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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON PETITION FOR WRIT OF CERTIORARI
TO THE SOUTH CAROLINA COURT OF APPEALS

Shannon M. Phillips, Master-in-Equity

Common Pleas Case No. 2019-CP-42-02270
Appellate Case No. 2022-000393
S. Ct. Appellate Case No. 2026-000374

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

v.

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

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

**RETURN TO PETITIONER'S WRIT OF CERTIORARI
TO THE SOUTH CAROLINA COURT OF APPEALS**

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PRELIMINARY STATEMENT

Respondent U.S. Bank Trust, N.A., as Trustee for LSF10 Master Participation Trust ("U.S. Bank" or "Respondent") submits this Return to the Petition for Writ of Certiorari filed by Petitioner Austin A. Lowery ("Lowery" or "Petitioner"). For the reasons discussed herein, this Court should deny the Petition. The unpublished decision of the South Carolina Court of Appeals, issued unanimously on October 8, 2025, and denying rehearing on January 21, 2026, faithfully applied well-settled South Carolina law in affirming the Master-in-Equity's grant of partial summary judgment. The Petition presents no novel questions of law, identifies no conflict with prior decisions of this Court, raises no substantial constitutional issue. The arguments are refuted by Petitioner's own admissions and the public record.

The Petitioner borrowed over $304,000 in 2002, intentionally executed a mortgage on his 5.0-acre property to secure that debt, received thousands of dollars at closing, made payments for fewer than eighteen months, and has not paid a single dollar toward the debt since April 2004. The lower courts correctly refused to allow Petitioner's stale and meritless affirmative defenses to serve as a mechanism to avoid accountability for this undisputed default. Certiorari should be denied.

ANALYSIS OF CRITERIA GOVERNING REVIEW

A writ of certiorari from the South Carolina Supreme Court to the Court of Appeals is not a matter of right. It is a discretionary remedy that will be granted only where there are special and important reasons justifying review. Rule 242(b), SCACR, sets forth the criteria that guide the Court's discretionary judgment. The Petitioner fails to satisfy *any* of these criteria.

I. There Is No Novel or Unsettled Question of Law

The primary criterion for certiorari review is the existence of a novel or important question of law that requires resolution. The Petition identifies none. Each of the legal issues Petitioner

raises has been conclusively settled by existing South Carolina authority. Petitioner's claim that the interpretation of "induced by unconscionable conduct" under S.C. Code Ann. § 37-10-105(C) presents a novel question is without merit. The standards for unconscionability under South Carolina law are well established. *See Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998). Furthermore, in S.C. Code Ann. §37-5-108, the legislature has provided a nonexclusive list of factors for the court to consider. The specific question of whether the attorney-supervision requirement from *Matrix* may be applied retroactively to transactions predating that decision was answered by the *Matrix* court itself, which expressly directed prospective application only. *Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011). There is nothing novel in applying this settled principle to preclude retroactive unconscionability claims based on alleged 2002 conduct.

The res judicata issue is likewise settled. South Carolina law has long required, as an element of res judicata, a prior final judgment on the merits. The principle that an administrative striking under Rule 40(j) with leave to restore does not constitute a final judgment on the merits follows directly from the plain language of the rule and the text of the Form 4 Order itself. No new interpretation of law is required or warranted.

Similarly, the contract interpretation question presented by the release defense — whether an unambiguous release that identifies a specific recorded instrument by its book and page number discharges a separate, differently recorded instrument — requires no novel analysis. Settled contract principles provide the answer: a release discharges only what its unambiguous language covers.

II. The Court of Appeals' Decision Is Not in Conflict with precedent.

A second basis for certiorari review is a decision by the Court of Appeals that conflicts with a prior decision of this Court or creates an inter-panel conflict. No such conflict exists here.

The Court of Appeals' decision is consistent with this Court's precedent. The Court of Appeals properly applied the prospective-only limitation established in *Matrix*. It faithfully applied Rule 56, SCRCP, and the summary judgment standard as articulated in this Court's jurisprudence. It correctly applied the elements of res judicata as defined by this Court. Its analysis of the release question is consistent with fundamental contract interpretation principles endorsed by this Court. There is no basis for the suggestion that the Court of Appeals departed from, or created a conflict with, any prior authority.

III. The Decision Below Was Unanimous; There Is No Dissent

A third factor bearing on the propriety of certiorari review is the existence of a dissent in the appellate court. Here, the Court of Appeals issued a unanimous, unpublished per curiam opinion with no precedential value because there is nothing new or novel in this case for the benefit of the bar. Chief Judge Williams and Judges Thomas and Curtis concurred in the result. There is no dissent, and no suggestion of judicial disagreement regarding the correctness of the outcome. Unanimous affirmance of a straightforward application of settled law does not warrant review by this Court.

