNESS: With which action?

3 BY MR. TAYLOR:

4 Q Action 1.

5 A No. But the fact that Action 1, you know,
6 was dismissed and then continued Action 2 and Action 3,
7 you know, the yo-yo just continued with any lack of
8 consideration for what it put me as a defendant
9 through.

10 Q Paragraph 93, you allege that "Plaintiff
11 and/or Nationstar improperly used the process of the
12 legal system to attempt to foreclose on the mortgage by
13 failing to name defendants as defendants in Action 4
14 when they were identified in the body of the
15 complaint."

16 Do you believe you were harmed by not being
17 named as a defendant?

18 MS. ARNOLD: Objection as to form.

19 THE WITNESS: I believe the fact that you
20 went after the trustee who was my sister-in-law to get
21 to me was unfair and lacked integrity.

22 BY MR. TAYLOR:

23 Q But you don't own the property; correct?

24 MS. ARNOLD: Objection as to form.

25 THE WITNESS: The property is owned by the

0034

1 Can you describe for me any actual,
2 consequential, incidental or compensatory or special
3 monetary damages that you have suffered as a result of
4 the conduct that is alleged in paragraphs 90 through 96
5 I think.

6 A Can you ask me that again?

7 Q Sure. Can you describe for me any monetary
8 or financial damages that you have suffered as a result
9 of what you have alleged in this abuse of process
10 claim?

11 A Well, yes. It's hurt my credit. The fact
12 that actions were brought and dropped, you know,
13 damaged myself and my family. It damaged my ability to
14 do what I do, and that is to go out and raise money
15 to -- for projects. It kept me from being in a
16 situation where I could provide for my family. It put
17 my life on hold.

18 Q Have you hired an expert or anything to, you
19 know, try to quantify the damage that you're
20 describing?

21 A Not yet.

22 Q What evidence do you have that the actions
23 described in your abuse of process claim have damaged
24 your credit?

25 A Well, there was a foreclosure pending against

0035

1 me since 2009. So for, you know, the last 13 years,
2 any search of my name in the Charleston County records
3 would show that I'm under foreclosure.

4 Q Okay. But I mean, are you familiar with how
5 credit reporting agencies operate and what effect that
6 had on your credit score?

7 MS. ARNOLD: Objection as to form.

8 THE WITNESS: I'm not necessarily talking
9 about my credit score.

10 BY MR. TAYLOR:

11 Q Okay. Well, what did you mean when you said
12 it affects your credit?

13 A It affects my ability to go out and raise
14 money. And my credit worthiness is in question because
15 this has been ongoing since 2009.

16 Q What do you mean when you say it "affects
17 your ability to raise money"?

18 A Any type of lender would go and look into my
19 name, into who I am. And prior to this, I had no
20 issues. And I was very creditworthy. However, after
21 this foreclosure in 2009, I have been unable to go out
22 and raise money to do projects as I was doing prior to
23 the foreclosure.

24 Q Has any lender told you that -- have you been
25 declined by any lender for an application for credit?

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1 A Yes.

2 Q And when was that?

3 A I believe it was around 2017.

4 Q Okay. And who was the lender?

5 A You know, I was trying to get a loan. I
6 believe it was through Loan Depot. And what occurred
7 was they pulled up our home and saw that it was under
8 foreclosure.

9 Q Was a foreclosure pending in 2017?

10 A It was on our record. It was on our record,
11 yes.

12 Q And has any lender ever told you that it --
13 that they were declining you for credit because of a
14 foreclosure action rather than nonpayment of the debt?

15 MS. ARNOLD: Objection as to form.

16 THE WITNESS: I don't understand the
17 difference.

18 BY MR. TAYLOR:

19 Q Okay. Well, you -- we've looked at the note
20 earlier in your deposition; right?

21 A Right.

22 Q And that was where you promised to repay the
23 loan to the lender; correct?

24 A Correct.

25 Q And you stopped making those payments by

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1 August 2009; correct?

2 A Correct.

3 Q And when you stopped making payments on a
4 loan, that affects your credit score; correct?

5 A Yes.

6 MS. ARNOLD: Objection as to form.

7 BY MR. TAYLOR:

8 Q So I think you have been telling me that you
9 suffered damages as a result of credit because the
10 foreclosure was filed. And I'm asking you if anyone
11 has specifically told you that it's because of the
12 foreclosure action rather than the fact that you were
13 not repaying the debt?

14 MS. ARNOLD: Objection as to form.

15 THE WITNESS: Not in so many words. But it's
16 obvious that the two are the same when it comes to
17 someone deciding whether you're creditworthy or not.

18 BY MR. TAYLOR:

19 Q If we scroll down, starting on paragraph 98,
20 you have alleged a claim for malicious prosecution.
21 What's your understanding of what malicious prosecution
22 is?

23 A My understanding is the fact that these
24 actions were brought three times with no ability to
25 complete them, leaving it in turmoil, and, again,

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1 leaving us in turmoil.

2 Q Paragraph 107 alleges that "Plaintiff and/or
3 Nationstar lacked probable cause to institute Action
4 Number 3 and further acted with malice in instituting
5 Action Number 3." Do you see that?

6 A Yes.

7 Q Can you tell me why you believe plaintiff or
8 Nationstar lacked probable cause in instituting Action
9 Number 3?

10 A I don't recall the lacking of probable cause.
11 I'm sure there's a reason for it. However, the malice
12 in instituting it and the inability to complete it and
13 prosecute it was evident.

14 Q And can you tell me why you believe that
15 plaintiff and/or Nationstar was acting maliciously?

16 A It appeared they didn't have the ability to
17 fully prosecute by not completing it.

18 Q Well, I mean, if that's true, I guess it
19 could be an honest mistake, or it could be that they
20 were sort of out to get you and Mrs. Rogers.

21 And my question is are you aware of any
22 reason to believe that it was not an honest mistake,
23 whatever we're talking about, and that they were intent
24 on harming you and Mrs. Rogers?

25 MS. ARNOLD: Objection as to form.

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1 THE WITNESS: I don't know their intent
2 necessarily, but I do know they did harm us.

3 BY MR. TAYLOR:

4 Q I mean, are you aware of anyone at plaintiff
5 or Nationstar who has a vendetta against you
6 personally?

7 A I think that's irrelevant. I'm not claiming
8 that.

9 Q There's a similar paragraph here in
10 paragraph 111 and 112 to the paragraphs we looked at
11 for abuse of process. Do you have any additional
12 monetary damages from this claim of malicious
13 prosecution that we didn't already discuss with respect
14 to your claim for abuse of process?

15 A No.

16 Q Okay. Starting on paragraph 113, there's a
17 claim for unfair trade practices. Do you see that?

18 A Yes.

19 Q And can you tell me what you -- well, first
20 of all, are you aware of anything that the plaintiff
21 did that was unfair or deceptive? And that would be a
22 big, long name. Let's see. Deutsche Bank Trust
23 Company Americas as trustee for residential Accredit
24 Loans, Inc., pass-through certificates 2007-QH2.

25 A I mean, it states simply there what my

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1 feeling is about it. I mean, the terms of the note. I
2 was given options that were just so far out. I believe
3 at one point I was given a loan modification offer that
4 if I could pay \$16,000 a month, that, you know, they
5 would do a workout with me. I mean, I don't think any
6 of us in here are going to be paying \$16,000 a month
7 for a mortgage.

8 Q And were you dealing with the plaintiff with
9 respect to that?

10 MS. ARNOLD: Objection as to the form.

11 THE WITNESS: I believe that was with
12 Nationstar.

13 BY MR. TAYLOR:

14 Q Okay. And is it your position that a loan
15 servicer like Nationstar engages in an unfair and
16 deceptive trade practice if they don't offer you a loan
17 modification that sort of is tailored to your needs?

18 MS. ARNOLD: Objection as to form.

19 THE WITNESS: I don't know how to answer that
20 question. You know, there should be a certain
21 understanding by Nationstar and any mortgage company
22 that, you know, when someone's seeking relief to try
23 and work something out, that they ought to give, you
24 know, some attainable ways to get that done and we have
25 never been offered that.

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1 BY MR. TAYLOR:

2 Q And paragraph 117 alleges that "Plaintiff
3 and/or Nationstar's unfair and deceptive acts or
4 practices have an impact on the public interest of
5 consumers in this state."

6 Can you describe for me what impact
7 Nationstar's unfair and deceptive acts or practices
8 have had on the public interest?

9 A I would say the pick-and-pay loan is probably
10 the most obvious situation that people have fallen prey
11 to.

12 Q But that was a loan you entered into with
13 Homecomings Financial; correct?

14 MS. ARNOLD: Objection as to form.

15 THE WITNESS: I was entered into that with
16 Aurora Loan Services, who was the predecessor of
17 Nationstar.

18 BY MR. TAYLOR:

19 Q But plaintiff and Nationstar were not present
20 for your loan closing, did not process your loan
21 application, or anything like that; correct?

22 A I believe Aurora Loan Services was
23 representing the plaintiff.

24 Q When was this?

25 A When the pick-and-pay was offered. I'd have

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

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COURT OF COMMON PLEAS
CASE No. 2019 CP 10 4503

DEUTSCHE BANK TRUST COMPANY
AMERICA, AS TRUSTEE FOR
RESIDENTIAL ACCREDIT LOANS, INC.,
PASS-THROUGH CERTIFICATES 2007-
QH2,

PLAINTIFF,

v.

ASHLEY JOHNSON BESHARA AS
TRUSTEE OF THE REVOCABLE TRUST
AGREEMENT FOR 2235 SHORELINE
DRIVE ORIGINALLY DATED 3RD DAY OF
MARCH 2010; SHORELINE FARMS
COMMUNITY ASSOCIATION, INC.;
WELLS FARGO BANK N.A.; CADLE
ROCK VENTURE, L.P. AND OHIO
LIMITED PARTNERSHIP, CURTIS
ROGERS AND JULIE ROGERS,

DEFENDANTS,

ASHLEY JOHNSON BESHARA AS
TRUSTEE OF THE REVOCABLE TRUST
AGREEMENT FOR 2235 SHORELINE
DRIVE ORIGINALLY DATED 3RD DAY OF
MARCH 2010,

THIRD-PARTY PLAINTIFF,

v.

NATIONSTAR MORTGAGE LLC,

THIRD-PARTY DEFENDANT

**DEFENDANTS'
RESPONSE IN OPPOSITION
TO PLAINTIFF'S AMENDED
MOTION FOR SUMMARY
JUDGMENT**

This response is submitted jointly by the Defendants, Ashley Beshara, Curtis Rogers and Julie Rogers ("Defendants") in opposition to Plaintiff, Deutsche Bank Trust Company's ("Deutsche") and Third-Party Nationstar Mortgage LLC's ("Nationstar")(collectively amended motion for summary judgment.

1. CONCISE SUMMARY OF THE NATURE OF THE CASE.

This is a fourth attempt to bring an action of foreclosure on a Note and Mortgage that have been the subject of three separate civil actions all of which were voluntarily dismissed which bars this action.

2. FACTS ARE DISPUTED.

Contrary to the opening remarks by Deutsche and Nationstar in their Memorandum, certain alleged facts recited therein are disputed by Defendants. Deutsche and Nationstar in their memorandum allege "This case represents a second attempt to foreclose..." (Deutsche Memo p. 2). However, thereafter they go on to acknowledge three previous foreclosure actions have been initiated and dismissed (Deutsche Memo pgs. 3-4). Deutsche and Nationstar state in their memorandum that after 2015-CP-10-01971 ("Action 3") was stricken from the docket "[n]either the Intervenor nor Nationstar reinstated the Foreclosure to the Court's active trial roster. Thus, *because the Mortgage Loan was transferred to Deutsche Bank and Deutsche Bank has become the holder of the Mortgage Loan, Deutsche Bank file this current foreclosure action.*" (Deutsche Memo p. 5). By contrast, Defendants allege Deutsche is not a holder of the Note due to fraudulent and/or improper endorsement alterations of the Note and improper assignments of the Mortgage and Nationstar intentionally filed this action naming Deutsche as Plaintiff and against Beshara not the Rogers, to tactically attempt to avoid issues of standing and res judicata. (See Beshara Amended Answer filed 7/15/20, Para. 35-74; Rogers' Answer filed 8/13/20, Para 35-78; Exhibit 1 attached to Bashara's Reply to Return to the Motion to Dismiss filed 6/12/20; Altered Note Copies attached hereto as

Exhibit "A" and incorporated herein by reference; Nationstar Discovery Responses referenced in Para 46 Beshara Amended Ans. Filed 7/15/20 attached hereto as **Exhibit "B"** and incorporated herein by reference; Rogers' Motion for summary judgment filed 3/3/14 in Action 2 and referenced in Para 65 Beshara Amended Ans. Filed 7/15/20 attached hereto as **Exhibit "C"** and incorporated herein by reference.)

3. THE FAILURE OF A PARTY TO PROVIDE PROPER DISCOVERY RESPONSES SHOULD PRECLUDE IT FROM MOVING FOR SUMMARY JUDGMENT.

“Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003).

Here, Deutsche has admitted that it has not identified who will appear at trial and does not intend to do so until a trial date is set. (Deutsche Opp. to Mot. To Comp., p. 3). This complete defiance to the rules, does not change the fact that Deutsche obviously has the burden of proving its’ case and defenses. *See., S. Bank Trust Nat. Ass'n v. Bell*, 684 S.E.2d 199, 385 S.C. 364 (S.C. App. 2009). Deutsch cannot assert there are no disputed facts when it is obstructing the process of establishing facts and disputed facts. Thus, when a party fails to properly engage in the discovery process, it should not be allowed to

4. THE AFFIDAVIT SUBMITTED IN SUPPORT OF THE MOTION FAILS TO MEET THE REQUIREMENTS OF RULE 56, SCRPC.

The moving party has the initial burden of demonstrating no issue of material fact exists. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115-117, 410 S.E.2d 537, 545 (1991). "The rule governing summary judgment provides that '[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.'" *Dawkins v. Fields*,

354 S.C. 58, 580 S.E.2d 433 (S.C. 2003), *citing* Rule 56(e), SCRCP. The Affidavit submitted by Deutsch is insufficient.

A genuine issue of fact “can be created only by evidence which would be admissible at trial.” *Hansen v. DHL Laboratories*, 316 S.C. 505, 510, 450 S.E.2d 624, 627 (Ct. App. 1994). In order for a Court to consider materials and affidavits in support or opposition to summary judgment, they must be admissible and “shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993); *See* Rule 11(c), SCRCP; Rule 56(e); SCRCP; *Montgomery v. CSX Transport, Inc.*, 376 S.C. 37, 656, S.E.2d 20 (2008) (applying the personal knowledge requirement of Rule 56(e)); and *Saro v. Ocean Holiday Partnership*, 314 S.C. 116, 441 S.E.2d 385 (Ct. App. 1994)(“facts stated in affidavits must be admissible evidence.”). Generally, affidavits are to be made on personal knowledge setting forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated. *See Baughman v. American Telephone & Telegraph Co*, 306 S.C. 101, 410 S.E. 2d 537 (1991).

Deutsche and Nationstar have submitted the Affidavit of Alan Blunt and employee of Nationstar with no apparent affiliation with Deutsche. Paragraph 9 of the Affidavit references a Revocable Trust Agreement of the Rogers of which he cannot authenticate and has no personal knowledge of nor asserts any. Paragraph 10 makes a completely unsupported statement as to the alleged status of the account which constitutes hearsay. Paragraph 11 makes a completely unsupported statement. Lastly Paragraph 12, makes reference to a document which is unsigned and in which Deutsche and Nationstar objected to produce through the course of discovery. (Rogers

Mot. Compel p. 16 (10 of 13)). Thus, each of these paragraphs is inappropriate and the testimony/evidence inadmissible.

