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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
George C. James, Jr., Circuit Judge

Appellate Case No. 2012-213309
Common Pleas Case No. 2010-CP-28-1197

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SC Court of Appeals

U.S. Bank National Association Successor trustee to LaSalle Bank National Association, as trustee under the Pooling and Servicing Agreement, dated as of April 1, 2002, among Asset Backed Funding Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB-1,.....Respondent,

v.

Kelley Burr; FIA Card Services, N.A.; Discovery Bank, Issuer of the Discover Card; Unifund CCR Partners; Defendants,

Of Whom Kelley Burr is.....Appellant.

RECORD ON APPEAL

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THE STATE OF SOUTH CAROLINA
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Court of Common Pleas
George C. James, Jr., Circuit Judge

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U.S. Bank National Association Successor trustee to LaSalle
Bank National Association, as trustee under the Pooling and
Servicing Agreement, dated as of April 1, 2002, among
Asset Backed Funding Corporation, Litton Loan Servicing LP
and LaSalle Bank National Association, ABFC Asset Backed
Certificates, Series 2002-SB-1,.....Respondent,

v.

Kelley Burr; FIA Card Services, N.A.; Discovery Bank, Issuer
of the Discover Card; Unifund CCR Partners; Defendants,

Of Whom Kelley Burr is.....Appellant.

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS,
) FIFTH JUDICIAL CIRCUIT
COUNTY OF KERSHAW)

U.S. BANK NATIONAL) Civil Action No. 2010-CP-28-1197
ASSOCIATION Successor trustee to)
LaSalle Bank National Association, as)
trustee under the Pooling and Servicing)
Agreement, dated as of April 1, 2002,)
among Asset Backed Funding)
Corporation, Litton Loan Servicing LP)
and LaSalle Bank National Association,)
ABFC Asset Backed Certificates, Series)
2002-SB-1,)

Plaintiff,)

vs.)

KELLEY BURR, FIA Card Services,)
N.A.; Discovery Bank, Issuer of the)
Discover Card; Unifund CCR Partners,)

Defendants.)

ORDER ON PLAINTIFF'S
MOTION TO DISMISS
COUNTERCLAIMS AND
TO STRIKE DEFENSES

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2012 OCT -1 AM 10:35
KERSHAW COUNTY

This matter is before the Court on Plaintiff U.S. Bank National Association's, as trustee for the above-referenced trust ("U.S. Bank"), Motion to Dismiss Defendant's Counterclaims and to Strike Defenses ("Motion"), which was filed on April 18, 2012. Counsel for U.S. Bank and counsel for Defendant Kelley Burr ("Burr") presented arguments at a hearing on September 13, 2012.

Pursuant to the S.C. Supreme Court Administrative Order, 2011-05-02-01 ("Foreclosure Intervention Order"), Plaintiff served its Notice of Foreclosure Intervention on July 25, 2011. Through this case, Plaintiff has made extensive efforts to provide Burr with an opportunity to be considered for a loan modification, including offering Burr a

modification proposal, as described in detail in Plaintiff's Motion and in Plaintiff's

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Court

[Signature]
Clerk of Court Kershaw County

Certification of Noncompliance with the Foreclosure Intervention Process, which it filed on October 27, 2011.

Pursuant to Rule 41(b), a counterclaim defendant may move for dismissal of claims against it for the counterclaim plaintiff's failure to prosecute. Burr asserts the following defenses and counterclaims against Defendant, all based primarily on an alleged failure to "conduct a fair, reasonable, comprehensive analysis" and "reconsideration of her home mortgage amount problem": a) unclean hands; b) breach of contract; c) fraud and misrepresentation in the inducement; d) violation of the S.C. Unfair Trade Practices Act; e) in pari delicto; f) residential home. (Answer and Counterclaims, ¶ 11).

The Court "must consider four factors before dismissing a case for failure to prosecute: (1) the plaintiff's degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal." *McComas v. Ross*, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006) (citing *Hillig v. Comm'r of Internal Revenue*, 916 F.2d 171, 174 (4th Cir.1990)).

In addition to the test to determine whether a party has failed to prosecute its claims, the Foreclosure Intervention Order also creates responsibilities for both the mortgagee and mortgagor in a foreclosure action. That order was entered to address the "difficulty in making final disposition of these actions as a result of failed or delayed loss mitigation efforts between lender-servicers and mortgagor-debtors. As a result, the number of unresolved foreclosure actions has increased, with a resulting burden on the resources of the Court before which the action is pending." Order at *1. The Foreclosure Intervention Order requires that the mortgagee notify the mortgagor of the availability of

foreclosure intervention options, and the mortgagor has 30 days to proceed with foreclosure intervention. *Id.* at 3. The foreclosure hearing can proceed after the mortgagee's counsel certifies that it has complied with the Foreclosure Intervention Order. *Id.* This action was subject to the Foreclosure Intervention Order.

First, regarding Burr's degree of personal responsibility, although Burr had counsel in this action who was acting on her behalf, she remains personally responsible for the foreclosure intervention process and submitting her information for a modification review. Second, regarding the amount of prejudice caused to the counterclaim defendant, U.S. Bank has expended time and expenses before and since the filing of the Complaint. Third, regarding the presence of a drawn out history of deliberately proceeding in a dilatory fashion, the history of U.S. Bank's attempts to work with Burr are described in detail in Plaintiff's Certification of Noncompliance and in this Motion. Fourth and finally, regarding the effectiveness of sanctions less drastic than dismissal, another court order directing compliance would provide no incentive for Burr to act. Thus, Burr "has been given abundant opportunity to litigate. There is a limit beyond which the court should allow a litigant to consume the time of the court and to prolong unnecessarily time, effort, and costs to defending parties." *Georganne Apparel, Inc. v. Todd*, 303 S.C. 87, 92, 399 S.E.2d 16, 19 (Ct. App. 1990).


In addition to failing to prosecute her claims, Burr's claims are moot because they are based on an alleged scenario of her not being offered a loan modification. *See Darden v. S.C. Dep't of Highways and Pub. Trans.*, 291 S.C. 270, 353 S.E.2d 279 (1987) (finding the case moot because an effective date had passed, so "there remain[ed] no actual case or controversy, and a judgment rendered by this Court would have no practical legal effect upon the existing case"). Plaintiff offered Burr a modification



proposal on January 10, 2012, and no evidence shows that Burr responded to this offer until April. A judgment in her favor would have no practical effect on her counterclaims because she already has been offered the primary relief that she sought: "For an Order granting the Defendant a fair, reasonable, comprehensive, and thorough reconsideration and modification of the terms of the contract, as [allegedly] was promised by the Plaintiff, to determine an affordable amount of mortgage payment." (Answer and Counterclaims, paragraph beginning WHEREFORE, sub B.)

Based on the arguments presented by counsel, the documents and evidence presented, and Rules 41(b) and Rules 12(c) and 12(f) of the South Carolina Rules of Civil Procedure, Plaintiff's Motion for to Dismiss Defendant Burr's Counterclaims and to Strike Affirmative Defenses is hereby GRANTED.

AND IT IS SO ORDERED.



George C. James, Jr.
Circuit Court Judge

Sumter, South Carolina

9/26, 2012

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
2010-CP-28-1197

U.S. Bank National Association)
Successor trustee to LaSalle Bank)
National Association, as trustee under)
the Pooling and Servicing Agreement)
dated as of April 1, 202, among)
Asset Backed Funding Corporation,)
Little Loan Servicing LP and LaSalle)
Bank National Association, ABFC)
Asset Backed Certificates, Series)
2002-SB-1,)

Plaintiff,)

vs)

Kelley Burr, FIA Card Services,)
N.A.; Discovery Bank, Issuer of the)
Discover Card; Unifund CCR)
Partners,)

Defendants,)

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2012 OCT 16 AM 11:08
CLERK OF COURT
KERSHAW COUNTY, S.C.

ORDER

The defendant Kelley Burr's motion for reconsideration is denied.

AND IT IS SO ORDERED.

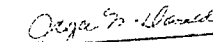


George C. James, Jr.
Circuit Court Judge

Sumter, South Carolina

October 15, 2012

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Court


Clerk of Court Kershaw County

STATE OF SOUTH CAROLINA)
)
COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS FOR
THE THIRD JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2010-CP-28-1197

U.S. Bank National Association successor)
trustee to LaSalle Bank National Association)
as trustee under the Pooling and Servicing)
Agreement dated as of April 1, 2002, among)
Asset Backed Funding Corporation, Litton)
Loan Servicing LP and LaSalle Bank National)
Association, ABFC Asset Backed Certificates,)
Series 2002-SB-1)

Plaintiff,)

v.)

Kelley Burr, FIA Card Services, N.A.,)
Discovery Bank, Issuer of the Discover)
Card; Unifund CCR Partners,)

Defendants.)

ORDER SUBSTITUTING COUNSEL

FILED FOR RECORD
2013 JAN 18 PM 3:26
JOSEPH H. HARRIS, ALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

IT APPEARS TO THE COURT that Plaintiff, U.S. Bank National Association Successor Trustee to LaSalle Bank National Association as trustee under the Pooling and Servicing Agreement dated as of April 1, 2002, among asset Backed Funding Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB-1, ("Plaintiff") has designated Attorney Sean A. O'Connor of Finkel Law Firm LLC as local counsel of record in place of Attorney Carmen Harper Thomas of Nelson Mullins Riley & Scarborough LLP.

Therefore, good and sufficient cause having been shown,

IT IS ORDERED that:

1. Finkel Law Firm LLC shall be substituted as counsel of record for Plaintiff;
2. Finkel Law Firm LLC shall receive copies of all pleadings, notices, orders, correspondence, and all other relevant documents pertaining to the within captioned action.

S/B. Thomas Cooper, Jr.
Presiding Judge
Third Judicial Circuit

Dated: 1-18, 2013

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Court

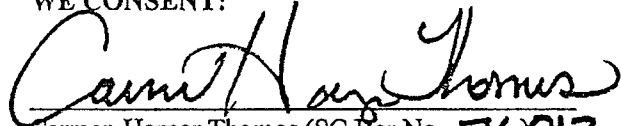
Clara J. ...
Clerk of Court Kershaw County

WE MOVE:



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STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

U.S. Bank National Association as successor trustee to LaSalle Bank National Association, as Trustee under the Pooling and Servicing Agreement, dated as of April 1, 2002, among Asset Backed Funding Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB1,

Plaintiff,

v.

Kelley Burr; FIA Card Services, N.A.; Discover Bank, Issuer of the Discover Card; Unifund CCR Partners;

Defendant(s).

(013644-01047)

IN THE COURT OF COMMON PLEAS

DOCKET NO.

2010-CP-28-1197

SUMMONS AND NOTICES
(NON-JURY)
FORECLOSURE OF REAL ESTATE
MORTGAGE
Deficiency Judgment Waived

FILED FOR RECORD
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JOYCE HOSKINSON
CLERK OF COURT
KERSHAW COUNTY, S.C.

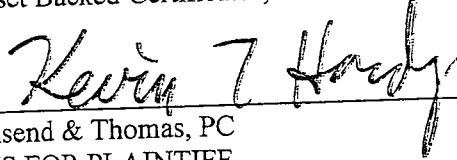
TO THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to appear and defend by answering the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer on the subscribers at their offices, 220 Executive Center Drive, Suite 109, Post Office Box 100200, Columbia, South Carolina 29202, within thirty (30) days after the service hereof, exclusive of the day of such service, except that the United States of America, if named, shall have sixty (60) days to answer after the service hereof, exclusive of the day of such service; and if you fail to do so, judgment by default will be rendered against you for the relief demanded in the Complaint.

YOU WILL ALSO TAKE NOTICE that Plaintiff will move for an order of reference or that the Court may issue a general order of reference of this action to a master in equity/special referee, pursuant to Rule 53, of the South Carolina Rules of Civil Procedure.

TO MINOR(S) OVER FOURTEEN YEARS OF AGE, AND/OR TO MINOR(S) UNDER FOURTEEN YEARS OF AGE AND THE PERSON WITH WHOM THE MINOR(S) RESIDES, AND/OR TO PERSONS UNDER SOME LEGAL DISABILITY:

YOU ARE FURTHER SUMMONED AND NOTIFIED to apply for the appointment of a guardian ad litem within thirty (30) days after the service of this Summons and Notice upon you. If you fail to do so, application for such appointment will be made by U.S. Bank National Association as successor trustee to LaSalle Bank National Association, as Trustee under the Pooling and Servicing Agreement, dated as of April 1, 2002, among Asset Backed Funding Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB1.



Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

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Reginald P. Corley (SC Bar #69453)
Ellie C. Floyd (SC Bar #68635)
Eve Moredock Stacey (SC Bar #5300)
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Columbia, South Carolina
October 29, 2010

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

U.S. Bank National Association as successor trustee to LaSalle Bank National Association, as Trustee under the Pooling and Servicing Agreement, dated as of April 1, 2002, among Asset Backed Funding Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB1,

Plaintiff,

v.