IV. The Petition Does Not Raise a Substantial Constitutional Question

The Petitioner gestures at a due process claim based on the Master's scheduling order, contending he was deprived of the right to cross-examine witnesses. As detailed above, this claim rests on a misreading of the Master's order. The order required pre-hearing submission of affidavits of indebtedness. It did not eliminate, curtail, or even address the right to cross-examination at the final hearing. Petitioner's right to cross-examine witnesses remains intact, available to be exercised at the final hearing that has not yet occurred. No substantial constitutional question is raised. The challenge to a routine pre-trial case management order — which is both premature (the final

hearing has not been held) and factually mistaken (the order does not prohibit cross-examination) does not implicate constitutional guarantees in any meaningful sense. This Court does not grant certiorari to review premature, speculative constitutional challenges.

V. There Are No Other Special and Important Reasons Justifying Review

Beyond the enumerated criteria, the Court considers whether any other special and important reason justifies exercise of its discretionary review jurisdiction. None is present here. This case involves the application of settled law to an undisputed factual record. Petitioner received $304,040.62 and has not paid it back. He intended to and did encumber his property to secure the debt, made payments for approximately eighteen months, and then defaulted. He has lived on the property for years without paying. Every court considering the merits of his affirmative defenses has found them legally and factually insufficient. There is no miscarriage of justice, no unsettled legal question, and no reason for this Court's intervention.

RESPONDENT'S COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals correctly affirm the Master-in-Equity's grant of partial summary judgment as to Petitioner's liability for foreclosure where there is no genuine dispute of material fact that Petitioner defaulted on the note secured by a mortgage on 5.0 acres?

2. Did the Court of Appeals correctly affirm the Master-in-Equity's grant of summary judgment as the Petitioners' affirmative defenses when the record shows that these defenses do not create genuine issues of material fact and that Respondent is entitled to judgment as a matter of law?[1]

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[1] It appears that the Petitioner only argued two of these affirmative defenses in the Petition, but stated them all in the questions presented, so Respondent is including them in the questions and argument.

a. Did the Master and Court of Appeals correctly determine that the record lacked sufficient evidence of "inducement by unconscionable conduct" under S.C. Code Ann. § 37-10-105(C) to create genuine issues of material fact since that Petitioner voluntarily executed the mortgage, received over $304,000 in benefits, the mortgage was corrected to 5.0 acres and Petitioner failed to identify any oppressive terms?

b. Did the lower courts correctly grant summary judgment on the defense of unclean hands, where there is no evidence that Respondent or its predecessor acted inequitably in the transaction to the prejudice of the Petitioner?

c. Did the lower courts correctly grant summary judgment on the defense of laches, where Petitioner suffered no prejudice and inequitably enjoyed the property without making a payment since 2004?

d. Did the lower courts correctly hold that the doctrine of res judicata did not bar Respondent's claim, because a prior administrative strike under Rule 40(j), SCRCP, was not a final adjudication on the merits?

e. Did the lower courts correctly find no genuine issue of material fact regarding the alleged release of the mortgage, where the public record plainly establishes the release applied to a separate, mistakenly recorded 53.73-acre mortgage and not the 5.0-acre mortgage being foreclosed?

3. Did the Court of Appeals correctly affirm the Master-in-Equity's order, which simply required the submission of affidavits of indebtedness three days prior to a final hearing to simplify issues, and did not deprive Petitioner of his due process right to cross-examine witnesses at the actual hearing?

COUNTER STATEMENT OF THE CASE

On or about May 24, 1996, Appellant Austin Lowery ("Lowery") acquired a 53.73-acre tract of land southeast of Woodruff in Spartanburg County. (R. 47-49) Lowery had 5.0 acres of this land surveyed in 1996, (R. 360), and again in 2002, (R. 361). On April 26, 2002, Lowery borrowed $210,000 from SunTrust Bank secured by a mortgage on the 5.0 acres that incorporates by reference the 1996 plat (of the entire 53.73-acre tract of land) in the legal description of the mortgage. (R. 362-64) According to Lowery, he needed to refinance a construction loan that was about to mature[2], so he and his wife, Lisa, applied for a loan from Household Finance Corporation II ("HFC II"), Plaintiff's predecessor-in-title. (R. 341-45) The mortgage loan was approved, and on September 24, 2002, Lowery and his wife, Lisa, executed a promissory note to HFC II in the principal amount of $304,040.62 (*Id.*). These funds were used to pay off various obligations of the Lowerys including the SunTrust mortgage which encumbered only 5.0 acres. Lowerys also received $13,535 from the closing (R. 346-48). Additionally, the Uniform Residential Appraisal Report, completed on September 19, 2002, for the originating lender and in anticipation of this closing transaction, appraised only the 5.0-acre tract and any improvements located on that 5.0-acre tract. (R. 352-359)

Lowery, who was the sole owner of the 5.0 acre property, also executed a mortgage dated September 24, 2002, to HFC II, securing the promissory note which was duly recorded in REM 2782 at Page 874 on September 26, 2002 (R. 331-35) The legal description of this mortgage referenced the entire 53.73-acre tract, which was in Lowery's deed acquiring the property, rather than the 5.0-acre parcel subsequently surveyed by Lowery (and which also was mortgaged by SunTrust) that all parties agree was the parcel intended to be mortgaged. Lowery admits this

[2] Presumably, this was not the SunTrust loan as it had a maturity date of 2032.