5. THE CLAIMS OF DEFENDANTS ARE NOT TIME BARRED; AND THE ISSUE IS FOR THE JURY TO DETERMINE.

Deutsche's argument that Defendant's claims are time barred fails as a matter of law for a number of reasons.

First, the question of when a statute of limitations runs is generally one left to the jury. *Dunbar v. Carlson*, 341 S.C. 261, 269, 533 S.E.2d 913, 917 (Ct. App. 2000) ("[G]enerally, statute of limitations issues are for the jury, rather than the court, to resolve."). Specifically, the question of when a plaintiff discovered, or should have discovered the alleged harm is for the jury to decide because it is an objective question. *Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) (stating in a medical malpractice action that when there is conflicting testimony regarding time of discovery of facts giving notice, the date on which discovery should have been made becomes an issue for the jury to decide); and *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) ("The burden of establishing the bar of the statute of limitations rests upon the one interposing it...and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide.").

Second, as conceded it is motion, that not all of the Defendants claims are outside what it claims to be the relevant statute of limitations. (Deutsche Memo. p. 7) Deutsche asserts Defendants claims "arise largely from events" that transpired in the litigation of the three prior matters. (Deutsche Memo. p. 7) This admission is counter intuitive to its motion and self-defeating. Defendants certainly agree their claims expand beyond the limitations asserted by Deutsche. Clearly, the Defendants claims include the acts and "bad acts" of Deutsche relating to this very action.

The claim for declaratory judgment is not necessarily subject to a three-year statute of limitations as asserted by Deutsche. "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)." *City of Hartsville v. S.C. Mun. Ins. & Risk Financing Fund*, 382 S.C. 535, 677 S.E.2d 574 (2009). A declaratory judgment action is like a chameleon. Its color is determined by its background, i.e., the underlying action. *See Jacobs v. Service Merchandise Co.*, 297 S.C. 123, 375 S.E.2d 1 (Ct.App.1988) (the character of a declaratory judgment action is determined by the main purpose of the complaint).

Here, the underlying action for mortgage foreclosure sounds in equity. *See, Carolina First Bank v. Badd, L.L.C.*, 414 S.C. 289, 778 S.E.2d 106 (2015). More importantly, the relief sought in the declaratory judgment cause by Defendants is for injunctive relief which is equitable. Generally, statutes of limitation do not bar the equitable relief. *See Richland County v. Kaiser*, 351 S.C. 89, 567 S.E. 2d 260 (Ct. App. 2002), *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 543 S.E.2d 563 (Ct. App.2001). The declaratory judgment claim is equitable and is not subject to a three-year statute of limitations. Additionally, none of the claims are barred by any statute of limitations.

Under South Carolina law, "a defendant may be estopped from claiming the statute of limitations as a defense if 'the delay that otherwise would give operation to the statute had been induced by the defendant's conduct.' " *Wiggins v. Edwards*, 314 S.C. 126, 130, 442 S.E.2d 169, 171 (1994)(quoting *Dillon County School Dist. Number Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 332 S.E.2d 555 (Ct. App.1985), cert. dismissed, 288 S.C. 468, 343 S.E.2d 613 (1986), overruled on other grounds by *Atlas Food Sys. & Servs. v. Crane Nat'l Vendors*, 319 S.C. 556, 462 S.E.2d 858 (1995)). Whether a defendant is estopped from claiming the statute of limitations is

ordinarily a question of fact. *See Black v. Lexington School Dist. No. 2*, 327 S.C. 55, 488 S.E.2d 327 (1997).

Here equitable tolling should apply. Defendants have set for facts invoking equitable tolling. For instance, the Defendants have asserted facts showing that for over eleven years Deutsche and its predecessors jumped in and out of court asserting the same claims against the same note and mortgage. Bad behavior is not rewarded and equity favors the tolling of any claims arising from bad behavior.

6. ALL NAME PARTIES HAVE THE RIGHT TO CHALLENGE DEUTSCHE AND NATIONSTAR’S ABILITY TO PROVE THEIR CLAIMS.

Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt. *U.S. Bank Trust Nat. Ass'n v. Bell*, 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009). Here, Deutsche specifically named Beshara as a defendant to the foreclosure action. Thus as a name defendant Beshara has the right to assert defenses and attack the ability of Deutsche to meet its burden of proof. It is implausible to think that one can bring in a defendant to an action and they say you cannot challenge my right to sue. The concept does not exist in law and truly borders the absurd.

A number of courts throughout the country have rejected the “standing” challenges lenders have raised against borrowers and owners attempting to keep them from being able to defend against foreclosure.¹ An owner of property clearly has standing to question the validity of the transfers of

¹ *Slorp v. Lerner, Sampson & Rothfuss*, 587 Fed. Appx. 249, 253–254 (6th Cir. 2014) (pursuing judicial foreclosure without assignments that would give authority to foreclose caused injury to borrower in having to defend suit; borrower had standing to bring debt collection claims); *Howard v. Chase Home Fin., L.L.C.*, 555 Fed. Appx. 567 (6th Cir. 2014) (under Michigan law, borrowers have standing to challenge assignments related to authority to foreclose, but after expiration of post-sale redemption period must assert strong claim of fraud or irregularity); *Reinagel v. Deutsche Bank Nat'l Trust Co.*, 735 F.3d 220, 225 (5th Cir. 2013) (Texas courts follow “the majority rule” that obligors may bring challenges based on any ground that renders assignment of deed of trust void);

loan documents that a party alleges give it the right to sell the owner and/or borrower's home. A foreclosure terminates an owner's interest in the property and subjects the owner to physical eviction. Since South Carolina is a lien theory state, a foreclosure sale extinguishes the owner's title to the property. To the extent that the owner seeks to protect these existing rights in the property, the owner has standing to take legal action to do so. In addition, to the property title claims, an unauthorized eviction poses a very concrete injury to the owner, an injury that the owner has standing to prevent.

Culhane v. Aurora Loan Serv. of Neb., 708 F.3d 282 (1st Cir. 2013) (applying Massachusetts law, borrowers may challenge assignments alleged to be invalid, ineffective, or void); *Juarez v. Select Portfolio Serv., Inc.*, 708 F.3d 269 (1st Cir. 2013) (same); *Metcalf v. Deutsche Bank Nat'l Trust Co.*, 2012 WL 2399369 (N.D. Tex. June 26, 2012) (borrower has standing to challenge whether foreclosing party has authority to enforce deed of trust); *Drouin v. Am. Home Mortg. Lending Serv., Inc.*, 2012 WL 1850967, at *4 (D.N.H. May 18, 2012) (borrower has standing to challenge whether assignor had rights to mortgage at time of alleged assignment); *Minnifield v. Johnson & Freedman II, L.L.C.*, 2012 WL 5463878, at *4 (N.D. Ga. Nov. 7, 2012), *aff'd on other grounds* 522 Fed. Appx. 782 (11th Cir. 2013) (if borrowers did not have standing to challenge mortgage assignments, they would be in the "perilous position" of being unable to oppose foreclosure by anyone claiming to be an assignee); *Fuller v. Lerner, Sampson, Rothfuss, L.P.A.*, 2012 WL 4361454, at *9–10 (N.D. Ohio May 14, 2012), objections to magistrate's report and recommendations denied, 2012 WL 4361448 (N.D. Ohio Sept. 21, 2012) (borrowers have standing to bring claim that entity other than foreclosing party has right to enforce loan documents); *Talton v. BAC Home Loans Servicing, L.P.*, 839 F. Supp. 2d 896 (E.D. Mich. 2012) (borrowers may challenge mortgage assignments or authority to conduct non-judicial foreclosure under Michigan's sale by advertisement statute); *U.S. Bank v. George*, 50 N.E. 3d 1049 (Ohio Ct. App. 2015) (maker of a promissory note or mortgage has standing to challenge their transfers and assignments, even if not in privity to the transfer or assignment challenged, declining to follow *Livonia Properties*); *Mruk v. Mortg. Elec. Registration Sys., Inc.*, 82 A.3d 527 (R.I. 2013); *EverBank v. Seederger Ventures, Inc.*, 499 S.W.3d 534, 541 (Tex. App. 2016) (borrowers have standing to challenge void assignments); *Brezzell v. Bank of Am.*, 2011 WL 2682973, at *4 n.3 (E.D. Mich. July 11, 2011) ("standing" argument raised by many lenders to dismiss challenge to foreclosures based on invalid assignments is a "bit of a red herring"; borrowers' claim to possession and ownership of property puts them well within the zone of interests required for standing), *quoting Langley v. Chase Home Fin., L.L.C.*, 2011 WL 130926, at *2 n.2 (W.D. Mich. Mar. 28, 2011).

Additionally, contrary to Deutsche's characterizations, Beshara does not seek to "enforce" contracts to which she is not a party, but instead, refers to these contracts as evidence that Deutsche lacks authority to enforce the loan documents under law. Beshara can protect her rights and interest.

7. DEFENDANTS HAVE ESTABLISHED ISSUES OF FACT EXIST AS TO NEGLIGENT MISREPRESENTATION.

Prior to and continuing through this action, Deutsche and Nationstar have made and continued to make misrepresentations. Monthly statements relating to the subject Note and Mortgage have been sent to either the Rogers or Beshara. Interesting, is the fact that although Deutsche and Nationstar claim Beshara is not a party to the Note and Mortgage, it sends personal account information of the Rogers relating to the Note to Beshara through her agent. It is those very account statements sent that, in part, are the basis for the claim of misrepresentation. And because Deutsche and Nationstar refuse to identify its witness, they cannot be crossed examined on the accuracy or inaccuracy the information contained in the account statements. Issues of fact exists.

Moreover, Deutsche and Nationstar fail to fully understand the claims of the Defendants. Deutsche and Nationstar have failed to record a satisfaction of mortgage with the Register of Deeds of Charleston County, despite the fact that through its actions it has lost the right to assert and claims under the mortgage. By maintaining the mortgage as a public record, Deutsche and Nationstar misrepresent its interest in the real property of Defendants. Each day the mortgage remains Deutsche and Nationstar make a false statement.

8. DEFENDANTS HAVE PRESENTED SUFFICIENT EVIDENCE OF ABUSE OF PROCESS TO WITHSTAND A MOTION FOR SUMMARY JUDGMENT.

"To sustain a claim for abuse of process, it is axiomatic that the judicial process must in some manner be involved... In our view, process, as it pertains to the abuse of process tort, embraces the full range of activities and procedures attendant to litigation." *Food Lion Inc. v. United Food &*

Commercial Workers International Union, 351 S.C. 65, 70, 567 S.E.2d 251 (Ct. App. 2002). “The two essential elements of an abuse of process claim are (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the conduct of the proceeding. The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure. *D.R. Horton, Inc. v. Wescott Land Co.*, 398 S.C. 528, 550, 730 S.E.2d 340 (Ct. App. 2012)

An ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process. There is no liability when the process has been carried to its authorized conclusion, even if done with bad intentions. The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself. Some definite act or threat not authorized by the process or aimed at an object not legitimate in the use of the process is required. The essence of the tort of abuse of process centers on events occurring outside the process, and our courts have noted that the improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort. *Id.* at 551. “One who uses a legal process, whether criminal or civil, against another *primarily* to accomplish a purpose for which it is not designed, is subject to liability for harm caused by the abuse of process. The collateral objective must be the sole or paramount reason for acting.” *Pallares v. Seinar*, 407 S.C. 359, 371, 756 S.E.2d 128 (2014).

“Our courts have noted that an abuse of process action may lie if a party prosecutes an entire lawsuit for collateral purposes. Nonetheless, an allegation of an ulterior purpose or ‘bad motive,’ standing alone, is insufficient to assert a claim for abuse of process.” *D.R. Horton, Inc. v. Wescott*

Land Co., 398 S.C. 528, 551, 730 S.E.2d 340 (Ct. App. 2012). “The tort centers on events occurring outside the process.” *Pallares v. Seinar*, 407 S.C. 359, 371, 756 S.E.2d 128 (2014).

“An ulterior purpose, to satisfy that element for abuse of process, exists if the process is used to gain an objective not legitimate in the use of the process. However, even assuming there is some evidence a party has an ulterior motive for bringing an action, that party is entitled to summary judgment in its favor on an abuse of process claim if there is no evidence the party engaged in a “willful act,” an element essential to the abuse of process cause of action which is characterized as a definite act not authorized by the process or aimed at an object not legitimate in the use of the process.” *D.R. Horton, Inc. v. Wescott Land Co.*, 398 S.C. 528, 552, 730 S.E.2d 340 (Ct. App. 2012).

“As to the second, or ‘willful act’ element, our supreme court has stated that some definite act not authorized by the process or aimed at an object not legitimate in the use of the process is required. Thus, the element comprises three components: 1) a ‘willful’ or overt act 2) ‘in the use of the process’ 3) that is improper because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective.” *Food Lion Inc. v. United Food & Commercial Workers International Union*, 351 S.C. 65, 70, 567 S.E.2d 251 (Ct. App. 2002)

First Defendants evidenced Nationstar as Deutsche's agent, not Deutsche, is one who initiated this action on behalf of Plaintiff. Defendants evidenced that Nationstar was the named plaintiff in the foreclosure Actions 2 and 3, and after Dismissal 3 Nationstar maintained communications with Roger's counsel about Nationstar reinstating the foreclosure action. Defendants evidenced that Nationstar retained Deutsche's counsel to file this action and that Nationstar is the principle contact for Deutsche's counsel.

Here, Defendants have provided evidence that Deutsche and Nationstar as the agent and servicer of Deutsche brought this Action for the ulterior purpose of trying to mitigate or improperly

rectify its of issues of standing and res judicata which are laid out in the public record of Actions 2 and 3. Deutsche and Nationstar knew or should have known that collateral estoppel precluded them from initiating this action against Beshara. Nationstar as Deutsche's agent committed willful acts by in or around November of 2013, executing an alleged endorsement of the Note and in April of 2014, executing an alleged assignment of the mortgage and doing so in both cases as an alleged attorney in fact for distinct entities. Defendants evidenced Nationstar as Deutsche's agent committed the willful act of trying to alleviate its standing issues by moving for and receiving Dismissal 2. Defendants evidenced that Nationstar as Deutsche's agent committed the willful act of trying to continue the foreclosure process despite Dismissal 2 by reinstating Action 2 through Action 3. Defendants evidenced that Nationstar as Deutsche's agent committed the willful act of trying to alleviate the standing and res judicata issues by moving for and receiving Dismissal 3. Defendants evidenced that Nationstar as Deutsche's agent committed the willful act of trying to continue to prosecute the foreclosure matter ten years, and three dismissals after it had begun by bring this action, Action 4 in 2019 in the name Deutsche for the first time.²in an attempt match the alleged 2013 endorsement of the Note and the void 2014 assignment of the Mortgage. Nationstar further sought to rectify the res judicata issues by not naming the Roger's as defendants but instead for the first-time naming Beshara. Defendants would assert they presented sufficient evidence to withstand Deutsche and Nationstar's motion for summary judgment as to Defendants' causes of action for abuse of process and this Court must deny the motion.