Kelley Burr; FIA Card Services, N.A.; Discover Bank, Issuer of the Discover Card; Unifund CCR Partners;

Defendant(s).

(013644-01047)

IN THE COURT OF COMMON PLEAS
DOCKET NO.

2010 - CP - 28 - 1197

COMPLAINT

(NON-JURY)

FORECLOSURE OF REAL ESTATE
MORTGAGE
Deficiency Judgment Waived

FILED FOR RECORD
2010 NOV - 1 PM 12:58
JOYCE MCCONNELL
CLERK OF COURT
KERSHAW COUNTY, S.C.

Plaintiff alleges:

1. This is an action for the foreclosure of a mortgage upon certain real estate in Kershaw County, South Carolina.
2. Pursuant to S.C. Code Section 33-15-101, Plaintiff is a corporation or other legal entity doing business in the State of South Carolina.
3. Plaintiff has the legal right to enforce the negotiable instrument secured by the Mortgage and is the real party in interest as defined by Rule 17(a) of the South Carolina Rules of Civil Procedure.
4. The Plaintiff's servicing agent for the mortgage loan described in this foreclosure action is participating in the Home Affordable Modification Program ("HMP"), but the subject loan is not eligible for modification because the borrower did not provide all necessary documents after those documents had been requested.
5. Some lien on or interest in the real estate, the subject of this action, may be claimed

by the Defendant(s) herein.

6. The Defendant(s) herein described as judgment creditors have by filing said judgments designated their attorney entering the judgment as their agent for service of process under the provisions of South Carolina Code Section 15-35-840.

7. Heretofore, on or about October 31, 2001, Kelley Burr made, executed and delivered a certain Fixed Rate Note ("Note") in the principal sum of \$100,800.00, payable in monthly installments.

8. In order to secure the payment of the Note according to the terms and conditions thereof, Kelley Burr made, executed and delivered unto EquiSource Home Mortgage Corp. a certain real estate mortgage ("Mortgage") covering the following described property and any and all improvements to the property, including but not limited to a mobile/manufactured home:

All that certain piece, parcel or lot of land containing 1.01 acres, more or less, with improvements thereon, situate, lying and being near the Community of Lugoff, in Wateree Township, County of Kershaw, State of South Carolina, and being more particularly shown on that plat prepared for James T. Burr and Kelly Burr by Donald G. Platt, RLS dated April 30, 1985 and recorded in the Office of the Clerk of Court for Kershaw County in Plat Book 37 at Page 1288; said property is bounded as follows: North by lands now or formerly of S. Cassidy and a portion of lands of J. Sweatt; East by Block A, Lot 7; South by Bayview Drive (S-28-900); and West by lands now or formerly of Earl F. Watts and Phillip P. Watts.

This being the same property conveyed to James T. Burr and Kelley Burr by deed of Earl F. Watts and Phylis Watts, dated May 1, 1985 and recorded May 23, 1985 in Book IV at Page 1915; subsequently, James T. Burr conveyed his one-half interest in the subject property to Kelley Burr by deed dated July 19, 1996 and recorded July 22, 1996 in Book 445 at Page 24 in the Office of the Clerk of Court for Kershaw County.

Property Address: 1128 Bayview Dr
Lugoff, SC 29078

TMS# 296-14-00-015A

9. The Mortgage was signed, witnessed and probated October 31, 2001; thereafter the Mortgage was recorded in the Office of the RMC/ROD for Kershaw County on November 5, 2001, in Mortgage Book 1072 at Page 142.

10. The Mortgage evidences and secures the repayment of money advanced by Plaintiff or its predecessor in interest to, or on behalf of, the mortgagor(s) and constitutes a first lien on the mortgaged premises.

11. Any notice required by the terms of the Note and Mortgage or by state or federal laws has been given to the applicable Defendant(s).

12. After all payments received by the Plaintiff have been credited to the subject loan, the loan is in default and due for May 5, 2009, and the conditions of the Note and Mortgage have been broken. Plaintiff elects to and does declare the entire balance of said indebtedness due and payable, and

that there is due on the Note and Mortgage as of May 5, 2009, the principal sum of \$96,974.63, with interest from April 5, 2009, advances, late charges, and also for the costs and disbursements of this action, including attorney's fees.

13. Plaintiff's right to a personal or deficiency judgment pursuant to South Carolina Code Sections 29-3-650 and 29-3-660 is expressly waived.

14. Pursuant to the terms of the Mortgage, Plaintiff has employed counsel to prosecute this action and a reasonable value of services of counsel in this action is the sum as the Court may find appropriate.

15. Plaintiff may be forced to pay sums for taxes and insurance and costs for securing the property, which sums, according to the terms of the Mortgage, should be added to the amount of the debt.

16. Pursuant to the terms of the Mortgage and applicable state law, Plaintiff requests the mortgage be foreclosed and that the property be sold at public auction in accordance with law, subject to any liens for taxes, special assessments of record against such property, and existing easements or restrictions of record.

17. The hereinafter named Defendant(s) may have some interest in or lien upon the premises covered by the Mortgage set forth above, or some part thereof, but that such interests or liens are junior and subsequent to the lien of Plaintiff's Mortgage or, if specified below, have been paid in full and either should be satisfied of record or the lien released from the subject real estate. Said liens or interests are of record in the Office of the RMC or Clerk of Court of the aforesaid county and are described as follows:

A. FIA Card Services, N.A., by virtue of a judgment against Kelley B. Burr in favor of MBNA America Bank, N.A. in the amount of \$14,374.86, dated January 20, 2006 and recorded on January 20, 2006 in Judgment Roll No. 46320 FIA Card Services, N.A. is successor in interest to MBNA America Bank, N.A.

B. Discover Bank, Issuer of the Discover Card, by virtue of a judgment against Kelley B. Burr in the amount of \$7,365.34, dated January 18, 2007 and recorded on January 18, 2007 in Judgment Roll No. 06-CP-26-718

C. Unifund CCR Partners, by virtue of a judgment against Kelley B. Burr in the amount of \$4,906.31, dated February 2, 2008 and recorded on February 12, 2008 in Judgment Roll No. 07-CP-28-923

D. Unifund CCR Partners, by virtue of a judgment against Kelley B. Burr in the amount of \$12,706.09, dated February 12, 2008 and recorded on February 12, 2008 in Judgment Roll No. 07-CP-28-978

WHEREFORE, having fully set forth its Complaint, Plaintiff prays that this Honorable Court inquire into the matters as set forth herein and:

(1) Under the direction of this Court, ascertain and determine the amount due upon the Note and Mortgage held by Plaintiff together with attorney's fees and costs of this action.

(2) Declare Plaintiff's Mortgage a first lien and render judgment of foreclosure for the amount so found to be due and owing thereon, together with any ad valorem taxes, or insurance premiums, and any other expenses which may be due and have been advanced by Plaintiff, with reasonable attorney's fees, and for the costs of this action.

(3) Order the reimbursement of all costs for inspecting and securing the property incurred by the Plaintiff as a result of the delinquency.

(4) Appoint a Receiver to collect the rents, issues, profits or designated sums from the mortgagor(s), and/or the grantee(s) of the mortgagor(s), and/or tenant(s) occupying or exercising control over the mortgaged premises and hold the same subject to the further order of this Court.

(5) Under the direction of this Court, sell the mortgaged premises, bar any equity of redemption, and apply the proceeds of sale as follows:

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

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

Third, to the distribution of any surplus pursuant to Rule 71, of the South Carolina Rules of Civil Procedure;

(6) Issue an order directing the Sheriff of Kershaw County, South Carolina, to place the successful purchaser at said foreclosure sale in possession of the property should the same become necessary;

(7)

Order such other and further relief as may be just and proper.

Kevin T Hardy

Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

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Reginald P. Corley (SC Bar #69453)
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Columbia, South Carolina
October 29, 2010

STATE OF SOUTH CAROLINA)

COUNTY OF KERSHAW)

U.S. BANK NATIONAL as)
ASSOCIATION Successor trustee to)
LaSalle Bank National Association,)
et. al.)

PLAINTIFF)

V.)

KELLEY BURR; et. al.)

DEFENDANTS)

IN THE
COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Docket No.: 2010-^{CP}DR-28-1197

ANSWER AND COUNTERCLAIMS

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CLERK OF COURT

NOW COMES the Defendant, Kelley Burr, by and through her attorney, David Paul Reuwer, Esquire, who herein files her Answer and Counterclaims to the Plaintiff's Complaint for Foreclosure of Real Estate Mortgage and would respectfully show unto this Honorable Court as follows:

FOR A FIRST DEFENSE

1. Each and every allegation of Plaintiff's Complaint not specifically admitted or qualified is expressly denied.
2. Defendant Burr admits the allegations contained in paragraphs 1, 7, 8, 9, 13,
3. Defendant Burr denies each and every one of the allegations contained in paragraphs 4, 12, 16.
4. Defendant Burr lacks sufficient information and knowledge to answer or otherwise respond to each and every one of the allegations contained in paragraphs 2, 3, 6, 10, 11, 14,

15, and 17 and to the extent a response is required, Defendant Burr denies the allegations contained in those paragraphs.

5. Defendant Burr admits the allegation in paragraph 5 that she, Kelley Burr, has an equitable interest in the subject real estate, but she is without sufficient information and knowledge to answer or otherwise respond to whether or not other defendants have a lien or interest in the real estate.

6. Where portions of a paragraph's allegations in the Complaint have been admitted, the remainder of the allegations in the said paragraph is hereby denied unless separately and specifically admitted or qualified.

FOR A SECOND DEFENSE AND COUNTERCLAIM

BURR'S FACTUAL ALLEGATIONS

7. The Defendant realleges each and every allegation in paragraphs 1 through 6 fully incorporated herein as if set forth verbatim and specifically averred herein.

8. The Defendant Burr and her husband provided Plaintiff Bank and/or its successor trustee with detailed information and documentation upon request of the Plaintiff.

9. The Plaintiff, by and through its authorized agents and employees, stated and represented to the Defendant that she would be taken care of not losing her residential home so long as she participated in the Home Affordable Modification Program.

10. The Defendant did cooperate and agree to participate in the Home Affordable Modification Program.

11. The Defendant is informed and believes that the Plaintiff did not conduct a fair, reasonable, comprehensive analysis nor reconsideration of her home mortgage payment amount problem, and that the Plaintiff never intended to actually do so.

FOR A THIRD DEFENSE AND COUNTERCLAIM

UNCLEAN HANDS

12. The Defendant realleges each and every allegation in paragraphs 1 through 11 fully incorporated herein as if set forth verbatim and specifically averred herein.

13. Plaintiff's claims are barred, in whole or in part, by the doctrine of unclean hands.

14. Circumstances in the life of the Defendant and in the business of her husband have arisen seriously affecting her ability to make such large, monthly payments so as to necessitate a change in the amount of the payments, first on a temporary basis and then permanently.

15. Nearly three years ago, the Defendant Burr did voluntarily and knowingly request guidance, assistance, help, and anywise reconsideration of her mortgage into a modification program determined for affordability.

16. In fact, the Defendant has granted information and provided documents to the Plaintiff as it requested in order to facilitate the reconsideration of the mortgage and subsequent modification. The Defendant's husband could not provide certain financial documents related to his work in the aftermath of Hurricane Hugo in New Orleans, Louisiana, because the same had not been provided to him, nor had he received full payment from all of that work.

17. These extenuating and unusual circumstances in the life of the Defendant and her husband also call for reconsideration and modification so that at least the payments may be made affordable as expeditiously as possible and pragmatic.

18. The Defendant Burr was led to believe by the Plaintiff's conduct that the Plaintiff would in fact give her a full, fair, comprehensive, and thorough reconsideration of her payment amounts.

FOR A FOURTH DEFENSE AND COUNTERCLAIM

BREACH OF CONTRACT

19. That the Defendant realleges each and every allegation in paragraphs 1 through 18 fully incorporated herein as if set forth verbatim and as specifically averred herein.

20. The contract exists between the Plaintiff and the Defendant, as evidenced by the note and mortgage, as also between predecessor in interest and its successor.

21. Plaintiff has breached the terms of the contract and its duty to service the agreement in good faith when dealing with the Defendant.

22. Plaintiff's breach actually, directly and proximately caused Defendant Burr to suffer damages, including but not limited to monetary loss, stress, sleeplessness, severe frustration, and infliction of distress.

FOR A FIFTH DEFENSE AND COUNTERCLAIM

FRAUD AND MISREPRESENTATION IN THE INDUCEMENT

23. That the Defendant realleges each and every allegation in paragraphs 1 through 22 fully incorporated herein as if set forth verbatim and as specifically averred herein.

24. Plaintiff stated and represented over time and telephone calls and correspondence that it would reconsider and help the Defendant into an affordable loan modification, such that she would not lose her residential home.