53.73-acre tract mortgage was never valid, (R. 327, para. 23), and that he only intended to mortgage the 5.0-acre tract, (R. 311, para. 9).

Upon discovery of the error in the legal description of the recorded mortgage, HFC II requested that Lowery, consistent with his obligation with the originating lender to sign any documents necessary to complete the loan closing transaction, return and sign a new and separate mortgage with the legal description intended by all parties: the 5.0-acre tract. Lowery did so on September 30, 2004, and this mortgage was recorded on October 4, 2004, in the Office of the Register of Deeds for Spartanburg County in Book 2789 at Page 575. (R. 336-40)

The mortgagee title insurance policy insured only the subsequent 5.0-acre mortgage and excluded the invalid mortgage from coverage under Schedule B, Item 10, with the specific mandate from the title insurance company, stating "BRANCH TO RELEASE" the invalid mortgage. (R. 349-51)

Lowery made payments on the promissory note but ultimately defaulted under the terms of the promissory note and mortgage by failing to make payments. Lowery admits that he has not made any payment on the note since prior to April 2004. (R. 77, para. 25) HFC II filed a foreclosure action in 2008 and subsequently amended the pleadings to clarify it was foreclosing the 5.0-acre mortgage. (R. 278-85) In the answer to paragraph 14 of the Amended Complaint filed in the 2008 foreclosure action, the Lowerys admit they executed a mortgage on the 5.0-acre tract, which is the subject of the action. (R. 316) The 2008 foreclosure action was ultimately stricken with leave to restore under Rule 40(j), SCRCP, in 2013[3]. (R. 286-87) That order was not appealed.

[3] Respondent believes this was common practice as a way for a Master to dispose of cases that were filed but still remained in loss mitigation review.

On January 11, 2019, and consistent with the mortgage being invalid, the intentions of the parties as admitted in prior pleadings, the discovery responses in this action, the Affidavit of Austin Allen Lowery, and the mandate from the title insurance company in Schedule B of the mortgagee title insurance policy, Respondent U.S. Bank filed a release, (R. 146-47), of the invalid mortgage instrument that encumbered the 53.73 acres, (R. 331-35). Thereafter, in June 2019, U.S. Bank filed the present foreclosure which was subsequently amended to clarify the foreclosure of the 5.0-acre mortgage, which was alleged in paragraph 27 of the Amended Complaint. (R. 62, para. 27) Lowery answered the Second Amended Complaint and pled affirmative defenses of release, unclean hands, the statute of limitations, res judicata, and laches. (R. 93-100) Lowery also pled a defense and counterclaim for violation of the attorney preference statute and alleged the mortgage loan was induced by unconscionable conduct. (R. 98-99) It is important for this court to understand the timing and context in which some of these affirmative defenses are raised. The Lowerys executed the promissory note on September 24, 2002. They made payments for almost two years before they stopped making payments in 2004. HFC II filed a foreclosure action in 2008 which it amended to specifically allege foreclosure of the 5.0 acres. In answering that amended complaint, Lowery specifically admitted giving HFC II a mortgage on the 5.0 acres and states, "the Mortgage held by the Plaintiff was a First Mortgage on 5 acres of real property as opposed to the 53.75 acres of land upon which they sought to foreclose." (R. 314, para. 2) Indeed, Lowery even counterclaimed for breach of contract for not satisfying or releasing the mortgage with the invalid legal description. Nowhere in the answer are claims of unconscionability or that the mortgage of the 5.0 acres is somehow the same as the prior mortgage with an invalid description which Lowery wanted released. These defenses appear for

the first time in Lowery's answer to the foreclosure filed in June 2019, almost 17 years after signing the note and mortgage.

The parties filed cross-motions for summary judgment which resulted in two orders by the Honorable Gordon G. Cooper,[4] the May 10, 2021, Order denying the Defendant's motions for summary judgment on counterclaims and the Plaintiff's claim, (R. 24-27), and the May 20, 2021, Order granting the Plaintiff's motion for partial summary judgment as to offensive use of the claim of unconscionability and limited use to an affirmative defense and setoff, (R. 28-34).

Subsequent to these orders, the matters remaining for the court were Defendant's affirmative defenses of unconscionability, res judicata, laches, unclean hands and release, the Plaintiff's foreclosure and Defendant's counterclaim based on the alleged violation of the attorney preference statute. (See R.2) U.S. Bank filed a motion for summary judgment as to the issue of liability for the foreclosure and the Defendant's affirmative defenses. The master granted this motion by order dated February 23, 2022. (R. 1-13) Lowery timely filed a motion to reconsider, but by later email requested the master summarily grant or deny the motion without a hearing. (R. 233) The Appellant timely appealed from that order and by a unanimous, unpublished opinion filed on October 8, 2025, the Court of Appeals affirmed the Master's order. Petitioner filed a petition for rehearing which was denied by order of the Court of Appeals filed on January 21, 2026. Petitioner then proceeded to file this Petition for Certiorari review.

[4] Judge Cooper retired as master and was succeeded by the Honorable Shannon M. Phillips.