9. Defendants Have Presented Sufficient Evidence of Malicious Prosecution to Withstand a Motion for Summary Judgment.

² Again Defendants evidenced that Nationstar in response to discovery asserted that the Securitized Trust was assigned the Note and Mortgage in 2007, However, Auroa Loan Service ("ALS") brought Action 1 in its own name in 2009, despite the Note never being endorsed to ALS, and then Nationstar and/or ALS moved to substitute Nationstar as plaintiff in Action 2 alleging to the Court that the Note and Mortgage had been assigned to Nationstar despite the fact the Note and Mortgage were never endorsed or assigned to Nationstar. Nationstar remained the named Plaintiff in Acton 3 and not until this action was Deutsche named a party.

“Our Supreme Court has recognized that an action will lie for the malicious prosecution of any ordinary civil action. To recover in an action for malicious prosecution, the plaintiff must show (1) the institution or continuation of original judicial proceedings, either civil or criminal (2) by, or at the instance of, the defendant (3) termination of such proceedings in plaintiff's favor (4) malice in instituting such proceedings (5) want of probable cause and (6) resulting injury or damage. The mere fact that the defendant was unsuccessful in the prior action has no bearing on the issue of probable cause.” *Garr v. N. Myrtle Beach Realty Co. Inc.*, 287 S.C. 525, 528, 339 S.E.2d 887 (Ct. App. 1986).

"[A] favorable termination of ancillary proceedings can support a malicious prosecution claim... Ancillary proceedings are defined as one growing out of or auxiliary to another action or suit, or which is subordinate to or in aid of a primary action, either at law or in equity...[With regard to Malicious Prosecution] [f]rom a policy perspective, the requirement that a favorable termination reflect the merits of an action fosters the strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction. Without the requirement that a termination reflect the merits, a party could obtain a favorable result in a malicious prosecution action while the claim underlying the malicious prosecution action was still pending. This could theoretically result in a party receiving two conflicting decisions arising from the same case: a favorable decision on the malicious prosecution action and an unfavorable decision on the underlying claim." *Gecy v Somerset Point at Lady's Island*, 426 S.C. 540, 549-53, 828 S.E.2d 73 (Ct. App. 2019) (citations omitted).

In this cause of action, malice is "the deliberate intentional doing of a wrongful act without just cause or excuse. It does not necessarily mean a defendant acted out of spite, revenge, or with a malignant disposition. Malice also may proceed from an ill-regulated mind which is not sufficiently cautious before causing injury to another person. Moreover, malice may be implied where the

evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person. Malice also may be implied in the doing of an illegal act for one's own gratification or purpose without regard to the rights of others or the injury which may be inflicted on another person. In an action for malicious prosecution, malice may be inferred from a lack of probable cause to institute the prosecution. Based on the foregoing, one need not show actual malice in order to successfully maintain an action for malicious prosecution.” *McBride v. School Dist. of Greenville*, 389 S.C. 546, 565-66, 698 S.E.2d 845 (Ct. App. 2020) “A party must show the opponent lacked probable cause as to each cause of action asserted to prevail on a claim of malicious prosecution; thus, the existence of probable cause as to any one is sufficient to defeat a malicious prosecution claim. Whether probable cause exists is ordinarily a jury question, but it may be decided as a matter of law when the evidence yields only one conclusion.” *Pallares v. Seinar*, 407 S.C. 359, 367, 765 S.E.2d 128 (2014)

Twice in the last five years our Court of Appeals has stated striking a case from the active roster pursuant to Rule 40(j), SCRCP, is equivalent to dismissing a case. See. *Goodwin v. Landquest Development, LLC*, 414 S.C.623, 779 S.E.2d 826 (Ct. App. 2015) (A case involving a foreclosure of a mortgage where motion to restore was denied because striking a case pursuant to Rule 40(J) is equivalent to a dismissal.). See. *Personal Care, Inv. v. Theos*, 426 S.C. 78, 825 S.E.2d 281 (Ct. App. 2019) (where the Court declined to restore a case to the active roster stating because striking a case under Rule 40(j) is the equivalent of dismissing the case and stating “Nevertheless, we believe this argument ignores the procedural posture of the case as dismissed.”)

“The terms of a contractual agreement are not conclusive in determining the association between two parties where there is evidence outside the contract establishing an agency relationship. If there are any facts tending to prove an agency relationship, the question is one for the jury. *Gamble v. Stevenson*, 305 S.C. 104, 108, 406 S.E.2d 350 (1991) “Generally agency may be implied or

inferred and may be circumstantially proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal. The doctrine of apparent authority provides that the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption.” *Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424 (1982)

Here Defendants evidenced ALS initiated Action 1 in 2009 to foreclose upon the Mortgage securing the Note. Defendants evidenced that there is not an endorsement endorsing the Note to ALS which would entitle ALS to enforce the Note or Mortgage. Defendants evidenced the Roger’s asserted the defense of standing and that thereafter Action 1 was dismissed pursuant to Dismissal 1. Defendants evidenced shortly after Action 2 was reinstated in 2013 Nationstar and/or ALS moved before the court alleging the Note and Mortgage had been assigned to Nationstar and that Nationstar should be substituted as plaintiff in Action 2, without notice or hearing of the motion to the Rogers. Defendants evidenced the Note does not bear an endorsement to Nationstar and there is no assignment of record of the Mortgage being assigned to Nationstar. Defendants evidenced that the Rogers moved to vacate the order substituting Nationstar as Plaintiff in action 2, but the motion was never heard. Defendant evidenced Nationstar on July 10, 2013, produced Note Copy 2 with a first endorsement from Homecomings Financial, LLC to Residential Funding and a Second Endorsement from Residential Funding Company, LLC to Deutsche Bank Trust Company Americas as Trustee (for an unidentified trust). Defendant evidenced the Motion to Vacate was scheduled to be heard November 18, 2013, though it was never heard, and that November 16, 2013, Nationstar’s counsel in Action 2 produced for the first time Note Copy 3 which a third endorsement whereby Nationstar as attorney in Fact for Deutsche Bank Trust Company Americas as Trustee (for an unidentified trust) endorse the note in blank. Nationstar on February 28, 2014, in response to requests for admission in

Action 2 admitted the note it produced in July of 2013 in response to discovery Action 2, could only be enforced by Residential Funding, and not Nationstar or ALS; and as of 2/28/14 no assignment of the Mortgage had been executed to Residential Funding, Deutsche Bank Trust Company Americas as Trustee, Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2, or Nationstar. March 3, 2014, the Rogers's filed a motion for summary judgment in Action 2, based upon Nationstar's lack of standing and attaching Nationstar's responses to the requests for admissions as a filed exhibit to the motion. Defendant evidenced that Nationstar aware that its cause of action for foreclosure in Action 2 could likely be dismissed because Nationstar lacked standing, sought to retroactively try to fix the issue by having its counsel for Action 2 file Assignment 2 of Mortgage dated April 1, 2014 wherein Nationstar as alleged attorney in fact for ALS assigned the Mortgage Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2, which was recorded by Nationstar's attorney in Action 2 on April 14, 2014, in Book 0398 at Page 768 in the RMC Office for Charleston County.³ Defendants evidenced that after Nationstar received notice of the scheduling of the Roger's Motion for Summary Judgment in Action 2, that prior to the hearing Nationstar moved for and was granted Dismissal 2. Defendants evidenced that pursuant to Rule 41(b), SCRPC, Dismissal 2 constituted an adjudication of upon the merits of foreclosure action on the Mortgage. Defendant evidenced despite Dismissal 2 barring Nationstar from reinstating the foreclosure action Nationstar moved to restore Action 2 and Action 3 was initiated in April of 2015. Defendants evidenced that Nationstar thereafter took no acts in furtherance of prosecuting Action 3 and when it was called for trial, with the Roger's Motion for Summary Judgment still pending, Nationstar moved for and was granted Dismissal 3 on May 16, 2016. Defendants evidenced that

³ It can also be inferred from the allegations that because Endorsement 3 of the Note was not on the copy of the Note produced in discovery in July of 2013, that Nationstar who executed Endorsement 3 did so after the Roger's had moved vacate Nationstar as plaintiff based upon standing.

pursuant to Rule 41(b), SCRPC, Dismissal 3 constituted an adjudication of upon the merits of foreclosure action on the Mortgage. Defendants evidenced that in the end 2018, Nationstar's counsel on behalf of Nationstar contacted the Roger's counsel stating that Nationstar wished to reinstate Action 3, and Roger's counsel put Nationstar on notice that it was the Roger's contention under Rule 41, the matter had been adjudicated on the merits and Nationstar was barred from reinstating a cause of action for foreclosure of the Mortgage. Defendants evidenced that thereafter on August 27, 2019, Nationstar, predecessor, servicer, and agent of Plaintiff, retained Plaintiff's counsel to bring this action, but that Nationstar concerned about issues of standing and res judicata determined that instead of bringing this action with Nationstar as the plaintiff and the Rogers as the defendants, determined it would name Deutsche plaintiff and Beshara defendant as the parties instead. Defendants evidenced that Nationstar and Deutsche are collaterally estopped from maintaining this Action 4, which is based upon the same facts and allegations as Actions 1, 2, and 3, seeking to foreclose on the same Mortgage secured by the same Note.

Therefore, there is evidence that Nationstar acting as Deutsche's agent and servicer dismissed Action 2 resulting in an adjudication on the merits in Defendants' favor. Thereafter, Nationstar instituted Action 3 which was also adjudicated on the merits in the Defendants favor.⁴ Thereafter Nationstar as servicer for Plaintiff initiated Action 4 continuing its attempts to foreclose upon the Mortgage for a fourth time ten years later. But in Action 4 instead, Nationstar elected to insert Plaintiff standing in Nationstar's past prosecutorial shoes in contrast to Action 2 and 3. Nationstar as Deutsche's agent and servicer chose a tactical maneuver to dismiss action 2 and Action

⁴ Defendant Beshara is the legal title holder to the Property and the Roger's reside in the property sought to be foreclosed upon in this matter, a foreclosure would extinguish Defendants' title to the property causing Defendants harm. Defendants have standing to protect their rights in the Property. Defendants plead that Plaintiff and Nationstar were collaterally estopped from instituting this Foreclosure action and had knowledge of such but brought the action anyway. The case law and elements for malicious prosecution do not require that Defendant Beshara was a party to the former action, only that those proceedings ended in Defendant's favor which they did because Action 2 and Action 3 were an adjudication as to the merits against Plaintiff and Nationstar's right to foreclose upon Defendant's Property.

3 to avoid a ruling by summary judgment or trial that Nationstar was barred from the foreclosure relief sought. Then Nationstar as servicer for Deutsche retained Deutsche's counsel to bring Action 4 more than three years later, naming the parties of Deutsche and Beshara instead of Nationstar and the Rogers to further attempt avoid res judicata and standing issues. This shows implied malice where the evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person. By Nationstar as Deutsche's agent instituting Action 4, Deutsche and Nationstar instituted an illegal act for their own gratuitous benefit without regard to the rights of Defendants or the injury which may be inflicted on Defendants. Deutsche and/or Nationstar lacked the probable cause to initiate Action 3 and continue to seek foreclosure of the Mortgage through Action 4 when they were on notice that they lacked probable cause to initiate both actions because the right to foreclose upon the Mortgage had been adjudicated upon the merits without a ruling in their favor. As a result of Deutsche and Nationstar's decade long attempt to foreclose upon the Mortgage and continuation of attempting to do so by Nationstar initiating Action 4 on behalf of Deutsche, Defendants have suffered the damages of incurring attorney's fees to defend this matter when Deutsche, Nationstar, and/or their alleged predecessor in interest never thought it necessary to name Defendant a party to Action 1, 2, or 3. Defendants are also injured by the threat of a defective foreclosure sale extinguishing Defendants' interest in the Property.

For the forgoing reasons Defendants evidenced an adequate basis to withstand a motion for summary judgment as to malicious prosecution. Deutsche and Nationstar's Motion as to Defendants' causes of action for malicious prosecution must be denied.

10. SCUTPA Claims Prevail.

Deutsche and Nationstar argue a claim for violation of the South Carolina Unfair Trade Practice Act ("SCUTPA") does not exist against them because they did not originate the loan. They

state “[a]s mere assignees of the mortgage loan, Deutsche Bank and Nationstar are subject to any claims arising from origination of the loan.”[sic]

There are a number of problems with their argument. First, it would appear that they meant to include the word “not” before the word “subject” otherwise the statement is inapposite to their position. Second, they leave out a critical holding in the case of *Rosemond v. Campbell*⁵ which they cite to support their position. Immediately before the sentence quoted by movants, the *Rosemond* Court states the following: "Consequently, the assignee of a debt takes the obligation subject to all claims and defenses the obligor may have against the assignor." *Id.* at 645. Being an assignee and ones that have affirmatively sought to enforce the loan provides them with no shelter. No basis for dismissal has been argued.

Likewise, it is important to note that Deutsche and Nationstar do not claim to be “holders in due course” and Defendants have affirmatively alleged they are not. Not being a holder in due course they are subject to all claims.

The blanket remark is made that a SCUTPA claim cannot be maintain if based on challenges to transfers of the mortgage or prior foreclosure activity. No support for this remark is made. Likely that is because Deutsche and Nationstar are aware the facts and issues involved far exceed any allegations addressing the transfers of the note and mortgage. The SCUTPA claims are based on the various principal agent relationships Deutsche had not only with Nationstar but other servicers of the loan. Defendants the claims for unfair and deceptive practices range from imposing unconscionable interest amounts owed, servicer violations, and maintaining a lien on real property that is unenforceable.

Recently the South Carolina Court of Appeals upheld a lower court’s grant of summary judgment in favor of a consumer on his counterclaim for violation of SCUTPA against a lender in a foreclosure action. *See Beneficial Financial I, Inc., v. Jon Windham*, Op. No. 5753 (Ct. App. August 5, 2020). The consumer/mortgagor asserted: Beneficial's conduct violated the SCUTPA by (1) "foreclosing on a tract of land which [Beneficial] knows, or should know, was not to be secured by any mortgage between [Beneficial] and [Windham]"⁴; (2) "force-placing insurance on [Windham's] property when [Windham] already had insurance, causing [Windham's] monthly payment to

⁵ 288 S.C. 516, 343 S.E. 2d 641 (Ct. App. 1986)

increase"; (3) "taking monthly payments from [Windham] and applying them all to alleged interest and fees"; (4) "unilaterally ceasing acceptance of payments from [Windham] on his loan"; and (5) "refusing to offer [Windham] a loan modification, even after stating it would do so."

The Court held Windham met his burden of proof on his counterclaim for a violation of SCUTPA. Beneficial's unfair practice of force-placing hazard insurance in violation of a mortgage contract has the potential for repetition. *See Crary*, 329 S.C. at 388, 496 S.E.2d at 23 (1998) (holding evidence indicating mortgage broker had other opportunities to enter into similar transactions was sufficient evidence to support a finding of a SCUTPA violation); *York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) (holding allegation of car dealership's alleged misrepresentation of a car's accident history was sufficient to survive directed verdict motion for SCUTPA violation because the dealership was in the business of selling cars; thus, "[c]ertainly the alleged acts or practices have the potential for repetition"). The lower court's grant of summary judgment to Windham on his counterclaim against Beneficial for a violation of the SCUTPA was affirmed. Like Windham, the Defendants have set forth a claim for violation of SCUTPA against their mortgagee and the claim should proceed forward to the jury.

11. Defendants' Claims Are the Precise Type of Controversy to be Resolved by a Declaratory Judgment Action.

A cause of action under the Declaratory Judgment Act is established by showing the existence of a justiciable controversy, defined as "a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 819 S.E.2d 142 (Ct. App. 2018), and *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970).