25. The note and mortgage are void by Plaintiff's fraud and misrepresentation in the inducement.

FOR A SIXTH DEFENSE AND COUNTERCLAIM
UNFAIR TRADE PRACTICES

26. That the Defendant realleges each and every allegation in paragraphs 1 through 25 fully incorporated herein as if set forth verbatim and as specifically averred herein.

27. Plaintiff communicates and does business state-wide with the general public, of whom the Defendant Burr is one member. Plaintiff engages the general public and its acts concern the public at large.

28. Plaintiff's conduct including but not limited to leading a stressed adult to think that she is being helped, for that issues be reconsidered, and that modification of payment amount will take place reasonably and in a timely manner, all the while lengthening the defaulted payments and foreclosing on the subject property constitutes unfair and deceptive trade practices, or anywise deceptive acts or course of conduct. Such Plaintiff's conduct was performed in the course of trade and commerce in the State of South Carolina in willful violation of the South Carolina Unfair Trade Practices Act, S.C. Code sections 39-5-10 (1976, as amended) et. seq.

29. The above described unfair and deceptive trade practices on the part of the Plaintiff are capable of repetition that will adversely effect the general public.

30. The Plaintiff's unlawful course of conduct constituted a willful and knowing violation of the Unfair Trade Practices Act; such that the Defendant Burr is informed and believes that this Court should award three (3) times the actual damages sustained and should anyway allow punitive damages to be determined by a jury. The Court, upon finding said statutory violation, should also award reasonable attorney's fees and costs.

31. The Defendant is informed and believes that she is entitled to a judgment against the Plaintiff for said damages and fees and costs as may be determined by a jury.

FOR A SEVENTH DEFENSE AND COUNTERCLAIM

IN PARI DELICTO

32. That the Defendant realleges each and every allegation in paragraphs 1 through 31 fully incorporated herein as if set forth verbatim and as specifically averred herein.

33. The Plaintiff's claims are barred, in whole or in part, by the doctrine of *in pari delicto*.

FOR AN EIGHTH DEFENSE AND COUNTERCLAIM

RESIDENTIAL HOME



34. That the Plaintiff realleges each and every allegation in paragraphs 1 through 33 fully incorporated herein as if set forth verbatim and as specifically averred herein.

35. The Defendant is informed and believes that it is in the best interests of justice and equity, as well as for the Defendant's health, safety and welfare, to remain within the subject real property as it is her residence and home, until this matter can be set and heard for a trial.

WHEREFORE the Defendant Burr prays this Honorable Court to be granted the following relief:

- A. For an Order dismissing the Plaintiff's Complaint with prejudice.
- B. For an Order granting the Defendant a fair, reasonable, comprehensive, and thorough reconsideration and modification of the terms of the contract, as was promised by the Plaintiff, to determine an affordable amount of mortgage payment.
- C. For an Order granting an award in three times the amount of actual damages sustained plus punitive damages to be determined by a jury.
- D. Upon a finding of fraud, misrepresentation and/or statutory violation, for costs and attorney fees of defending against this foreclosure and for prosecuting this petition of counterclaims.
- E. For an Order determining that the Plaintiff's legal action is barred.
- F. For an Order determining that the Plaintiff's note and mortgage are void; and
- G. For such other and further relief as this Court may deem equitable, just and proper.

December 20, 2010
at Camden, South Carolina

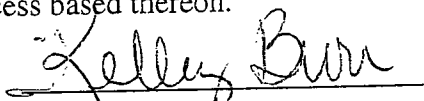
by: 
DAVID P. REUWER, Bar # 70696
ATTORNEY for  DEFENDANT
306 Hampton Park
P.O. Box 1776
Camden, SC 29021
803.549.6710
808.425.7136 Fax
BURR

STATE OF SOUTH CAROLINA)
)
COUNTY OF KERSHAW)

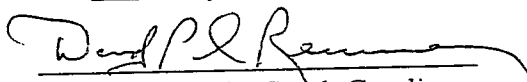
VERIFICATION

Personally appeared me, the Defendant, Kelley Burr, who being duly sworn says:

- (a) That this Deponent has read the allegations contained in the attached pleadings consisting of seven pages;
- (b) That the attached pleadings were prepared by this Deponent's attorney based upon information this Deponent has personally furnished to said attorney;
- (c) That the allegations contained in the attached pleadings are true and correct, and are based upon the personal knowledge of this Deponent, except for those allegations which are based upon this Deponent's information and belief and, as to those, this Deponent verily believes the same to be true;
- (d) That the Deponent has authorized said attorney to file the attached pleadings, to present the same to the Court and secure any necessary pleadings, to present the same to the Court and secure any necessary Orders based thereon and to secure service upon the adverse party of the attached pleadings and necessary process based thereon.


KELLEY BURR

SUBSCRIBED AND SWORN before me
this 20 day of December, 2010


Notary, Public for South Carolina
My commission expires: August 27, 2013

88

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS,
) FIFTH JUDICIAL CIRCUIT
COUNTY OF KERSHAW)

U.S. BANK NATIONAL) Civil Action No. 2010-CP-28-1197
ASSOCIATION Successor trustee to)
LaSalle Bank National Association, as)
trustee under the Pooling and Servicing)
Agreement, dated as of April 1, 2002,)
among Asset Backed Funding)
Corporation, Litton Loan Servicing LP)
and LaSalle Bank National Association,)
ABFC Asset Backed Certificates, Series)
2002-SB-1,)

Plaintiff,)

vs.)

KELLEY BURR, FIA Card Services,)
N.A.; Discovery Bank, Issuer of the)
Discover Card; Unifund CCR Partners,)

Defendants.)

PLAINTIFF'S ANSWER TO
DEFENDANT BURR'S
COUNTERCLAIMS

JOYCE HODDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

2011 FEB 24 PM 3:56

FILED FOR RECORD

Reserving all rights and remedies available to it, Plaintiff U.S. Bank National Association, successor trustee to LaSalle Bank National Association, as trustee under the Pooling and Servicing Agreement, dated as of April 1, 2002, among Asset Backed Funding Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB-1 ("U.S. Bank"), answering Defendant Kelley Burr's ("Defendant") Counterclaims, would respectfully show as follows:

FOR A FIRST DEFENSE TO THE ANSWER

1. Unless expressly admitted herein, every allegation contained in the Counterclaims is denied.

2. Paragraphs 1, 2, 3, 4, 5, and 6 respond to the allegations of U.S. Bank's complaint, and therefore, U.S. Bank is not required to respond to these paragraphs.

FOR AN ANSWER
TO THE SECOND DEFENSE AND COUNTERCLAIM
(Burr's Factual Allegations)

3. U.S. Bank denies the allegations of Paragraphs 7, 8, 9, 10, and 11.

FOR AN ANSWER TO THE THIRD DEFENSE AND COUNTERCLAIM
(Unclean Hands)

4. U.S. Bank denies the allegations of Paragraphs 12, 13, 14, and 15.

5. Responding to Paragraph 16, U.S. Bank is without knowledge or information sufficient to form a belief as to the truth of Defendant's allegations as to the reasons he could not provide documents. U.S. Bank denies the remaining allegations of Paragraph 16.

6. U.S. Bank denies the allegations of Paragraphs 17 and 18.

FOR AN ANSWER TO THE FOURTH DEFENSE AND COUNTERCLAIM
(Breach of Contract)

7. U.S. Bank denies the allegations of Paragraph 19.

8. Responding to Paragraph 20, U.S. Bank admits that it is the owner of the note and mortgage and is entitled to enforce its rights thereunder. U.S. Bank craves reference to any other "contract" between the parties. U.S. Bank denies the remaining allegations of Paragraph 20.

9. U.S. Bank denies the allegations of Paragraphs 21 and 22.

FOR AN ANSWER TO THE FIFTH DEFENSE AND COUNTERCLAIM
(Fraud and Misrepresentation in the Inducement)

10. U.S. Bank denies the allegations of Paragraphs 23, 24, and 25.

FOR AN ANSWER TO THE SIXTH DEFENSE AND COUNTERCLAIM
(Unfair Trade Practices)

11. U.S. Bank denies the allegations of Paragraph 26.

12. . To the extent that Paragraph 27 asserts conclusions of law, U.S. Bank is not required to respond, but U.S. Bank denies any allegations of Paragraph 27 to which it is required to respond.

13. U.S. Bank denies the allegations of Paragraph 28.

14. To the extent that Paragraphs 29, 30, and 31 assert conclusions of law, U.S. Bank is not required to respond, but U.S. Bank denies any allegations of Paragraphs 29, 30, and 31 to which it is required to respond.

FOR AN ANSWER TO THE SEVENTH DEFENSE AND COUNTERCLAIM

(In Pari Delicto)

15. U.S. Bank denies the allegations of Paragraphs 32 and 33.

FOR AN ANSWER TO THE SIXTH DEFENSE AND COUNTERCLAIM

(Residential Home)

16. U.S. Bank denies the allegations of Paragraphs 34 and 35.

17. U.S. Bank denies the allegations in the Paragraph beginning WHEREFORE and the subparagraphs labeled A, B, C, D, E, F, and G.

FOR A SECOND DEFENSE

18. Defendant's Counterclaims fail to state facts sufficient to constitute a cause of action against U.S. Bank and must be dismissed pursuant to Rule 12(b)(6), S.C. Rules of Civil Procedure.

FOR A THIRD DEFENSE

19. At all times, U.S. Bank has acted in good faith and in a reasonable manner to comply with all applicable state and federal laws with respect to its dealings with Defendant; because U.S. Bank's actions concerning Defendant were taken in good faith and in a reasonable manner, Defendant is precluded from recovery against U.S. Bank.

FOR A FOURTH DEFENSE

20. U.S. Bank states that if Defendant has been injured or otherwise damaged, which allegations are specifically denied, such injury or damage was the result, in whole or in part, of independent and intervening or superseding causes over which U.S. Bank had no control nor in any way participated.

FOR A FIFTH DEFENSE

21. If Defendant incurred any loss or damage as alleged in the Counterclaims, such loss or damage resulted from the acts of omissions of another party or parties over whom U.S. Bank neither exercised nor had any right of control, for which U.S. Bank is not responsible, and whose conduct U.S. Bank had no duty or reason to anticipate or control.

FOR A SIXTH DEFENSE

22. U.S. Bank would show that, even in the event it did not comply with the alleged obligations or procedures purportedly identified in Defendant's Counterclaims, which is expressly denied, any alleged noncompliance with said obligations or procedures would not have been intentional and would have resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, and therefore, Defendant's claims are barred.

FOR A SEVENTH DEFENSE

23. Defendant's claims may be barred, in whole or in part, by any or all of the doctrines of waiver, unclean hands, in pari delicto, fraud, accord and satisfaction, estoppel, consent, release, or ratification and adoption.

FOR AN EIGHTH DEFENSE

24. Defendant's claims may be barred, in whole or in part, by the statute of frauds.

FOR A NINTH DEFENSE

25. Defendant's claims may be barred, in whole or in part, by the doctrine of payment and voluntary payment.

FOR A TENTH DEFENSE

26. U.S. Bank incorporates by reference all of the terms, conditions, exclusions, exceptions, and limitations of any contracts which U.S. Bank has the right to enforce with Defendants, and would show that U.S. Bank has performed all of its obligations under any such contract. U.S. Bank further pleads the terms and conditions of that contract as a complete defense and bar to this action. In addition, U.S. Bank would show Defendant's prior breach of any contract as a bar to its claims for relief.

FOR AN ELEVENTH DEFENSE

27. The damages allegedly recoverable by Defendant, if any, which U.S. Bank denies, must be reduced by any amount of damages caused by Defendant's failure to mitigate such damages in whole or in part.

FOR A TWELFTH DEFENSE

28. Plaintiff, its assignors, or its predecessor in interest advanced a sum of money to Defendant, which Defendant promised to repay in full at the rate of interest agreed upon. If the relief Defendant seeks is granted, Plaintiff is entitled to repayment of the sums advanced, plus interest and other relief allowed by the Note and Mortgage.

FOR A THIRTEENTH DEFENSE

29. U.S. Bank would show that any actions or omissions alleged by the Defendant do not constitute a violation of the South Carolina Unfair Trade Practices Act and the Act does not apply because U.S. Bank operated in a regulated industry.

FOR A FOURTEENTH DEFENSE

30. U.S. Bank would show that the alleged acts of U.S. Bank, or its predecessors or assignors, which are expressly denied, do not affect the public interest but are essentially private in nature and, therefore, the South Carolina Unfair Trade Practices Act is inapplicable.

FOR A FIFTEENTH DEFENSE

31. U.S. Bank would show that Defendant failed to satisfy one or more conditions precedent to any contract, and, therefore, Defendant cannot recover for breach of contract.