ARGUMENT ON EACH QUESTION PRESENTED

1. THE COURT OF APPEALS CORRECTLY AFFIRMED THE ORDER GRANTING SUMMARY JUDGMENT AS TO PETITIONER'S LIABILITY FOR FORECLOSURE OF THE MORTGAGE BECAUSE THERE IS NO GENUINE ISSUE OF MATERIAL FACT THAT LOWERY DEFAULTED ON THE NOTE SECURED BY A MORTGAGE ON 5.0 ACRES.

"Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt. Once the debt and default have been established, the mortgagor has the burden of establishing a defense to foreclosure such as lack of consideration, payment, or accord and satisfaction." *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 221, 746 S.E.2d 478, 481 (Ct. App. 2013) (*Citing U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 374-75, 684 S.E.2d 199, 205 (Ct. App. 2009)).

Lowery admits to signing the promissory note. (See R. 94, para. 6) Lowery further admits that he has not made any payments on the note since prior to April 2004. Lowery states that it was his intent to mortgage 5.0 acres, and Lowery also admits to giving HFC II a mortgage on the 5.0 acres in his answer to the original foreclosure pleadings brought by HFC II (U.S. Bank's predecessor-in-title). Thus, Respondent U.S. Bank has made out a *prima facie* case for foreclosure subject to a final determination of the debt which the order of the court provided for by affidavit and a final hearing. Therefore, unless Lowery can prove a valid affirmative defense, summary judgment for the Respondent as to liability for foreclosure was proper. As set forth in the following argument, Lowery has not raised any valid affirmative defenses as a matter of law.

2. THE COURT OF APPEALS CORRECTLY AFFIRMED SUMMARY JUDGMENT AS TO THE PETITIONER'S AFFIRMATIVE DEFENSES

a. There Was No Genuine Issue of Material Fact Regarding Unconscionability Under S.C. Code Ann. § 37-10-105(C).

The Master's opinion (R. 1-13), which is recited in part below, shows that Master properly considered the claims for unconscionability and inducement by unconscionable conduct and ultimately determined that the alleged claims do not create genuine issues of material fact as to unconscionability and do not rise to the threshold level of extreme unfairness:

"In a prior order, Judge Cooper granted Plaintiff partial summary judgment on the Defendant's claim of unconscionability as it related to the offensive use to the extent the Defendant sought a money judgment and attorney's fees and costs against Plaintiff as assignee from HFC II. Judge Cooper's order was without prejudice to Lowery's right to raise his counterclaim as an equitable and statutory defense for the purpose of setoff or recoupment.

S.C. Code Ann. §37-5-108(c) allows the court to use its equitable powers and discretion if it finds as a matter of law (a) the agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct. Lowery bases his unconscionability argument on several factors which he argues collectively support a finding of unconscionability.

First, he asserts that the violation of the attorney preference statute is unconscionable conduct. This same argument was raised and rejected in *Lackey v. Green Tree Financial Corp*., 330 S.C. 388, 498 S.E.2d 898 (S.C. App. 1998). In Lackey, the trial court held that an arbitration clause included in a retail installment contract for the purchase of a manufactured home was unconscionable and unenforceable, in part, because Green Tree failed to comply with the attorney-preference statute, "thereby denying each buyer the right to consult counsel." *Id*. at 330 S.C. 398. The South Carolina Supreme Court rejected this conclusion and stated, "Contrary to the holding of the trial court in this case, we do not read F*irst Baptist Church of Timmonsville* to establish a bright line test rendering an arbitration clause unenforceable where a contract

somehow prevents a party from consulting a lawyer. But even if it did, there is nothing in the contract which prevented respondents from consulting legal counsel." *Lackey* at 399.

Furthermore, Lowery has failed to point out what provision or provisions in the promissory note or the mortgage which are unconscionable which counsel would have allegedly protected him from. Plaintiff served discovery requesting this information but received no answer or response.

Lowery also argues that the absence of counsel at the closing is unconscionable conduct. While there is no doubt about the benefits of counsel at closing, the court is mindful of the distant closing date and the circumstances of a closing which occurred almost twenty years ago. "In determining unconscionability, courts are limited to considering facts and circumstances existing when the contract was executed." *Hardee v. Hardee,* 348 S.C. 84, 95-96, 558 S.E.2d 264, 269-70 (Ct.App.2001) (citing Restatement (Second) of Contracts § 208 (1981)), aff'd as modified, 355 S.C. 382, 585 S.E.2d 501 (2003). During that time, closings did occur without the presence of counsel. *Matrix*[5] was decided almost a decade later, prospectively applying the unclean hands doctrine to potentially preclude equitable remedies to a lender of a loan closed without an attorney. *Id*. 714 S.E.2d at 535. Also, again, Lowery fails to show or allege how the absence of counsel materially prejudiced him in terms of the note or mortgage.

Lowery does claim in his affidavit that HFC II promised he could refinance to a 5% rate if he made his payments for one year. However, the promissory note, which Lowery is charged with reading, provides for a reduction in rate of .50% at the end of the third year (36th month) , fourth year (48th month), and fifth year (60th month) if Lowery makes his payments within 30 days of their due date and does not file bankruptcy. (Exhibit 3, page 2, "Adjustment to Contract

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[5] Matrix Financial Serv. Corp... v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (S.C. 2011)

Rate.") Lowery did not make it to 36 months and there is no evidence that he requested the refinance or offered to make any payments at the 5% rate.