The Defendants have alleged a real and substantial controversy concerning the very contracts Deutsche has sued upon. In part, the Defendants seek a determination of the subject contracts are enforceable or whether they have any obligations under the contracts. Additionally, they seek a determination as to the impact of the initiation of the within suit in light of the prior three suites that were dismissed is precluded under the law of this state and the Rules of Civil Procedure. The

Defendants' claims are therefore the very type of controversy the Declaratory Judgment Act contemplates, as it invites a party affected by a contract and law to ask a court to define how the contract and law impacts the party's rights. *See Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 819 S.E.2d 142 (Ct. App. 2018).

Indeed, the points proffered by Deutsche illustrate a controversy exists. Deutsche contends Rule 40(j) and 41, SCRCF do not preclude it from bringing the within action whereas the Defendants take the absolute opposition position and have so pled in their counterclaim. Deutsche claims that the pic-a-pay option contained in the subject Note which creates negative amortization cannot be unconscionable, the opposite of what Defendants contend. Again, a justiciable controversy. *See Consignment Sales Llc v. Tucker Oil Co.*, 391 S.C. 266, 705 S.E.2d 73 (S.C. App. 2011), citing *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995) (“A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party.’ *Id.* Thus, ‘[a]ny person interested under a ... written contract ... may have determined any question of construction or validity arising under the ... contract ... and obtain a declaration of rights, status or other legal relations thereunder.’ S.C. Code Ann. § 15–53–30 (2005)”). The declaratory judgment claim should proceed to trial.

CONCLUSION

Deutsche and Nationstar’s motion to for summary judgment fails and outlined above. Defendants are entitled to have all their claims considered by a trier of fact.

s/Mary Leigh Arnold
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EXHIBIT B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	Case No.: 2011-CP-10-1805
	)	
Nationstar Mortgage, LLC	)	ANSWERS TO DEFENDANT'S
	)	SECOND SET OF
Plaintiff,	)	INTERROGATORIES TO PLAINTIFF
	)	
v.	)	
	)	
Curtis Rogers a/k/a Curtis L. Rogers III,	)	
Julie J. Rogers, National City Bank,	)	
Shoreline Farms Community Assoc., Inc.,	)	
and Harbor National Bank,	)	
	)	
Defendants.	)	

TO: MARY LEIGH ARNOLD, ATTORNEY FOR DEFENDANT

Plaintiff, Nationstar Mortgage, LLC ("Nationstar"), responds to Defendant's Second Set of Interrogatories as follows:

GENERAL OBJECTIONS

1. Plaintiff objects to Defendant's requests which seek information from this Plaintiff as to any purported act, omission, or policy of non-parties to this action, and which information is not within the knowledge, custody, or control of the Plaintiff.
2. Plaintiff objects to Defendant's requests which seek to have Plaintiff authenticate, identify, or describe any document which was not produced or generated by the Plaintiff, or which includes information and data from persons or entities other than the Plaintiff.
3. Each of the Plaintiff's responses herein are subject to and limited by these General Objections.

INTERROGATORIES

1. Please state the date, manner, method, and from whom Plaintiff would allege Aurora Loan Services, LLC became the lien holder and acquired ownership interest in the subject Note and Mortgage.

ANSWER: Aurora Loan Services LLC became lienholder to the property of Defendant by way of assignment of mortgage from Mortgage Electronic Registration Systems, Inc., the original nominee mortgage. Aurora Loan Services LLC was servicer of the Defendant's loan for the benefit of the RALI Series 2007-QH2 Trust, but was not the owner of the beneficial interest in the indebtedness evidenced by the Note and Mortgage of the Defendant.

2. Please state the date, manner, and method by which Plaintiff would allege Aurora Loan Services, LLC ceased to become the lien holder and relinquished its ownership interest in the subject Note and Mortgage and to whom Aurora Loan Services, LLC transferred title of said interest to.

ANSWER: See Answer to Interrogatory number 1, above. The servicing of the Defendant's loan was transferred to Nationstar Mortgage, LLC effective July 1, 2012 pursuant to a servicing asset purchase by Nationstar from Aurora Bank FSB and Aurora Loan Services LLC. Incident thereto, the subject mortgage is to be assigned to Nationstar by Aurora Loan Services LLC, for enforcement for the benefit of the RALI Series 2007-QH2 Trust.

3. Please list in chronological order from origination of the subject Note and Mortgage to present all individuals and/or entities who have held and [sic] ownership interest, title interest, were a holder, holder in due course, or non-owner with the right to enforce the subject Note and Mortgage, and for each individual please state what type of interest that individual held concerning the subject Note and Mortgage be it holder, holder in due course, or otherwise.

ANSWER: See General Objections; further, Plaintiff objects on the grounds that such requested information as holders of “title interests” is not within the custody or control of the Plaintiff, but is or should be available to Defendant in the public title records.

Subject to and without waiving said objections, as evidenced by the subject promissory note, Homecomings Financial, LLC, Residential Funding Company, LLC, and Deutsche Bank Trust Company Americas, as Trustee for the RALI Series 2007-QH2 Trust have held ownership interests in the indebtedness evidenced by the Rogers’ Note and Mortgage. Mortgage Electronic Registration Systems, Inc. (MERS) was original mortgagee as nominee for Homecomings Financial, LLC and its successors and assigns, and said mortgage was subsequently assigned by MERS to Aurora Loan Services LLC. Additionally, Homecomings Financial LLC, Aurora Loan Services LLC, Aurora Bank FSB, and Nationstar Mortgage, LLC have held servicing rights to the Rogers loan, for the benefit of the owner of the beneficial interest in the indebtedness.

4. Please list in chronological order from origination to present each entity whose [sic] acted as servicer for the loan account of the subject Note and Mortgage; please state the date each said entity began servicing the account and the date each said entity ceased servicing

the account; and please state who the owners of the Note and Mortgage was that each entity was acting as servicer for.

ANSWER: Plaintiff objects to this request to the extent it seeks information that predates the acquisition of servicing rights to the loan by Aurora Loan Services LLC, and further states that such information should be within the possession of the Defendant, not the Plaintiff. Subject to and without waiving said objections, see response to Interrogatory No. 3.

5. Please state who is in physical possession of the original documents in this action, including the Note and any Allonge thereto, the Mortgage and any Assignment of Mortgage thereto whether recorded or unrecorded, and please provide and [sic] address where said originals are currently being held.

ANSWER: The original Note, Mortgage and Riders, and Title Policy are currently maintained by counsel for the Plaintiff, at the office of KORN LAW FIRM, P.A., 1300 Pickens Street, Columbia, SC 29221.

6. If the loan account for the subject Note and Mortgage has ever been a part of a any [sic] securitized trusts or mortgage pools please specifically name and identify each specific trust or pool for which the loan account has been a part of and give the date which the loan account became a part of said trust or pool.

ANSWER: The loan of Curtis Rogers was sold to the Residential Accredit Loans, Inc. Mortgage Asset-Backed Pass-Through Certificates, Series 2007-QH2 Trust pursuant to an

Assignment and Assumption Agreement, dated as of February 27, 2007, between Residential Funding Company, LLC and Residential Accredit Loans, Inc.

7. If Plaintiff, a predecessor of Plaintiff, and/or any servicer who has ever serviced the subject loan has ever denied mortgage loan modification, workout agreement, and/or other loss mitigation application of Defendant's or Loss Mitigation offer made to Defendant's please state the date of each denial and the specific reason for said denial.

ANSWER: Plaintiff objects to this request to the extent it seeks information predating the Plaintiff's servicing of the loan in question. Subject to and without waiving said objection, Plaintiff states that included, but may not be limited to, the following: Aurora offered Rogers a Special Forbearance Agreement in October, 2009 in which Aurora agreed to forbear from immediately foreclosing on the property due to the Borrower's default on his loan repayment obligations. Thereafter, Defendant's request for short sale approval in May, 2010 was denied, and requests for loan modification were denied in November, 2010 and January, 2011, because Rogers failed to provide required information and documentation and his debt-to-income ratio was too high to qualify for modification of the loan. In February and March, 2011, Aurora denied a request for short sale approval as Rogers failed to provide required financial records as well as a preliminary HUD-1 or net sheet for the proposed sale. In May, 2013, Nationstar denied Rogers for a loan modification because the loan amount exceeded HAMP program guidelines, and Rogers' income was insufficient to support even a substantially modified and reduced monthly payment.

8. In reference to the “Notice of Denial of Loan Modification or Other Means of Loss Mitigation” executed by Plaintiff’s counsel and served on Defendant on June 4, 2013, please state with specificity the reason’s [sic] which Plaintiff states “the Mortgagor does not qualify for loan modification or other means of loss mitigation, in accordance with any standards, rules or guidelines of the Mortgagee” and please state with specificity the standard, rules, or guidelines which Plaintiff is referring to and provide Defendant a copy of the specifically identified standards, rules or guidelines.

ANSWER: Plaintiff objects to providing the information requested, as the eligibility criteria and requirements under the HAMP program are readily available to Defendant in the public domain at www.makinghomeaffordable.gov. See also, Nationstar 0137 produced in response to Defendant’s Second Requests for Production.

9. Please identify all requests Plaintiff, a predecessor of Plaintiff, and/or any servicer who has ever serviced the subject loan have received from Defendant for either approval of a short sale or modification, providing the date received and the name and address of the person who was assigned to respond to the request.

ANSWER: See objections and response to Interrogatory no. 7. See also documents produced in response to Defendant’s Second Requests for Production.

10. Please identify all actions taken by If [sic] Plaintiff, a predecessor of Plaintiff, and/or any servicer who has ever serviced the subject loan relating to a request for approval of either a short sale or modification.

ANSWER: See objections and response to Interrogatory no. 7. See also documents produced in response to Defendant's Second Requests for Production.

11. Describe the detail how If [sic] Plaintiff, a predecessor of Plaintiff, and/or any servicer who has ever serviced the subject loan determined whether to approve or deny a request for a short sale or modification including the information used to make such determination, the analysis used to make such determination, the names and addresses of all that had authority or input to make such determination , [sic] the actual determination made and how and when such determination was provided to Defendant.

ANSWER: See objections and response to Interrogatory no. 7. See also documents produced in response to Defendant's Second Requests for Production.

12. Please identify all NPV determinations made by Plaintiff, a predecessor of Plaintiff, and/or any servicer who has ever serviced the subject loan pursuant to HMP Guidelines or other guidelines with regard to the subject loan, including all factors used to make such determine [sic] and all results reached.

ANSWER: See objections and response to Interrogatory no. 7. See also documents produced in response to Defendant's Second Requests for Production, including but not limited to Nationstar 0137.

13. Please list every charge or fees assessed to the account, including but not limited to every late fee, payment method fee, inspection fee, home preservation fee, and/or corporate advance that has been assessed to the subject account, including the date the fee was assessed

and the amount that was assessed on said date. If you respond by referring to a document produced in discovery, please specifically identify that document and explain how it responds to this interrogatory.

ANSWER: To the extent such requested information is within the possession, custody and/or control of the Plaintiff, it is set forth in the account payment history and account activity records produced in response to Defendant's Second Request for Production of Documents.

14. Please set forth the date of each allonge and/or endorsement of the subject Note, by whom signed, the authority of the person who assigned the allonge or endorsement, the consideration paid for the allonge or endorsement, and the name and address of the person or entity receiving the transfer of the note. Further if any individual signing an allonge or endorsement did so as an attorney in fact or under power of attorney, please provide a copy of the power of attorney granting said authority.

ANSWER: Plaintiff objects to this request as seeking information not within the possession or control of the Plaintiff. Subject to and without waiving said objection, see response to Interrogatory no. 6. The loan of Curtis Rogers was sold to the Residential Accredit Loans, Inc. Mortgage Asset-Backed Pass-Through Certificates, Series 2007-QH2 Trust pursuant to an Assignment and Assumption Agreement, dated as of February 27, 2007, between Residential Funding Company, LLC and Residential Accredit Loans, Inc. The Rogers Adjustable Rate Note would have been endorsed by Residential Funding Company, LLC to Deutsche Bank Trust Company Americas, as Trustee for the RALI Series 2007-QH2 trust, incident to the transfer of the loan into the trust. Thereafter,

incident to the prosecution of the foreclosure action against the Borrower, the Note was endorsed by Deutsche Bank Trust Company Americas, as Trustee, in blank, thus converting the note to bearer paper enforceable by its authorized servicing agent.

15. There is no Interrogatory numbered 15.

16. Please set forth the date of each assignment of the subject mortgage, by whom signed, the authority of the person who assigned the assignment, the consideration paid for the assignment, and the name and address of the person or entity receiving the transfer of the mortgage.

ANSWER: The Rogers Mortgage was assigned by the original nominee mortgagee, Mortgage Electronic Registration Systems, Inc. (MERS) to Aurora Loan Services LLC on September 8, 2009; the assignment was executed by Theodore Schultz, a vice president of MERS and bears a MERS corporate seal. There was no consideration paid by Aurora to MERS for this assignment.

17. Please define with specificity the meaning of the phrase found on the Copy of the Note attached hereto as Exhibit "A" and incorporated herein by reference, "Pay to the Order of _____ Without Recourse, Deutsche Bank Trust Company Americas As Trustee, By Nationstar Mortgage LLC As Successor to Aurora Loan Servicing LLC, As Successor Servicer to Residential Funding Company, LLC As Attorney-In-Fact", including but not limited to defining the meaning of "As Successor Servicer" and "As Attorney-In-Fact".

ANSWER: Plaintiff objects to this request on the ground that there is no Exhibit "A" attached to Defendant's Interrogatories, and Plaintiff is therefore incapable of providing a full and meaningful response to this request. However, subject to and without waiving the foregoing objections, Plaintiff states that as a general matter, such language of endorsement in blank serves to convert a negotiable instrument to bearer paper enforceable by the holder; "successor servicer" means and refers to a subsequent servicer of the loans contained in the RALI Series 2007-QH2 Trust for which Residential Funding Company, LLC originally served as Master Servicer; further, the term "attorney-in-fact" in a legal term so defined in Black's Law Dictionary, meaning generally "authorized by another to act in its stead".

Dated this the 28th day of February 2014.

**ATTORNEYS FOR PLAINTIFF
NATIONSTAR MORTGAGE, LLC**



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CERTIFICATE OF SERVICE

DOCUMENT: **ANSWERS TO DEFENDANTS SECOND SET OF INTERROGATORIES TO PLAINTIFF**

PARTY SERVED: Mary Leigh Arnold, Esq.
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Mt. Pleasant, South Carolina 29464
Attorney for Defendants Curtis Rogers
and Julie Rogers


Mindi Robinson
ADAMS AND REESE LLP

EXHIBIT B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	Case No.: 2011-CP-10-1805
	)	
Nationstar Mortgage, LLC	)	PLAINTIFF'S RESPONSE TO
	)	DEFENDANT'S SECOND SET OF
Plaintiff,	)	REQUESTS FOR PRODUCTION
	)	
v.	)	
	)	
Curtis Rogers a/k/a Curtis L. Rogers III,	)	
Julie J. Rogers, National City Bank,	)	
Shoreline Farms Community Assoc., Inc.,	)	
and Harbor National Bank,	)	
	)	
Defendants.	)	

TO: MARY LEIGH ARNOLD, ATTORNEY FOR DEFENDANT

Plaintiff, Nationstar Mortgage, LLC ("Nationstar"), responds to Defendant's Second Requests for Production of Documents as follows:

GENERAL OBJECTIONS

1. Plaintiff objects to Defendant's requests which seek information from this Plaintiff as to any purported act, omission, or policy of non-parties to this action, and which information is not within the knowledge, custody, or control of the Plaintiff.
2. Plaintiff objects to Defendant's requests which seek to have Plaintiff authenticate, identify, or describe any document which was not produced or generated by the Plaintiff, or which includes information and data from persons or entities other than the Plaintiff.
3. Each of the Plaintiff's responses herein are subject to and limited by these General Objections.