FOR A SIXTEENTH DEFENSE

32. U.S. Bank would show that Defendant lacks the capacity, authority, and standing to assert some or all of the claims asserted in the Answer and Counterclaim.

FOR A SEVENTEENTH DEFENSE

33. U.S. Bank would show that an award of punitive damages would violate the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that:

- a. the judiciary's ability to correct a punitive damages award only upon a finding of passion, prejudice, or caprice is inconsistent with due process guarantees;
- b. any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;

- c. any award of punitive damages based upon the wealth of U.S. Bank violates due process guarantees;
- d. the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;
- e. an excessive award of punitive damages violates the due process guarantees of U.S. Bank;
- f. an award of punitive damages that is neither reasonable nor proportionate to the alleged wrong committed is irrational, arbitrary, furthers no legitimate purpose, and is an unconstitutional deprivation of the property of U.S. Bank;
- g. an award of punitive damages that is grossly disproportionate to any compensatory damages awarded violates U.S. Bank's due process guarantees;
- h. an award of punitive damages based solely on vicarious liability or the doctrine of respondeat superior is violative of due process guarantees;
- i. due to the lack of standards for determining punitive damages, U.S. Bank lacks fair notice of the punishment to which they could be subjected;
- j. even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness;
- k. an award of punitive damages that does not comport with the three guideposts articulated in *State Farm Mutual Automobile Insurance Company v. Campbell* fails to satisfy constitutional due process guarantees; and
- l. the Defendant's claim for punitive damages violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of U.S. Bank.

FOR AN EIGHTEENTH DEFENSE

34. U.S. Bank specifically reserves the right to amend its Answer to the Counterclaims to supplement with any additional defenses that may be revealed during the course of discovery or otherwise.

WHEREFORE, having fully answered the Counterclaims of Defendant, U.S. Bank prays that the Counterclaims be dismissed, with prejudice, and for such other and further relief as the Court may deem just and proper.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Carmen Harper Thomas

SC Bar No. 76012

E-Mail: carmen.thomas@nelsonmullins.com

B. Rush Smith III

SC Bar No. 12941

E-mail: rush.smith@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

Tel: (803) 255-9385

Fax: (803) 255-5932

Columbia, South Carolina

February 18, 2011

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for , do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

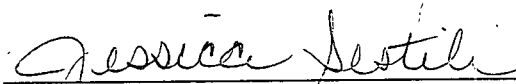
Plaintiff's Answer to Defendant Burr's Counterclaims

Counsel Served:

David P. Reuwer
306 Hmapton Park
P.O. Box 1776
Camden, SC 29021

Roy Boggs
FIA Card Services, N.A.
1300 Pickens Street
Columbia, SC 29201

FILED FOR RECORD
2011 FEB 24 PM 3:56
JOYCE HODDINALL
CLERK OF COURT
KERSHAW COUNTY, S.C.



Jessica Sestili
Administrative Assistant

February 18, 2011

STATE OF SOUTH CAROLINA)
)
COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS,
FIFTH JUDICIAL CIRCUIT

U.S. BANK NATIONAL)
ASSOCIATION Successor trustee to)
LaSalle Bank National Association, as)
trustee under the Pooling and Servicing)
Agreement, dated as of April 1, 2002,)
among Asset Backed Funding)
Corporation, Litton Loan Servicing LP)
and LaSalle Bank National Association,)
ABFC Asset Backed Certificates, Series)
2002-SB-1,)

Plaintiff,)

vs.)

KELLEY BURR, FIA Card Services,)
N.A.; Discovery Bank, Issuer of the)
Discover Card; Unifund CCR Partners,)

Defendants.)

Civil Action No. 2010-CP-28-1197

JUYCE McDERMOLD
CLERK OF COURT
KERSHAW COUNTY, S.C.

2012 APR 18 AM 11:52

FILED FOR RECORD

PLAINTIFF'S
MOTION TO DISMISS
COUNTERCLAIMS AND
TO STRIKE DEFENSES

Defendant Kelley Burr ("Burr") has failed to prosecute and even has defeated her own counterclaims by not responding to Plaintiff U.S. Bank National Association's ("U.S. Bank") efforts to offer her a loan modification proposal, in addition to not providing information to allow consideration of Burr for a modification. Therefore, pursuant to Rules 12(c), 12(f), and 41(b), S.C. Rules of Civil Procedure, U.S. Bank hereby moves to dismiss Burr's counterclaims and to strike her defenses. U.S. Bank's motion is based on the following grounds:

1. Burr asserts the following defenses and counterclaims against Defendant, all based primarily on an alleged failure to "conduct a fair, reasonable, comprehensive analysis" and "reconsideration of her home mortgage amount problem":
a) unclean hands; b) breach of contract; c) fraud and misrepresentation in the inducement;

d) violation of the S.C. Unfair Trade Practices Act; e) in pari delicto; f) residential home. (Answer and Counterclaims, paragraph 11).

FACTS

2. Through this case, Plaintiff has made extensive efforts to provide Burr with an opportunity to be considered for a loan modification, including offering Burr a modification proposal, as described in detail below.

3. Plaintiff served its Notice of Foreclosure Intervention on July 25, 2011, pursuant to the S.C. Supreme Court Administrative Order, 2011-05-02-01.

4. Plaintiff's counsel filed the Certification of Noncompliance with the Foreclosure Intervention Process on October 27, 2011, detailing the numerous unsuccessful attempts to gain information from Burr in order to consider her for a loan modification. See Certification, attached as Exhibit A.

5. Since the Certification was filed, additional efforts have been made to offer foreclosure intervention to Burr, through her counsel, including an actual loan modification proposal:

- a. November 23, 2011- Plaintiff's counsel called Burr's counsel. Burr's counsel indicated that he had submitted modification documents, although Plaintiff's counsel had not received them. Burr's counsel followed up that call with an email. See Email from David Reuwer to Carmen Thomas (Nov. 23, 2011), attached as Exhibit B. Burr's counsel faxed minimal documents to Plaintiff's counsel, presumably to initiate a modification review.
- b. November 23, 2011- Plaintiff's counsel replied to Burr's counsel's email, but Plaintiff's counsel never received a response to this

- reply, including any necessary documents. See Email from Carmen Thomas to David Reuwer (Nov. 23, 2011), Exhibit B.
- c. December 6, 2011- Plaintiff's counsel called and emailed Burr's counsel regarding the outstanding information and whether Burr would withdraw the counterclaims. See Email from Carmen Thomas to David Reuwer (Dec. 6, 2011), Exhibit B. Plaintiff's counsel never received a response to the voice mail message and email.
- d. On January 10, 2012, Plaintiff's counsel sent a modification proposal to Burr's counsel by mail and email, and also notified him by voice mail that the proposal was forthcoming. See Email from Jessica Sestili to David Reuwer (Jan. 10, 2010), attached as Exhibit C (confidential attachment omitted). The letter requested a response by January 31, 2012.
- e. On January 18, 2012, Plaintiff's counsel followed up with Burr's counsel by leaving another voice mail and sending another email. See Email from Carmen Thomas to David Reuwer (Jan. 18, 2012), Exhibit C.
- f. On February 28, 2012, Plaintiff's counsel called Burr's counsel and spoke briefly with him. However, Burr's counsel was unable to talk because he was meeting with someone. Therefore, counsel planned to talk on February 29, 2012 at 8:30 a.m. Plaintiff's counsel left a voice mail for Burr's counsel at 8:30 a.m. and at

11:00 a.m. on February 29th, including in the 11:00 a.m. message a request for Burr to withdraw her counterclaims.

- g. Neither Burr nor her counsel ever responded to the modification proposal or reached out to Plaintiff's counsel to provide information or otherwise respond to Plaintiff's efforts.

LAW AND ANALYSIS

6. Pursuant to Rule 41(b), a counterclaim defendant may move for dismissal of claims against it for the counterclaim plaintiff's failure to prosecute.

7. The Court "must consider four factors before dismissing a case for failure to prosecute: (1) the plaintiff's degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal." *McComas v. Ross*, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006) (citing *Hillig v. Comm'r of Internal Revenue*, 916 F.2d 171, 174 (4th Cir.1990)).

8. Regarding Burr's degree of personal responsibility, even before this action was filed on November 1, 2010, Burr did not provide the documents needed to evaluate her for a loan modification. When information was requested again through the foreclosure intervention process, she provided only a few documents, which were insufficient for the review. By her own nonresponsiveness over 17 months, Burr is personally responsible for her own failure to prosecute her claims.

9. Regarding the amount of prejudice caused to the counterclaim defendant, U.S. Bank has expended time and expenses before and since the filing of the complaint. Burr's claims are based only on the modification process, and the process has been more than exhausted. Thus, Burr "has been given abundant opportunity to litigate.

There is a limit beyond which the court should allow a litigant to consume the time of the court and to prolong unnecessarily time, effort, and costs to defending parties.” *Georganne Apparel, Inc. v. Todd*, 303 S.C. 87, 92, 399 S.E.2d 16, 19 (Ct. App. 1990).

10. Regarding the presence of a drawn out history of deliberately proceeding in a dilatory fashion, the history of U.S. Bank’s attempts to work with Burr are described in detail in the Certification of Noncompliance, attached as Exhibit A.

11. Finally, regarding the effectiveness of sanctions less drastic than dismissal, Burr has already shown inattention to the foreclosure intervention process ordered by the South Carolina Supreme Court, so another court order directing compliance would provide no incentive for action.

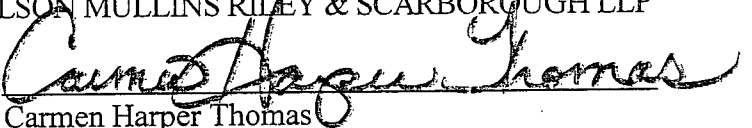
12. In addition to failing to prosecute her claims, Burr’s claims are moot because they are based on an alleged scenario of her not being offered a loan modification. *See Darden v. S.C. Dep’t of Highways and Pub. Trans.*, 291 S.C. 270, 353 S.E.2d 279 (1987) (finding the case moot because an effective date had passed, so “there remain[ed] no actual case or controversy, and a judgment rendered by this Court would have no practical legal effect upon the existing case”). As explained above, Plaintiff offered Burr a modification proposal on January 10, 2012. Burr never responded to this offer. A judgment in her favor would have no practical effect on her counterclaims because she already has been offered the primary relief that she sought: “For an Order granting the Defendant a fair, reasonable, comprehensive, and thorough reconsideration and modification of the terms of the contract, as [allegedly] was promised by the Plaintiff, to determine an affordable amount of mortgage payment.” (Answer and Counterclaims, paragraph beginning WHEREFORE, sub B.)

13. Burr has not cooperated in any respect with her own responsibilities in working toward some type of foreclosure intervention. She has not taken any steps toward prosecuting her counterclaims, and now that she has failed to acknowledge the relief offered to her, her own actions defeat her counterclaims.

For these reasons, Plaintiff requests that this Court order dismissal of Burr's counterclaims for failure to prosecute pursuant to Rule 41(b), SCRCF, and order Burr's defenses be stricken pursuant to Rule 12(f), SCRCF.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By:



Carmen Harper Thomas

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Columbia, South Carolina

April 17, 2012

EXHIBIT A

Certification of Mortgagor Noncompliance

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS,
) FIFTH JUDICIAL CIRCUIT
 COUNTY OF KERSHAW)

U.S. BANK NATIONAL)
 ASSOCIATION Successor trustee to)
 LaSalle Bank National Association, as)
 trustee under the Pooling and Servicing)
 Agreement, dated as of April 1, 2002,)
 among Asset Backed Funding)
 Corporation, Litton Loan Servicing LP)
 and LaSalle Bank National Association,)
 ABFC Asset Backed Certificates, Series)
 2002-SB-1,)

Civil Action No. 2010-CP-28-1197

2011 OCT 27 AM 11:49
 CLERK OF COURT S.C.

CERTIFICATION OF
MORTGAGOR NONCOMPLIANCE
(Administrative Order 2011-05-02-01)

Plaintiff,)

vs.)

KELLEY BURR, FIA Card Services,)
 N.A.; Discovery Bank, Issuer of the)
 Discover Card; Unifund CCR Partners,)
 Defendants.)