Lowery also points to the different legal descriptions in the mortgages that were recorded; however, this was quickly corrected (within a week) and Lowery admits that the 5.0 acre mortgage which is being foreclosed is the mortgage he intended and did execute. The other mortgage with the incorrect description was released.

Unconscionability is characterized by the "absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Fanning v. Fritz's Pontiac-Cadillac-Buick Inc.,* 322 S.C. 399, 402, 472 S.E.2d 242, 245 (1996) (emphasis added) (*citing* J*ones Leasing v. Gene Phillips and Assocs.,* 282 S.C. 327, 318 S.E.2d 31 (Ct.App.1984)).

In this case, Lowery has offered no evidence that he could not have sought a loan elsewhere or that the terms of his loan were "so oppressive that no reasonable person would make them." Lowery admits as much by failing to respond to the Plaintiffs Requests for Admission alleging these same points. Indeed, Lowery made payments for a little over 18 months on the promissory note and the mortgage. The HUD-1 Closing Statement reflects that Lowery had several debts paid from his x mortgage including paying off another mortgage of y and walked away from closing with $13,535. (See Plaintiff's Exhibit 46) It would be inequitable to allow Lowery to receive this benefit, fail to make payments since 2004 and then argue his note and mortgage are unenforceable because of alleged unconscionability which occurred, if at all, almost 17 years prior to his claims being asserted.

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[6] Plaintiff's exhibits filed with the Return in Opposition to Lowery's motion for Summary Judgment as to Plaintiff's claims.

In short, Lowery has failed to come forward with sufficient facts which would create a genuine issue of material fact to lead this court to conclude that the agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct. Therefore, US Bank is entitled to summary judgment as a matter of law."

Petitioner also seeks to have this court somehow define or provide some litmus test as to what "induced by unconscionable conduct" means. Specifically, the Petitioner wants this court to adopt some broad, liberal test which would require the court to completely set aside a validly executed note and mortgage with reasonable terms based on alleged claims they were induced by unconscionable conduct, regardless of the benefits received by the mortgagor. The court should reject this siren call. This case illustrates the need for case-by-case determination by the trial judge exercising their discretion and determining if the inducement claims alleged arise to the threshold level of unconscionable conduct. This is exactly what the Master did and her judgment and discretion should be affirmed. As noted in the Respondent's counter statement of the case, the affirmative defense of induced by unconscionable conduct was not raised until almost 17 years after the alleged unconscionable conduct and more than fifteen years after Lowery stopped paying his mortgage. As quoted by Lowery in his appellate brief, "Unconscionability simply means "[e]xtreme unfairness." Black's Law Dictionary, 1663 (9th ed. 2009). There is no evidence of extreme unfairness in Lowery's loan or closing.

The court should further note that Respondent is not seeking a deficiency judgment against Petitioner so the alleged unconscionable conduct would have to be so extreme as sufficient to set aside the mortgage or excuse decades of non-payment.

b. Unclean Hands does not bar the Respondent's Claim.

The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998). "The expression 'clean hands' means a clean record with respect to the transaction with the defendants themselves and not with respect to others." *Arnold v. City of Spartanburg*, 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943). The rule must be understood to refer to some misconduct concerning the matter in litigation of which the opposing party can, in good conscience, complain in a court of equity. *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010). This defense is not valid in this case for several reasons.

First, the master already considered the same allegations of "unclean hands" in granting summary judgment to U.S. Bank on the foreclosure and unconscionability claims. Second, as it is an equitable doctrine, it is intended to prevent *a party who acted unfairly in a matter that is the subject matter of the litigation* from recovering under an equitable remedy. Here, there is no evidence that U.S. Bank acted unfairly in this matter, so it should not be denied equitable remedies.[7] Indeed, Judge Cooper in his order denying Defendant's motion for summary judgment on the grounds of the release, explains, "that there is no genuine issue of material fact as it would, under the facts and circumstances, be inequitable for Defendant to receive $304,040.62 from Plaintiff which funds were in fact used to benefit the Defendant and it being clear that Defendant intended to and did give a mortgage to HFC II on the 5.0 acre parcel." It is inequitable that Lowery has failed to make any payments since before April 2004. Thus, the

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[7] *See Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011) (holding "that a lender may not enjoy the benefit of equitable remedies **when that lender** failed to have attorney supervision during the loan process as required by our law." The Respondent notes that in both *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 75 (Ct. App. 2010) and *Matrix*, those lenders directly participated in the alleged misconduct and were not assignees.

equities favor U.S. Bank instead of Lowery. Finally, the principal argument Lowery makes as to unclean hands is that his loan was closed without counsel. It is undisputed that the 5.0-acre mortgage being foreclosed was dated September 30, 2002, and recorded on October 4, 2002, *Matrix* was decided in an opinion issued on rehearing on August 11, 2011. *See BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 624, 731 S.E.2d 547, 550 (2012) ("we clarify now that it is the date the document a party seeks to enforce was filed. Here, Systems' mortgage was recorded on April 20, 2007, well before the issuance of *Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011). Thus, regardless of whether an attorney participated in the closing of Mortgage 2, BAC would not be barred from recovery by the illegality.").