REQUESTS FOR PRODUCTION

1. Please make available for viewing by Plaintiff [sic] the original Note, any original Allonge to the Note, the original Mortgage, and any original assignments to the Mortgage.

Response: The requested documents are currently in the possession of the Korn Law Firm, 1300 Pickens Street, Columbia, SC 29211, and available for viewing by appointment.

2. Please produce all copies of the subject note, mortgage, allonges to the Note, and assignments of the Mortgage (recorded or unrecorded), and any power of attorney relied on by any party to transfer or assign the Note or Mortgage.

Response: Plaintiff objects to this request to the extent it seeks information and documentation outside the possession, custody or control of the Plaintiff. Further, the request seeks documents that are irrelevant and immaterial in this cause, and not likely to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, copies of the requested documents as maintained in the loan servicing file of Aurora Loan Services and Nationstar Mortgage are produced herewith.

3. If the subject loan account is or has ever been a part of the securitized trust or mortgage pool please provide a copy of the trust or pool's "pooling and servicing agreement," "Prospectus," any corresponding servicing or subservicing agreements or guidelines, along with all corresponding exhibits, and copy of the "Custodial File" as defined by the securitized trust or mortgage pool.

Response: Plaintiff objects to this request as seeking documentation that is irrelevant and immaterial to the issues presented, and thus not likely to lead to the discovery of admissible evidence. Moreover, Defendant has no privity of contract with respect to the requested documents. Subject to and without waiving the foregoing objections, and to the extent a response may be necessary, Plaintiff refers to the information and documents publicly available through the "EDGAR" system on the United States Securities and Exchange Commission's website, <http://www.sec.gov/edgar.shtml>.

4. Please produce a copy of every letter of denial of loss mitigation or a mortgage modification which has been sent to Defendant concerning the subject loan account.

Response: To the extent these documents are available to Plaintiff, they are included in the loan servicing file documents produced herewith.

5. Please produce copies of records of all contact regarding the subject account not priorly [sic] provided, including, but not limited to: (i) communication logs and/or servicing notes from each department (loss mitigation, collections, etc.) and (ii) copies of all notices, correspondence, statements, or documents of any kind sent by and [sic] Plaintiff to the named Defendant or her agents. Please provide said records in both paper and the original electronic format. Please include any document that describes, identifies, or explains the meaning of the codes used in said records.

Response: To the extent these documents are available to Plaintiff, they are included in the documents produced herewith, and Plaintiff further states that said documents speak for themselves.

6. Please produce any documents consulted in the preparation of the answers to Defendants' second set of interrogatories.

Response: See documents produced herewith.

7. Please produce all copies of any repayment plan, forbearance agreement, workout agreement, temporary modification, permanent modification, and/or trial plan offered to Defendants, agreed to by Defendants, or entered into by Defendants and Plaintiff or a Predecessor of Plaintiff.

Response: To the extent these documents are available to Plaintiff, they are included in the documents produced herewith, and Plaintiff further states that said documents speak for themselves.

8. There is no Request for Production numbered 8.

9. Please product any document or agreement relating to or evidencing the transfer of ownership or servicing rights of the subject loan between any entity involved in the ownership, trusteeship, or servicing of the loan.

Response: Plaintiff objects to this request as seeking documentation that is irrelevant and immaterial to the issues presented, and thus not likely to lead to the discovery of admissible evidence. Moreover, Defendant has no privity of contract with respect to the requested documents. Subject to and without waiving the foregoing objections, and to the extent a response may be necessary, Plaintiff refers to the information and documents publicly available through the “EDGAR” system on the United States Securities and Exchange Commission’s website, <http://www.sec.gov/edgar.shtml>.

10. Please produce all policies, procedures, and guidelines that governed the origination and underwriting of the subject loan, and the rate sheets for the month of the loan.

Response: Plaintiff objects to this request as seeking information that is irrelevant and immaterial, and not reasonably calculated to lead to the discovery of admissible evidence in this action. Furthermore, this request seeks information that is not within the possession, custody or control of the Plaintiff, who did not originate or underwrite the subject loan.

11. Please produce all policies, procedures, and guidelines that governed reviewed loss mitigation options concerning the subject loan.

Response: Plaintiff objects to this request as seeking information that is irrelevant and immaterial, and not reasonably calculated to lead to the discovery of admissible evidence in this action; further, any such information in the possession of Plaintiff is confidential and proprietary to Plaintiff and other non-parties to this action. Subject to and without waiving the foregoing objections, Plaintiff states that the eligibility criteria and requirements under the HAMP program are readily available to Defendant in the public domain at www.makinghomeaffordable.gov.

Dated this the 28th day of February 2014.

**ATTORNEYS FOR PLAINTIFF
NATIONSTAR MORTGAGE, LLC**



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Columbia, SC 29211-2369
(803) 231-2022
(803) 231-2060 (fax)

EXHIBIT B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	Case No.: 2011-CP-10-1805
	)	
Nationstar Mortgage, LLC	)	
	)	
Plaintiff,	)	
	)	CERTIFICATE OF SERVICE
v.	)	
	)	
Curtis Rogers a/k/a Curtis L. Rogers III,	)	
Julie J. Rogers, National City Bank,	)	
Shoreline Farms Community Assoc., Inc.,	)	
and Harbor National Bank,	)	
	)	
Defendants.	)	

I, the undersigned attorney in the law firm of Adams and Reese LLP, one of the attorneys for the Plaintiff, do hereby certify that a copy of the below-identified pleading or document was served on counsel for the Defendants by causing the same to be deposited into the United States Mail, postage prepaid, addressed as follows:

DOCUMENT: **PLAINTIFF'S RESPONSE TO DEFENDANT'S
SECOND SET OF REQUESTS FOR PRODUCTION**

PARTY SERVED: Mary Leigh Arnold, Esq.
749 Johnnie Dodds Blvd., Suite B
Mt. Pleasant, South Carolina 29464
Attorney for Defendants Curtis Rogers
and Julie Rogers

This 28th day of February, 2014.


Mindi Robinson
ADAMS AND REESE LLP

EXHIBIT C

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Nationstar Mortgage LLC

☐ Plaintiff

v.

Curtis R. Rogers, Et Al.

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2010-CP-10-1805

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

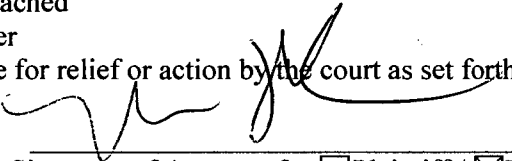
Plaintiff's Attorney: Dean Hayesi, Bar No. Address: Post Office Box 12369 Columbia, SC 29211-2369 phone: fax: e-mail: other:	Defendant's Attorney: Mary Leigh Arnold, Pa , Bar No. Address: 749 Johnnie Dodds Blvd., Ste. B Mt. Pleasant, SC 29464 phone: 843 971-6053 fax: 843 971-6055 e-mail: sammie@maryarnoldlaw.com other:
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: Motion for Summary Judgment Estimated Time Needed: 30 Court Reporter Needed: ☐ YES / ☐ NO	
SECTION II: Motion/Order Type	
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.  _____ Signature of Attorney for ☐ Plaintiff / ☒ Defendant April 1, 2014 _____ Date submitted	
SECTION III: Motion Fee	
☒ PAID – AMOUNT: 25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☒ Other: Motion to Summary Judgment	
JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	_____ JUDGE CODE: _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED – AMOUNT DUE: _____	

EXHIBIT C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2011-CP-10-1805
	)	
Nationstar Mortgage, LLC,	)	
	)	
Plaintiff,	)	
v.	)	DEFENDANTS' NOTICE OF MOTION
	)	AND MOTION FOR SUMMARY
Curtis Rogers a/k/a Curtis L. Rogers, III,	)	JUDGMENT
Julie J. Rogers, National City Bank,	)	
Shoreline Farms Community Association,	)	
Inc., and Harbor National Bank.	)	
	)	
Defendants.	)	
	)	

FILED
2014 MAR -4 AM 9:05
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

TO: DEAN A. HAYES, ATTORNEY FOR PLAINTIFF:

PLEASE TAKE NOTICE that the Defendants, Curtis Rogers and Julie J. Rogers (hereinafter "Defendants"), by and through their undersigned attorney will move before the presiding Judge, at chambers, Charleston County Courthouse, Charleston, South Carolina, at such place and time as the court may appoint, for an Order granting summary judgment as to Plaintiff's cause of action for foreclosure on the grounds that Plaintiff, lacks standing. This motion is made pursuant to all applicable Rules of Civil Procedure including but not limited to rule 56.

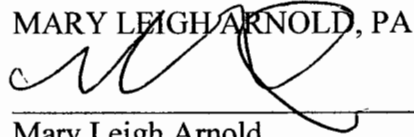
This Motion will be supported by the pleadings, public records, Plaintiff's Responses to Requests for Admissions a copy of which are attached hereto as Exhibit "A" and incorporated herein by reference, and any other exhibits or memoranda which Defendants may submit to this Court at the time of the hearing in this matter.

The undersigned hereby certifies and affirms in accordance with Rule 11(a) of the South Carolina Rules of Civil Procedure that consultation with counsel prior to filing would serve no useful purpose.

PLEASE BE PRESENT TO DEFEND IF SO MINDED.

Respectfully Submitted,

MARY LEIGH ARNOLD, PA



Mary Leigh Arnold
749 Johnnie Dodds Blvd, Suite B
Mt. Pleasant, SC 29464
Phone: 843-971-6053
Facsimile: 843-971-6055

March 4 2014
Mt. Pleasant, SC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4 day of March, 2014 a copy of the Defendants' Motion for Summary Judgment, in the within action, was placed in the United States Mail, postage prepaid addressed to opposing counsel as follows:

Dean A. Hayes
KORN LAW FIRM, P.A.
1300 Pickens St.
P.O. Box 12369
Columbia, SC 29211



EXHIBIT C

ELECTRONICALLY FILED - 2023 Feb 09 10:15 PM - CHARLESTON - COMMON PLEAS - CASE#2019CP1004503

EXHIBIT A

RECORD0450

EXHIBIT C

33095908

www.adamsandreesse.com

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Nationstar Mortgage, LLC

Plaintiff,

v.

Curtis Rogers a/k/a Curtis L. Rogers III,
Julie J. Rogers, National City Bank,
Shoreline Farms Community Assoc., Inc.,
and Harbor National Bank,

Defendants.

IN THE COURT OF COMMON PLE

Case No.: 2011-CP-10-1805

**PLAINTIFF'S RESPONSE TO
DEFENDANT CURTIS ROGERS'
REQUESTS FOR ADMISSION**

TO: MARY LEIGH ARNOLD, ATTORNEY FOR DEFENDANT

In accordance with Rule 36 of the South Carolina Rules of Civil Procedure, Plaintiff Nationstar Mortgage, LLC ("Nationstar") responds to Defendant Curtis Rogers' Request for Admission as follows:

REQUESTS FOR ADMISSION

1. Admit that Aurora Loan Services, LLC did not originate the subject no mortgage in this action.

Response: Admit.

2. Admit that from September 15, 2009 through June 30, 2012 Aurora

RECORD0451

EXHIBIT C

Services, LLC was not the owner of the subject Note.

Response: To the extent Defendant means by use of the term "owner" to refer owner of the beneficial interest in the indebtedness evidenced by the promissory note mortgage of the Defendant, Plaintiff admits.

3. Admit that the copy of Note attached hereto as Exhibit "A" does not bear endorsement to Residential Funding Company, LLC.

Response: Objection. This request is premised upon a written instrument or document which speaks for itself. Subject to and without waiving said objection, Plaintiff admits

4. Admit that the copy of Note attached hereto as Exhibit "A" bears an endorsement in blank executed by Bakhtlar S. Akhunji, Assistant Secretary, Homecomings Financial, LLC, A Delaware Corporation.

Response: Objection. This request is premised upon a written instrument or document which speaks for itself. Subject to and without waiving said objection, Plaintiff admits

5. Admit that the copy of Note attached hereto as Exhibit "B" bears an endorsement to Residential Funding Company, LLC, executed by Bakhtlar S. Akhunji, Assistant Secretary, Homecomings Financial, LLC, A Delaware Corporation.

Response: Objection. This request is premised upon a written instrument or document

EXHIBIT C

which speaks for itself. Subject to and without waiving said objection, Plaintiff admit

6. Admit that the copy of the Note attached hereto as Exhibit "B" bear endorsement to Deutsche Bank Trust Company Americas as Trustee executed by Judy Vice President, Residential Funding Company, LLC.

Response: Objection. This request is premised upon a written instrument or document which speaks for itself. Subject to and without waiving said objection, Plaintiff admit

7. Admit that the copy of the Note attached hereto as Exhibit "B" do specifically bear an endorsement to Deutsche Bank Trust Company Americas as Trustee RALI Series 2007-QH2 Trust.

Response: Objection. This request is premised upon a written instrument or document which speaks for itself. Subject to and without waiving said objection, Plaintiff admit

8. Admit the copies of the Notes attached hereto as Exhibit "A" & "B" do not bear an endorsement to Aurora Loan Services, LLC.

Response: Objection. This request is premised upon a written instrument or document which speaks for itself. Subject to and without waiving said objection, Plaintiff admit

EXHIBIT C

9. Admit the copies of the Notes attached hereto as Exhibit "A" & "B" do not constitute an endorsement to Nationstar Mortgage, LLC.

Response: Objection. This request is premised upon a written instrument or document which speaks for itself. Subject to and without waiving said objection, Plaintiff admit

10. Admit that Plaintiff did not produce a copy of the Note attached hereto as Exhibit "C" as part of Plaintiff's responses to requests for production dated July 10, 2013.

Response: Objection. Plaintiff cannot confirm with certainty any or all documents may or may not have been previously produced by its attorneys, and thus cannot admit nor deny this request as presented. However, subject to and without waiving said objection, Plaintiff admits a copy of the Note bearing an endorsement in blank from Deutsche Bank Trust Company Americas, as Trustee, may not have been part of Plaintiff's

original production, as the original fully-endorsed Note is maintained by a document custodian for safekeeping and is not typically in possession of the loan servicer until such time as the original collateral file may be needed for trial.

11. Admit that as of the date of service of these Requests for Admissions the assignment of the subject Mortgage recorded in the Charleston County, SC, RMC Office assignment which states that it assigns the subject Mortgage to Aurora Loan Services

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Response: Admit.

Response: Objection. Plaintiff cannot confirm with certainty any or all document may or may not have been previously produced by its attorneys, and thus can n admit nor deny this request as presented. Subject to and without waiving the fore objection, Plaintiff admits that an assignment to Nationstar has not, to date, been reco

RECORD0455

EXHIBIT C

assigning the subject mortgage to 1) Residential Funding, LLC; 2) Deutsche Bank Company Americas; 3) Deutsche Bank Trust Company Americas as Trustee for RALI 2007-QH2 Trust; or 4) Nationstar Mortgage, LLC.