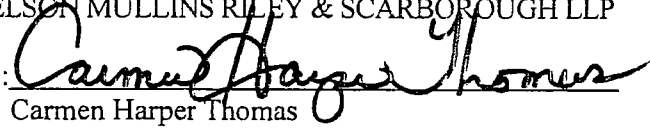
The Plaintiff by and through its undersigned attorney does hereby certify as follows:

- 1) That this is an action for the foreclosure of owner occupied real property.
- 2) That pursuant to Supreme Court Administrative Order 2011-05-02-01:
 - a) Based on the following, the Mortgagor has been served with the required notice of rights.
 - a. On July 25, 2011, Plaintiff served the Notice of Defendant's Right to Foreclosure Intervention ("Notice") on opposing counsel, which was filed on July 26, 2011.
 - b. On August 8 and 9, 2011, counsel for the parties communicated about the Notice, with Plaintiff re-sending the Notice on August 9, 2011.
 - b) Based on the following, the Mortgagor has failed, refused, or voluntarily elected not to participate in any foreclosure intervention process:

- a. The deadline to respond was August 24, 2011, based on the July 25, 2011 service date, or was September 8, 2011, based on re-sending the Notice on August 9, 2011.
- b. From August 19 to September 21, 2011, counsel for the parties communicated regarding the status of Mortgagor's documents and records for foreclosure intervention.
- c. On September 26, 27, and 29, 2011, a paralegal in Plaintiff's counsel's office left voice mails with Mortgagor's counsel regarding the status of the foreclosure intervention information.
- d. On October 4, 2011, Plaintiff's counsel wrote Mortgagor's counsel regarding the foreclosure intervention process, giving a final deadline of October 14, 2011 to receive information from Mortgagor.
- e. No documents or records were ever received by Plaintiff's counsel.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By:


Carmen Harper Thomas

SC Bar No. 76012

E-Mail: carmen.thomas@nelsonmullins.com

B. Rush Smith III

SC Bar No. 12941

E-mail: rush.smith@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

Tel: (803) 255-9385

Fax: (803) 255-5932

Columbia, South Carolina

October 26, 2011

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for , do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:


Certification of Mortgagor Non-Compliance

Counsel Served:

David P. Reuwer
306 Hampton Park
P.O. Box 1776
Camden, SC 29021

Roy Boggs
FIA Card Services, N.A.
1300 Pickens Street
Columbia, SC 29201

2011 OCT 27 AM 11:49
FEDERAL COURTS
COLUMBIA, S.C.



Jessica Sestili
Administrative Assistant

October 26, 2011

EXHIBIT B

Email from David Reuwer to Carmen Thomas (Nov. 23, 2011)
Email from Carmen Thomas to David Reuwer (Nov. 23, 2011)
Email from Carmen Thomas to David Reuwer (Dec. 6, 2011)

From: Carmen Thomas
To: "David Paul Reuwer"
Cc: Meredith Keane
Subject: FW: US Bank v. Burr
Date: Tuesday, December 06, 2011 3:33:24 PM
Attachments: [2011.10.27 Certification of Mortgagor Noncompliance \[filed\] - 4831-9708-0333 v 1.pdf](#)

David,

Can you please respond regarding the issues in my 11/23/11 email by Friday, December 8th? I just left you a voice mail to be sure you knew I was trying to get in touch with you about these issues. If we don't hear from you by Friday, we will need to proceed with the foreclosure. To that end, if you cannot respond by this Friday, please let us know if you will consent to withdrawing the counterclaims and allowing my client to proceed with the foreclosure.

Thanks.

Carmen

Carmen Harper Thomas

Nelson Mullins Riley & Scarborough LLP

carmenhthomas@nelsonmullins.com

(803) 255-9385 o

(803) 255-5932 f

From: Carmen Thomas
Sent: Wednesday, November 23, 2011 5:09 PM
To: David Paul Reuwer
Cc: Meredith Keane
Subject: RE: US Bank v. Burr

David,

Thanks for sending those materials today.

We made numerous efforts to contact your office regarding the foreclosure intervention process. Because I've made a certification to the court about those efforts, we need evidence that these materials were sent to us previously if we are to attempt to undo what the certification has done.

Also, this package, even if sent in the appropriate timeframe, is materially deficient. The income/expenses for household statement appears to be incomplete, with empty boxes

and question marks. I don't see the 3rd page that is the signature page. The cover sheet to the form requests several documents, and I don't see them in what you've sent, including but not limited to bank statements. The divorce decree refers to at least four bank accounts. I also do not see any documentation of income. Also, I cannot tell when the documents were signed because the dates are illegible. This may affect the ability to use these documents for any potential modification review. Please provide legible copies or tell me when they were signed.

Before we proceed with getting additional documentation from Ms. Burr, please send proof that this package was sent to me before today.

Please also confirm that you received the Certification of Noncompliance that we filed on 10/27/11 and that I mentioned on the phone earlier today. I attached the filed copy.

Thanks.

Carmen

Nelson Mullins

Carmen H. Thomas
Associate
carmen.thomas@nelsonmullins.com
Nelson Mullins Riley & Scarborough LLP
Meridian, 17th Floor
1320 Main Street, Columbia, SC 29201
Tel: 803.255.9385 Fax: 803.255.5932
www.nelsonmullins.com
(View Bio)

From: David Paul Reuwer [mailto:davidreuwer3@aol.com]
Sent: Wednesday, November 23, 2011 3:18 PM
To: Carmen Thomas
Subject: US Bank v. Burr

Dear Carmen:

Thank you for your courtesy phone call this morning to my office about Kelly Burr. I have pulled the file and sending you by fax the requested Modification papers (6pgs) and unfiled 2008 Tax Return (6pgs) and Temporary Divorce Order (5pgs) which I have previously sent you to send to MakingHomeAffordable program, as filled in by Kelly Burr. I am working Friday and all next week, of course, and trying to talk with my client before Monday. I would like to discuss procedurally the next step with you at your earliest when you come back in from

the holiday.
Have a blessed Thanksgiving.

David Paul Reuwer LLC
Attorney at Law
P.O. Box 1776
Camden, SC 29021
803.549.6710

EXHIBIT C

Email from Jessica Sestili to David Reuwer (Jan. 10, 2010)
Email from Carmen Thomas to David Reuwer (Jan. 18, 2012)

From: Carmen Thomas
To: "davidreuer3@aol.com"
Cc: Meredith Keane
Subject: RE: US Bank v. Kelley Burr
Date: Wednesday, January 18, 2012 4:13:00 PM

David,

I just left you another voice mail following up on this letter we mailed and emailed last week. Please respond to confirm whether or not you have received any of my communications. Thanks.

Carmen

From: Jessica Sestili
Sent: Tuesday, January 10, 2012 2:29 PM
To: davidreuer3@aol.com
Cc: Carmen Thomas
Subject: US Bank v. Kelley Burr

Mr. Reuer,

Please find attached correspondence from Attorney Thomas in the above-referenced matter.
Thank you.

Nelson Mullins

Jessica Sestili
Administrative Assistant
jessica.sestili@nelsonmullins.com

Nelson Mullins Riley & Scarborough LLP

Meridian, 17th Floor
1320 Main Street, Columbia, SC 29201
Tel: 803.255.5535
www.nelsonmullins.com

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for , do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

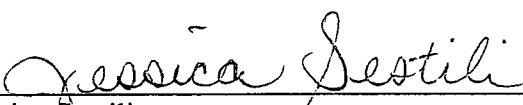
Plaintiff's Motion to Dismiss Counterclaims and to Strike Defenses

Counsel Served:

David P. Reuwer
306 Hampton Park
P.O. Box 1776
Camden, SC 29021

Roy Boggs
FIA Card Services, N.A.
1300 Pickens Street
Columbia, SC 29201

FILED FOR RECORD
2012 APR 18 AM 11:52
JOYCE HODDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.



Jessica Sestili
Administrative Assistant

April 17, 2012

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

IN THE COURT OF COMMON PLEAS

Case No. 2010-CP-28-1197

U.S. Bank National Association Successor trustee to LaSalle Bank National Association, as trustee under the Pooling and Servicing Agreement, dated as of April 1, 2002, among Asset Backed Funding Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB-1,

Plaintiff,

vs.

Kelley Burr, FIA Card Services, N.A.; Discovery Bank, Issuer of the Discover Card; Unifund CCR Partners,

Defendants.

MOTION TO RECONSIDER

2012 OCT 12 AM 9:42
CLERK OF COURT
KERSHAW COUNTY, S.C.

TO: THE HONORABLE GEORGE C. JAMES, JR., CIRCUIT JUDGE; AND THE PLAINTIFF AND ITS ATTORNEY, CARMEN H. THOMAS, ESQ.:

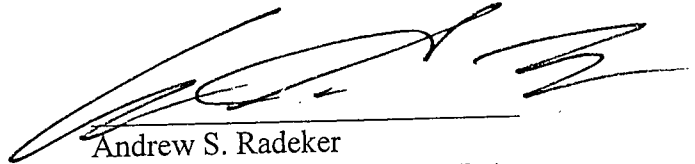
YOU WILL PLEASE TAKE NOTICE that Defendant Kelley Burr (hereinafter “the Defendant”) moves before this Court pursuant to Rules 52(b) and 59(e), SCRPC, as well as pursuant to all other applicable law, in the above-captioned action for an Order that reconsiders and/or alters or amends this Court’s Order dated September 26, 2012, and filed October 1, 2012¹, that granted the Plaintiff’s motion to dismiss the Defendant’s counterclaims and strike the Defendant’s affirmative defenses.

The grounds for this motion are more particularly shown in the attached memorandum, which is incorporated herein by reference as if here set forth verbatim.

¹ The Plaintiff received written notice of the entry of this Order on October 2, 2012.

Consultation by the undersigned with opposing counsel about the substance of this motion in advance of the making hereof would have served no useful purpose.

Respectfully submitted,



Andrew S. Radeker
HARRISON & RADEKER, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)

ATTORNEY FOR DEFENDANT
KELLEY BURR

Columbia, South Carolina
October 9, 2012

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

U.S. Bank National Association Successor trustee to LaSalle Bank National Association, as trustee under the Pooling and Servicing Agreement, dated as of April 1, 2002, among Asset Backed Funding Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB-1,

Plaintiff,

vs.

Kelley Burr, FIA Card Services, N.A.;
Discovery Bank, Issuer of the Discover
Card; Unifund CCR Partners,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2010-CP-28-1197

MEMORANDUM IN SUPPORT OF
MOTION TO RECONSIDER

2012 OCT 12 AM 9:42
KERSHAW COUNTY, S.C.

Defendant Kelley Burr (hereinafter “the Defendant”) hereby submits this memorandum in support of the Defendant’s motion in the above-captioned action for an Order that reconsiders and/or alters or amends this Court’s Order dated September 26, 2012, and filed October 1, 2012¹, that granted the Plaintiff’s motion to dismiss the Defendants’ counterclaims and strike the Defendant’s affirmative defenses.

NO FAILURE TO PROSECUTE WAS SHOWN

The Plaintiff’s motion was based on conduct that, while regrettable, did not constitute failure to prosecute. Black’s Law Dictionary defines “prosecute” as “[t]o commence and carry out a legal action[.]” The leading (and perhaps only) reported South Carolina case analyzing a dismissal for failure to prosecute, McComas v. Ross, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006), dealt a situation in which the plaintiff in that case did not show up on time at the

courtroom for the trial. That is the sort of conduct that would trigger an analysis of whether a failure to prosecute that warrants dismissal has occurred.

Here, what happened was, at most, a failure to engage in settlement negotiations. That is not a failure to prosecute. The Plaintiff noted no instance of the Defendant not appearing at a roster meeting or other court event and no instance of the Defendant failing to participate in discovery. The remedy for noncompliance with a mortgagor's responsibilities under the operative administrative order is not the dismissal of counterclaims or the striking of defenses. The conduct complained of by the Plaintiff does not consist of a failure to prosecute; thus, the Court should not have reached the four-factor analysis discussed in McComas.

As to the Defendant's personal responsibility, this factor refers to the Defendant's personal responsibility for a failure to prosecute; as discussed above, there was no such failure here. In that same vein, any time and expenses the Plaintiff expended in attempting settlement negotiations with the Defendant were not as a result of any failure on her part to prosecute her claims; indeed, the Court's order notes that the Plaintiff "has expended time and expenses before and since the filing of the Complaint." With regard to any history of proceeding in a dilatory fashion, the Plaintiff could not point to one court or discovery event that was delayed by anything the Defendant did. Further, as for whether less drastic sanctions might be effective, the blanket statement that "another court order directing compliance would provide no incentive for Burr to act" lacks evidentiary support.

No affidavit or other cognizable evidence was put forth in support of the Plaintiff's motion. With no factual record to support its contentions, the Plaintiff's motion should have been denied.

¹ The Plaintiff received written notice of the entry of this Order on October 2, 2012.

The Defendant's claims are not moot. Nothing before the Court showed that any modification the Plaintiff offered complied with applicable Home Affordable Modification Program directives or other standards. Additionally, the Defendant pled that the Plaintiff had promised her a modification and then reneged on that promise, which could not be made moot simply by the Plaintiff offering the Defendant a modification. The Defendant did not solely seek a modification as the relief to be granted on her claims. The burden was on the Plaintiff to prove mootness, and no such proof was adduced.