For all these reasons, the court should hold that Lowery's defense of unclean hands is not a bar to U.S. Bank's foreclosure.

c. The Equitable Doctrine of Laches does not Apply to the Case at Hand.

The party seeking to establish laches must show (1) delay, (2) that was unreasonable under the circumstances, and (3) prejudice. *Kelley v. Kelley*, 368 S.C. 602, 606, 629 S.E.2d 388, 391 (Ct. App. 2006). To establish laches as a defense, *the defendant must show* the complaining party unreasonably delayed its assertion of a right, thereby prejudicing the defendant. *Id.* "The determination of whether laches has been established is largely within the discretion of the trial court." *Id.* at 607, 629 S.E.2d at 391. Additionally, for the defense of laches to be sustained, "the circumstances must have been such as to import that the complainant had abandoned or surrendered the claim or right which he now asserts." *Id.* (*quoting Byars v. Cherokee County*, 237 S.C. 548, 560, 118 S.E.2d 324, 330 (1961)); *see also Jones v. Leagan*, 384 S.C. 1, 20, 681 S.E.2d 6, 16 (Ct. App. 2009).

"Delay alone is not enough to constitute laches; it must be unreasonable, and the party asserting laches must show prejudice." *Gordon v. Drews*, 358 S.C. 598, 612, 595 S.E.2d 864, 871 (Ct. App. 2004) (*quoting Brown v. Butler,* 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001)).

In this case, U.S. Bank's predecessor, HFC II, filed a previous foreclosure suit which was stricken pursuant to Rule 40(j), SCRCP and then after the paper changed hands, U.S. Bank brought the present suit within the statute of limitations period. The Defendant fails to articulate how the delay prejudiced him as he was always free to assert his claims in a lawsuit filed by him at any time. In his brief, Lowery argues the accumulation of interest, but of course this stems from his lack of payment and he could have challenged the interest rate or the loan at any time.

Furthermore, Laches is an equitable defense, and the Defendant has been inequitable. This court notes in the order the comment from Judge Cooper, "that there is no genuine issue of material fact as it would, under the facts and circumstances, be inequitable for Defendant to receive $304,040.62 from Plaintiff which funds were in fact used to benefit the Defendant and it being clear that Defendant intended to and did give a mortgage to HFC II on the 5.0-acre parcel." Also, the Defendant stopped making payments in 2004. If anything, U.S. Bank could claim laches against the Defendant for not making alleged claims concerning the closing of his mortgage loan until almost 17 years later.

Finally, there is no evidence from Lowery that U.S. Bank or its predecessor HFC II suggested that it had abandoned or surrendered its claims to enforce the note and mortgage by foreclosure.

d. Res Judicata does not bar the Respondent's Claim against the Petitioner.

Lowery argues that the bank is barred from filing the present foreclosure by the doctrine of res judicata. Lowery contends that the court's prior striking of a foreclosure action filed by Household Finance Corporation, II[8] (HFC II) filed July 26, 2013, precludes the bank from bringing the current foreclosure action. This contention lacks merit as can be seen from the face of the Form 4 Order striking the prior foreclosure action. (R. 286-87) Under the doctrine of res judicata, a litigant is barred from raising issues previously adjudicated between the parties in a subsequent action. *See Hilton Head Ctr. of S.C., Inc. v. Public Serv. Comm'n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). Res judicata requires three elements: "(1) a judgment that is final, valid, and on the merits; (2) the parties in the second action are identical to those in the first; and (3) the subsequent action must involve a subject matter properly included in the first action." *Owenby v. Owens Corning Fiberglas*, 313 S.C. 181, 183, 437 S.E.2d 130, 132 (Ct. App. 1993). In this case, while it may be debatable whether the parties and the subject matter are identical[9], assuming arguendo these elements are satisfied, there never was an adjudication on the merits or final judgment in the first foreclosure. On its face, the Form 4 order strikes (but does not dismiss) the case pursuant to Rule 40(j), SCRCP for failure to prosecute. Defendant argues this order is equivalent to an order of dismissal under Rule 41(b), SCRCP "for other reasons" because the parties did not consent and therefore was with prejudice and adjudication on the merits. However, it was obvious the court did not intend for the dismissal to be under Rule 41 or with prejudice. The court could have checked the boxes for dismissal and for Rule 41 but did not. More importantly, *the order expressly provided for the parties to be able to restore the*

[8] U.S. Bank's predecessor-in-title and assignor.
[9] Arguably, Household Finance Corp, II and U.S. Bank are not identical, although U.S. Bank is a successor by assignment and arguably payments accruing after the case was dismissed are different.

action when they were ready to proceed. Thus, the order could not have been a final judgment on the merits for res judicata purposes. This order was not appealed and is the law of the case. If Lowery had wanted to contend that the dismissal had preclusive effect, he should have raised that issue with the judge who signed the order.