Response: Objection. Plaintiff objects to the compound nature of this request, impedes the Plaintiff's ability to provide a full and meaningful response. However, s to and without waiving the foregoing objection, Plaintiff admits that there is a assignment of the subject Rogers mortgage from Mortgage Electronic Regist Systems, Inc. to Residential Funding, LLC, Deutsche Bank Trust Company Americ Deutsche Bank Trust Company Americas as Trustee for RALI Series 2007-QH2 Plaintiff denies the remainder of this request.

14. Admit that as of the date of service of these Requests for Admissions Plaintiff not produced to Defendant in this action is an assignment of the subject Mortgage assigni subject Mortgage to 1) Residential Funding, LLC; 2) Deutsche Bank Trust Company Am 3) Deutsche Bank Trust Company Americas as Trustee for RALI Series 2007-QH2 Trust Nationstar Mortgage, LLC.

Response: Objection. Plaintiff objects to the compound nature of this request, impedes the Plaintiff's ability to provide a full and meaningful response. However, s to and without waiving the foregoing objection, Plaintiff admits that there is n assignment of the subject Rogers mortgage from Mortgage Electronic Regist

EXHIBIT C

Systems, Inc. to Residential Funding, LLC, Deutsche Bank Trust Company America
Deutsche Bank Trust Company Americas as Trustee for RALI Series 2007-QH2 Trust
thus one was not produced to Defendant. Plaintiff denies the remainder of this request.

15. Admit that the document attached hereto as Exhibit "D" is a correspondence from Aurora Bank, FSB, dated September 8, 2011 and addressed to the Defendant Curt Rogers, which states: "Aurora Bank provides the servicing for the owner of your loan. Contact information for the owner is as follows: Deutsche Bank National Trust Company Americas, as Trustee for RALI Series 2007-QH2 Mortgage Asset-Backed Pass-Through Certificates, Series 2007-QH2[.]"

Response: Objection. This request is premised upon a written instrument or document which speaks for itself. Subject to and without waiving said objection, Plaintiff admits the document states as represented, followed by an address for the owner of the loan.

16. Admit that the document attached hereto as Exhibit "E" is a correspondence from Nationstar Mortgage, LLC, dated July 15, 2012 and addressed to the Defendant Curt Rogers, which states: "Welcome to Nationstar Mortgage! We look forward to servicing you in the future on behalf of Deutsche Bank, Trustee, RALI SERIES 2007-QH2."

Response: Objection. This request is premised upon a written instrument or document which speaks for itself. Subject to and without waiving said objection, Plaintiff admits the document states as represented.

EXHIBIT C

Dated this the 28th day of February 2014.

**ATTORNEYS FOR PLAINTIFF
NATIONSTAR MORTGAGE, LLC**



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(803) 231-2060 (fax)

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

}

COURT OF COMMON PLEAS
CASE No. 2019 CP 10 4503

**DEUTSCHE BANK TRUST COMPANY
AMERICA, AS TRUSTEE FOR
RESIDENTIAL ACCREDIT LOANS, INC.,
PASS-THROUGH CERTIFICATES 2007-
QH2,**

PLAINTIFF,

V.

**ASHLEY JOHNSON BESHARA AS
TRUSTEE OF THE REVOCABLE TRUST
AGREEMENT FOR 2235 SHORELINE
DRIVE ORIGINALLY DATED 3RD DAY OF
MARCH 2010; SHORELINE FARMS
COMMUNITY ASSOCIATION, INC.;
WELLS FARGO BANK N.A.; CADLE
ROCK VENTURE, L.P. AND OHIO
LIMITED PARTNERSHIP, CURTIS
ROGERS AND JULIE ROGERS,**

DEFENDANTS,

**ASHLEY JOHNSON BESHARA AS
TRUSTEE OF THE REVOCABLE TRUST
AGREEMENT FOR 2235 SHORELINE
DRIVE ORIGINALLY DATED 3RD DAY OF
MARCH 2010,**

THIRD-PARTY PLAINTIFF,

V.

NATIONSTAR MORTGAGE LLC,

THIRD-PARTY DEFENDANT

**CURTIS AND JULIE ROGERS
NOTICE OF MOTION AND
MOTION TO RECONSIDER
AND SUPPORTING
MEMORANUM**

TO: THE HONORABLE KRISTI F. CURTIS; RICH MCPHERSON AND JASON RICHARDSON OF MCGUIRE WOODS LLP, ATTORNEYS FOR DEUTSCHE BANK TRUST COMPANY AND NATIONSTAR MORTGAGE LLC:

PLEASE TAKE NOTICE that Curtis Rogers and Julie Rogers (hereinafter “Defendants”), by and through their undersigned attorney, move before the Honorable Kristi F. Curtis, at Chambers, Charleston County Courthouse, Charleston, South Carolina, or at such other place and time as the court may appoint to reconsider that certain Order filed on July 10, 2023 (hereinafter “the Order”). Defendants make the motion pursuant all applicable Rules of Civil Procedures including but not limited to Rules, 52, 59, and 60, for the purposes of preserving all issues for appeal.

The Court committed the following errors in its Order in the following ways:

1. The statement by the Court “the Court rules that the decision is affirmed...” (Order, p. 2) is a misstatement at best. It is uncertain what is meant by this statement because there is no specific reference to the decision being affirmed and when the phrase is read with the entire sentence, it lacks comprehension. Alternatively, it states an incorrect proposition that the Court sat as a reviewing court and had the ability to affirm another unreferenced decision. This Court was not sitting as a reviewing Court and lacked the ability to affirm another Court’s decision in this matter.

2. The Court erred by making the following finding of fact: “This is a case that represents a second attempt to foreclose a first priority mortgage...” (Order, p. 2)

First, a Court considering summary judgment does not make findings of fact. See *Chastain v. Hiltabidle*, 381 S.C. 508, 514, 673 S.E.2d 826, 829 (Ct. App. 2009) (“A court considering summary judgment makes neither factual determinations nor considers the merits of competing

testimony."); and *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). The Court erred by making this finding of fact.

Second the finding is inconsistent with other statements by the Court. The Court recognizes three prior foreclosure actions: (1) Civil Action No. 2009-CP-10-05840 ("Action 1") (Order, pp. 2-3); (2) Case No. 2011-CP-10-01805 ("Action 2") (Order p. 3); and (3) Case No. 2015-CP-10-01971 ("Action 3") (Order, p. 3) It is inconsistent to state the present and fourth civil action is a second attempt to foreclosure having recognized the prior civil actions.

Each separate civil action is a separate attempt to foreclose. Each time a new filing fee was required, made and recorded. Each time a new case number was given. Each time the action ended and was dismissed. There were three prior civil actions and the present action is a fourth attempt to foreclose on the very same note and mortgage. The Court has incorrectly found only two attempts to foreclose were made.

Third, clearly the statement "a second attempt to foreclose" was disputed by Defendants. This proposition was contained in Plaintiff's Memorandum in Support of its Amended Motion for Summary Judgment. Defendants' Response in Opposition to Plaintiff's Amended Motion for Summary Judgment" directly disputed this very position. (Def. Rep. in Opp., p. 2). Defendants draw out both Deutsche and Nationstar's acknowledgement of the three prior actions in its filings. It is a disputed fact, and error to state it was not or make a finding of fact in contradiction.

3. The Court erred as a matter of law when making the statement "the Foreclosure Action was removed from the Court's **active trial roster** pursuant to a consent Rule 40(j)..." (Order, p. 3).

As noted by all the parties, a Rule 40(j) Order is an order of dismissal as recognized by the South Carolina Court of Appeals in the cases of *Goodwin v. Landquest Development, LLC*, 414

S.C.623, 779 S.E.2d 826 (Ct. App. 2015) (A case involving a foreclosure of a mortgage where a motion to restore was denied stating striking a case pursuant to Rule 40(J) is equivalent to a dismissal.) and *Personal Care, Inv. v. Theos*, 426 S.C. 78, 825 S.E.2d 281 (Ct. App. 2019) (where the Court declined to restore a case to the active roster, ruling that striking a case under Rule 40(j) is equivalent to dismissing a case and stating “Nevertheless, we believe this argument ignores the procedural posture of the case as dismissed.”). (Rogers Memo. Supp. Sum. Jud., pp 5-6; and Deutsche’s Return to Beshara Motion to Dismiss, p. 6)(“ While there is a basis to consider a case stricken pursuant to Rule 40(j), SCRPC as the equivalent of being dismissed...”)

The Court ignores established authority. The Court ignores argument and the Notes to the 1994 Amendment to Rule 40, SCRPC, that state Rule 40(j), SCRPC substantially revises the procedure ***for dismissing a case*** previously found in Rule 40(c)(3), SCRPC. (emphasis added) Further, the Court ignores and attempts to alter the fact that the Form 4 Orders dismissing the actions under Case number 2011-CP-10-1805 filed June 20, 2014, and under case number 2015-CP-10-1971 filed May 16, 2016, clearly noted the cases had ended by checking the box stating this order ends the case. (Rogers, Answer, Counterclaim, p.6, ¶32). The cases did not simply bounce back and forth between the general docket and the “active jury docket” remaining as a pending matter. The cases ended each time they were dismissed under Rule 40(j), SCRPC, and to suggest or find otherwise is error.

4. The Court erred in finding “[t]he demand for accounting claim, SCUTPA claim, negligence misrepresentation claim, and declaratory judgment claimed alleged in this action mirror the counterclaims that the Rogers raised in the amended answer that they served in Action 2 on February 2, 2012.” (Order, p. 5). A quick and simple comparison of the pleadings shows the claims do not mirror each other. By way of example the Declaratory Judgment claim asserted in

the Rogers Answer, Counterclaim and Cross claim in this matter is found at ¶¶ 79-81. Paragraph 80 reads:

80. Defendants seek a declaration of the following;
 - a. The Note is unenforceable due to its unconscionable terms specifically including but not limited to negative amortization;
 - b. *The dismissal of three prior actions involving the same Note and Mortgage preclude and/or bar the within action;*
 - c. Plaintiff lacks standing, authority or ownership to bring the within action; and
 - d. The divergent direction of the Mortgage renders the Mortgage unenforceable.

In contrast, the Declaratory Judgment claim asserted in 2012 in the Second Action can be found at ¶¶ 38-43. Paragraph 40 reads:

40. The Note should be unenforceable due to its unconscionable terms specifically including but not limited to negative amortization. Additionally, and alternatively if the terms of the Note are enforceable and not null and void, then entered the workout agreement between Defendants and Plaintiff should be enforceable. As such, Defendants seek an order declaring the note null, void and unenforceable or in the alternative the terms of the workout agreement enforceable, allowing the Defendants to rescind the loan transactions requiring the return of all payments made to Plaintiff, prohibiting and or enjoining Plaintiffs from declaring the terms of the loan transactions in default, prohibiting and enjoining Plaintiffs from initiating or prosecuting a foreclosure action and/or reforming the loan transactions.

Certain of the facts asserted in the present matter in 2020 did not exist in 2012. The Court erred in finding the claims mirrored the other.

5. The Court erred in determining “[t]he Roger’s Motion for Summary Judgment raises the same arguments raised in Beshera’s Motion to Dismiss.” (Order, p. 6). The Court further committed error in failing to address and consider the jurisprudence presented by the Rogers.

a. The arguments raised by the Rogers were not the same as those raised by Beshera. While ultimately the parties do take the same position the present case is barred by Plaintiff’s

multiple actions filed and dismissed relating to the exact same note and mortgage, their arguments were different. The Court in error did not consider the arguments raised by the Rogers.

Additionally, the fact that Beshera filed a motion to dismiss prior to the Rogers becoming parties in the matter is of no consequence. The standard for a motion to dismiss is different than the standard for a motion for summary judgment. It is error to conflate the two standards. Likewise, it is error to conclude that the denial of a motion to dismiss warrants or mandates the denial of a motion for summary judgment. *See, Ballenger v. Bowen*, 313 S.C. 476, 443 S.E. 2d 379 (the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later state of the proceedings). If such is the case, the Order evidences the Court's disparate treatment of the parties. If such is the case, the Court should have denied Deutsche's motion for summary judgment because Deutsche presented the same arguments in its motion for summary judgment as it did in its prior motion to dismiss which was denied.

b. The Court erred by failing to address and consider the specific language of Rule 40(j) as argued by the Rogers.

"In interpreting the meaning of the South Carolina Rules of Civil Procedure, the [c]ourt applies the same rules of construction used to interpret statutes. If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." *Ex parte Wilson*, 367 S.C. 7, 15, 625 S.E.2d 205, 209 (2005) (citation omitted)); *Eagle Container Co. v. County of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 896 (2008) ("The language must also be read in a sense [that] harmonizes with its subject matter and accords with its general purpose." (quoting *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992))); *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("[T]he statute must be read as a whole and sections [that] are part of the

same general statutory law must be construed together and each one given effect." (*quoting S.C. State Ports Auth. v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006)); and *Ex parte Wilson*, 367 S.C. at 15, 625 S.E.2d at 209 ("The Rules of Civil Procedure 'shall be construed to secure the just, speedy, and inexpensive determination of every action.'" (*quoting Rule 1, SCRCP*)).

As argued by the Rogers Rule 40(j), SCRCP specifically uses the phrase "one time". It explicitly contemplates a one-time strike. It allows on a singular occasion for the dismissal of a case that protects against a statute of limitations challenge in the future if the Rule is properly followed. *See, See, Maxwell v. Genez*, 356 S.C. 617, 621, 591 S.E.2d 26, 28 (2003). Nothing in the Rule suggests it was adopted to allow for anything more than a one-time dismissal. Multiple dismissals are not contemplated or permitted. The Rule is designed to dismiss cases not ready for trial and clear congested dockets under restricted conditions. The Rule does not promote the idea that a party that refuses to prosecute the action it commenced and bring it to conclusion before the court, can simply repeatedly dismiss and restore as done here.

"If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." *Pers. Care, Inc. v. Theos*, 825 S.E.2d 281(S.C. App. 2019), *quoting, Knotts v. S.C. Dept. of Natural Res.*, 348 S.C. 1, 10, 558 S.E.2d 511, 516 (2002). The Court erred when it failed to construe the rule considering the specific clear wording and language used. The Court erred by in effect writing out the specific terms used in the Rule. The multiple dismissals ended the matter with finally and precludes the prosecution of a fourth matter.

c. The Court erred when it found multiple dismissals are acceptable under Rule 40(j), SCRCP, failing to address and consider the purpose of Rule 40(j) and the intersect and overlap between the other Rules of Civil Procedure, like Rule 41, SCRCP.

Rule 40(j), SCRCP was not designed to allow for repeated abusive or unlimited dismissals. As noted by Rogers and ignored by the Court Rule 40(j), SCRCP replaced Rule 40(3)(c), SCRCP providing for a new procedure for dismissing and restoring cases. *Graham v. Dorchester County School Dist.*, 339 S.C. 121, 528 S.E. 2d 80 (Ct. App. 2000); and *Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 630, 779 S.E.2d 826, 830 (Ct. App. 2015)("In the notes to the 1994 amendments to the South Carolina Rules of Civil Procedure, Rule 40(j) is described as 'substantially revis[ing] the procedure for dismissing a case previously found in Rule 40(c)(3)."). Rule 40(j), SCRCP revised and restricted the former Rule 40(c)(3), SCRCP, which only struck a case and left it pending before the court. Rule 40(j), SCRCP does not leave a matter pending before the court but rather limits dismissals and, unlike Rule 40(c)(3), provides for the tolling of the statute of limitations for a claim dismissed, if the claim is restored upon motion made within one year of the date of removal. *See, Maxwell v. Genez*, 356 S.C. 617, 621, 591 S.E.2d 26, 28 (2003). "The effect of the [Rule 40(j)] is not to set a new deadline, but to extend the statute of limitations' deadline by applying the rule's tolling provision when the motion to restore is made within a year." *Pers. Care, Inc. v. Theos*, 825, S.E. 2d 281 (Ct. App. 2019), *citing*, *Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 630, 779 S.E.2d 826, 830 (Ct. App. 2015). This Court erred by treating the first foreclosure action initiated as having remained pending despite the three Rule 40(j), SCRCP dismissals and considering the fourth foreclosure as a second attempt to foreclose.