RULES 12(c) AND 12(f) DID NOT APPLY

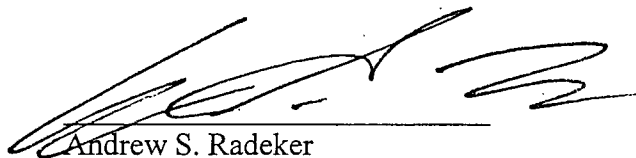
“A motion to dismiss a counterclaim must be based solely on the allegations set forth in the counterclaim. See Rule 12(b)(6), SCRCPP; Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). “A Rule 12(b)(6) motion may not be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the [complainant] to any relief on any theory of the case.” Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602-3 (1995). The question is whether in the light most favorable to the complainant, and with every doubt resolved on his behalf, the counterclaim states any valid claim for relief. Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). The counterclaim should not be dismissed merely because the trial court doubts the complainant will prevail in the action. Id.” Charleston County Sch. Dist v. Laidlaw Transit, Inc., 348 S.C. 420, 559 S.E.2d 362 (Ct. App. 2001). This is the standard that applies to a motion under Rule 12(c), SCRCPP. Rule 12(f), SCRCPP, provides that the Court “may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.”

The Plaintiff did not advance any arguments concerning these standards, and the Court's order does not contain any analysis of whether these standards were met. Rules 12(c) and 12(f), SCRCF, do not provide an appropriate basis for the Court's decision.

CONCLUSION

The Court erred in its ruling. The ends of justice require that the Court reconsider and undo its previous ruling.

Respectfully submitted,



Andrew S. Radeker
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(803) 779-2211
(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)

ATTORNEY FOR DEFENDANT
KELLEY BURR

Columbia, South Carolina
October 9, 2012

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

U.S. Bank National Association Successor trustee to LaSalle Bank National Association, as trustee under the Pooling and Servicing Agreement, dated as of April 1, 2002, among Asset Backed Funding Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB-1,

Plaintiff,

vs.

Kelley Burr, FIA Card Services, N.A.;
Discovery Bank, Issuer of the Discover
Card; Unifund CCR Partners,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2010-CP-28-1197

CERTIFICATE OF SERVICE


JOYCE DEWITT
CLERK OF COURT
KERSHAW COUNTY, S.C.
2012 OCT 12 AM 9:43
FILED

I, Andrew S. Radeker, an attorney with the law firm of Harrison & Radeker, P.A., attorneys for Defendant Kelley Burr, do hereby certify that I have, on this the 9th day of October, 2012, served the foregoing document in the above-captioned action by depositing the same in the United States Mail, first class, postage prepaid, with the return address clearly noted, addressed as follows, to wit:

The Hon. George C. James, Jr.
Circuit Judge
P.O. Box 1716
Sumter, SC 29150

Carmen H. Thomas, Esq.
Nelson Mullins Riley & Scarborough, LLP
P.O. Box 11070
Columbia, SC 29211-1070

Roy Boggs, Esq.
Korn Law Firm, PA
1300 Pickens St.
Columbia, SC 29201



Andrew S. Radeker

STATE OF SOUTH CAROLINA)
)
COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
2010-CP-28-1197

U.S. Bank National)
Association)
)
)

Transcript of Record

VS.)
)

Kelley Burr, et al.)

September 13, 2012
Camden, South Carolina

B E F O R E:

The Honorable George C. James, Jr.

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

Carmen Harper Thomas, Esquire
Columbia, South Carolina

Attorney for the Plaintiff

Andrew S. Radeker, Esquire
Columbia, South Carolina

Attorney for the Defendant

SHIRLEY G. BROOM
CIRCUIT COURT REPORTER
SIXTEENTH JUDICIAL CIRCUIT

I N D E X

WITNESS

DIRECT CROSS RE-DIRECT RE-CROSS

(No testimony taken)

E X H I B I T S

EXHIBIT NO.	DESCRIPTION	ID	EV
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(No Exhibits)

1 The Court - This is your motion to dismiss
2 counterclaims and strike defenses.

3 Ms. Thomas - Yes, Your Honor.

4 The Court - All right, Mr. Radeker, just for the
5 Clerk of Court's purposes, has there been any formal
6 relief of Mr. Reuwer and you being substituted?

7 Mr. Radeker - I understand he's sending me a
8 Notice of Substitution of Counsel. I filed a notice of
9 appearance this morning --

10 The Court - That's good enough.

11 Mr. Radeker - -- just so the record will reflect
12 that I'm here.

13 The Court - That's fine. All right, just wanted
14 to make sure that as we go further they know who to send
15 things to. Okay. First if you would, tell me a little
16 bit about the case and how we got to where we are and then
17 you can start.

18 Ms. Thomas - I will, Your Honor. This is a
19 foreclosure. I represent U.S. Bank. Again, my name's
20 Carmen Thomas.

21 The Court - All right.

22 Ms. Thomas - And U.S. Bank filed the foreclosure
23 in 2010, November 1st of 2010 and the borrower is due for
24 a May 5th, 2009 payment as reflected in the complaint, so
25 that -- the loan is overdue by several years. The --

1 The Court - Is this proceeding subject to any of
2 those restrictions that the Chief Justice has put on
3 anything?

4 Ms. Thomas - It is very subject to one of the
5 administrative orders. That is the essence really of why
6 we're here.

7 The Court - Okay.

8 Ms. Thomas - And I will talk about that.

9 The Court - All right.

10 Ms. Thomas - The borrower, Kelley Burr, answered
11 on -- we filed the complaint on November 1st of 2010. She
12 answered on December 20th and served counterclaims against
13 us that essentially we didn't consider her fairly for a
14 loan modification. And this is before the administrative
15 order on foreclosure intervention. We answered the
16 counterclaims in February of 2011, then in May 2nd of 2011
17 Chief Justice Toal issued the Foreclosure Intervention
18 Order requiring that we serve a Notice of Foreclosure
19 Intervention, and so we served that on her on July 25th.

20 The Court - Of '11?

21 Mr. Thomas - Of 2011, yes, sir, just a couple of
22 months after that -- the Order was issued, once we, you
23 know, figured out what to do with it really. So we served
24 that Notice of Foreclosure Intervention. As you can see -
25 - and we filed a Certificate of Non-Compliance. That

1 details our efforts to get Defendant Burr to engage in the
2 foreclosure intervention process. We filed that about
3 ninety days after. We're required to allowed thirty days
4 after that, but we followed up with her attorney numerous
5 times and finally after we filed a Certificate of Non-
6 Compliance, we got a couple of documents back that were
7 some kind of effort I think to try to comply, but they had
8 blanks in them and --

9 The Court - And what do those documents consist
10 of?

11 Ms. Thomas - Those were documents to consider
12 her for a loan modification.

13 The Court - Like income records?

14 Ms. Thomas - No income records were included,
15 Your Honor. The form itself have many blanks and question
16 marks written on it. It was missing a signature page. It
17 had a tax return, a draft tax return that she'd obviously
18 provided her attorney but it was not a final tax return
19 which was one of the things that's required. No bank
20 statements were included and we note from the Divorce
21 Decree that there were at least five bank accounts. So it
22 was a completely deficient package. We couldn't do
23 anything with it, so we followed up and asked for more
24 documents.

25 The Court - Is that the package that was

1 contemplated by the Chief Justice's Order?

2 Ms. Thomas - That's a package we sent with the
3 Notice of Foreclosure Intervention that said, here, we
4 need this information to evaluate for a loan modification.
5 We received that. We -- so we served the Notice of
6 Foreclosure Intervention as I said in July. We received
7 that information in November of 2011, and then didn't
8 receive any other complete -- no other information until
9 a couple of weeks ago. We eventually felt like we needed
10 to move to dismiss the counterclaims, because we're bound
11 by the Order. We can't move forward with a foreclosure
12 until we've certified non-compliance. We've got --

13 The Court - But you've done that.

14 Ms. Thomas - We have done that. So we have the
15 counterclaims and to resolve the counterclaims we've moved
16 to dismiss those here based on failure to prosecute,
17 because that administrative order overlays on any
18 foreclosure action, the obligations that we have and that
19 the borrower has to participate in the foreclosure
20 intervention process. We have gone over and beyond -- can
21 see by our Certification of Non-Compliance and then this
22 motion reflects the time-line of contacts that we've
23 reached out over and over again to borrower's prior
24 counsel to try to offer her the modification. We actually
25 sent her a modification offer on January 10th and got no

1 response, like I said, until a real response a couple of
2 weeks ago. We had a phone conversation in April with the
3 borrower and her lawyer to talk about it and they were
4 going to go get documents, but we -- we have not received
5 anything. And that Foreclosure Intervention Order I
6 believe was intended to both provide borrowers an
7 opportunity for foreclosure intervention which we've
8 clearly given, but also to keep these cases from getting
9 bogged down on dockets and to move them forward. And
10 that's what's happened with this case. For it to be able
11 to go forward, we need to resolve the counterclaims and
12 then move forward with the foreclosure, and honestly,
13 right now we are still trying to work on modification with
14 her, but the property's in such disrepair now that we've
15 got to get an appraisal and she knows that we're waiting
16 to get an appraisal on the property because her prior
17 counsel has said that the value is so low that we need to
18 know that before we agree to a modification.

19 The Court - Is your position that that current
20 effort -- that modification is more of a business decision
21 than a legally binding requirement on you?

22 Ms. Thomas - Right, Your Honor, and just based
23 on entries (sic) for her to still not give up.

24 The Court - So if that non-compliance is rubber-
25 stamped or said by a Court that yes, you've done all you

1 could do, you would still be as a practical matter trying
2 to work with her?

3 Ms. Thomas - Yes, Your Honor.

4 The Court - All right.

5 Ms. Thomas - I mean it's always in our interest
6 to have a conforming loan on the books, so we um --

7 The Court - Okay, and you want -- what are their
8 -- what are her counterclaims based on? I see in your
9 motion that they're all based on lack of assistance to get
10 some relief.

11 Mr. Thomas - Allegedly not considering her for
12 a loan modification.

13 The Court - All right.

14 Ms. Thomas - And we -- we've done that. We've
15 actually -- we've considered what we could and tried to
16 get more documents and have, like I said, actually offered
17 a loan modification with a -- with terms and a payment
18 amount and, you know, everything she needed to know to
19 decide -- or even to tell us -- or, you know, rejected at
20 the time, say no, I want to negotiate. We got nothing
21 like --

22 The Court - All right. Okay.

23 Ms. Thomas - -- that for months and months and
24 months. And so we have two grounds for our motion to
25 dismiss, one was failure to prosecute under Rule 41(B) and

1 then also judgment on the pleadings based on Rule 12(C)
2 because the relief that she seeks, which is to have
3 reconsideration and an offer of a modification, we've done
4 that. We can't do anything else to give her that relief,
5 so we considered that that claim for relief is moot. The
6 grounds for considering failure to prosecute are the
7 degree of personal responsibility, the amount of prejudice
8 to the defendant, history of proceeding in a deliberately
9 dilatory fashion and effectiveness in sanctions less
10 drastic. First, about the degree of personal
11 responsibility, I will admit that it is probably not this
12 borrower's hundred percent fault that this has happened,
13 but she has a role in the process, and the analysis is her
14 degree of responsibility. She provided some documents to
15 her lawyer at some point after the Notice of Foreclosure
16 Intervention, because we got those documents in November
17 about, you know, four or five months after. So we know
18 that she has been engaged in the process. She also has
19 talked to him at least we know in April, so -- and she's
20 not been making payments on this loan since 2009. I can't
21 imagine that she has just totally let the whole thing go,
22 and if she has, that is her fault for doing that and not
23 following up. The amount of prejudice to the defendant,
24 there are obviously financial implications; interests has
25 continued to accrue this entire time. We've had more

1 property inspections fees, my time and other time in my
2 office has been spent trying to follow-up regularly and
3 move this forward and provide her with opportunity for a
4 modification and it's just gotten to an absurd point by
5 now.

6 The Court - And the security is deteriorating --
7 Ms. Thomas - Yes, Your Honor, it -- we found
8 that out recently that it has gotten to a point inside
9 where -- I mean I think the floors are falling in and
10 things like that. We haven't gotten inside to look at it
11 yet, but that is a huge concern for us. History of
12 proceeding in a deliberately dilatory fashion, I've
13 described all this in the motion and it's tedious to go
14 through and I don't know if you want to see it, but there
15 is that history there. She has not engaged in any other
16 action to proceed with her counterclaims. They were filed
17 in -- on December 20th of -- of 2010. She's done no
18 discovery, no motions. We haven't served discovery, Your
19 Honor, because of the stay from the Foreclosure
20 Intervention Order. So after we filed the Certificate of
21 Non-Compliance we moved forward with this motion, you
22 know, taking the next step to try to resolve the
23 counterclaims and then, of course, our next step after
24 this would be to move forward with foreclosure if this
25 modification doesn't work out.

1 The Court - All right.

2 Mr. Thomas - And then the effective of sanctions
3 less drastic, she's had these counterclaims pending and I
4 -- they obviously haven't been an incentive for her to
5 participate and prosecute this action, so I don't know
6 what other incentive there could be.