The court should further note the context of the order; the court struck this case *sua sponte* without notice or a hearing. It was clearly intended to be administrative action until the parties were ready to proceed. "Restraint is particularly warranted when the prior action was dismissed on procedural grounds. *Garris v. Governing Bd. of S.C. Reinsurance*, 333 S.C. 432, 450, 511 S.E.2d 48, 57 (1998) (*quoting Kearns v. General Motors Corp.*, 94 F.3d 1553, 1556 (Fed. Cir. 1996).

If the order was truly intended to be an order of dismissal with prejudice for lack of prosecution, a lot more due process is required. *McComas v. Ross*, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006) ("In those cases where our supreme court has affirmed dismissal of actions based on a failure to prosecute, the dismissals were imposed to maintain the orderly disposition of cases in the face of repeated warnings to the offending party or multiple opportunities to proceed with trial, and only then upon a finding of unreasonable neglect."). The master properly granted summary judgment on this issue.

e. The 5.0-Acre Mortgage was not Released.

Lowery argues that U.S. Bank's foreclosure action must fail because it released its mortgage. This argument lacks merit and the master correctly granted summary judgment on this issue. On September 24, 2002, Lowery executed a mortgage to HFC II securing the promissory note as part of the closing for refinancing his construction loan with SunTrust Bank. This mortgage was recorded in REM 2782 at Page 874 on September 26, 2002. The legal description of this

mortgage mistakenly referenced the entire 53.73-acre tract which was in Lowery's deed acquiring the property, rather than the 5.0-acre parcel subsequently surveyed by Lowery (and which also was mortgaged by SunTrust). Lowery admits this 53.73-acre mortgage was never valid, (R. 227-28, interrogatory 27), and that he only intended to mortgage the 5.0-acre tract.[10] Upon discovery of the error in the legal description of the recorded mortgage, HFC II requested that Lowery return and sign a mortgage with the correct legal description for the 5.0-acre tract. Lowery did so on September 30, 2002, and this mortgage was recorded on October 4, 2002, in the Office of the Register of Deeds for Spartanburg County in Book 2789 at Page 575.

The master also noted from Exhibit 10 to the Plaintiff's Return to Defendant's Summary Judgment that the tile insurance policy excepted to the first mortgage with an incorrect legal description from coverage in Schedule B and stated it was to be released.

There are no genuine issues of material fact that Lowery intended to and did execute a mortgage on the 5.0-acre tract which is the subject of this foreclosure. Lowery admits that it was always his intent to mortgage the 5.0-acre tract,[11] and Lowery also admits to giving HFC II a mortgage on the 5.0 acres in his answer to the original foreclosure pleadings brought by HFC II (U.S. Bank's predecessor-in-title).[12] Lowery states in his answer to the HFC II complaint, "the Mortgage held by the Plaintiff was a First Mortgage on 5 acres of real property as opposed to the 53.75 acres of land upon which they sought to foreclose."

Having admitted to giving Plaintiff a mortgage on this property, it is incumbent on the Defendant Lowery to prove as an affirmative defense that the 5.0-acre mortgage has been released or satisfied. The only evidence offered by Lowery in response to summary judgment is

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[10] See Lowery Affidavit (R. 311, para 9)
[11] See Lowery Affidavit (R. 311, para 9)
[12] See Lowery Answer to HFC II Amended Complaint, (R. 315, para. 3; R. 316, para. 14), and generally, U.S. Bank Return to Lowery Motion for Summary Judgment.

the recorded release of the prior recorded mortgage which Lowery admits contained an incorrect legal description, that he wanted released and was recorded in error.

U.S. Bank recorded a document entitled “RELEASE OF MORTGAGE” in Mortgage/ Record Book 2782 at Page 874. (R. 331-35) In that document, U.S. Bank released the property from “liens under that certain Mortgage dated September 24, 2002, from Austin A. Lowery, recorded in the office of the ROD/RMC/Clerk of Court for Spartanburg County on September 26, 2002, in Mortgage/Record Book 2782 at Page 874 and assigned to U.S. Bank Trust, N.A., as Trustee for LSF10 Master Participation Trust by assignment dated June 26, 2018, and recorded July 3, 2018, in Book 5469 at Page 795.” The language used by U.S. Bank is very specific and intentional. This Release by its express language applied to that specific mortgage and no other. Lowery admits that well prior to this release, Lowery executed another mortgage for 5.0 acres, in accordance with the intent of the parties, which was recorded on October 4, 2002, in the Office of the Register of Deeds for Spartanburg County in Book 2789 at Page 575. (R. 336-340) A plain reading of the recorded release shows that it only released the property from the lien of the invalid mortgage dated September 24, 2002, from Austin A. Lowery, recorded in the office of the Register of Deeds for Spartanburg County on September 26, 2002, in Mortgage/Record Book 2782 at Page 874. There is no mention or description of the subsequent mortgage dated September 30, 2002, and recorded on October 4, 2002, in the Office of the Register of Deeds for Spartanburg County in Book 2789 at Page 575, even though it was already filed and of record at the time the release was executed and recorded.