The Court erred when it failed to consider the purpose of the Rules of Civil Procedure are to promulgate the smooth and efficient functioning of state courts. For instance, a case dismissed

pursuant to Rule 40(j), SCRCP has been compared to a dismissal under Rule 41(a). In the notes to the 1994 Amendments addressing the revisions to 40(j) it is stated: “A case can also be dismissed voluntarily under Rule 41(a).” Rule 40, General Docket, Trial Rosters and Call of Cases for Trial, South Carolina Rules Anno. (SC Bar) (2022 Ed.)). Rule 41(a), SCRCP houses the accepted two-dismissal rule. “Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.” Rule 41(a), SCRCP. Rule 41, SCRCP provides that when an action has been previously dismissed a subsequent notice of dismissal operates as an adjudication on the merits.

Both Rules 40(j) and 41(a), SCRCP address dismissals and restrict them. Rule 41, SCRCP provides for an absolute effect when a second voluntary dismissal occurs before an answer is filed. In that instance, Rule 41, SCRCP provides the dismissal is with prejudice because it is a decision on the merits. However, that is not the only instance that a dismissal is a decision on the merits. As argued by the Rogers, it is recognized that generally a “[d]ismissal, unless otherwise stated, is an adjudication on the merits.” “James F. Flanagan, South Carolina Civil Procedure, 490 (2020 Ed.). (Rogers, Mot. Sum. Judg., p. 8). Thus, Deutsche’s second and third voluntary dismissals were adjudications on the merits and therefore with prejudice. Because both the second and third voluntary dismissals functioned as an adjudication on the merits, this forth action by Deutsche is barred. *See, Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986) (“A dismissal ‘with prejudice’ indicates an adjudication on the merits and, operating as res judicata, precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication.”); *Laughon v. O’Braitis*, 360 S.C. 520, 527, 602 S.E.2d 108, 111 (Ct. App. 2004)

("In a subsequent action involving the same subject matter, the dismissal finally settles all matters litigated in the earlier proceedings, and all matters which might have been litigated therein.").

d. The Court erred in concluding a decision on the merits conflicts with the text of Rule 40(j). (Order, p. 6). The Courts conclusion lacks any support and merely makes a bald statement. This decision actually ignores the expressed language of Rule 40(j), SCRCPP that provides for a one-time event. It ignores and conflicts with the provisions of the Rule that allows for restoration if the requirements of the Rule are followed. It ignores the purpose of the Rules which is to provide protection from the expiration of a statute of limitations after a one-time dismissal. It conflates the concept of a strike and an opportunity to restore if done with a certain time period. It continues in the misperception the case remained pending rather than being dismissed. Finally, it ignores the fact that here there were three separate dismissal orders, not one.

e. The Court erred in failing to consider and rule on the Rogers argument that Deutsche's actions of four separate filings under the same exact facts was abusive. As noted by the Rogers, the United States Supreme Court in the case of *Cooter Gell v. Hartmarx Corporation*, 496 U.S. 384, 110 S. Ct. 2447, 10 L. Ed. 2d 359 (1990) was confronted with determining whether a federal court was divested of jurisdiction from determining Rule 11 sanctions for failure to make sufficient pre-filing inquiries to support a complaint, after plaintiff voluntarily dismissed the case pursuant to Rule 41(a)(1), FRCP. Although *Cooter* is not on point, because of certain issues addressed by the Court, it is instructive. The Court noted that both Rule 11, FRCP and Rule 41(a)(1), FRCP are aimed at curbing abuses of the judicial system.

Like the federal rule 41(a)(1), Rules 40(j) and 41(a)(1), SCRCPP, were designed to limit abuses. Rule 40(j), SCRCPP was designed to limit a dismissal to one occasion but only with the consent of all parties. It was designed to afford litigates with limited protection with regard to the

statute of limitations once, but only if the proscribed times were followed. Similarly, Rule 41(a) was designed to limit dismissals without prejudice. Thus, like the federal Rule 41(a), Rules 40(j) and 41(a)(1), SCRCF were aimed at curbing abuse and not allowing successive filings. To permit this fourth action to proceed allows for the very abuses Rule 40(j) and 41(a)(1) were designed to preclude.

f. The Court erred in failing to address the equitable principles presented to the Court and the totality of the circumstances. Equity does not reward one who sits on their hands and fails to be prepared to proceed to trial. Deutsche is responsible for its and its predecessor's deleterious behavior. It has been 14 years since the first action on the CRogers Note and Rogers Mortgage was commenced. Deutsche could not be bother with prosecuting any of the three prior actions. Two years lapsed between the filing of 2009 Action and the 2011 Action. Three years after the 2011 Action had commenced with no trial, the Rogers filed a motion for summary judgment. Approximately a month after the Notice of Hearing on the Rogers' motion had been set the matter was again dismissed. Slightly less than a year later the 2015 Action was filed. No activity took place in the 2015 Action except for the notice of a trial term. Within days of the trial notice the matter was again dismissed. It was another three years thereafter that the 2019 Action was filed. Deutsche did nothing in any of the actions to prosecute the claim. In fact, when the Rogers dispositive motion came up for hearing Deutsche ran and hide. It ran and hide when the matter came up for trial and failed to prosecute. The Rules of Civil Procedure were not written so as to provide a means of dismissing and refiling a case as many times as one wishes with impunity. Deutsche and Nationstar are entitle to no shield from the preclusive effects of invoking Rule 40(j) then intentionally ignoring its specific limitations; creating documents to justify their assertion of

claims (see pp. 17-18, *supra*); dismissing the matter three times; and failing to prosecute the matter when called for trial.

6. The Court erred in granting summary judgment in favor of Deutsche as to all of the counterclaims and cross claims of the Defendants as being time barred. “Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003).

First, the question of when a statute of limitations runs is generally one left to the jury. *Dunbar v. Carlson*, 341 S.C. 261, 269, 533 S.E.2d 913, 917 (Ct. App. 2000) (“[G]enerally, statute of limitations issues are for the jury, rather than the court, to resolve.”). Specifically, the question of when a plaintiff discovered, or should have discovered the alleged harm is for the jury to decide because it is an objective question. *Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) (stating in a medical malpractice action that when there is conflicting testimony regarding time of discovery of facts giving notice, the date on which discovery should have been made becomes an issue for the jury to decide); and *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) (“The burden of establishing the bar of the statute of limitations rests upon the one interposing it...and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide.”).

Second, the Court’s conclusion that the claims “arise largely from events that transpired in the litigation of this matter between 2009 and 2016...” (Order, p. 8) inherently conflicts with the ruling. The “largely” events referenced by the court are not delineated. The use of the term “largely” clearly excludes certain events that are not specified and fall outside the reference. Thus, the Court leaves open whether the exclude events fall with a statute of limitations for a jury to determine.

Additionally, the finding that the claims transpired in “this matter” make it impossible for events to be outside a statute of limitations. If the events occurred in “this matter” which was not commenced until 2019 then the counterclaims that were asserted in 2020 certainly were within a statute of limitations. Further, Deutsche’s concession in its motion that not all of the Defendants claims are outside the relevant statute of limitations is counter intuitive to the granting of summary judgment on a time barred basis. Defendants set forth specific facts they describe as “bad acts” of Deutsche and certainly agree that their claims expand beyond the limitations asserted by Deutsche. The Court erred in its ruling.

Additionally, the Court failed to consider Defendants argument that the claim for declaratory judgment is not necessarily subject to a three-year statute of limitations as asserted by Deutsche. "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue.' *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)." *City of Hartsville v. S.C. Mun. Ins. & Risk Financing Fund*, 382 S.C. 535, 677 S.E.2d 574 (2009). A declaratory judgment action is like a chameleon. Its color is determined by its background, i.e., the underlying action. *See Jacobs v. Service Merchandise Co.*, 297 S.C. 123, 375 S.E.2d 1 (Ct.App.1988) (the character of a declaratory judgment action is determined by the main purpose of the complaint).

Here, the underlying action for mortgage foreclosure sounds in equity. *See, Carolina First Bank v. Badd, L.L.C.*, 414 S.C. 289, 778 S.E.2d 106 (2015). More importantly, the relief sought in the declaratory judgment cause by Defendants is for injunctive relief which is equitable. Generally, statutes of limitation do not bar the equitable relief. *See Richland County v. Kaiser*, 351 S.C. 89, 567 S.E. 2d 260 (Ct. App. 2002), *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 543 S.E.2d 563 (Ct. App.2001). The declaratory judgment claim is equitable and is not subject to

a three-year statute of limitations. The Court erred by failing to address the equitable claims not being subject to a statute of limitations.

Likewise, the Court erred in failing to consider as argued by the Defendants that under South Carolina law, "a defendant may be estopped from claiming the statute of limitations as a defense if 'the delay that otherwise would give operation to the statute had been induced by the defendant's conduct.'" *Wiggins v. Edwards*, 314 S.C. 126, 130, 442 S.E.2d 169, 171 (1994)(quoting *Dillon County School Dist. Number Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 332 S.E.2d 555 (Ct. App.1985), cert. dismissed, 288 S.C. 468, 343 S.E.2d 613 (1986), overruled on other grounds by *Atlas Food Sys. & Servs. v. Crane Nat'l Vendors*, 319 S.C. 556, 462 S.E.2d 858 (1995)). Whether a defendant is estopped from claiming the statute of limitations is ordinarily a question of fact. See *Black v. Lexington School Dist. No. 2*, 327 S.C. 55, 488 S.E.2d 327 (1997). The Court erred by failing to address or give consideration to the arguments presented.

7. The Court erred by concluding a named Defendant, Beshera lacks standing to challenge the terms of the mortgage loan. It is fundamental right for named defendants to be able to challenge a plaintiff's ability to bring and prove the causes of action asserted in a complaint.

The party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt. *U.S. Bank Trust Nat. Ass'n v. Bell*, 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009). Deutsche specifically named Beshara as a defendant to the foreclosure action. Thus, as a name defendant Beshara has the right to assert defenses and attack the ability of Deutsche to meet its burden of proof. It is implausible to think that one can bring in a defendant to an action and then say you cannot challenge my right to sue you.

A number of courts throughout the country have rejected the "standing" challenges lenders have raised against borrowers and owners attempting to keep them from being able to defend

against foreclosure.¹ An owner of property clearly has standing to question the validity of the transfers of loan documents that a party alleges give it the right to sell the owner and/or borrower's home. A foreclosure terminates an owner's interest in the property and subjects the owner to physical eviction. Since South Carolina is a lien theory state, a foreclosure sale extinguishes the owner's title to the property. To the extent that the owner seeks to protect these existing rights in

¹ *Slorp v. Lerner, Sampson & Rothfuss*, 587 Fed. Appx. 249, 253–254 (6th Cir. 2014) (pursuing judicial foreclosure without assignments that would give authority to foreclose caused injury to borrower in having to defend suit; borrower had standing to bring debt collection claims); *Howard v. Chase Home Fin., L.L.C.*, 555 Fed. Appx. 567 (6th Cir. 2014) (under Michigan law, borrowers have standing to challenge assignments related to authority to foreclose, but after expiration of post-sale redemption period must assert strong claim of fraud or irregularity); *Reinagel v. Deutsche Bank Nat'l Trust Co.*, 735 F.3d 220, 225 (5th Cir. 2013) (Texas courts follow “the majority rule” that obligors may bring challenges based on any ground that renders assignment of deed of trust void); *Culhane v. Aurora Loan Serv. of Neb.*, 708 F.3d 282 (1st Cir. 2013) (applying Massachusetts law, borrowers may challenge assignments alleged to be invalid, ineffective, or void); *Juarez v. Select Portfolio Serv., Inc.*, 708 F.3d 269 (1st Cir. 2013) (same); *Metcalf v. Deutsche Bank Nat'l Trust Co.*, 2012 WL 2399369 (N.D. Tex. June 26, 2012) (borrower has standing to challenge whether foreclosing party has authority to enforce deed of trust); *Drouin v. Am. Home Mortg. Lending Serv., Inc.*, 2012 WL 1850967, at *4 (D.N.H. May 18, 2012) (borrower has standing to challenge whether assignor had rights to mortgage at time of alleged assignment); *Minnifield v. Johnson & Freedman II, L.L.C.*, 2012 WL 5463878, at *4 (N.D. Ga. Nov. 7, 2012), *aff'd on other grounds* 522 Fed. Appx. 782 (11th Cir. 2013) (if borrowers did not have standing to challenge mortgage assignments, they would be in the “perilous position” of being unable to oppose foreclosure by anyone claiming to be an assignee); *Fuller v. Lerner, Sampson, Rothfuss, L.P.A.*, 2012 WL 4361454, at *9–10 (N.D. Ohio May 14, 2012), objections to magistrate's report and recommendations denied, 2012 WL 4361448 (N.D. Ohio Sept. 21, 2012) (borrowers have standing to bring claim that entity other than foreclosing party has right to enforce loan documents); *Talton v. BAC Home Loans Servicing, L.P.*, 839 F. Supp. 2d 896 (E.D. Mich. 2012) (borrowers may challenge mortgage assignments or authority to conduct non-judicial foreclosure under Michigan's sale by advertisement statute); *U.S. Bank v. George*, 50 N.E. 3d 1049 (Ohio Ct. App. 2015) (maker of a promissory note or mortgage has standing to challenge their transfers and assignments, even if not in privity to the transfer or assignment challenged, declining to follow *Livonia Properties*); *Mruk v. Mortg. Elec. Registration Sys., Inc.*, 82 A.3d 527 (R.I. 2013); *EverBank v. Seederger Ventures, Inc.*, 499 S.W.3d 534, 541 (Tex. App. 2016) (borrowers have standing to challenge void assignments); *Brezzell v. Bank of Am.*, 2011 WL 2682973, at *4 n.3 (E.D. Mich. July 11, 2011) (“standing” argument raised by many lenders to dismiss challenge to foreclosures based on invalid assignments is a “bit of a red herring”; borrowers' claim to possession and ownership of property puts them well within the zone of interests required for standing), *quoting Langley v. Chase Home Fin., L.L.C.*, 2011 WL 130926, at *2 n.2 (W.D. Mich. Mar. 28, 2011).

the property, the owner has standing to take legal action to do so. In addition, to the property title claims, an unauthorized eviction poses a very concrete injury to the owner, an injury that the owner has standing to prevent. It was error for the court to preclude a named Defendant from protecting their rights and interest in the real property.

8. The Court erred in failing to view the facts in the light most favorable to the Defendants as to the claim for negligent misrepresentation. The Court completely overlooked the fact that the Defendants claim the monthly statements that have been sent to them on a continuing basis, in part, are a basis for the claim of misrepresentation. This particular loan is a pick a pay loan with a negative amortization feature. So, each monthly statement that represents the payments options available will be applied to the outstanding balance and reduce the balance is a misrepresentation.

The Court's focus on its perception of whether Mr. Rogers understands or does not understand the loan terms is completely misplaced and irrelevant to the establishment of a claim for negligent misrepresentation. Defendants came forward with deposition testimony of Mr. Rogers (Def. Sup. Resp. Opp. Sum. Judg., Ex. A.) to which the Court gave no consideration. Issues of fact material fact were asserted and established and summary judgment was improperly granted.