7 The Court - Okay. All right, anything else?

8 Ms. Thomas - We had the other ground of
9 mootness, Your Honor, and I think that's pretty clear.

10 The Court - Mootness is kind of tied to
11 everything you've already talked about.

12 Ms. Thomas - Right, Your Honor, but it's -- the
13 41(B) basis for a dismissal is judgment on the pleadings
14 and then mootness is under 12(C) judgment on the pleadings
15 because of her claim for relief, and that it is moot.
16 There's no -- no point in going forward with it, and --

17 The Court - All right.

18 Ms. Thomas - -- we don't want to waste the
19 Court's time and our time with having these counterclaims
20 continue to be pending. We would have to come back or
21 either deal with them at a foreclosure hearing later if
22 this modification doesn't work out, so --

23 The Court - Okay.

24 Ms. Thomas - -- we just -- we want some
25 assurance that we can go forward with this action. Thank

1 you.

2 The Court - All right, Mr. Radeker.

3 Mr. Radeker - Thank you, Your Honor. I'll do
4 what I can with this. I am newly in this case, just got
5 hired the end of the day on Monday and just -- just now
6 appearing on this. Plainly I would say that through her
7 predecessor counsel, my client didn't pay the attention to
8 settlement negotiations that maybe ought to have been paid
9 apparently. I mean you can -- you can look at what's here
10 and see that, but I'm not sure that failure to engage in
11 settlement negotiations amounts to a failure to prosecute.

12 The Court - Well, failure to -- but the
13 settlement negotiations were the modification process, not
14 truly settlement, but loan modifications.

15 Mr. Radeker - So -- well, Your Honor, yes. I
16 mean and it's clear from looking at the counterclaims here
17 that, you know, one of the things she asked for is process
18 me for a loan modification here. That's obvious. But at
19 the same time, I mean that's not failure to show up for a
20 hearing about what the issues are in the case. It's not
21 failure to participate in the discovery process. So I'd
22 say that while it is something and it's not good for this
23 to have happened the way that it's happened, I don't think
24 it is what failure to prosecute is. I think that that's
25 just something else. I mean there's -- the McComas case

1 which is really just about -- really the only substantive
2 case that I know of to deal with failure to prosecute in
3 the state, what was at issue in that case was whether the
4 plaintiff's failure to show up on time for her trial
5 constituted failure to prosecute. Arguably if it did, the
6 Court determined that because she was trying to get there
7 and just didn't make it on time, that it didn't amount to
8 it on appeal, but this is just something of an entirely
9 different character. I don't doubt that the e-mails
10 attached to this motion are authentic or that they were
11 sent or anything like that, but this motion does list a
12 number of things as having happened, that there's really
13 no factual material here to show that they did happen or
14 didn't happen, there's no affidavits or anything like that
15 to show that. Her counterclaims and defenses, while they
16 do largely focus on saying process me for a modification,
17 what is also here are allegations that the plaintiff had
18 promised to give her a modification and reneged on that
19 promise.

20 The Court - But has she taken advantage of the
21 modification entreaties you know, whether -- whether
22 they're -- you know, however you want to couch them -- if
23 her counterclaim -- if any counterclaim is based on them
24 not offering her a modification, well, the case was
25 basically stayed or is stayed to allow that to happen. In

1 other words, she's getting -- or they're offering what she
2 asked for. Has she taken advantage of it?

3 Mr. Radeker - Well, Your Honor, I -- I would say
4 that I'm not sure whether she personally was actually
5 aware of many of these communications incited in the
6 plaintiff's motion. I understand that she's got a lawyer
7 and usually the -- any neglect of the attorney would be
8 imputed to the client as Your Honor mentioned in the
9 previous hearing --

10 The Court - Right.

11 Mr. Radeker - -- but in any event, you know, --
12 I mean there is here noted that while it might not have
13 been too timely, there was a response to the latest
14 settlement proposal and that negotiations are on-going in
15 that regard. Also the question of whether the matter
16 remained stayed under the administrative order and whether
17 she's failed to prosecute the counterclaims are not the
18 same question is what I would say. The Court can say,
19 well, we're done with the mandatory stay under this Order,
20 but not agree that there's been failure to prosecute such
21 that the counterclaim --

22 The Court - Can you prosecute a counterclaim
23 during a stay?

24 Ms. Thomas - Your Honor, the stay applies to our
25 prosecution of the foreclosure action, so we can't proceed

1 on the merits.

2 The Court - How long has it been stayed?

3 Ms. Thomas - Well, I think under the Order it
4 would not be stayed after we filed that Certificate of
5 Non-Compliance.

6 The Court - When did the -- when did the stay
7 start? It's got to be November.

8 Ms. Thomas - Well, we filed the Notice of
9 Foreclosure Intervention in July 2011 and then the
10 Certificate of Non-Compliance -- I'm sorry --

11 The Court - I thought it was November of '11.

12 Mr. Radeker - Your Honor, I believe that under
13 the Order that the stay would've been in effect is when
14 the Order went in effect. So as of the -- May of 2011 and
15 it would've gone until the Certificate was filed.

16 The Court - When was the Certificate of Non-
17 Compliance filed?

18 Ms. Thomas - October 27th of 2011.

19 The Court - Okay. All right, go ahead, Mr.
20 Radeker?

21 Mr. Radeker - Thank you, Your Honor. I'd also
22 note as to the mootness argument, that mootness would need
23 to be shown factually again; -- this -- no real factual
24 material here in the record. You know, as to her claim
25 that, you know, they promised her a modification and

1 renewed on that promise before the lawsuit that are
2 commenced, that wouldn't be subject to the motion for
3 judgment on the pleadings --

4 The Court - Is that actionable?

5 Mr. Radeker - Well, I mean it might be
6 actionable on a number of theories, negligence
7 misrepresentation, promissory estoppel perhaps. So --
8 also, we make a oral motion here to -- to be granted a
9 leave to amend the answer and counterclaim in this case.
10 Haven't been in this case long enough really to find out
11 exactly what --

12 The Court - What do you want to add?

13 Mr. Radeker - Well, I was about to say, I hadn't
14 really been in this case long enough to find out exactly
15 what it is I want to add, but I know I want it to read
16 differently from the way it reads now.

17 The Court - All right. Well, that I understand
18 what you're saying and we'll get to that in a minute, but
19 Ms. Thomas, how about the fact that there are no
20 affidavits and no -- nothing other than what you say?

21 Ms. Thomas - Well, I signed this pursuant to
22 Rule 11 and that is my commitment that these things are
23 true in the motion.

24 The Court - Okay. All right, Mr. Radeker --

25 Ms. Thomas - I stand by them. I know that they

1 haven't.

2 The Court - All right, Mr. Radeker, anything
3 else?

4 Mr. Radeker - Not on that motion. I mean I --
5 if you want to argue the motion to amend separate --

6 The Court - All right, we'll get to that in just
7 a second. Here's what my ruling -- Do you have anything
8 else to say?

9 Ms. Thomas - Well, Your Honor, I wanted to
10 mention that one of my points was going to be that I stand
11 by what is in this pursuant to Rule 11. I signed this.
12 I don't know whether these things are true, and Mr.
13 Radeker mentioned that this isn't like the case where the
14 woman didn't show up for trial. No, it's not, but that
15 there are other cases that aren't that same situation
16 where a party, you know, didn't engage in the process.
17 That's what failure to prosecute is about. In this
18 situation with a Foreclosure Intervention Order, I'm not
19 sure what else this could be other than a failure to
20 prosecute and participate in the action. We've done what
21 we can. We've filed a Certificate of Non-Compliance. We
22 now have tried to take a step to -- to get the
23 counterclaims out of the action, and we're moving forward.
24 She's not doing anything and has not done anything. He
25 also mentioned her awareness of the proceedings and what

1 was going on, and I know that she was clearly aware. She
2 was not paying her mortgage this entire time. And that
3 fact is what is underlying in the case.

4 Mr. Radeker - And I would just like to note for
5 the record -- talk about the affidavit from a procedural
6 basis. I do not believe that Ms. Thomas is attempting to
7 mislead this Court about anything.

8 The Court - I know that.

9 Ms. Thomas - I know you don't.

10 The Court - Okay, I guess the -- I frankly don't
11 doubt anything that she said, but what I'm struggling with
12 is at this stage whether or not I can dismiss
13 counterclaims based on pre-foreclosure proceeding
14 representations that she claims were made, but then again,
15 the relief that she said she was promised under HAMP I
16 guess. Is that what it is? Home Affordable --
17 Affordability Modification?

18 Ms. Thomas - Yes, Your Honor.

19 The Court - That's what she claims that she was
20 promised beforehand. Is that the same modification that
21 you say you've been trying to do during this stay period?

22 Ms. Thomas - No, Your Honor. The failure to
23 prosecute goes to her conduct in the whole action, not
24 just whether or not those counterclaims are valid. She --
25 you know, it is supposed to recognize when a party has

1 engaged the judicial system and then not taken advantage
2 of it and not wisely used the Courts and the other
3 parties' resources and this case has just sat around for
4 so long while we've tried to do so much that --

5 The Court - But could you do anything from May
6 until October?

7 Ms. Thomas - You mean because of the stay?

8 The Court - Yes, ma'am. Couldn't do anything.
9 Neither one of you could do anything with the action.

10 Ms. Thomas - She could. She could've proceeded
11 on her counterclaims. The stay affects our ability to
12 proceed on the merits of the foreclosure.

13 The Court - All right, anything else?

14 Ms. Thomas - No, Your Honor.

15 The Court - All right, what I'm going to do is
16 I'm going to grant the motion to strike the counterclaims.
17 Mr. Radeker, you mentioned that you want to move to amend?

18 Mr. Radeker - That's correct, Your Honor.

19 The Court - You can do that and that will have
20 to be heard, because you have to -- I don't think you can
21 move to amend and kind of state some cloudy things you
22 might want to allege. I think the proper thing would be
23 to move to amend with a proposed amended counterclaim
24 attached to your Motion and you'll just have to let the
25 chips fall on that.

1 Mr. Radeker - So this ruling would not be
2 prejudicial to us making a motion to amend --

3 The Court - Not prejudicial to your right to
4 make a motion, but that doesn't mean it's going to be
5 amended, and whoever hears that motion can perhaps look at
6 my Order and determine whether or not your proposed
7 amendments fall outside -- or fall inside or outside what
8 I've dismissed.

9 Mr. Radeker - Thank you, Your Honor.

10 The Court - Okay?

11 Ms. Thomas - Thank you, Your Honor.

12 The Court - Could you send me an Order in Word
13 format?

14 Ms. Thomas - Yes, Your Honor.

15 The Court - Copy Mr. Radeker with the Order and
16 thank you for your presentations.

17 Ms. Thomas - Thank you.

18 Mr. Radeker - Thank you, Your Honor.

19 (End of transcript)

20

21

22

23

24

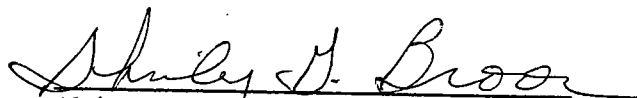
25

Certificate

I, Shirley G. Broom, the undersigned Court Reporter, hereby certify that the foregoing 22 pages constitute a true record of proceedings taken in the case of U.S. Bank National Association vs. Kelley Burr, et al. as taken by me at the time and place stated.

I do further certify that the persons were present as stated, that I am not of Counsel for, related to, or in the employe of any of the parties to this action and that I have no interest whatsoever in the outcome of this case.

This the 13th day of Nov., 2012.



Shirley G. Broom
Circuit Court Reporter
Sixteenth Judicial Circuit

STATE OF SOUTH CAROLINA)
)
COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

U.S. BANK NATIONAL)
ASSOCIATION Successor trustee to)
LaSalle Bank National Association, as)
trustee under the Pooling and Servicing)
Agreement, dated as of April 1, 2002,)
among Asset Backed Funding)
Corporation, Litton Loan Servicing LP)
and LaSalle Bank National Association,)
ABFC Asset Backed Certificates, Series)
2002-SB-1,)

Civil Action No. 2010-CP-28-1197

NOTICE OF DEFENDANTS' RIGHT
TO FORECLOSURE
INTERVENTION PURSUANT TO
S.C. SUPREME COURT
ADMINISTRATIVE ORDER NO.
2011-05-02-01

Plaintiff,)

vs.)

KELLEY BURR, FIA Card Services,)
N.A.; Discovery Bank, Issuer of the)
Discover Card; Unifund CCR Partners,)

Defendants.)

FILED FOR RECORD
2011 JUL 26 PM 1:57
JOYCE HEDDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

TO: DEFENDANT KELLEY BURR THROUGH DAVID P. REUWER,
ATTORNEY FOR DEFENDANT

1. You have a right to "Foreclosure Intervention."

As the Defendant in this case, you have a right to be considered for "Foreclosure Intervention" for the purpose of seeking a resolution of this foreclosure action.