Judge Cooper in his order denying Defendant’s motion for summary judgment on the grounds of the release explains, “that there is no genuine issue of material fact as it would, under the facts and circumstances, be inequitable for Defendant to receive $304,040.62 from Plaintiff

which funds were in fact used to benefit the Defendant and it being clear that Defendant intended to and did give a mortgage to HFC II on the 5.0 acre parcel." (R. 25)

Lowery tries, but fails, to conflate the two separately executed and recorded mortgages as somehow being the same[13]. First, this argument is not valid as the mortgages were executed on separate days, have different legal descriptions, different witnesses, and were recorded separately. Not to mention that one mortgage was invalid and unintended and the other was valid and intended by the parties (as specifically and continuously admitted to by Lower, as outlined above).

It is difficult to see how the release of a mortgage, which Lowery acknowledges was invalid and contrary to the intent of the parties (that 5.0 acres be mortgaged), could somehow result in a release of a subsequently executed mortgage that was valid and consistent with the intent of the parties. Indeed, as noted previously Lowery sued HFC II claiming the first mortgage with the invalid description should be released.

A plain reading of the release shows that the release did not include the 5.0-acre mortgage given by Lowery. Lowery admits that the mortgage actually released by Plaintiff was invalid, contrary to the intention of the parties, and was supposed to be released. Lowery admits giving Plaintiff the mortgage being foreclosed and there is no evidence that it has been released or otherwise satisfied. It would be inequitable for Lowery to receive and apply the loan proceeds, give Plaintiff a mortgage, fail to repay the loan for over 17 years, and then claim the mortgage he admits he gave was released.

[13] "The Plaintiff is obviously taking the position that these are two different mortgages, not that the second recorded mortgage document is just a corrected version of the first. Let us be clear: Defendant's position is that the second recorded mortgage document is just a corrected version of the first and that the mortgage was released when the release document was done." Defendant's Memorandum in Opposition to Motion to Dismiss Counterclaim, p. 7. (R. 225)

The court properly concluded that there are no genuine issues of material fact that Lowery intended to and did give Plaintiff a mortgage on the 5.0 tract in consideration of the loan and to secure the promissory note. The court also properly concluded that Lowery did not provide sufficient facts to create a genuine issue of material fact that this subsequent mortgage for 5.0 acres was released. Summary judgment on this defense was proper and should be affirmed.[14]

3. The Court of Appeals Correctly Found That There was no Deprivation of the Right to Cross-Examine Witnesses.

The Petitioner asserts that his due process right to cross-examine witnesses was violated by the Master's order. The Master-in-Equity's order simply granted summary judgment on liability and directed U.S. Bank to submit affidavits of indebtedness at least three days prior to the final hearing. This is a standard and routine pre-trial case management measure authorized by Rule 16 of the SCRCP.

As the Court of Appeals correctly ruled, nothing in the Master's pre-trial order prohibited the Petitioner from cross-examining witnesses at the actual final hearing. The right to cross-examination, if and when it becomes applicable at the final hearing, had not been curtailed. The Petitioner's argument targets a completely speculative scenario, as he argues that he was denied a right that no order has purported to deny him. Moreover, this claim is premature. The final hearing has not occurred. Any claim that the Petitioner was improperly deprived of the right of cross-examination must await the final hearing and a concrete order actually denying that right. To grant certiorari on a speculative, premature constitutional claim based on a misreading of a scheduling order would be an improvident exercise of this Court's discretionary jurisdiction.

[14] Lowery also argued in his brief that since the mortgage was released the statute of limitation on the note is now three years and the action barred; however, for the reasons just argued, the mortgage was not released and this argument is moot.

The Petitioner has admitted that he has made no payments since 2004. The calculation of the amount owed is merely a mathematical exercise. Pre-hearing submission of an affidavit of indebtedness serves to streamline the proceedings without prejudicing the Petitioner's right to contest the figures at the hearing. There is no constitutional infirmity in this approach.

CONCLUSION

The South Carolina Court of Appeals, in a unanimous opinion, correctly applied settled South Carolina law in affirming the Master-in-Equity's grant of partial summary judgment in this mortgage foreclosure action. The Petition presents no novel question of law, identifies no conflict with prior decisions of this Court, reveals no substantial constitutional question, reflects no judicial disagreement, and offers no other special or important reason for this Court's intervention. The Petition is supported only by factual mischaracterizations that are refuted by Petitioner's own admissions, the plain text of the release document, and the unambiguous language of the Form 4 Order.

The record is undisputed: Petitioner received over $304,000 in loan proceeds in 2002, encumbered his property to secure that debt, made payments for fewer than eighteen months, and has not paid a single dollar toward the obligation since April 2004. He has lived on the mortgaged property for over twenty years without payment. His affirmative defenses — unconscionability, release, res judicata, laches, and unclean hands — are each legally foreclosed and factually unsupported. The Court of Appeals' decision is correct, and this Court's review is not warranted.

For the foregoing reasons, Respondent U.S. Bank Trust, N.A., as Trustee for LSF10 Master Participation Trust, respectfully requests that this Court DENY the Petition for Writ of Certiorari.

Respectfully submitted,

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