9. The Court erred in granting summary judgment on the abuse of process cause of action. The tort of abuse of process embraces the full range of activities and procedures attendant to litigation.” *Food Lion Inc. v. United Food & Commercial Workers International Union*, 351 S.C. 65, 70, 567 S.E.2d 251 (Ct. App. 2002). “The two essential elements of an abuse of process claim are (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the conduct of the proceeding. The abuse of process tort provides a remedy for one damaged by

another's perversion of a legal procedure for a purpose not intended by the procedure. *D.R. Horton, Inc. v. Wescott Land Co.*, 398 S.C. 528, 550, 730 S.E.2d 340 (Ct. App. 2012).

Defendants have provided evidence that Deutsche and Nationstar as the agent and servicer of Deutsche brought this Action for the ulterior purpose of trying to mitigate or improperly rectify its of issues of standing and res judicata which are laid out in the public record of Actions 2 and 3. Deutsche and Nationstar knew or should have known that collateral estoppel precluded them from initiating this action.

Nationstar and/or Deutsche's have acted improperly by manipulating endorsements and assignments of the Note and Mortgage in nefarious manners. Aurora Loan Services (ALS) initiated Action 1 in 2009 to foreclose upon the Mortgage securing the Note although there was no endorsement of the Note to ALS which would entitle ALS to enforce the Note or Mortgage. Consequently, Rogers asserted the defense of standing and thereafter Action 1 was dismissed pursuant to Dismissal 1. During the course of Action 2 in 2013 Nationstar and/or ALS moved before the court alleging the Note and Mortgage had been assigned to Nationstar and that Nationstar should be substituted as plaintiff in Action 2, without notice or hearing of the motion to the Rogers. The Note does not bear an endorsement to Nationstar and there is no assignment of record of the Mortgage being assigned to Nationstar. Rogers moved to vacate the order substituting Nationstar as Plaintiff in Action 2. On July 10, 2013, Nationstar produced Note Copy 2 with a first endorsement from Homecomings Financial, LLC to Residential Funding and a Second Endorsement from Residential Funding Company, LLC to Deutsche Bank Trust Company Americas as Trustee (for an unidentified trust). On November 16, 2013, Nationstar's counsel in Action 2 produced for the first time Note Copy 3 which contained a new and third endorsement whereby Nationstar as attorney in Fact for Deutsche Bank Trust Company Americas as Trustee

(for an unidentified trust) endorse the note in blank. In response to requests for admission in Action 2 Plaintiff admitted the note it produced in July of 2013 in response to discovery, could only be enforced by Residential Funding, and not Nationstar or ALS; and as of 2/28/14 no assignment of the Mortgage had been executed to Residential Funding, Deutsche Bank Trust Company Americas as Trustee, Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2, or Nationstar. On March 3, 2014, the Rogers's filed a motion for summary judgment in Action 2, based upon Nationstar's lack of standing and attaching Nationstar's responses to the requests for admissions as a filed exhibit to the motion. Nationstar then sought to retroactively try and fix the issue by having its counsel for Action 2 file an Assignment 2 of Mortgage dated April 1, 2014 wherein Nationstar as alleged attorney in fact for ALS assigned the Mortgage Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2, which was recorded by Nationstar's attorney in Action 2 on April 14, 2014, in Book 0398 at Page 768 in the RMC Office for Charleston County.²

As described above, Nationstar as Deutsche's agent committed willful acts by in or around November of 2013, when executing an alleged endorsement of the Note and in April of 2014, executing an alleged assignment of the mortgage and doing so in both cases as an alleged attorney in fact for distinct entities. Defendants demonstrated that Nationstar as Deutsche's agent committed the willful act of creating documentation (potentially bogus) in an effort to try align the documentation with their efforts to justify and continue the prosecution of a foreclosure matter ten

² It can also be inferred from the allegations that because Endorsement 3 of the Note was not on the copy of the Note produced in discovery in July of 2013, that Nationstar who executed Endorsement 3 did so after the Roger's had moved to vacate Nationstar as plaintiff based upon standing.

years, and three dismissals after it had begun by bringing this action, Action 4 in 2019 in the name Deutsche for the first time³. Nationstar further sought to avoid issues and problems, particularly the res judicata issue, by not naming the Rogers as defendants the parties on the Note and Mortgage. Sufficient evidence was presented to withstand Deutsche and Nationstar's motion for summary judgment as to Defendants' causes of action for abuse of process.

10. The Court erred by basing its determination to grant summary judgment on the cause of action for malicious prosecution on the faulty determination there was no adjudication on the merits in the prior actions as set forth above.

11. The Court erred by failing to recognize issues of fact exist as to Defendants' cause of action for violation of the South Carolina Unfair Trade Practice Act ("SCUTPA"). Further, it made in correct conclusions of law.

The Court mistakenly concludes that Beshera's claims are the same as the Rogers' claims. They are not. The Court recited the numerous bases set forth in the pleadings for the cause. (Order, pp. 16-17). In the recitation it is clear by the very language some claims are only those of the Rogers. Likewise, the Court erred in finding Beshera's claims only arise in a representative capacity. Certain of Beshera's claims arise as a result of her ownership of the subject real property.

The recitation the allegations from the pleadings, clearly show that numerous of the asserted facts are not based on the terms of the note and mortgage, therefore, the Court incorrectly rule as such. Rather, some of the facts clearly revolve around the direct actions of Deutsche and

³ Nationstar in response to discovery asserted that the Securitized Trust was assigned the Note and Mortgage in 2007, however, Auroa Loan Service ("ALS") brought Action 1 in its own name in 2009, despite the Note never being endorsed to ALS. Then Nationstar and/or ALS moved to substitute Nationstar as plaintiff in Action 2 alleging to the Court that the Note and Mortgage had been assigned to Nationstar despite the fact the Note and Mortgage were never endorsed or assigned to Nationstar. Nationstar remained the named Plaintiff in Action 3 and not until this action was Deutsche named as a party.

Nationstar creating endorsements after the fact to try and realign the progression of the note and mortgage so they did not diverge or at least later realigned. These activities in the manner in which they were conducted are suspect at best and likely improper.

Second, the Court incorrectly relies on the case of *Rosemond v. Campbell*⁴. The Court erred in finding *Rosemond* provides a complete blanket of protection to an assignee. In fact, the *Rosemond* cases states: "[c]onsequently, the assignee of a debt takes the obligation subject to all claims and defenses the obligor may have against the assignor." *Id.* at 645. Further, the mortgage which is a part of the record clearly states in paragraph 16 that it is governed by federal law and the law of the jurisdiction in which the property is located. Certain federal statutes hold assignors liable for originators actions. This, the Court erred in concluding an assignee is shelter from all liability.

Additionally, the Court failed to address Defendants argument that Deutsche and Nationstar do not claim to be "holders in due course" and Defendants affirmative assertion they are not. Since neither Deutsche or Nationstar are holders in due course they are subject to all claims and the Court erred in granting summary judgment.

The Court erred in concluding the SCUTPA claims are based on procedural history. Again, this is inconsistent and obviously incorrect based on the various acts committed by Deutsche and Nationstar complained of by the Rogers and recited by the Court. (Order, pp. 16-17). The complained of acts also show that Deutsche and Nationstar are absolutely engaged in trade and commerce. Both lend money, impose charges and collect alleged debts from consumers. These are all activities involved in commerce.

⁴ 288 S.C. 516, 343 S.E. 2d 641 (Ct. App. 1986)

The activities of Deutsche and Nationstar have potential for repetition. As determined in the case of *Beneficial Financial I, Inc., v. Jon Windham*, Op. No. 5753 (Ct. App. August 5, 2020), a lenders action of force placing insurance on a consumer in violation of a mortgage contract has the potential for repetition. *See Crary*, 329 S.C. at 388, 496 S.E.2d at 23 (1998) (holding evidence indicating mortgage broker had other opportunities to enter into similar transactions was sufficient evidence to support a finding of a SCUTPA violation); *York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) (holding allegation of car dealership's alleged misrepresentation of a car's accident history was sufficient to survive directed verdict motion for SCUTPA violation because the dealership was in the business of selling cars; thus, "[c]ertainly the alleged acts or practices have the potential for repetition"). The actions of Deutsche and Nationstar are subject to repetition and the Rogers plead this fact specifically by setting forth the case of 2012-CP-15-166 in ¶ 118 of their Answer and Counterclaim.

Finally, not only has a pecuniary loss been asserted but the Court made a blatantly incorrect statement when it said "Rogers have made no payments since prior to the First Action." (Order, p. 20). The excerpts from Curt Rogers deposition presented by Deutsche and Nationstar as Exhibit B to its motion clearly are contradiction to this statement.

12. The Court erred as a matter of law by concluding an "accounting" is not an affirmative cause of action. (Order, p. 20). Contrary to this Court's conclusion a number of Courts have recognized an accounting as a cause of action. In *Morris v. Tidewater Land & Timber, Inc.*, 388 S.C. 317, 696 S.E. 2d 599 (Ct. App. 2010) the Court holds "an action for an accounting sound in equity." The Supreme Court stated in *Verenes v. Alvanos*, No. 26780 (S.C. March 1, 2010) "the

third cause of action is a classic cause of action for an accounting.” So, while an accounting action may sound in equity, that does not mean it is not an affirmative cause of action, and this Court erred as a matter of law in so concluding.

13. The Court erred concluding the Declaratory Judgment is duplicative and “unnecessary” because the issues of standing and the authority to enforce the debt will be decided in Plaintiff’s case. (Order, p. 21).

This lack of rationale does not support the preclusion of a cause of action for declaratory judgment. A cause of action under the Declaratory Judgment Act is established by showing the existence of a justiciable controversy, defined as "a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 819 S.E.2d 142 (Ct. App. 2018), and *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970).

The Defendants have alleged a real and substantial controversy concerning the very contracts Deutsche has sued upon. In part, the Defendants seek a determination of the subject contracts are enforceable or whether they have any obligations under the contracts. Additionally, they seek a determination as to the impact of the initiation of the within suit in light of the prior three suites that were dismissed is precluded under the law of this state and the Rules of Civil Procedure. The Defendants’ claims are therefore the very type of controversy the Declaratory Judgment Act contemplates, as it invites a party affected by a contract and law to ask a court to define how the contract and law impacts the party's rights. *See Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 819 S.E.2d 142 (Ct. App. 2018).

The conclusion further lacks rationale because on the one hand the Court says the issues will be decided in Plaintiff’s case, and then two lines below improperly concludes Deutsche has

standing because it is in constructive possession of the note with all proper endorsements. (Order, p. 21). How the Court could conclude the endorsements were proper is incomprehensible. The Court did not have the necessary evidence before it to make this finding and/or conclusion. The Court did not sit in this instance as a fact finder. Moreover, it is this very issue the Court says will be determined in Plaintiff's case. The Court erred as a matter of law.

14. The Court erred in failing to exclude from consideration the Affidavit by Deutsche and Nationstar. The Affidavit failed to meet the requirements of Rule 56, SCRCF.

The moving party has the initial burden of demonstrating no issue of material fact exists. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115-117, 410 S.E.2d 537, 545 (1991). "The rule governing summary judgment provides that '[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.'" *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (S.C. 2003), *citing* Rule 56(e), SCRCF. The Affidavit submitted by Deutsch is insufficient.

A genuine issue of fact "can be created only by evidence which would be admissible at trial." *Hansen v. DHL Laboratories*, 316 S.C. 505, 510, 450 S.E.2d 624, 627 (Ct. App. 1994). In order for a Court to consider materials and affidavits in support or opposition to summary judgment, they must be admissible and "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993); *See* Rule 11(c), SCRCF; Rule 56(e); SCRCF; *Montgomery v. CSX Transport, Inc.*, 376 S.C. 37, 656, S.E.2d 20 (2008) (applying the personal knowledge requirement of Rule 56(e)); and *Saro v. Ocean Holiday Partnership*, 314 S.C. 116, 441 S.E.2d 385

(Ct. App. 1994)(“facts stated in affidavits must be admissible evidence.”). Generally, affidavits are to be made on personal knowledge setting forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated. *See Baughman v. American Telephone & Telegraph Co*, 306 S.C. 101, 410 S.E. 2d 537 (1991).

Deutsche and Nationstar submitted the Affidavit of Alan Blunt and employee of Nationstar with no apparent affiliation with Deutsche. Paragraph 9 of the Affidavit references a Revocable Trust Agreement of the Rogers of which he cannot authenticate and has no personal knowledge of nor asserts any. Paragraph 10 makes a completely unsupported statement as to the alleged status of the account which constitutes hearsay. Paragraph 11 makes a completely unsupported statement. Lastly Paragraph 12, makes reference to a document which is unsigned and in which Deutsche and Nationstar objected to producing through the course of discovery. (Rogers Mot. Compel p. 16 (10 of 13)). Thus, each of these paragraphs is inappropriate and the testimony/evidence inadmissible.

15. The Court erred by granting summary judgment prematurely. Pending at the time of the motions and hearing was Rogers’ motion to compel. Because of Deutsche and Nationstar’s’ obstructive behavior regarding discovery, discovery was and is still ongoing. Deutsche was order to provide full responses to the Rogers written discovery requests. Not having those responses clearly indicates discovery was not been complete. But more important, it is the obstructive behavior of Deutsche and Nationstar that created the posture of Defendants not having a full and fair opportunity to complete discovery. The motion was premature and should have been denied.

16. The Court erred in failing to require Deutsche and Nationstar to name the witnesses they intend to call at the time of trial to prove their claims and defenses. Deutsche admitted that it has not identified who will appear at trial and does not intend to do so until a trial date is set. (Deutsche Opp. to Mot. To Comp., p. 3). This complete defiance to the rules, does not change the

fact that Deutsche obviously has the burden of proving its' case and defenses. *See., S. Bank Trust Nat. Ass'n v. Bell*, 684 S.E.2d 199, 385 S.C. 364 (S.C. App. 2009). The Defendants want to know who will be called at the time of trial to establish the causes asserted by Deutsche. Defendants are entitled to this information so they can prepare their defense. It is unconceivable that one has to ask a Court to compel a party to provide this fundamental information and the Court refuses to do.

As noted by the South Carolina Supreme Court "[t]he entire thrust of our discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party." *In re Anonymous Member of the SC Bar*, 346 S.C. 177, 552 S.E. 2d 10 (2001), *citing Samples v. Mitchell*, 329 S.C. 105, 495 S.E. 2d 213 (Ct. App. 1997). "Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed. *Samples*, at 217.

The failure of Deutsche and Nationstar to properly respond to the Court adopted standard interrogatories as set forth in Rule 33(b), SCRCF is highly prejudicial to Defendants. Banks and lending institutions are subject to the same rules as all other litigates. The fact that a 30(b)(6) deposition can be taken does not mean the 30(b)(6) deponent will appear at trial. While a 30(b)(6) deposition is to be binding on a corporate entity, it does not mean a trial witnesses testimony will be consistent with the 30(b)(6) witness. A trial witness could testify to issues beyond the testimony of the 30(b)(6). It is possible that a trial witness could be used to impeach the 30(b)(6) witness's testimony. Thus, the fact that a party is not provided with the witness who will appear at trial is highly prejudicial to other side and places them in a guessing game. The Court erred in denying the Rogers' the fundamental right of all parties of knowing who will appear and testify at trial.

CONCLUSION

For all the foregoing reasons the Defendants motion for reconsideration should be granted and the Court should reverse and vacate the Order.

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