Under the South Carolina Supreme Court's Administrative Order No. 2011-05-02-01 (a copy of the entire order is attached), "Foreclosure Intervention" means any policy, process, or procedure employed by Plaintiff U.S. Bank National Association, successor trustee to LaSalle Bank National Association, as trustee under the Pooling and Servicing Agreement, dated as of April 1, 2002, among Asset Backed funding

Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB-1 (hereinafter referred to as "the Trustee") for the purpose of seeking a resolution of a foreclosure action. Depending on your loan and circumstances, you may qualify for Foreclosure Intervention.

- 2. You have thirty days to act, and if you fail or refuse to participate in the Foreclosure Intervention process, this foreclosure action will proceed.**

If you fail or refuse to participate in the Foreclosure Intervention process within thirty days of the date of service of this Notice, the foreclosure action will proceed. If you voluntarily elect not to participate in the Foreclosure Intervention process within thirty days of the date of service of this Notice, this foreclosure action will proceed.

Attached to this Notice is a Request to Participate in Foreclosure Intervention and related information on a potential loan modification. Also, the website for Litton Loan Servicing, the servicer of your loan, has additional information concerning potential alternatives to foreclosure at https://www.littonloan.com/fin_info1.asp.

- 3. To participate in the Foreclosure Intervention process, follow these instructions.**

If you want to participate in Foreclosure Intervention, sign and return the Request to Participate in Foreclosure Intervention that is enclosed with this letter and return it by mail to the following:

**Nelson Mullins Riley & Scarborough, LLP
ATTN: Brian A. Calub
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201**

This law firm represents the Trustee. After the law firm receives your Request to Participate in Foreclosure Intervention, it will contact you requesting additional information.

You will be required to provide documents and records that will be used to evaluate your eligibility for foreclosure intervention.

After receiving all of the required documents and records, the Trustee will evaluate your eligibility and you will be notified about whether you qualify for a loan modification or other means of loss mitigation that could resolve the foreclosure action. If you qualify, the Trustee will propose an Agreement to be signed by the parties and filed with the Court.

- 4. If you have any information or data that you would like for the Trustee to consider, please send it in with your Request to Participate in Foreclosure Intervention.**

If you would like the Trustee to consider any other information or data pertaining to your mortgage loan or personal circumstances, please send it with the Request to Participate in Foreclosure Intervention.

- 5. The Trustee cannot communicate with you directly about the Foreclosure Intervention process and foreclosure. The Trustee must communicate with you through its lawyers.**

Under the South Carolina Supreme Court's Administrative Order No. 2011-05-02-01, the Trustee cannot communicate with you directly about Foreclosure Intervention or foreclosure, and you have the right to communicate with and otherwise deal with the Trustee through its attorneys, the law firm of Nelson Mullins Riley and Scarborough, L.L.P. ("Nelson Mullins"). **Nelson Mullins does not represent you.**

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: Brian A. Calub

Brian A. Calub

E-Mail: brian.calub@nelsonmullins.com

B. Rush Smith III

E-Mail: rush.smith@nelsonmullins.com

1320 Main Street / 17th Floor

Columbia, SC 29201

Telephone: (803) 799-2000

Attorneys for U.S. Bank National Association, successor trustee to LaSalle Bank National Association, as trustee under the Pooling and Servicing Agreement, dated as of April 1, 2002, among Asset Backed funding Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB-1

Columbia, South Carolina
July 25, 2011

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW) FIFTH JUDICIAL CIRCUIT

U.S. BANK NATIONAL) Civil Action No. 2010-CP-28-1197
ASSOCIATION Successor trustee to)
LaSalle Bank National Association, as)
trustee under the Pooling and Servicing)
Agreement, dated as of April 1, 2002,)
among Asset Backed funding)
Corporation, Litton Loan Servicing LP)
and LaSalle Bank National Association,)
ABFC Asset Backed Certificates, Series)
2002-SB-1,)

Plaintiff,)

vs.)

KELLEY BURR, FIA Card Services,)
N.A.; Discovery Bank, Issuer of the)
Discover Card; Unifund CCR Partners,)

Defendants.)

REQUEST TO PARTICIPATE IN
FORECLOSURE INTERVENTION

FILED FOR RECORD
2011 JUL 26 PM 1:57
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

I hereby elect to participate in the Foreclosure Intervention process. I agree to provide any and all documents required to evaluate my eligibility for foreclosure intervention, and I authorize the law firm of Nelson Mullins Riley & Scarborough LLP to communicate with me by telephone, mail, e-mail, and any other means regarding the Foreclosure Intervention process.

Kelley Burr

This Request for Foreclosure Intervention should be returned to:

Nelson Mullins Riley & Scarborough, LLP.
ATTN: Brian A. Calub
1320 Main Street / 17th Floor
Columbia, South Carolina 29201

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Plaintiffs, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

**NOTICE OF DEFENDANTS' RIGHT TO
FORECLOSURE INTERVENTION PURSUANT TO
S.C. SUPREME COURT ADMINISTRATIVE
ORDER NO. 2011-05-02-01**

Counsel Served:

David P. Reuwer
306 Hampton Park
P.O. Box 1776
Camden, SC 29021

Roy Boggs
FIA Card Services, N.A.
1300 Pickens Street
Columbia, SC 29201

FILED FOR RECORD
2011 JUL 26 PM 1:57
JUDITH E. PROSSER
CLERK OF COURT
KINGSTON COUNTY, S.C.



Kelli Diamond Martin
Administrative Assistant

July 25th, 2011.

STATE OF SOUTH CAROLINA)
)
COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS,
FIFTH JUDICIAL CIRCUIT

U.S. BANK NATIONAL)
ASSOCIATION Successor trustee to)
LaSalle Bank National Association, as)
trustee under the Pooling and Servicing)
Agreement, dated as of April 1, 2002,)
among Asset Backed Funding)
Corporation, Litton Loan Servicing LP)
and LaSalle Bank National Association,)
ABFC Asset Backed Certificates, Series)
2002-SB-1,)

Plaintiff,)

vs.)

KELLEY BURR, FIA Card Services,)
N.A.; Discovery Bank, Issuer of the)
Discover Card; Unifund CCR Partners,)

Defendants.)

Civil Action No. 2010-CP-28-1197

2011 OCT 27 AM 11:49
CLERK OF COURT
KERSHAW COUNTY, S.C.

CERTIFICATION OF
MORTGAGOR NONCOMPLIANCE
(Administrative Order 2011-05-02-01)

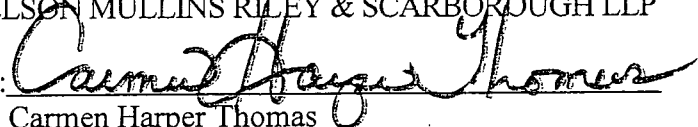
The Plaintiff by and through its undersigned attorney does hereby certify as follows:

- 1) That this is an action for the foreclosure of owner occupied real property.
- 2) That pursuant to Supreme Court Administrative Order 2011-05-02-01:
 - a) Based on the following, the Mortgagor has been served with the required notice of rights.
 - a. On July 25, 2011, Plaintiff served the Notice of Defendant's Right to Foreclosure Intervention ("Notice") on opposing counsel, which was filed on July 26, 2011.
 - b. On August 8 and 9, 2011, counsel for the parties communicated about the Notice, with Plaintiff re-sending the Notice on August 9, 2011.
 - b) Based on the following, the Mortgagor has failed, refused, or voluntarily elected not to participate in any foreclosure intervention process:

- a. The deadline to respond was August 24, 2011, based on the July 25, 2011 service date, or was September 8, 2011, based on re-sending the Notice on August 9, 2011.
- b. From August 19 to September 21, 2011, counsel for the parties communicated regarding the status of Mortgagor's documents and records for foreclosure intervention.
- c. On September 26, 27, and 29, 2011, a paralegal in Plaintiff's counsel's office left voice mails with Mortgagor's counsel regarding the status of the foreclosure intervention information.
- d. On October 4, 2011, Plaintiff's counsel wrote Mortgagor's counsel regarding the foreclosure intervention process, giving a final deadline of October 14, 2011 to receive information from Mortgagor.
- e. No documents or records were ever received by Plaintiff's counsel.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By:


Carmen Harper Thomas

SC Bar No. 76012

E-Mail: carmen.thomas@nelsonmullins.com

B. Rush Smith III

SC Bar No. 12941

E-mail: rush.smith@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

Tel: (803) 255-9385

Fax: (803) 255-5932

Columbia, South Carolina

October 26, 2011

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for , do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Certification of Mortgagor Non-Compliance

Counsel Served:

David P. Reuwer
306 Hampton Park
P.O. Box 1776
Camden, SC 29021

Roy Boggs
FIA Card Services, N.A.
1300 Pickens Street
Columbia, SC 29201

RECORDED
2011 OCT 27 AM 11:49
CLERK OF COURT
KERSHAW COUNTY, S.C.



Jessica Sestili
Administrative Assistant

October 26, 2011

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

U.S. Bank National Association Successor trustee to LaSalle Bank National Association, as trustee under the Pooling and Servicing Agreement, dated as of April 1, 2002, among Asset Backed Funding Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB-1,

Plaintiff,

vs.

Kelley Burr, FIA Card Services, N.A.;
Discovery Bank, Issuer of the Discover
Card; Unifund CCR Partners,

Defendants.

IN THE COURT OF COMMON PLEAS

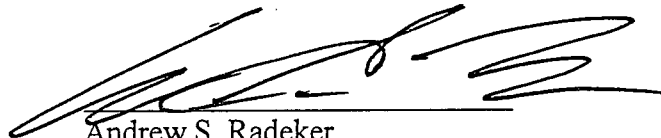
Case No. 2010-CP-28-1197

NOTICE OF APPEARANCE

FILED FOR RECORD
2012 SEP 13 AM 8:55
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

The undersigned hereby gives notice of his appearance on behalf of Defendant Kelley Burr in the above-captioned matter and requests that all notices and other filings, documents, and materials in this matter be furnished to him at the address below.

Respectfully submitted,



Andrew S. Radeker
HARRISON & RADEKER, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)

ATTORNEY FOR DEFENDANT
KELLEY BURR

Columbia, South Carolina
September 13, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Judge

Appellate Case No. 2012-213309
Common Pleas Case No. 2010-CP-28-1197

U.S. Bank National Association Successor trustee to LaSalle Bank National Association, as trustee under the Pooling and Servicing Agreement, dated as of April 1, 2002, among Asset Backed Funding Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB-1,.....Respondent,

v.

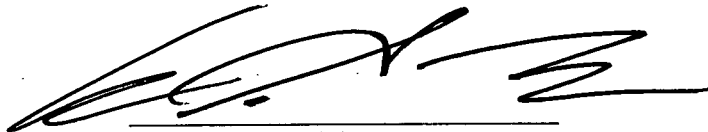
Kelley Burr; FIA Card Services, N.A.; Discovery Bank, Issuer of the Discover Card; Unifund CCR Partners; Defendants,

Of Whom Kelley Burr is.....Appellant.

CERTIFICATE OF COUNSEL

I certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,



Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

RECEIVED

OCT 17 2013

SC Court of Appeals

September 27, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
George C. James, Jr., Circuit Judge

Appellate Case No. 2012-213309
Common Pleas Case No. 2010-CP-28-1197

RECEIVED

SEP 27 2013

SC Court of Appeals

U.S. Bank National Association Successor trustee to LaSalle Bank National Association, as trustee under the Pooling and Servicing Agreement, dated as of April 1, 2002, among Asset Backed Funding Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB-1,.....Respondent,

v.

Kelley Burr; FIA Card Services, N.A.; Discovery Bank, Issuer of the Discover Card; Unifund CCR Partners; Defendants,

Of Whom Kelley Burr is.....Appellant.

PROOF OF SERVICE

I certify that I served the Record on Appeal by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

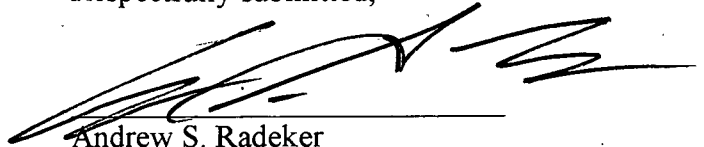
Carmen H. Thomas, Esq.
Nelson Mullins Riley & Scarborough, LLP
P.O. Box 11070
Columbia, SC 29211-1070

Sean A. O'Connor, Esq.
Finkel Law Firm, LLC
P.O. Box 41489
Charleston, SC 29423

S. Anna Powers, Esq.
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
4268 I-55 North Meadowbrook Office Park
Jackson, MS 39211

September 27, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Andrew S. Radeker", written over a horizontal line.

Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant